Neutral Citation Number: [2020] EWHC 2142 (Fam)

Case No: ZC15D00789

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2020

Before :

MR JUSTICE FRANCIS

- -

Between :

Dominika Anita Brack	**Applicant**
- and -	
Per Cenny Brack	**Respondent**

- -
- -

Patrick Chamberlayne QC (instructed by **Keystone Law**) for the **Applicant**
Lewis Marks QC and **Peter Mitchell QC** (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing dates: 20th and 21st May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE FRANCIS

Mr Justice Francis :

Introduction

1. This is my Judgment in respect of an application by Dominika Anita Gabrielsson Brack (to whom I shall refer as "the wife") to set aside a finding in my Judgment dated 22 December 2016 that there were no vitiating factors present at the time when the parties entered into their (three) prenuptial agreements. I am asked instead to make a finding that there were vitiating factors that will negate any effect the agreements might otherwise have.

2. Per Cenny Brack (to whom I shall refer as "the husband") applies to strike out this set-aside application on the basis that it is an abuse of process and/or that, in the light of the delay in bringing her application, I should refuse to hear it. The wife's application is dated 6 December 2019 and was heard by me on 20 and 21 May 2020, with Judgment reserved, as the hearing finished in the afternoon of the second day and there was a considerable volume of material to digest.

3. In the light of the Covid-19 pandemic, the hearing proceeded remotely via the Zoom platform. As is my custom in respect of all remote hearings, I asked Counsel to confirm on behalf of their respective clients that they were content for the matter to proceed remotely. Both counsel indicated that they were and, indeed, in circumstances where there has been no oral evidence, this type of hearing is, in my judgement, particularly well-suited to being dealt with remotely. It also has the advantage that I have been able to play back the entire hearing before writing this Judgment. I am bound to say that I have found this to be a very considerable advantage: watching the entire hearing is immeasurably better than reading my own notes and I trust that, as we review in due course the benefits and drawbacks of remote hearings, we shall bear this in mind. The capacity to play back any part of the hearing has been of immense value to me.

4. The relevant background in this case is set out in paragraphs 4 to 15 of my Judgment dated 22 December 2016[1] and does not bear repetition here.

This hearing

5. At the outset of the May 2020 hearing there was a dispute between counsel as to whether I should hear the set-aside application or the strike out application first. Having considered the matter and read the parties' written submissions, it was clear to me that there was, at least, an arguable case that the wife's set-aside application should be struck out and it was obviously logical and appropriate for me to hear that first. Although there was no formal strike out application issued, Mr Mitchell QC, on behalf of the husband, had advertised in an e-mail exchange with Mr Chamberlayne dated 11 May (i.e. 9 days before the hearing) that "there is a live point about admissibility and delay which, if successful, disposes of the application without evidence".

6. The following day, the wife's solicitors forwarded the draft bundle to the husband's solicitors. This included, importantly, a signed statement dated 1 May 2016 to which I refer later in this Judgment.

[1] [2016] EWHC 3431

7. Mr Chamberlayne, in a note attached to an email sent to me on 26 June 2020, described the strike out application as being "completely unadvertised". He also suggested in that note that "we were substantially disadvantaged by the tactic employed" and that the strike out application should not have been heard. He even went so far as to suggest in his e-mail that the strike out application was "an abuse of process itself". I disagree.

8. The husband's arguments in support of his strike out application would all in effect have been deployed in defence of the set-aside application. If there is cogent evidence to suggest that an application should be struck out it is, in my judgement, plainly correct to hear the strike out application first. Moreover, the two day time estimate for this case was woefully inadequate, especially given that there was half a day's reading suggested by counsel before we could even commence.

9. Mr Chamberlayne relied early in his oral submissions on the decision of Rimer J in *The Coca-Cola Company v Ketteridge* [2003] EWHC 2488 (Ch). In long running and complex civil litigation, the judge there said, in respect of a strike out application by one of the Defendants:

> "*If it is or was ever an abuse, it must have been an abuse from the moment the claim form was issued, and that was the time when, if it was open to him to do so, Ray Junior could and should have sought to strike the action out. Instead, he put in a defence on 1 October 2002 and has defended the claim on its merits.*"

10. Mr Chamberlayne submitted that here, as in *Ketteridge*, the strike out application, if made, should have been made immediately. However, a proper analysis of the decision of Rimer J shows how very different the circumstances there were. In the instant case, the litigation was fully on hold in the sense that the parties were waiting for the hearing before me for "further consideration of the wife's claim for financial remedy" following the decision of the Court of Appeal in December 2018. More than three years after my original decision, the wife was seeking to set aside one of my central findings, yet it is she who now, through Mr Chamberlayne, not only complains about the *husband's* delay, but uses it as the basis of her argument that, on account of delay, I should not hear the application. The irony of this situation is manifest. At the first hearing of that application, the husband asked me to strike it out. The last hearing before me, i.e. before the May 2020 hearing, was in November 2019, when the wife indicated that she "intended" to bring a set aside application (although she was yet to make it).

11. At the November 2019 hearing, I directed (*inter alia*) that if the wife was to make such an application, she must do so by no later than 9 December 2019. I further provided for the filing of evidence in respect of that intended claim. The wife duly made the set-aside application on 9 December 2019 and filed her statement in support on 18 December. The husband filed his statement in opposition on 21 January 2020.

12. In *Ketteridge*, the point was that the Defendant had defended the claim on its merits, at very considerable expense to all, instead of applying to strike out the claim. To use an analogy, it was a bit like submitting to the jurisdiction in a conflicts case. The basis of his strike out application had nothing to do with the merits, rather it was that, if the Claimant had a claim against the relevant Defendant, it should have brought the claim in an earlier round of litigation. The Judge found that choosing to defend the claim on its merits amounted to acquiescence. This is quite different from the instant case where,

in effect, nothing had happened in the litigation between the set-aside application and this hearing. There was no acquiescence by the husband and I have no difficulty in distinguishing *Ketteridge* as being a case with a completely different factual matrix, which has no application to the financial remedy proceedings with which I am dealing.

Litigation history

13. On 22 December 2016 I handed down my Judgment in respect of the wife's application for a financial remedy order. The parties argued for some months after that Judgment about the drafting of the order and the final order was not sealed until August 2017, following a half day hearing about the terms of the order in June 2017. In my December 2016 Judgment, I made it clear that I thought that the wife should be provided with a home in her own name as well as other capital provision, but I found that I was constrained by the prorogation clause from giving full effect to that. The precise details of that are no longer relevant. I found that I was constrained by the combined effect of the prenuptial agreements into which the parties entered and my interpretation of the European Maintenance Agreement from making the provision for the wife which I wished to make. I encouraged the parties to try hard to settle their differences. It was obvious that I was encouraging the husband to make provision more generous than that which I had felt able to make because of the constraints referred to above.

14. In January 2017, the wife issued a Notice of Appeal. There was considerable delay before the case was heard. The Judgment of the Court of Appeal was handed down in December 2018[2]. The Court of Appeal held that there was no valid maintenance prorogation clause. Furthermore, the Court of Appeal held that I had erred in concluding that the wife had **inevitably** lost her sharing claim as a consequence of valid prenuptial agreements. However, the court made clear that, where there was a valid prenuptial agreement (or agreements, as I had found), which provided that the wife had contracted out of a division of the assets based on sharing, the court was likely to regard fairness as demanding that she receive a settlement limited to that which provided for her needs. The court made it clear, however, that this would not **inevitably** be the outcome in every case because the court remained obliged to consider all the factors pursuant to section 25 MCA 1973.

15. Accordingly, the case has been remitted to me for further determination. That hearing is listed to come before me in October this year. The wife and her advisors know that the three prenuptial agreements that she signed would still be central features of my application of the s25 factors, albeit not binding in the absolute sense.

Costs

16. Following receipt of the Judgment of the Court of Appeal, one might have hoped that the parties would have settled the case; it is not especially difficult. The parties' children were aged 8 and 12 when the case was before me in 2016. They are now respectively 12 and 16 and it is regrettable that their young lives will have been overshadowed by their parents' litigation. The husband has now spent £1,003,959 on this litigation and expects to spend a further £301,000 by the time the case has finished (I should say that, by tragically sad circumstances, his original leading counsel is no longer available).

[2] [2018] EWCA Civ 2862

The wife has spent £634,098 and expects to spend a further £185,000. This means that the parties' costs will total some £2,124,057.

17. In paragraph 19 of my 2016 Judgment, I found that the assets in the case were £10,859,533. Although I have not received any up to date evidence about this, I imagine that the value of the assets which I identified at that time will have decreased, given the events which have overwhelmed the world since 2016. This means that the parties have now spent at least 20% of their net worth litigating against each other. It would, I respectfully suggest, have been wiser to spend that money on each other and not on their excellent, but expensive, legal teams. It is, of course, a matter for them, but it would be hard to explain to that elusive "reasonable person" how they are where they are.

The wife's case

18. One of the principal issues at the hearing before me in November 2016 was whether the husband was being honest when he denied the wife's case that he made misrepresentations which induced her to enter into the prenuptial agreements. For reasons which I set out in some detail in my Judgment in 2016, I found that the wife was not being frank with the court and I preferred the husband's evidence. It is important to remember that the wife entered into no less than three prenuptial agreements.

19. The wife now applies to set aside my findings on this issue. She relies upon two documents which did not form part of the evidence put before me in 2016. The husband contends that this application, made some three years after my findings, is an abuse of process and/or that in light of the delay in bringing her application, the court should refuse to hear it. Furthermore, he says that the wife has had these documents throughout the proceedings and made a conscious decision not to deploy them.

20. The wife's case is that the husband is guilty of lying to me at the original hearing in 2016 in respect of the critical issue of whether he made a parallel representation to her at the time of the signing of the prenuptial agreements. It was the wife's case that the husband had made various promises and representations to her at the time when the prenuptial agreements were signed, in reliance on which the wife then signed the agreements, expecting that they would never be used to her disadvantage. The husband denied that there were any relevant discussions or that he made any promises or representations.

21. The wife's evidence in relation to the first prenuptial agreement (July 2000) was:

> "He told me repeatedly that it was just a piece of paper and that it would not make any difference to me. He told me if ever we divorced I would carry on financially just as before. Nothing would change. Prenup would not make a difference to me. I should trust him, he said, because he had always looked after me."

The husband denied that he had made any parallel representations of the kind alleged, or at all. His case was that the parties should be bound by the terms of their prenuptial agreements. The husband was cross-examined about this at the hearing before me in

2016. In my 2016 Judgment, I rejected the wife's assertion that the husband was guilty of serious misrepresentation in relation to the prenuptial agreements. Specifically, in paragraph 39, I found that, at the time they were entered into, the effect of the agreement or agreements was not vitiated by factors such as fraud, misrepresentation or undue pressure.

22. Mr Chamberlayne, for the wife, argues that if the husband did, indeed, tell the wife that the prenuptial agreement(s) would not govern the financial consequences of the marriage coming to an end, then "that is the end of the PNA" and that it "will negate any effect the agreement might otherwise have". Mr Chamberlayne reminds me that, in paragraph 60 of my December 2016 Judgment, I said:

> "Plainly, if there is a vitiating factor present such as fraud, duress or undue influence, a court is likely to determine that the agreement is void ab initio."

I also made reference to the case of *Sharland* where the Supreme Court repeated the well known maxim "fraud unravels all."

The "new" material

23. The wife says that there are two relevant emails which I was not shown in the 2016 hearing. The first was written by the husband at 0138 on 23 July 2015 and appears at page A84 of the bundle prepared for this hearing. The second is the wife's reply at 0950 of the same date which appears at page A89. I pause to note that this "new" material upon which the wife seeks to rely is not contemporaneous to the signing of the prenuptial agreements. The prenuptial agreements were all signed in 2000. The parties married in December 2000. The wife issued her petition for divorce on 20 February 2015. The documents on which the wife now seeks to rely both post-date the issuing of her divorce proceedings. The wife issued her Form A in February 2015 and the parties exchanged their Form Es in June 2015. The emails upon which the wife now seeks to rely were, therefore, exchanged at the height of this litigation. It is common ground that, on 22 July 2015, there was a party at the former matrimonial home which the husband attended and at which the husband and the wife had a row about a without prejudice offer that the husband had made to the wife a few days earlier. It is clear to me the context of this email exchange is important. It manifestly is not evidence of what happened in 2000. At best, it is evidence of what the parties said to each other in 2015 when they were embroiled in financial remedy proceedings.

24. I should add, before referring to the texts of the emails, that there remains a live dispute between the parties as to the admissibility of the emails, the husband contending that they are protected by without prejudice privilege. I have not ruled yet on that issue, the husband agreeing that I could read them *de bene esse* for the purposes of the strike out argument.

25. In his email, the husband said:

> "*When you and I got married we agreed to write a prenuptial agreement. At the same time I said to you that if we do get divorced and resolve matters between us I would do what I can so that you would have a good financial platform.*"

He then went on to say:

> "*What I can do is to give you, what would be considered by most standards to be a good, long-term platform, see above. That is more than the promise I once gave you.*"

Mr Chamberlayne asserts that this email "makes it abundantly clear that there were discussions of the very sort that the husband denied, and that the husband did reassure the wife financially, or make a financial promise to the wife, of substantial financial provision, at the time of the PNAs".

26. In her email in reply [A89], the wife said:

> "*You know perfectly well that I did not want to sign any prenuptial agreements that you promised and vowed that they wouldn't mean anything, but we could sit down and resolve it without lawyers in case we got divorced. You promised me that you would look after me and any potential children and that we would have the same standard. We also talked a great deal about it after your first infidelity. It was going to be as if we didn't have them, but since you owned a lot of companies the property settlement would be complicated if we didn't have them….*"

The husband's case in relation to the "new" material

27. Mr Marks correctly submits that, for the purposes of this strike out application, I must accept that the husband's e-mail (central to this application) is capable of establishing that which the wife asserts, in other words that he made parallel representations. In a strike out application I must assume that what is factually asserted will be established. Mr Marks has, I should add, made it clear that, should we get to that stage, he will forcefully argue that it does not have this effect. However he has correctly asserted that this is the basis on which I must look at it for the purposes of this strike out application.

28. Central to the strike out application which the husband makes, Mr Marks says that the wife consciously chose not to rely on these e-mails in the hearing before me in December 2016. In her email of 23 July, the wife says that she is going to her solicitor "all day today". It is a trite proposition that whatever the wife discussed with her solicitor that day is privileged and, therefore, no one is entitled to know about it unless privilege is waived (which it is not). However, Mr Marks submits, and I agree with this submission, that either the wife must have discussed the email exchanges or chose not to do so. It is also pertinent to note that the husband's email invites the wife to discuss this with her solicitor. The husband said in his email, *"consider these when you sit with your lawyer"*. However, as I have said, what the wife discussed with her lawyer(s) is privileged and I cannot, and do not, draw any inferences at all.

29. At an early stage in the proceedings (January 2016), the wife was ordered by Moylan J (as he then was) to file a statement about the circumstances of the making of the prenuptial agreements. I now have two versions of her statement, but the one that the wife relied on in court, and which formed part of the court bundle in front of me in 2016, made no reference to this email exchange. At that stage (December 2016) I did not have the earlier signed but unused statement. As it happens, that statement was accidentally produced by the wife's solicitors when preparing the bundle for the May 2020 hearing. Whatever the legal arguments may be about the admissibility of that statement, Mr Chamberlayne, on instructions, properly agreed that I should read it and accepts that it forms part of the evidence that I am now considering. The wife's solicitors initially referred to this earlier statement as a "draft", but when it was pointed out by the husband's solicitors that it had been signed, they accepted that it was, indeed, a statement signed by the wife. There are some important and significant differences between the signed, but unused, statement and the signed, but used, statement. In particular, the unused statement includes this passage:

> "*Kenny told me that the prenuptial was about taking care of me, about protecting me and to enable us to sort things out between ourselves without lawyers if we ever fell out. He repeatedly told me I will look after you, you will not have to worry this is just a piece of paper. He told me I have always taken care of you and always will because I love you.*"

It is neither possible nor necessary for me to know why these passages were abandoned in the statement that was actually used. However, it is reasonable to conclude that this discarded passage was drafted with the husband's email of 23 July 2015 in mind.

30. The discarded statement contains the assertion that the husband told the wife that they would be able "to sort things out between ourselves without lawyers if we ever fell out" and that "we didn't really discuss [that PNA] in the context of divorce". In the statement that was actually used, these two elements had been deleted. There was no reference to them being able to sort things out between themselves and instead of there being no discussion "in the context of a divorce", the wife then stated, "he told me that if we divorced I would carry on financially just as before". I agree with the submission made by Mr Marks and Mr Mitchell that it is undeniable that a decision was taken not to run the case that the husband told the wife that if they were able to sort things out without lawyers they could do so. This was an assertion made by the wife in the signed but un-served statement but not in the statement relied upon.

31. What the wife now seeks to do, almost 4 years later, is to seek to reopen her case to rely on something that she discarded between her first signed statement and second signed statement.

32. In addition to the decision not to use the email the for the purposes of the 2016 hearing, Mr Marks identifies three further occasions when the wife could have decided to seek to rely on the "new" evidence:

    i) The first is the phase between the end of the hearing (18 November 2016) and the circulation of a draft Judgment on 22 December 2016. The wife asserts in her notice of application that she found the "new" evidence on 22 November 2016, i.e. only four days after the conclusion of the hearing, but well before

Judgment. It is not at all unusual for a litigant to seek to produce evidence after the hearing has finished and, if the wife sought then to rely on these emails she should, through her counsel, immediately have contacted me and sought my permission to re-open the hearing. The parties knew that Judgment would be delayed for a few weeks because I was fully listed for the rest of that term and I told them that there would be a delay of a few weeks before Judgment but that I hoped to circulate a draft before Christmas (which is what happened).

ii) The second occasion of delay relied upon by Mr Marks and Mr Mitchell is the time between handing down of the Judgment on 22 December 2016 and the perfection of the order in August 2017. During this phase of the proceedings, the wife could have invited me to invoke what is referred to as the *Barrell* jurisdiction, asking me to change my decision in the light of new evidence that had come to light.

iii) The third, and final, period of delay referred to by Mr Marks and Mr Mitchell is the period between 22 November 2016 and 9 December 2019, a period exceeding three years, during which the wife could have sought to put in this new evidence.

33. The matter goes further still: importantly, the wife raised this very matter with the Court of Appeal when she invited them to admit fresh evidence, **namely these very emails** with which I am concerned in this judgement. The order signed by Peter Jackson LJ states:

> "*Permission to file fresh evidence is refused permission to appeal on ground 4 is consequently refused.*"

Ground 4 started with these words:

> "*Ground 4 relies on the wife producing new evidence, in the form of two emails which pass between her and the husband in July 2015. As part of the appeal she seeks permission to adduce the two emails.*"

Ground 4 then went on to recite the very parts of the emails with which I have been concerned in this Judgment. Paragraph 4.5 of the grounds of appeal says:

> "*that email is the clearest written confirmation from the husband himself that he did indeed promise the wife that the zero provision which the PNAs gave her would not be the true outcome on divorce.*"

When giving his reasons for refusing permission to appeal on Ground 4, Peter Jackson LJ stated:

> "*Permission to file fresh evidence is refused. Although the Ladd v Marshall criteria may not be strictly applied where to do so would prejudice the welfare of children, that is not a strong consideration here. However, there is a strong public interest in the finality of litigation, and in this case (leaving aside the issue*

> *of privilege) the consequence of admitting fresh evidence would probably be the case would have to be remitted to the judge for the primary finding of fact to be reconsidered. This would add further to the delay and expense that has already risen. Finally, and decisively, no good reason whatever has been given for the failure to produce this evidence at trial.*
> *Permission to appeal on Ground 4 is therefore refused*".

34. It is, in my judgement, remarkable that, having been so robustly turned down by the Court of Appeal on this issue, the wife now seeks through another route to introduce the evidence which the Court of Appeal said was too late. Importantly, the Court of Appeal said that no good reason had been given for the failure to produce the evidence at trial. Does the same apply now as applied when the Court of Appeal ruled against the wife on Ground 4 in December 2018? Mr Chamberlayne says not and I now turn to address the case that he has forcefully advanced.

The wife's response

35. Mr Chamberlayne puts his case this way:

> "Peter Jackson LJ's decision to refuse permission was in line with the law at the time. At that time there was binding Court of Appeal authority in the form of the then recent (March 2017) Court of Appeal decision in Takhar v Gracefield Developments (and two other Court of Appeal decisions to the same effect) that where an application to admit new evidence to set aside/appeal an earlier decision was based on a claim that the new evidence showed fraud, permission would be refused unless the appellant could show that the material could not have been produced at the original hearing if reasonable diligence had been used. However, the Supreme Court, sitting as a court of seven judges, reversed Takhar and the other Court of Appeal authorities on 29 March 2019 – UKSC 2019 13. The law now is that fraud unravels all and therefore:-
>
> > *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.*
> >
> > *"It appears to me that the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming. "*
>
> And Lord Sumption made it clear that it was not a discretionary issue – if it was established that there had been fraud, then it was

not a question of 'degrees of dishonesty', with a flexible approach being taken to set aside:-

> *"Nor do I accept Lord Briggs' view that a more flexible and fact-sensitive approach may be required in order to distinguish between degrees of dishonesty. I think that this would introduce an unacceptable element of discretion into the enforcement of a substantive right. The standard of proof for fraud is high, and rightly so. But once it is satisfied, there are no degrees of fraud which can affect the right to have the judgment set aside."*

36. In my judgement, the straightforward and decisive answer to Mr Chamberlayne's case lies in the last phrase of Mr Chamberlayne's quoted passage, namely:

> "*….unless a deliberate decision was then taken not to investigate or rely on the material.*"

37. For reasons set out above, it is clear that a deliberate decision was taken not to rely on the material now asserted by her to be "new" and "decisive". Thus I am constrained to agree with Mr Marks and Mr Mitchell that the wife's application is "fatally flawed" and that it should be struck out. Even were I to have a discretion whether to admit the material, I would decisively exercise my discretion against the admission of the material, given the delay between the "discovery" of the material in November 2016 and her attempt to introduce it in November 2019. I agree with Mr Marks and Mr Mitchell that (at least) the following lacunae exist in the wife's case, were I to be in a position where I were exercising my discretion whether to admit the material:

    i) why it was not part of her case at the final hearing that the husband had told her that he would be prepared to *agree* to make financial provision for her (which is the admission that he is now said to have made);

    ii) whether she told her solicitor about the email the day it was received (and if not why not);

    iii) how the email eluded her alleged physical and electronic searches she was required and twice said to have undertaken for material evidence;

    iv) how she came across it, i.e. what she was doing at the time and for what purpose;

    v) when and why she told her solicitors about the email;

    vi) why no application was made to reopen the evidence during the four weeks that judgment was reserved, or to invoke the *Barrell* jurisdiction in the more than seven months between delivery of the draft judgment and finalisation of the order;

    vii) why no application was made to set-aside the findings before more than three years had elapsed since she discovered the email.

38. Accordingly, in my judgement, even if *Takhar* does, in principle, allow me to go beyond the Court of Appeal's determination on the "new" material (as asserted by Mr Chamberlayne):

    i) *Takhar* makes it clear that there is an exception if a decision has been made not to rely on the material. Such a decision was plainly made here as set out in detail above;

    ii) Were I called upon to exercise any discretion to admit the "new" material, I would not do so for the reasons set out above.

39. Finally, in the context of *Takhar*, it is worth noting the facts of that case. There, the claimant had not realised that her signature on a crucial document had been forged, indeed, she believed that she might have signed it. It was only after judgment – the case having proceeded on the assumption that she had signed the document – that she obtained evidence that in fact her signature had been forged. That gave rise to a wholly new cause of action, namely for fraud which, notwithstanding the prior judgment in the action which she had lost, she was permitted by the Supreme Court to advance as a fresh claim. The judgments in that case raise the possibility, obiter, that had she even *argued* first time around that the signature was forged, albeit that she had lacked the evidence to prove it, she might not have been permitted to pursue her fresh claim.

40. Here, the wife both argued that the husband was not telling the truth about what was said to her about the effect of the prenuptial agreements and had possession of the piece of evidence which she now asserts establishes the truth of her case. It is a long way removed from the facts of *Takhar*.

41. On 16 June 2020, Mr Chamberlayne e-mailed me to tell me that "a new Supreme Court decision on strike outs has just emerged". Naturally, I agreed to consider it, given that I had not yet written my Judgment. The case referred to by Mr Chamberlayne is *Summers v Fairclough Homes Ltd* [2012] UKSC 26. That case establishes that the court has power under the CPR and under its inherent jurisdiction to strike out a statement of case at any stage of the proceedings, even when it had already been determined that the claimant was, in principle, entitled to damages in an ascertained sum. However, that power was to be exercised only where it was just and proportionate to do so, and that was likely to be only in very exceptional circumstances. Mr Chamberlayne's complaint is that the wife "has had no opportunity to present her evidence or for the court to hear from H about the manifestly false evidence he gave at the original trial". As I have set out above, the wife has had since (at least) November 2016 to show me the "new" material. In fact, as the unused but signed statement shows, she has in fact had since before the 2016 hearing started the opportunity of showing me the material.

42. Mr Marks complained in an email to me dated 16 June 2020 that it was "far too late for further argument or submissions to be made". However, given that I had not written my Judgment when Mr Chamberlayne's e-mail was received I thought it better to consider the Supreme Court decision to which he had referred. Plainly, if it was material to my decision, I would not want inadvertently to hand down a Judgment which was inconsistent with a binding decision from a superior court.

43. Having considered the *Fairclough Homes* case, I agree with Mr Marks that the decision has “nothing to do with the situation in this case” and is confined to the subject matter of that appeal.

Conclusion

44. Accordingly, I accede to the application to strike out the wife’s application to set aside my finding in the 2016 hearing.