Neutral Citation Number: [2010] EWHC 3172 (Ch)

Case No: 1854 of 2007

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

08/12/2010

B e f o r e :

MR JUSTICE NORRIS

Between:

In the matter of Surety Guarantee Consultants Limited
And in the matter of the Insolvency Act 1986
Ian Oakley Smith
Dan Schwarzmann
(Joint Liquidators of Surety Guarantee Consultants Limited) **Claimants**

- and -

QBE Insurance (Europe) Limited
Markel International Insurance Company Limited
Templeton Insurance Limited **Respondents**

Reuben Comiskey (instructed by Davies Arnold Cooper) for the Claimants
David Eaton Turner (instructed by Nelsons, Nottingham) for the Respondents
Hearing date: 10 November 2010

HTML VERSION OF JUDGMENT

Mr Justice Norris :

1. Surety Guarantee Consultants Ltd ("SGC") was authorised by QBE Insurance (Europe) Ltd ("QBE") and by Markel International Insurance Ltd ("Markel") to act as cover holder and to issue performance bonds on the terms contained in formal Binding Authority Agreements. QBE and Markel claim that these Binding Authority Agreements provided for the establishment of respective trust accounts in respect of any premiums paid pursuant to business written under those Authorities.

2. One of the principal shareholders in SGC was Mr Brunswick. He was also a director of Templeton Insurance Ltd ("Templeton"). Like Markel and QBE, Templeton underwrote performance bonds: and there were dealings between SGC and Templeton in connection with such insurance business, though it does not appear that the relationship was formally documented.

3. In about April 2007 QBE presented a winding up petition against SGC in respect of unpaid premiums that SGC admitted that it owed to QBE. At the time the petition was presented QBE and Markel were also conducting proceedings in the Queen's Bench Division against SGC, Mr Brunswick and others in respect of a fraud which they alleged (and which was subsequently found) to be operated by SGC and Mr Brunswick in respect of policies issued under the Binding Authority Agreements.

4. On 26 April 2007 Mr Williams, a director of SGC, told the solicitors for Templeton that in the course fraud investigations he had discovered that on 13 April 2005 SGC had received from Templeton the sum of $371,498, shown in SGC's cash book as "direct commission" relating to a performance bond in the sum of $100 million to be issued by Templeton in relation to a construction project in Kazakhstan. On 9 May 2007 Templeton issued proceedings in the Queen's Bench Division. Paragraph 3 of the Particulars of Claim pleaded:-

   "On 13 April 2005 Templeton paid to SGC $371,498 representing commission on [a] bond issued by Templeton…in the sum of $100 million…the said bond related to a construction project in Kazakhstan…the said bond never took effect as the said construction project never commenced and no premium was ever paid to Templeton…consequently, no commission was ever due from Templeton to SGC and Templeton is entitled to the immediate return of the said $371,498 being monies had and received by SGC to the use of Templeton in this regard together with interest thereon at the judgment rate of 8% per annum from 13 April 2005…"

   Although paragraph 6 also pleaded that further or alternatively "Templeton is entitled to trace the sum of $371,498 into any assets which SGC holds on trust for Templeton" the prayer for relief contained no proprietary claims and sought no tracing remedies. The only prayer for relief was for payment of the sterling equivalent of $371,498 plus interest.

5. SGC (acting by Mr Williams) filed an Acknowledgment of Service which admitted the claim: and on 11 May 2007 Templeton obtained judgment on admissions against SGC in a sterling sum which included the $371,498 plus interest at 8% from 13 April 2005 ("the 2007 Judgment"). So within the space of a couple of days Templeton had issued and secured judgment on its claim against SGC, Mr Williams being speedy with his acknowledgement of service and with his admission.

6. On 22 May 2007 Templeton informed QBE that it was a judgment creditor of SGC and would be supporting the winding up petition. SGC was wound up the following day.

7. It is not difficult to see what is going on. Alerted to the possibility that it had a claim against SGC, Templeton was anxious to turn that claim into a judgment debt before SGC was wound up, so that when it came to proof in the liquidation Templeton could rely on the 2007 Judgment and would not have to persuade the liquidator to admit the claim to proof. It looks as though Mr Williams was particularly co-operative and Templeton's objective was achieved. In the ordinary course Templeton would be treated (for voting and other purposes) as an unsecured judgment creditor in the liquidation: and nothing in the papers suggests that this case is out of the ordinary.

8. By August 2009 it had become apparent that the joint liquidators of SGC had collected £1.48 million from the nine bank accounts that were operated by SGC of which (assuming the liquidation expenses could be paid out of that fund) about £1.3 million was available for distribution amongst the creditors. But Markel and QBE said that it was trust money under the terms of the Binding Authority Agreements. But none of the accounts was a designated account for QBE or Markel (or any other insurer operating on the same basis). All of the accounts contained mixed funds. The total trust claims far exceeded £1.3 million: so there would be nothing for unsecured creditors.

9. Templeton decided that it was not an unsecured creditor and that it too had a proprietary claim, not under any formal document, but under a constructive trust. On 26 March 2008 it wrote to the joint liquidators setting out the facts which had been pleaded in the Queen's Bench action (to the effect that the $371,498 represented commission on a bond that was never issued, and that Templeton was entitled to the return of its money together with interest) and saying:-

   "It is Templeton's position that SGC has acted fraudulently in retaining Templeton's funds for itself whilst knowing that they should be returned to Templeton. SGC has therefore been unjustly enriched to the extent of [the payment] at Templeton's expense and it would be unconscionable to allow SGC

to keep these monies…this means that a constructive trust arises by operation of law and Templeton has a proprietary claim over the funds as beneficiary".

10. Faced with these competing claims the joint liquidators sought the directions of the Court. On 2 November 2009 Mr Registrar Simmons directed:-

    (a) That until further order the joint liquidators should take no further part in the proceedings:

    (b) That the issue of whether the funds collected by the joint liquidators belonged to the company or to somebody else (and if so to whom) should be fought out between QBE, Markel and Templeton:

    (c) That each of them must serve Points of Claim "setting out the basis on which they claim to have a proprietary interest in the Fund":

    (d) That each should serve Points of Response to the other's Points of Claim by 18 January 2010:

    (e) That each should then serve Points of Reply on the other by 1 February 2010.

11. When Templeton's Points of Claim were served they duly asserted a proprietary claim. But the proprietary interest that was pleaded was not the same as that which had been asserted in the January 2008 letter. The claim now advanced was:-

    (a) That in March 2005 Templeton had insured certain bloodstock risks brokered by Godwin Higgins Insurance Brokers Ltd ("Godwin"):

    (b) That the premium payable in respect of those insurances was $371,498 net:

    (c) That on 30 March 2005 Godwin paid this premium to Templeton:

    (d) That on 13 April 2005 Mr Brunswick and another procured that the $371,498 was transferred to SGC:

    (e) That there was no commercial justification for that transfer (which was dishonest and in breach of Mr Brunswick's fiduciary duties): and

    (f) "In the premises the sum of $371,498 was received and is held by SGC on constructive trust for Templeton".

12. The genesis of this significantly different account of how Templeton came to pay $371,498 to SGC (and the quite different legal claim to which it gave rise) is explained in a witness statement which Mr Wells (the managing director of Templeton) made in the Queen's Bench proceedings on 13 April 2010. When Templeton examined its own books, documents and records it found:-

    (a) That there had been a proposed (though not completed) performance bond for the Kazakhstan project, but that the brokers involved were not SGC but Legal Risks Management (Templeton's own "in house" broker) to whom any commission would have been payable: and

    (b) That its books recorded the receipt from Godwin of a sum very slightly in excess of $371,498 on 1 April 2005 in respect of the bloodstock risks (recorded in a payment confirmation of 11 April 2005); and

    (c) That its books recorded a "reversal" of this payment, and that there was a payment instruction (recording instructions from Mr Brunswick) that the sum be transferred to SGC (recorded on a remittance advice and on Templeton's bank statement).

13. When this proprietary claim was advanced in the Companies Court QBE and Markel took the point that a cause of action estoppel arose by virtue of the 2007 Judgment which prevented Templeton from asserting that the personal claim for repayment of commission on the Kazakhstan bond (a

debtor/creditor relationship on which it had secured judgment) was really a proprietary claim to the return of an identical sum representing a fraudulently diverted premium on the Godwin bloodstock risks policy (a trustee/beneficiary relationship).

14. When that contention was raised in correspondence Templeton decided to apply in the Queen's Bench Division to vary the 2007 Judgment. Templeton's Application Notice dated 13 April 2010 sought an order that:-

    "The judgment entered against the defendant dated 11 May 2007 be set aside under Part 3 of the CPR".

    Although QBE and Markel were told that an application was being made, they were not told when and where. The joint liquidators adopted a neutral stance. That is understandable because:

    (a) They had been told in the Companies Court that they need not take an active part in the competing claims to the funds in their hands:

    (b) The claims of the unsecured creditors (apart from Templeton) appear to have amounted to only about £5,600 (which would not warrant great expenditure in defending their position): and

    (c) If Templeton wished to assert that it was not a creditor entitled to prove in the liquidation and that it wished to surrender its judgment debt, that was not an argument which the liquidators would feel bound to oppose.

    Templeton's application was supported by the witness statement of Mr Wells to which I have referred.

15. The application came before Master Foster in a busy list on 30 April 2010. Master Foster had not seen Mr Well's witness statement before the hearing began. He therefore had much to absorb very rapidly about a complicated procedural position and a relatively complex factual context. The argument was presented on one side only. The Master was taken to the provisions of CPR 3.1(7), and to the commentary in the White Book upon that Rule in paragraph 3.1.9. He was referred to three cases (Collier v Williams [2006] 1 WLR 1945, Simms v Carr [2008] EWHC 1030 (Ch) and Roult v North West Strategic HA [2010] 1 WLR 487). It was submitted to him that these cases were all distinguishable because the judgment in the case before him arose out of a procedural step based on an admission and not out of any final decision. The Master said that he was entirely certain that (whether inadvertently or not) Templeton had been misled when it entered judgment, and that he would vary the 2007 Judgment. The order he made was one that varied (so as to set aside) that part of the order dated 11 May 2007 as related to the claim for $371,498 plus interest, reduced the judgment accordingly, and adjourned the claim relating to the $371,498 generally with liberty to restore. (That claim verified by a statement of truth therefore remains active in the Queen's Bench Division simultaneously with the quite different claim, also verified by a statement of truth, proceeding in the Companies Court). The entire process had taken 20 minutes; and it is a credit to the Master that he had assimilated so much material in so short a time.

16. The applications now before me are:-

    (a) An application by Markel and QBE dated 26 March 2010 for the striking out of paragraphs 5 to 10 inclusive of Templeton's Points of Claim in the Companies Court proceedings, or alternatively summary judgment on those paragraphs (which set out Templeton's proprietary claim based on the receipt by SGC of the $371,498): and

    (b) An application dated 3 June 2010 that Master Foster's order be set aside.

    The clear written and oral advocacy of Mr Comiskey (for QBE and Markel) and Mr Eaton Turner (for Templeton) (together with well prepared hearing bundles) have considerably assisted me in the disposal of these applications.

17. I will consider first the "set aside" application. QBE/Markel submitted (and Templeton did not challenge) that they had standing to make the application as parties directly affected by Master Foster's order (pursuant to CPR 40.9). I agree. QBE/Markel are locked in battle with Templeton in the Companies Court, one of the issues between them being the existence and effect of cause of action estoppel. The application to Master Foster was quite deliberately designed to have an impact upon that battle (as was carefully explained in paragraph 42 of Mr Well's witness statement placed before Master Foster). Although the limits of the Rule in CPR 40.9 are not clear, the present application by QBE/Markel plainly falls within its scope.

18. Templeton's application to Master Foster was founded upon CPR Part 3. No reliance was placed upon any inherent jurisdiction, and the discussion which follows takes no account of any inherent jurisdiction.

19. CPR Part 3.1(7) provides:-

    "A power of the court under these Rules to make an order includes a power to vary or revoke the order".

    The order that SGC do pay Templeton the sterling equivalent of $371,498 plus interest was made under CPR 14.4(4) following the submission by Templeton of a request for judgment. A literal reading of CPR 3.1(7) would therefore appear to confer upon the court a power to revoke that order notwithstanding that it was a final order disposing of the entire case between the parties, and after the making of which the Court was *functus officio*. Mr Comiskey submits that the Rule cannot be so read and that there is no jurisdiction to set aside a final order (provided that the order is complete in itself and does not contemplate the further involvement of the court): or alternatively, if there is such a jurisdiction, it plainly ought not to have been exercised in the instant case.

20. In my judgment Mr Comiskey is probably right in the first of those submissions: but I accept (and ground my decision on) the second.

21. The general law as to perfected final judgments is conveniently stated in paragraph 36 of the judgment of Buxton LJ in Enron (Thrace) Exploration v Clapp [2005] EWCA Civ 1511 in these terms:-

    "As Willes J said in GNR v Mossop (1855) 17 CB 130 at 132: "*the very object of instituting courts of justice is that litigation should be decided, and decided finally*". In that spirit, once a judgment has been perfected and entered it is final in the sense that the court whose judgment it is cannot recall it, even if it has been obtained by fraud…Once perfected, the judgment can only be attacked by appeal; or by a collateral action to set it aside, the only ground for such action being fraud…" (citations omitted).

22. The relationship between this principle and the terms of CPR 3.1(7) were commented upon by the Court of Appeal in Roult v North West Strategic HA (Supra) in the judgment of Hughes LJ at paragraph 15:-

    "There is scant authority upon Rule 3.1(7) but such as exists is unanimous in holding that it cannot constitute a power in a judge to hear an appeal from himself in respect of a final order…I agree that in its terms the Rule is not expressly confined to procedural orders. Like Patten J in the Ager/Hanssen case [2003] EWHC 1740 I would not attempt any exhaustive classification of the circumstances in which it may be proper to invoke it. I am however in no doubt that CPR Rule 3.1(7) cannot bear the weight which [Counsel's] argument seeks to place upon it. If it could it would come close to permitting any party to ask any judge to review his own decision and, in effect, to hear an appeal from himself, on the basis of some subsequent event. It would certainly permit any party to ask the judge to review his own decision when it is not suggested that he made any error. It may well be that, in the context of essentially case management decisions, the grounds for invoking the Rule will generally fall into one or other of the two categories of (i) erroneous information at the time of the original order or (ii) subsequent event destroying the basis on which it was made…There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned…can be made, then any party can return to

the trial judge and ask him to re-open any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part. And it especially does not apply when the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interests of justice, and of litigants generally, require that a final order remains such unlike proper grounds for appeal exist".

These observations support the decision of Aikens J at first instance in the Enron case [2005] EWHC 401 at Paragraph [49] that CPR 3.1(7) does not permit a default judgment to be re-opened. The commentary of Hughes LJ is also consistent with the course which Lindsay J adopted in Russell-Cooke Trust Company v Prentis [2003] EWHC 1435 where (probably in exercise of the inherent jurisdiction: see paragraph [37]) he varied a final order he had made in a case in which the terms of the final order indicated that the court had retained seisin of the matter.

23. However, I decline to decide the jurisdiction point when there is another ground upon which my decision can be based. I hold that in the light of the arguments which were addressed to me (but were not addressed to Master Foster) it would be wrong to exercise any power under CPR 3.1(7) to set aside any part of the final judgment obtained in May 2007.

24. These are my reasons:-

(a) The principles upon which final judgments may be varied or set aside are limited in number, of long standing and well founded upon a clearly articulated public policy. This case does not fall within them. For a new procedural rule to displace or to extend those principles in any way a truly exceptional case would be required: and this is not such a case.

(b) The party seeking to set aside the 2007 Judgment is the party in whose favour judgment was given, a judgment obtained on that party's own terms. In essence, Templeton is simply saying that in 2007 it got exactly what it asked for but it now wishes it had asked for something different.

(c) This is not truly a case of "erroneous information" i.e. (to use the words of Patten J in Ager/Hanssen (*supra*) at paragraph [7]) "that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him". All of the information before the Court came from Templeton. The "mistake" was made by Templeton: but a mistake by a party does not justify re-opening a final decision. Mr Eaton Turner submitted that the mistake had been induced by the "fraud" of SGC. He obviously could not say that Mr Williams was fraudulent and dishonest by accurately disclosing the actual entries in SGC's books. Nor could he say that Mr Williams was fraudulent and dishonest in admitting what was alleged (so the judgement could be obtained). So he submitted that SGC acted fraudulently by creating a dishonest entry in its records on which Templeton relied in formulating its claim. But the entries in SGC's books were not statements made to Templeton intended by SGC to be relied on in the formulation of Templeton's claim against it. The form which Templeton's claim took was determined by its desire to obtain a judgment before an order winding up SGC was made (and in consequence its decision not to check its own records which clearly disclosed the true position). Templeton's mistake was its own.

(d) It makes no difference that the final order which disposed of the action was made without an adjudication by a judge of the merits. A final order is a final order, whether it results from an admission, a default by the Defendant, a consent of the Defendant, proof before a judge at a trial where the Defendant does not appear, or an adjudication on the merits after a fully contested trial.

25. For these reasons I consider it inappropriate to exercise the jurisdiction under CPR 3.1(7) (assuming it to exist). I will therefore in exercise of the power conferred by CPR 40.9 set aside the order of Master Foster dated 30 April 2010, dismiss the application on which that Order was made and restore the 2007 Judgment.

26. I would add that I think it was wrong of Templeton (and a plain breach of its duties under CPR 1.3) to get the Court to rule on the application on an unopposed basis with a deliberate aim that the resulting order would have an impact in the Companies Court proceedings. Helping the Court to deal with the case justly required (in the light of the directions which had been given in the Companies Court) Templeton to notify QBE and Markel as soon as reasonably practicable of the time and date

of the hearing before Master Foster to afford them the opportunity to take such steps as they thought fit to protect their interests: no more, but no less.

27. It is now necessary to address the strike out application in the light of my determination that Templeton has obtained judgment on the case which it pleaded in the Queen's Bench Division. QBE and Markel submit that the existence of this judgment estops Templeton from advancing a different case in the Companies Court: and if that is so then the relevant paragraphs of its Points of Claim should be struck out as an abuse of the process. Templeton submits that it is not advancing a different case: and that if it is advancing a different case, then to strike out its pleading would be to allow procedural questions to overwhelm the merits, and that what was required was the "broad, merits based judgment which takes account of the public and private interests involved" to which Lord Bingham referred in Johnson v Gore Wood & Co [2002] 2 AC 1 at p 31D.

28. In support of his submission that what was said in the Queen's Bench proceedings is essentially no different from what is now said in the Companies Court, Mr Eaton Turner submitted that if in the averment in the Queen's Bench proceedings about the payment of $371,498 one inserted the word "purportedly" so that it read "On 13 April 2002 Templeton paid to SGC $371,498 *purportedly* representing commission"; and if one then deleted the averment that Templeton was entitled to the immediate return of that sum as monies had and received by SGC to the use of Templeton; and if one further took into account the alternative plea that Templeton was entitled to trace the sum of $371,498 (albeit that no relief of a proprietary nature was claimed); then what was said in the Queen's Bench was not inconsistent with what was now said in the Companies Court. SGC got $371,498 from Templeton when it should not have done and that gave rise to claims by Templeton.

29. I do not accept either of these submissions. In my judgment upon a fair reading of the two statements of case although it is true that both assert that Templeton paid $371,498 to SGC and that Templeton has a legal claim arising out of that payment, the factual context supporting the claim and the legal rules justifying the claim are very different (as is the nature of the claim itself). Further, whilst I unhesitatingly accept that Lord Bingham's words provide clear guidance as to the approach to be adopted in this general area of the law, the approach indicated is not a substitute for the faithful application of such rules as do exist.

30. One of those rules is cause of action estoppel arising between the same parties to different cases (or between their privies). The parties to the Queen's Bench action were Templeton and SGC. The parties to the issue in the Companies Court are Templeton and QBE/Markel. Mr Comiskey argued that QBE and Markel are (for the purposes of the Companies Court proceedings) privies of SGC, because the structure set up under the Registrar's order is that SGC itself shall take no part in the issue, but that each claimant to the fund shall advance its own case and shall take (as against the other contending parties) any point which SGC itself could have taken. Mr Eaton Turner (correctly in my judgment) did not argue against this analysis. I shall therefore treat the parties to the Queen's Bench proceedings and the parties to the Companies Court proceedings as the same.

31. A second rule (stated in Boileau v Rutlin (1848) 2 Exch. 665) is that facts actually decided by an issue in any suit cannot be litigated between the same parties again, and are conclusive evidence between them (with the object of bringing litigation to an end). So are material facts alleged by one party which are directly admitted by the opposite party: *per* Baron Parke giving the judgment of the court at p 681. In the Queen's Bench proceedings Templeton made averments about the nature and circumstances of the relevant payment to SGC, which allegations SGC admitted: and so, for the purpose of terminating litigation, those admitted facts are evidence between the parties.

32. A third rule is that this estoppel between the parties arises even if the Court has not adjudicated upon the proceedings in which the admission is made. That is clear from the decision of Vaughan Williams J in Re South American and Mexican Company [1895] 1 Ch 37 at 45 where he said:-

    "It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interests of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment…an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end".

33. A fourth rule is that this estoppel continues to operate even if one party subsequently wishes to say that the facts or judgment to which the estoppel relates is actually wrong. This appears from a passage in a speech of Lord Millett in Mulkerrins v Price Waterhouse Coopers [2003] 1 WLR 1937 at paragraph 10 where he said:-

"As between the parties to a judicial decision, however, it does not matter whether the decision is right or wrong. …res judicata (or to give it its full name estoppel per rem judicatam) is a form of estoppel which gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by an appeal or not at all. As between themselves the parties are bound by the decision, and neither may re-litigate the same cause of action nor re-open any issue which was an essential part of the decision".

34. The application of those rules means that (whilst the 2007 Judgement stands) Templeton cannot set up any inconsistent case in the Companies Court: it cannot say in paragraphs 5 -10 of its Points of Claim in the Companies Court that the $371,498 dollars is a fraudulently diverted premium having obtained the 2007 Judgement on the footing it was wrongly paid commission. If it wishes to do so, it must upset the 2007 Judgement.

35. I can only strike out paragraphs 5-10 of Templeton's Points of Claim if I can properly hold that there is no real prospect of Templeton successfully obtaining the relief which it seeks on the basis of those paragraphs. Mr Comiskey submits that the claim is bound to fail by virtue of estoppel per rem judicatam unless the 2007 Judgement can be set aside on appeal or otherwise. An appeal is not open to Templeton in relation to the 2007 Judgment because Templeton was wholly successful in its action and got everything it asked for immediately. So Mr Eaton Turner submits (i) that he has a real prospect of successfully showing that the 2007 Judgement was obtained by the fraud of SGC; and (ii) that he can raise that issue in the Companies Court proceedings rather than commencing a fresh action to set aside the Queen's Bench judgment because the Court of Appeal said in Noble v Owens [2010] EWCA Civ 224 (at paragraph [29]) that although the old cases say that where there is an issue of fraud to be tried that must be done by commencing a fresh action, that is not always necessary now.

36. For the purpose of considering Mr Eaton Turner's submission I will assume that a procedure could be devised within the Companies Court proceedings to raise and determine the issue of fraud in relation to the Queen's Bench judgment. On that assumption the question is whether there is a real prospect of success on that issue.

37. If a completed judgment is to be impeached on the ground of fraud then the particulars of the fraud must be exactly given and the allegation established by the strict proof which such a charge of fraud requires: Jonesco v Beard [1930] AC 298 at 300. No such facts were, of course, pleaded in Templeton's Points of Claim: any answer Templeton had to QBE/Markel's estoppel point would be found in its Points of Reply (due to have been served by 1 February 2010). But no such statement of case was prepared (at least until Mr Eaton Turner produced one in the course of the present hearing). The fraud (particulars of which must be exactly given) was not therefore pleaded: but I allowed argument on the point (to which Mr Comiskey sensibly did not object) because the key factual allegation is a short one. Templeton allege that the entry in SGC's cash book of $371,498 as "direct commission" was dishonest and fraudulent. Templeton did not know that the entry was dishonest and fraudulent, pleaded it, SGC admitted it, and so the court was deceived into giving judgment. That last part of the argument needs to be re-stated at slightly greater length. Templeton does not say that it deceived the court. Templeton says that SGC (by creating a false book entry) deceived the court into giving judgment against it and in Templeton's favour. But it remains the case that Templeton is saying that it successfully obtained judgment in its favour by the fraud of the unsuccessful defendant.

38. In my judgment this argument has no real prospect of success: the case is fanciful for the reasons canvassed in paragraph 23(c) above. As Lord Wilberforce said in the Ampthill Peerage Case [1977] AC 547 at 571B:-

"In relation to judgments…..it is clear that only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the [judgment] must be obtained by it. Authorities...make

clear that anyone wishing to attack a judgement on grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it. The establishment of the fraud is a condition precedent to re-opening the case…".

39. Templeton did not obtain its favourable judgment because of the fraud of SGC. There was an actual entry in SGC's books: it did not itself constitute a statement to Templeton. Mr Williams informed Templeton of the entry. It must be taken that Mr Williams was honest. Templeton, having its own books, documents and records which record this self-same payment, decided for tactical reasons to proceed on the footing that SGC's book entry was correct (without investigating how Templeton itself recorded the transaction). It pleaded its case accordingly. Unsurprisingly Mr Williams of SGC admitted the claim: it must be taken that he did so honestly. SGC did not deceive the court. If anybody did, it was Templeton, who misdescribed the true transaction in their Particulars of Claim.

40. Further, on the English authorities, this fraud must be established by fresh evidence not available (through the exercise of due diligence) at the time of the 2007 Judgment: Owens Bank v Bracco [1992] 2 AC 443 at 483E-F *per* Lord Bridge. Mr Eaton Turner drew to my attention that in Australia Handley JA disagrees with Lord Bridge's formulation of the common law rule: see Spencer Bower & Handley 4th ed. para 17.05 citing Handley JA in Toubia v Schwenke [2002] NSWCA 34. But I must apply the law as stated within this jurisdiction. Reasonable diligence would have brought to light the material within Templeton's own books and records upon which it now relies for its alternative account of how SGC received $371,498 from it. This is yet another reason why Templeton has no real prospect of being able to set aside the 2007 Judgment.

41. I will therefore strike out paragraphs 5 to 10 inclusive of Templeton's Points of Claim in the Companies Court proceedings.

42. I do not expect attendance of legal representatives when I formally hand down judgment. Submissions on costs and any other applications should be sent to me in writing to be received seven days after formal delivery of judgment. If either party requires an oral hearing then immediate notice of that should be given to my clerk and the necessary arrangements will be made through the usual channels.

Mr Justice Norris……..8 December 2010