

# Fresh Evidence in Appeals: *Dale v Banga & Ors* [2021] EWCA Civ 240

26 May 2021

The Court of Appeal has provided guidance on the approach to be adopted where fresh evidence alleging that a judgment was obtained by fraud is adduced after trial.

In *Dale v Banga & others* [2021] EWCA Civ 240, the Court of Appeal declined to remit a question of fraud to the lower court, where the Applicant alleged that fresh evidence showed that the judgment had been obtained by fraud. The Court held that the fresh evidence in this case did not meet the threshold test of demonstrating that the lower court had been deliberately misled for the issue to be remitted to the lower court.

The facts of this case concern a probate dispute, although the Court's analysis is of wider applicability to commercial disputes. In brief summary, the deceased had executed two wills. The first will was dated 1 November 2012 and favoured the Claimant daughter. The second will was dated 18 November 2013 and favoured the Defendant son, Mr Banga. The lower court held that the 2013 will was invalidly executed. However, the lower court also held that the 2012 will had been validly revoked by way of a letter of revocation, such that the deceased died intestate. The letter of revocation had been attested to by Mr Banga and a third party, Mr Arif.

The Applicant subsequently obtained permission to adduce new evidence to challenge the validity of the letter of revocation on the basis that Mr Arif had been convicted of fraudulent trading and money laundering. Mr Banga was accused of attempting to pervert the course of justice by falsifying documents in the same criminal investigation.

The Applicant's case was that, if this evidence had been available at trial, it would have entirely changed the way the lower court approached the question of the proper attestation of the letter and its conclusion in that regard. The Applicant sought an order that the issue of whether the letter was properly attested to be remitted to the lower court and retried by the judge, taking into account the fresh evidence.

The Court of Appeal noted that there are two procedural avenues available to an applicant alleging that a judgment was obtained by fraud:

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- the dissatisfied party may bring a new action to set aside the judgment on the basis it was obtained by fraud; or
  - the dissatisfied party may appeal against the original order. Where the fraud is incontrovertible or admitted, a retrial may take place. Where the issue of fraud is neither admitted nor incontrovertible (as was the case in this instance), the issue of fraud will be remitted to the lower court for it to be decided within the same proceedings (a *Noble v Owens* order).

The Court of Appeal first considered the key principles which govern applications to set aside judgments obtained by fraud, as enunciated by the Supreme Court in *Takhar v Gracefield Developments Ltd & Ors* [2020] AC 450:

- There has to be a “conscious and deliberate dishonesty” in relation to the evidence given, or action taken, statement made or matter concealed;
- The relevant evidence, action, statement or concealment must be material, in that it was an operative cause of the court’s decision to give judgment in the way that it did; and
- 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 have been made if the claim were to be retried on honest evidence.

Given that the evidence of fraud in this case was neither admitted nor incontrovertible, the Court of Appeal considered whether the issue of fraud should be remitted to the lower court. In doing so, it provided guidance on the appropriate test:

- As a threshold test, the fresh evidence must be capable of showing that the judge had been deliberately misled and that the judgment of the lower court may have been obtained by fraud. This requires that:
  - the fresh evidence must be sufficient to justify a pleading of fraud;
  - the fresh evidence must be capable of showing that there was conscious and deliberate dishonesty that was the causative effect of the judgment being obtained in the terms that it was; and
  - the conscious and deliberate dishonesty must be that of a party to the action or was at least suborned by or knowingly relied upon by a party.

- if the threshold test is satisfied, the Court must determine, whether on the facts and in the circumstances of the particular case, it is appropriate that the question of fraud should be remitted or otherwise dealt with within the same proceedings.

The Court of Appeal determined that the fresh evidence in this case did not meet the threshold test. It was circumstantial evidence and evidence of bad character, which would require inferences to be drawn based on the alleged lack of credibility of witnesses. The decision is a helpful reminder that this test will be more difficult to meet where the fresh evidence being adduced is “indirect” and requires inferences to be drawn to establish the alleged fraud.

The Court noted that, even if the threshold test had been met, it would not have exercised its discretion to remit the issue to the lower court on the basis that it would not be expedient, convenient and proportionate to do so. The judge in the lower court had retired and it was unlikely therefore that time and costs would be saved. Furthermore, the Applicant was seeking to set aside the lower court’s decision in relation to one issue, whilst preserving the lower court’s dicta in relation to another matter.

The decision can be found [here](#).

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Please do not hesitate to contact us with any questions.



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