Editor's Note

Finality of Litigation—Setting Aside a Final Judgment

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LT Change of circumstances; Consent orders; Final determination; Fraud; Judgments and orders; Maintenance orders; Reopening appeals

A number of recent decisions have dealt with the principle of finality of litigation. Such cases tend to present the administration of justice with a difficult choice between, on the one hand, a claim to the enforcement of rights, and on the other hand the need for peace from litigation. The dilemma can be difficult because finality of litigation is no mere technicality. It is an inseparable feature of the rule of law. The law cannot govern unless the rights it establishes are certain. And rights can be certain only if they are reasonably well defined and understood, reasonably well enforced, and reasonably stable. The rule of law can be degraded as much by the vulnerability of rights to repeated challenges in the courts as by the state's failure to impose its authority and protect rights. In either case the possessor of rights would be unsure that they will yield the expected benefits.

This obvious observation needs reiterating because the temptation to do what is perceived as justice in a particular case may have the unintended consequence of undermining the golden principle of finality and thereby risking wider and greater injustice. *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9 illustrates the temptation. The facts were both complex and bizarre, but for our purpose a simplified version will suffice. Hendry worked for Cinpers in the 1980s, when he invented a process useful in the manufacture of plastics. He sold the rights to Ladney. Cinpres challenged Ladney's right to the patent in 1991, but Hendry swore in the patent proceedings that he had made the invention after leaving Cinpres and while working for Ladney. He was believed and the patent was granted to Landley (acting through one of his companies) and Hendry was named sole inventor. Cinpres appealed but was finally defeated in the Court of Appeal. Much later Hendry told Cinpres that he had perjured himself in the first Patent Office proceedings and as a result

Cinpres started fresh entitlement proceedings in the Patent Office, seeking in effect to overturn the earlier judgment.

The case came before Mann J. who found that Hendry had perjured himself in the first proceedings, that the invention was made by him while working for Cinpres, but that Ladney did not know that. He held that since Hendry's perjured evidence was not attributable to Ladney, the judgment in the first proceedings could not be set aside on grounds of fraud. In reaching this conclusion he followed the authority of *Odyssey v OIC Run-Off* [2000] EWCA Civ 71, which decided that the "fraud of the party" rule, whereby a judgment can be set aside on grounds of fraud, was limited to the fraud of the party concerned.

The "fraud of the party" rule is a matter of fundamental justice derived from the principle that a person should not be allowed to profit by their own wrong. It is therefore not enough that a mere witness gave perjured evidence, the fraud must have been perpetrated by a party to the proceedings. Fraud is clearly involved when a judgment is obtained directly by the perjured evidence of one of the parties, or where a party relied on a witness knowing that the testimony was perjured. Where the party is a corporation the fraud rule applies if the perjured evidence is attributable to the company itself, as where the evidence was given on behalf of the company by one of its officers. But the fraud may be attributed to a party in certain other circumstances. In the *Odyssey* case a company called as one of its main witnesses a person who was a director at the time of the events in issue but who had retired by the time of the trial. His perjured evidence resulted in judgment for the company. The Court of Appeal held that the perjured evidence could be attributed to the company notwithstanding that the witness was no longer an employee of the company because, first, he was the company's "vital" witness and, crucially, he had been a committed member of the team which took decisions as to how the company's case was to be presented. Thus, to set aside a judgment on grounds of fraud it must be shown that the party either adduced evidence knowing it to be perjured or, alternatively, that the perjurer was a member of the party's legal team in the sense of having some influence over the management of the party's case.

In the instant case, however, the Court of Appeal found that the *Odyssey* test had not been satisfied because although Hendry was a "vital" witness on whose evidence Ladney's case depended, he was a committed member of the team which took decisions about the litigation. Nonetheless, the court found that the judgment in favour of Ladney in the first patent proceeding should be set aside because both:

> "Hendry and Ladney were actually parties to the 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."[1]

[1] *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9 at [106].

The court also pointed out that since Hendry could not resist the earlier judgment (registering him as the inventor) being set aside on the grounds of his fraud, the whole judgment is unravelled and should be set aside in its entirety.

The court was clearly right to hold that the case fell into the ''fraud of the party'' rule since Hendry was party, as inventor, to the first proceedings. But the additional justification offered by the court for its conclusion is more doubtful. The Court of Appeal put it the following way:

> ''108. Further Ladney's 'title' completely depended and continues to depend on Hendry's false claims to have made the invention whilst working for Ladney and to have been entitled to assign the right to apply for patents to Ladney. Ladney (and hence Melea [his company]) cannot stand in a better position than Hendry. Ladney's 'title' depended on the fraud. Melea are currently in effect saying to the world: 'we are the legitimate proprietors of the patent by succession from Ladney who was entitled to apply for it as a successor to Hendry, the devisor.' But that has been exposed in these proceedings as false. So Melea are publicly maintaining a false story—the same false story as the subject of evidence in the first proceedings. Unlike the false evidence in Odyssey it is a continuing false representation. Melea are thereby adopting it as their own.
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> 109. In doing so they are also saying: 'the evidence given in the first proceedings was true'. That is dishonest, and it is Melea's dishonesty. We see no reason why that should not be treated as within the 'fraud of the party' rule for the purposes of setting aside a previous judgment and every reason why it should.''

This amounts to a considerable extension of the fraud rule, because it lays open to challenge any person who derives rights from a decision that was founded on false testimony. Suppose that an employer applies to register a patent mistakenly believing it to have been invented by one of his employees. The employee falsely testifies that he was the author of the invention. The employer is registered as owner. On a literal interpretation of the court's view, a future challenge to the employer rights, or to the rights of any subsequent innocent assignee of the rights, would succeed because by asserting the validity of their rights such owner would be effectively stating that ''the evidence given in the first proceedings was true'', which would be dishonest, according to the Court of Appeal. If this interpretation is correct, then it seems that the Court of Appeal has broken new ground and has freed the fraud exception of the condition that it be fraud of the party. Any false evidence can now lay a judgment open to attack, no matter how innocent the parties to it were, no matter how many intermediaries have derived their rights from the decision, and no matter how long a time has passed since. On this interpretation, any proprietary rights derived from a judgment founded on perjury could be challenged, regardless of the innocence of the parties to the original proceedings.

It is difficult to tell whether the Court of Appeal intended such a radical departure from the fraud of the party rule. There are indications that this particular panel of the Court of Appeal was sympathetic to the idea of investing

the court with a wider discretion to reopen final judgments. The opportunity for expressing a view on this matter arose as a result of Cinpres' attempt to rely on the long forgotten bill of review. A bill of review was an equitable device whereby a party could apply to the Chancery Court for the review of an earlier judgment on the grounds that new evidence has emerged which the party did not possess and which he would have been unable to obtain at the time of the original proceedings. To overcome the first decision in the patent proceedings Cinpres sought a bill of review so that the court could revisit the first decision in the light of the new evidence that has since emerged (Hendry's admission of perjury), which Cinpres could not have had at the time. The Court of Appeal was compelled to accept that this procedure had long since fallen into disuse and that in modern times the court has been hostile to the idea of disinterring it (not least the influential decisions in *Barrell Enterprises, Re* [1972] 3 All E.R. 631; [1973] 1 W.L.R. 19 (CA) and in *Odyssey*). Nonetheless, the Court of Appeal expressed regret at the demise of the bill or review saying:

> "100. We have to say that we are not entirely happy with the position [limiting challenges to a final judgment to fraud of the party]. It would make for better justice in principle for a prior decision to be impugnable on the grounds for which a bill of review once lay, namely that there was fresh evidence not discoverable by reasonable diligence, which 'entirely changes the aspect of the case' (Lord Cairns' phrase in Phosphate *Sewage v Molleson* (1879) 4 App. Cas. 801)."

It is much to be doubted whether it is in the interests of justice that final judgments should be liable to review at any future time, without limit, on the grounds that new evidence has emerged. On the contrary, as observed at the outset, justice can be maintained only under an effective rule of law. For the law to govern, rights established by law must be certain. This means that the outcome of court adjudication must be certain too, ie immune to future challenge short of proof of fraud by a party. Paradoxically, court discretion to review judgments would render rights established by final judgment even less certain than those that have not been litigated at all. This is because a bill of review would not be subject to a limitation period. A claim in contract, for example, is subject to a six-year limitation period, beyond which no claim may be brought. But if a claim has been adjudicated, the parties will then be able to challenge the judgment on grounds of new evidence without any time limit.

Court discretion to reopen a final judgment on grounds of new evidence may have been justified in the past, when the means of discovering the existence of evidence and securing it were considerably more limited. Modern procedure offers vastly superior access to evidence and facilitates much more effective pre-trial means of securing and testing evidence and, indeed, of learning the opponent's arguments in advance. Modern economic conditions require even greater certainty of rights than in the past. Against this background there

is no justification whatever for reviving an old jurisdiction which has been abandoned, and for good reason.

A quite different approach has been evinced by a majority of the Court of Appeal in *Dixon v Marchant* [2008] EWCA Civ 11. Here the attack on the judgment was founded not on fraud but on the grounds that it was based on a fundamental assumption which was subsequently invalidated and which should therefore lead to the judgment being set aside. On the divorce of the husband (H) and wife (W) in 1993 an order was made for the payment of periodical maintenance to W. In 2005 H approached W saying that as he was about to retire he would like to capitalise the maintenance for the future by making a one off lump sum payment. Since an order of maintenance comes to an end if a spouse remarries, H enquired as to W's intentions in this regard. W replied that she was not cohabiting and had no desire or intention to cohabit or remarry. A lump sum of £125,000 was agreed and a consent order was made accordingly. Within three months of the order W remarried. H applied to set aside the consent order on the basis that new events had occurred which invalidated the basis and fundamental assumption upon which the order had been made. The judge below held that W's remarriage was not planned and W had been open and honest at the time of giving her response; she merely changed her mind later. He concluded that the fundamental assumption was to get rid of the periodical maintenance and that the judgment should stand.

It should be stressed at the outset that the law in this area is governed principally by family law principles, which have been developed to deal with the special needs of divorced couples and their children. The key decision is *Barder v Caluori* [1988] A.C. 20 at [43] where Lord Brandon said:

> "A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case. To these three conditions . . . I would add a fourth . . . that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order."

In the case under consideration, the Court of Appeal was divided on whether the consent order was founded on the fundamental assumption that W will

not remarry. Ward L.J. thought that the consent order represented no more than the straightforward capitalisation of the W's periodical payments in order to achieve the common desire for a clean break. The payment of a lump sum in lieu of periodic payments:

> "[C]arried risks for both parties—a risk for the husband that the wife would re-marry so that he would have been better off paying her maintenance until that obligation ceased on her re-marriage, and a risk for the wife that a lump sum crudely based, on the face of it, on a multiplicand of no more than seven years or so at £15,000 per annum might be exhausted during her life time so that she would have been better off preserving her rights to maintenance from him and his estate."[2]

He therefore concluded that the assumption that the W would not remarry within a short time was not a fundamental assumption.

Ward L.J. explained that the test whether the court's decision (albeit a consent order) was founded on a fundamental assumption was an objective test which required the court to determine not what each party assumed or hoped for but what motivated the court in reaching its decision. For the reason just mentioned he concluded that the assumption that the W would not remarry within a short time was not a fundamental assumption. Lawrence Collins L.J. agreed that the consent order should not be disturbed. He stressed the point that what distinguished those cases in which the *Barder* principle was successfully invoked was that justice cried out for a remedy, as happened in *Barder*, where the matrimonial home was transferred to the wife so that she could care for the children but she and the children died shortly afterwards. Lawrence Collins L.J. thought that in this case H had no strong argument for justice on his side since the consent order represented a fair compromise at the time. Significantly, Lawrence Collins L.J. emphasised the importance of finality pointing out that it:

> "[H]as often been said that the application of the *Barder* principle is exceptional, and I am satisfied that the use of that expression is not simply lip-service to the principle. The reported cases, with very few exceptions, apply the principle strictly, and with good reason."[3]

Wall L.J. agreed that the test whether the assumption was fundamental had to be determined objectively. But he was of the view that the possibility of remarriage was critical for the obvious reason that remarriage by the payee brings an order for periodical payments automatically to an end. In his view remarriage was the critical event which, in *Barder* terms, vitiated the fundamental, albeit tacit, basis upon which the consent order was made.

The majority's conclusion seems unassailable, particularly in view of the fact that had the wife waited a few more months, the *Bader* jurisdiction would have been exhausted in any event. However, the need to rely on the *Barder* principle in cases of this kind is quite unsatisfactory. Decisions about the division of

[2] *Dixon v Marchant* [2008] EWCA Civ 11 at [24].
[3] *Dixon v Marchant* [2008] EWCA Civ 11 at [100].

matrimonial property are often intended to achieve future welfare benefits for spouses and their children and are inevitably based on numerous assumptions about future events. Notwithstanding the court's insistence that the test for the applicability of the *Bader* principle is objective, there is in reality no clear criterion, objective or otherwise, for distinguishing between assumptions the falsification of which justifies a variation of judgment and those that do not justify such variation. The difference between situations in which justice cries out and those where no such cry is heard is largely a matter of degree and evaluation and liable to be influenced by the judge's moral views about the rights and wrongs of the couple. The *Bader* test makes it difficult to foresee with confidence how an application of this kind would be resolved.

There is, however, a much better solution to the problem that arises in this kind of situation: the adoption of provisional orders of the kind used in personal injury cases. Put differently, rather than try to work out after the event what was and what was not a fundamental assumption, the court making an order should set out the circumstances that would justify an application for variation, as is done in relation to provisional damaged under s.32A of the Supreme Court Act 1981. The adoption of this approach, whether by legislation or precedent, would do no more than spell out the assumptions that the court already makes and it would have the added advantage that parties would have work out more carefully what they want to achieve. They would be made to focus their minds on whether they want a clean break that leaves no room for future applications, or simply a provisional order subject to change of circumstances. Either way there will be far less room for doubt, less the need to have recourse to essentially unstructured discretion.