

FRAUD IN STATUTORY ADJUDICATION: A COMPARATIVE STUDY OF COMMON LAW JURISDICTIONS

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I. INTRODUCTION

Fraud, in civil proceedings, is an insidious act in law and has been aptly judicially described as a disease². It takes many forms, from the subtle gifts, facilitation costs to the more repugnant and nefarious, bribery and corruption. The judicial abhorrence to fraud is well expressed by Lord Buckmaster in *Jonesco v Beard*³ in the following graphic terms:

“... *Fraud* is an insidious disease, and *if clearly proved to have been used so that it might deceive the Court, it spreads to and infects the whole body of the judgment* ...”
(Emphasis added.)

The effect of an act of fraud in equity and common law is understandable and is well encapsulated in the proverbial statement of the law by Denning LJ in *Lazarus Estates*⁴ that “*Fraud unravels everything*”.⁵

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² Per Lord Buckmaster in *Jonesco v Beard* (HL) [1930] AC 298, 301-302.

³ Per Lord Buckmaster in *Jonesco v Beard* (HL) [1930] AC 298, 301-302.

⁴ *Lazarus Estates Ltd v Beasley* (CA) [1956] 1 QB 702 at 712.

⁵ Thereby giving rise to the “fraud unravels everything” maxim, per Andrews LJ in *Park v CNH Industrial Capital Europe Ltd (t/a CNH Capital)* (CA) [2021] EWCA Civ 1766; [2022] 1 WLR 860; [2022] 3 All ER 867 at paragraph 43; *Prest v Petrodel Resources Ltd* (SC) [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1; [2013] 4 All ER 673 per Lord Sumption JSC at paragraph 18; *Rous v Mitchell* (CA) [1991] 1 WLR 469 per Nourse LJ at pages 496D, 497A–B referred to in *Eurocom Ltd v Siemens plc* (QBD (TCC)) [2014] EWHC 3710 (TCC) per Ramsey J at paragraphs 66–75.

In the recent Supreme Court decision of *Takhar*,⁶ Lord Sumption⁷ reiterated the Court's adverse sentiments towards fraud, in an application to set aside a judgment obtained by fraud, in rejecting the argument⁸ that the innocent party is subject to the doctrine of estoppel, or the principle⁹ of abuse of court process for failure of due diligence on the part of the defrauded party at the first hearing, because: "The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not the underlying dispute. It follows that *res judicata* cannot therefore arise in either of its classic forms ...".¹⁰

This article analyses the developments into the nature, scope and effect of fraud in challenges to, or enforcement of, statutory adjudication determination, by undertaking a comparative study into the recent developments in the common law¹¹ jurisdictions of Australia, Malaysia, Singapore and the UK which have embraced the "pay now, argue later" principle undergirding statutory adjudication (the common law jurisdictions).

In particular, this article discusses, inter alia, (a) the legal definition of fraud in statutory adjudication; (b) the rationale, scope, principles; and (c) the judicial tests adopted by the courts in common law jurisdictions when approaching fraud as a ground to set aside an adjudication determination. In conclusion, it is suggested that the just judicial approach, in law and

⁶ *Takhar v Gracefield Developments Ltd* (SC) [2019] UKSC 13; [2020] AC 450; [2019] 2 WLR 984; [2019] 3 All ER 283 at paragraphs 60 and 62 applied recently in *Park v CNH Industrial Capital Europe Ltd (t/a CNH Capital)* (CA) [2021] EWCA Civ 1766; [2022] 1 WLR 860; [2022] 3 All ER 867, *Tinkler v Esken Ltd (formerly Stobart Group Ltd)* (CA) [2023] EWCA Civ 655; [2023] Ch 451; [2023] 3 WLR 457, *Goddard-Watts v Goddard-Watts* (CA) [2023] EWCA Civ 115; [2023] 4 WLR 20.

⁷ Expressing the view of the majority of the Supreme Court comprising of Lords Sumption, Lord Hodge, Lord Lloyd-Jones and Lord Kitchin JJSC approving and applying the Australian High Court decision of *McDonald v McDonald* (1965) 113 CLR 529, NSWCA appeal decision of *Toubia v Schwenke* (2002) 54 NSWLR 529.

⁸ *Takhar*, fn 6 above, at paragraph 67, thereby rejecting the dicta of Lord Bridge in *Owens Bank Ltd v Bracco* (HL) [1992] 2 AC 443, 483; Lord Templeman in *Owens Bank Ltd v Etolie Commerciale SA* (PC) [1995] 1 WLR 44 at 48 and reversing the decision of the Court of Appeal in *Gracefield Developments Ltd v Takhar* (CA) [2017] EWCA 147; [2018] Ch 1; [2017] 3 WLR 853.

⁹ *Henderson v Henderson* (Ch D) (1843) 3 Hare 100, 115 per Wigram VC; *Arnold v National Westminster Bank plc* (HL) [1991] 2 AC 93, *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* (SC) [2013] UKSC 46; [2014] AC 160; [2013] 3 WLR 299; [2013] 4 All ER 715.

¹⁰ See similar views expressed by the Australian High Court recently in *Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers and Managers appointed)* [2018] HCA 12, judgment delivered on 21 March 2018 comprising Kiefel CJ, Gageller, Keane, Gordon an Elderman JJ.

¹¹ See also Magintharan, S, "Fraud as a ground to set aside a statutory adjudication determination in Singapore", [2022] Const LJ 38 (2) pages 93–101; Coulson on *Construction Adjudication* (2018 Oxford University Press, 4th Edition) pages 330–333, paragraph 8.51–8.58; Royce, D, *Adjudication in Construction* (2016, 1st Edition, Informa Law) pages 154–156 paragraph 6.41–6.43, Salmon, K, *Fraud in Construction Adjudication* (2018, SlaterHeelis Newsletter, dated 27 September 2018); Rajoo, S, Leong Hong Kit, Wong Xien Yee, C, *Law, Practice and Procedure of Adjudication Vol 2* (2023 LexisNexis Group) pages 1063–1074.

practice, when considering setting aside an adjudication determination on the ground of fraud (which is proved during, or after the adjudication proceedings) is for the courts, unless the justice of the case requires otherwise, not to set aside the whole adjudication determination, but to sever the determination tainted by fraud and temporarily to enforce the untainted aspect of the adjudication.

II. LEGAL DEFINITION OF FRAUD IN STATUTORY ADJUDICATION

The genesis of statutory adjudication was in contractual dispute resolution clauses contained in construction contracts.¹² However, statutory adjudication is not a mere procedural¹³ means of redress available to the contractor to resolve their cash flow dispute, nor is it subject to the mischief of the main contractor imposing onerous contractual terms, or condition, in order to stifle claims and deprive the contractor of their statutory right to invoke the statutory dispute resolution machinery. Instead, it is a substantial statutory right conferred upon a party to the contract to progress payment for construction works carried out and outlaw, or override any contractual term inconsistent with, or antithesis to, the parties' right to progress payment under the statute.¹⁴

Notwithstanding, it is undeniable that the genesis underlying the right of the party under statutory adjudication, arises from the existence of a construction contract,¹⁵ express or implied, between the parties. In the premises, the definition of fraud with regard to statutory adjudication invariably is that of the common law of contract.

¹² Maginathan, S, "The Derailment of the 'Dual Railway Track System', 'Primacy of Statutory Adjudication' Principles of Statutory Adjudication in Singapore – *Shimizu Corporation v Starwood Construction Pte Ltd*", [2020] 36 Const LJ 459; Chapter 1; Burr, A, *International and Statutory Adjudication* (2017, Informa Law) (ICSA) page 1 paragraph 1.2.

¹³ See, however, the extreme and, it is respectfully submitted, erroneous view expressed by the Singapore Court of Appeal in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791, *Far East Square Pte Ltd v Yau Lee Construction Pte Ltd* [2019] 2 SLR 189, CA, *Shimizu Corporation v Starwood Construction Pte Ltd* [2020] 1 SLR 1338; See S Maginathan, *Recent Developments in Construction Adjudication in Singapore* [2020] 36 Const LJ 219 at 256–268.

¹⁴ Maginathan, S, "The Derailment of the 'Dual Railway Track System', 'Primacy of Statutory Adjudication' Principles of Statutory Adjudication in Singapore – *Shimizu Corporation v Starwood Construction Pte Ltd*", [2020] 36 Const LJ 459; Maginathan, S, "The 'Dual Railway Track System', 'Primacy of Statutory Adjudication' principles of statutory adjudication – A Comparative study", [2021] Vol 1 (4) *AIADR Journal of International ADR* 16 at 37–60.

¹⁵ See Chapter 1, Burr, A in *International Contractual and Statutory Adjudication* (2017 Informa Law from Routledge) page 1 paragraph 1.2; Expressly mandated in the jurisdiction of Singapore, Malaysia, or express, or implied, now in the jurisdiction of the UK and Australia.

The *locus classicus* definition of fraud in contract law accepted in common jurisdictions¹⁶ is that enunciated by Lord Herschell in *Derry v Peek*¹⁷ as follows:

“Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false ...”

This definition of fraud is also applicable to statutory adjudication, in particular, as a ground to set aside a statutory adjudication, or in defence to the enforcement of an adjudication determination in all the common law jurisdictions.

The rationale, scope, principles and tests adopted by courts in the common law jurisdictions when considering fraud as a defence, or as a ground to challenge the enforcement of statutory adjudication determinations, are analysed hereinafter.

III. FRAUD AS A DEFENCE TO THE ENFORCEMENT OF STATUTORY ADJUDICATION IN THE COMMON LAW JURISDICTIONS

A. The Nature of Fraud, Its Scope and Its Enforceability in the UK

Statutory adjudication was introduced in the UK (and, it submitted, as a result, in common law jurisdictions) by the enactment of the Housing Grants, Construction and Regeneration Act 1996 (the HGCRA),¹⁸ intended to reform construction law, to facilitate the cash flow of the contractors and to prevent the mischief¹⁹ existing in the common law, prior to 1994. However, there is a glaring weakness²⁰ in the HGCRA because it does not

¹⁶ UK – *Derry v Peek* (HL) (1889) 14 App Cas 337 at 371, *AIC Ltd v ITS Testing Services (UK) Ltd* (“*The Kriti Palm*”) (CA) [2006] EWCA Civ 1601; [2007] 1 Lloyd’s Rep 555; [2007] 1 All ER 667, *Hayward v Zurich Insurance Company Ltd* [2016] UKSC 48; [2017] AC 142; [2016] 3 WLR 637; [2016] 4 All ER 628, *Fitzroy Robinson Ltd v Mentmore Towers Ltd* (QBD (TCC)) [2009] EWHC 1552 (TCC); [2009] BLR 505; 125 Con LR 171, *Eurocom Ltd v Siemens plc* (QBD (TCC)) [2014] EWHC 3710 (TCC) per Ramsey J at paragraph 57; Australia – *Inns Leisure Industries Pty Ltd v DF McCloy Pty Ltd* [1991] 100 ALR 447, *Sargent v Campbell* [1972-3] ALR 708; Malaysia – *Yeohata Machineries Sdn Bhd v Coil Master Sdn Bhd* [2015] 6 MLJ 810, CA, Singapore- *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR 435, CA, *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1990] SLR 454, *Winson Oil Trading Pte Ltd v OCBC Ltd* [2023] SGHC 220.

¹⁷ *Derry v Peek* (HL) (1889) 14 App Cas 337 at 371; *Eurocom Ltd v Siemens plc* (QBD (TCC)) [2014] EWHC 3710 (TCC) per Ramsey J at paragraph 57.

¹⁸ As amended by the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA).

¹⁹ *Rupert Morgan Building Services Ltd v Jervis* (CA) [2004] BLR 18 per Jacob LJ citing Keating on Building Contract; *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1230 at paragraph 11] per Young CJ also referring to the “mischief” and the Singapore Court of Appeal in *Civil Tech Pte Ltd v Hua Rong Engineering Ptd Ltd* [2018] 1 SLR 584, per Menon CJ at paragraphs 23–26 referring to the “palpable injustice” caused to the “cash flow” of the downstream contractors by the “mischief”.

²⁰ Lloyd, *Adjudication and The British Courts*, [2001] ICLR 437–468.

contain the necessary substantive and procedural law relating to challenging and setting aside adjudication determinations.

Dyson LJ extra-judicially expressed the view²¹ that such interstices left vacant by Parliament were deliberate for the intention that it falls to the courts to fill those interstices.

Fraud allegations in statutory adjudication proceedings, challenging statutory adjudication determinations are real, serious and strike at the very core of public confidence in the administration of justice. The recent comprehensive second report by King's College, London²² identified fraud as a separate ground in the category of others (5.5 per cent of cases) in challenging adjudication determination before the Technology and Construction Court (the TCC) in the UK and the courts' consideration of setting-aside or refusing to enforce, statutory adjudications tainted, *inter alia*, for fraud.

The courts in the UK have filled these interstices relating to fraud as a ground to challenge judgments and decisions of tribunals. This includes setting aside statutory adjudication under the HGCRA, with the application essentially of the common law maxim of fraud unravels everything²³ principle, albeit drawing subtle distinctions as to whether the issue of fraud was raised, decided in the course of the adjudication, or discovered only after the adjudication.

In *SG South Ltd*,²⁴ the TCC was concerned with an application to resist the enforcement of an adjudication decision by way of summary judgment by arguments of fraud on the part of the claimant during statutory adjudication proceedings, which were raised before the adjudicator, considered and rejected by the adjudicator.

Akenhead J laid out some basic propositions on the effect of fraud in statutory adjudication, which can be summarised as follows:

- “(a) Fraud or deceit can be raised as a defence in adjudication provided that it is a real defence to whatever the claims are;
- (b) If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgment, it must be supported by clear and unambiguous evidence and argument; and
- (c) A distinction has to be made between fraudulent behaviour, act or omissions [A1] in which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omission are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former”.

²¹ Dyson LJ, *Finality in Arbitration and Adjudication: The Evershed Lecture 2000*, Arbitration page 296.

²² Nazzini, R and Kalisz, A 2023: *2023 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform*: King's College London: <http://do.org/10.18742/pub-01-161> (King's College second report), page 10; see also Nazzini, R and Kalisz, A, King's College first Report 2022, page 58.

²³ *Lazarus*, fn 4 above.

²⁴ *SG South Ltd v King's Head Cirencester LLP* (QBD (TCC)) [2009] EWHC 2645 (TCC); [2010] BLR 47; [2010] CILL 2793 at paragraphs 19 and 20.

The basic propositions enunciated by Akenhead J in *SG South Ltd*²⁵ were approved and applied by the English Court of Appeal in *Speymill Contracts Ltd*.²⁶ *Speymill Contracts Ltd* was also a case where the allegation of fraud was raised before the adjudicator, considered and rejected by the adjudicator. The Court of Appeal affirmed the High Court decision and rejected arguments for the review of the adjudicator's decisions on its merits by rejecting allegations of fraud and enforced the adjudicator's determination.

In *Gosvenor London Ltd*,²⁷ Fraser J reviewed the authorities and, emphasising the temporary finality principle of statutory adjudication, limited a challenge or defence to the enforcement of an adjudication decision on the ground of fraud to extremely rare cases, which hardly ever arise, that issues which arise on enforcement will themselves be tried.

However, in *Eurocom Ltd*²⁸ Ramsey J reviewed and applied the fraud unravels everything principle and, importantly, refused the enforcement, by way of summary judgment, of a statutory adjudication, which was, inter alia, tainted with fraudulent misrepresentation to the Adjudicator Nomination Body, which fraud was discovered only after the adjudication hearing. His Honour significantly held, that “*fraudulent misrepresentation would invalidate the process of appointment and make the appointment a nullity so that the adjudicator would not have jurisdiction*”.²⁹

In the recent decision of the English High Court in *PBS Energo AS*,³⁰ Pepperall J was also confronted with the situation where fraud was not raised at the hearing before the adjudicator, but discovered subsequently, in the course of the discovery process in the final action. Pepperall J held,³¹ whilst recognising the “*statutory policy of enforcing the temporary finality of an adjudication decision is important*”, that “*such policy consideration must, however, yield to the well-established principle that the court will not allow its procedures to be used as a vehicle to facilitate fraud*”.

His Lordship held that where “*exceptionally, it is properly arguable on credible evidence that the adjudication decision was itself procured by a fraud that*

²⁵ *SG South Ltd*, fn 24 above refusing an application in defence to enforcement of an adjudication determination on the ground of fraud.

²⁶ *Speymill Contracts Ltd v Baskind* (CA) [2010] EWCA Civ 120; [2010] BLR 257; [2010] CILL 2828; 129 Con LR 66 at paragraph 36 per Jackson LJ rejecting an application to enforce an adjudication determination on the ground of fraud and theft; See also *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* (QBD (TCC)) [2010] EWHC 283 (TCC); [2010] BLR 377 per Ramsey J; recently in *PBS Energo AS v Bester Generacion UK Ltd* (QBD (TCC)) [2019] EWHC 996 (TCC) per Pepperall J at paragraph 17 – refusing to enforcement of an adjudication decision and finding that fraud was made out.

²⁷ *Gosvenor London Ltd v Aygun Aluminium UK Ltd* (QBD (TCC)) [2018] EWHC 227; [2018] BLR 353 per Fraser J at paragraphs 19.

²⁸ *Eurocom Ltd*, fn 5 above at paragraphs 57–75.

²⁹ *Eurocom Ltd*, fn 5 above at 75.

³⁰ *PBS Energo AS v Bester Generacion UK Ltd* (QBD (TCC)) [2019] EWHC 996 (TCC) per Pepperall J at paragraph 21. See also *Eurocom Ltd*, fn 5 above at paragraph 57.

³¹ *PBS Energo AS* (TCC), fn 30 above at paragraph 21.

was reasonably discovered after the adjudication, the court is unlikely to grant summary judgment”.

In such a case, where the fraud was reasonably discovered after the adjudication, His Honour considered the following:³²

- (a) First, the alleged representation made in the adjudication;
- (b) Secondly, the question of falsity;
- (c) Thirdly, any evidence as to whether the party making the representation knew the true position, or was reckless as to falsity;
- (d) Fourthly, the question of whether any false representation induced the adjudicator’s decision;
- (e) Fifthly, whether the innocent party could, or should, have taken the point in the adjudication; and
- (f) Sixthly, whether there were other submissions as to whether the Court should, or should not, grant summary judgment.

Having considered all the relevant factors as enunciated, His Lordship held that the case before the court was one of those rare adjudication cases where there is a properly arguable defence that the decision was obtained by fraud and refused summary judgment.³³

The decision of Peppercall J in *PBS Energo AS (TCC)*³⁴ was recently approved and applied on appeal by Coulson LJ in *PBS Energo AS (CA)*. Significantly, Coulson LJ helpfully distilled³⁵ the principles as to enforcement where there are allegations of fraud, as follows:

- (a) If the allegations of fraud were made in the adjudication, then they were considered, or will be deemed to have been considered, by the adjudicator in reaching his decision, and cannot subsequently amount to a reason not to enforce the decision;
- (b) The same principle applies if the allegations of fraud were not made in the adjudication, but could and should have been made there; and
- (c) If the adjudicator’s decision was arguably procured by fraud, or where the evidence upon which the adjudicator relied is shown to be both material and arguably fraudulent then, on the assumption that the allegations of fraud could not have been raised in the adjudication itself, such allegations can be a proper ground for resisting enforcement.

³² *PBS Energo AS (TCC)*, fn 30 above at paragraphs 26–77.

³³ *PBS Energo AS (TCC)*, fn 30 above at paragraphs 32–71.

³⁴ *PBS Energo AS (TCC)*, fn 30 above at paragraph 21.

³⁵ *PBS Energo AS v Bester Generacion UK Ltd (CA)* [2020] EWCA Civ 404; [2020] BLR 355; [2020] 4 All ER 1101; 191 Con LR 121, per Coulson LJ at paragraph 23.

The basic propositions enunciated by Akenhead J in *SG South Ltd* and applied subsequently in the cases³⁶ before the courts in cases where fraud was alleged before the adjudicator or discovered later, are now subject to the principles laid out by the Supreme Court in *Takhar*.³⁷

*The Takhar*³⁸ decision

Mrs Takhar owned various properties, which she transferred to the defendants. She brought an action in the High Court, alleging that the various properties had been transferred to the defendants as a result of undue influence, or other unconscionable conduct on the part of the defendants. Mrs Takhar did not raise fraud as a cause of action in the action. She failed in her claim and her claim was dismissed.

Some three years later, Mrs Takhar brought another action for a claim, seeking to have the previous judgment in favour of the defendants set aside, on the ground that it was obtained by fraud. In support of her allegation of fraud, Mrs Takhar relied on evidence that the second and third Defendants had forged her signature on a document.

The defendants applied for her claim to be struck out as an abuse of court's process, on the basis that, with reasonable diligence, Mrs Takhar could have obtained the fresh evidence before the original trial. The High Court judge³⁹ refused that application and allowed Mrs Takhar's claim to proceed to trial. The Court of Appeal⁴⁰ allowed the defendant's appeal, holding that a claim by which a party sought to set aside a previous judgment on the grounds that it had been obtained by fraud would be an abuse of process, if the success of the claim depended upon evidence which could, with reasonable diligence, have been produced at the original trial. Mrs Takhar appealed to the Supreme Court, which unanimously allowed Mrs Takhar's appeal.⁴¹

For the purpose of the present article, Lord Sumption, who delivered the majority decision,⁴² distilled the following principles:

³⁶ *SG South Ltd*, fn 24 above; *Speymill Contracts Ltd v Baskind* (CA) [2010] EWCA Civ 120; [2010] BLR 257; [2010] CILL 2828; 129 Con LR 66 at paragraph 36 per Jackson LJ rejecting an application to enforce an adjudication determination on the ground of fraud and theft; See also *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* (QBD (TCC)) [2010] EWHC 283 (TCC); [2010] BLR 377 per Ramsey J; *Gosvenor London Ltd*, fn 27 above and recently in *PBS Energo AS v Bester Generacion UK Ltd* (QBD (TCC)) [2019] EWHC 996 (TCC) per Pepperall J at paragraph 17.

³⁷ *Takhar*, fn 6 above.

³⁸ *Takhar*, fn 6 above, applied recently in *Park v CNH Industrial Capital Europe Ltd (t/a CNH Capital)* (CA) [2021] EWCA Civ 1766; [2022] 1 WLR 860; [2022] 3 All ER 867, *Tinkler v Esken Ltd (formerly Stobart Group Ltd)* (CA) [2023] EWCA Civ 655; [2023] Ch 451; [2023] 3 WLR 457, *Goddard-Watts v Goddard-Watts* (CA) [2023] EWCA Civ 115; [2023] 4 WLR 20.

³⁹ Newey J.

⁴⁰ Comprising Patten, King and Simon LJ.

⁴¹ *Albeit*, for different reasons.

⁴² With whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin JJSC agreed. The "minority" decision of Lord Kerr, Lord Briggs and Lady Arden, albeit, agreeing with the majority to allow the appeal provided different reasons for allowing the appeal.

- (a) An action to set aside an earlier judgment for fraud is not a procedural application, but a cause of action.⁴³
- (b) In equity, if the fact and materiality of the fraud was established, the party bringing the bill was absolutely entitled to have the earlier judgment set aside.
- (c) The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute and therefore there is no question of cause of action estoppel nor any question of issue estoppel.⁴⁴
- (d) Once a claimant establishes his right to have the earlier judgment set aside it follows that *res judicata* cannot therefore arise in either of its classic forms.
- (e) A reasonable person is entitled to assume honesty on those with whom he deals.⁴⁵
- (f) It follows that unless, on the earlier occasion, the claimant deliberately decided not to investigate a suspected fraud, or rely on a known one, it cannot be said that he should have raised it and the procedural doctrine of abuse of process⁴⁶ will not apply in order to set aside a judgment obtained by fraud.
- (g) Once the claimant has established the high burden of proof for fraud, there are no degrees of fraud which can affect the right to the judgment set aside, thereby rejecting the legal proposition that that evidence must not have been obtainable by reasonable diligence for the earlier proceedings as “mistaken”.⁴⁷

⁴³ *Takhar*, fn 6 above, per Lord Sumption at paragraph 60 applying the dicta of Sir George Jessel MR in *Flower v Lloyd* (CA) (1877) 6 Ch D 297, 299–300 and explaining that “Equity has always exercised a special jurisdiction to reverse transactions procured by fraud”, a “A party to earlier litigation was entitled to bring an original bill in equity to set aside the judgment given in that litigation on the ground that it was obtained by fraud”.

⁴⁴ *Takhar*, fn 6 above, per Lord Sumption at paragraph 61.

⁴⁵ *Takhar*, fn 6 above, per Lord Sumption at paragraph 63.

⁴⁶ Enunciated by Wigram V-C in *Henderson v Henderson* (Ch D) (1843) 3 Hare 100, 115 and applied in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* (SC) [2013] UKSC 46; [2014] AC 160, 22–25; [2013] 3 WLR 299; [2013] 4 All ER 715, *Arnold v National Westminster Bank plc* (HL) [1991] 2 AC 93; *Johnson v Gore Wood & Co* (HL) [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481.

⁴⁷ *Takhar*, fn 6 above, per Lord Sumption at paragraph 65 rejecting as “mistaken”, the legal requirement for “the new evidence must not have been obtainable by reasonable diligence in the earlier proceedings” enunciated by Goff LJ in the Court of Appeal in case of a “collateral attack” in a civil action of a criminal judgment in *Hunter v Chief Constable of West Midlands Police* (CA) [1980] QB 283, 333–335 as a general proposition of law to set aside previous civil judgments, approved and applied by Lord Diplock in the House of Lords in *Hunter v Chief Constable of West Midlands Police* (HL) [1982] AC 529, 545; [1981] 3 WLR 906; [1981] 3 All ER 727, Lord Bridge in *Owens Bank Ltd v Bracco* (HL) [1992] 2 AC 443, 483 and Lord Templeman in *Owens Bank Ltd v Etolie Commerciale SA* (PC) [1995] 1 WLR 44, 48; approving the “carefully and separately considered” principles set out by the High Court of Australia in *McDonald v McDonald* [1965] 113 CLR 529 and the New South Wales Court of Appeal decision of *Toubia v Schwenke* [2002] NSWCA 34; (2002) 54 NSWLR 46 which refused to follow the dicta of the “two *Owen Bank* cases”.

- (i) The provisional view of the majority of the Supreme Court was that the same principle will apply to a case where fraud was raised in the earlier proceedings, but unsuccessful because, if decisive new evidence is deployed to establish fraud, an action to set aside the judgment will lie irrespective of whether it could be reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material.

The Test of “Materiality” of Fraud in Defence to Enforcement of Statutory Adjudication in the UK

The principles set out by the Supreme Court in *Takhar*,⁴⁸ it is submitted, are a restatement of the proverbial statement by Denning LJ in *Lazarus Estates*⁴⁹ that:

“No judgment of a court, no order of a Minister, can be allowed to stand if it had been obtained by fraud. Fraud unravels everything ...”.⁵⁰

Since fraud unravels everything, it is submitted that fraud, if proved on the high burden on the balance of probabilities, will also unravel any adjudication determination obtained by fraud, whether the fraud was committed in the course of the adjudication proceedings, unless it can be proved that a deliberate decision was then taken not to investigate, or rely upon the material⁵¹ evidencing the fraud, or discovered only after the adjudication proceedings.⁵²

It follows that the test to set aside an adjudication determination, or deny enforcement of a statutory adjudication decision in the UK, following the seminal decision of the Supreme Court in *Takhar*,⁵³ is whether there is sufficient evidence to satisfy the high burden⁵⁴ of proof that the fraudulent statement/conduct was “material” (decisive)⁵⁵ and an operative cause⁵⁶ in inducing the adjudicator to award the statutory determination, regardless as to whether the fraud was raised before the adjudication, unless it was deliberately not raised,⁵⁷ or discovered after the adjudication determination.

⁴⁸ *Takhar*, fn 6 above.

⁴⁹ *Lazarus Estates*, fn 4 above.

⁵⁰ See also *Hip Foong Hong v H Neotia & Co* (PC) (1918) AC 888 per Lord Buckmaster: “If a judgment is affected by fraudulent conduct it must be set aside”.

⁵¹ *Takhar*, fn 6 above, per Lord Sumption at paragraph 66.

⁵² *Takhar*, fn 6 above; *PBS Energo AS* (TCC), fn 30 above at paragraphs 32–71; *PBS Energo* (CA), fn 35 above at paragraph 23.

⁵³ *Takhar*, fn 6 above, per Lord Sumption at paragraphs 59–67.

⁵⁴ *Takhar*, fn 6 above, per Lord Sumption at paragraph 64

⁵⁵ *Takhar*, fn 6 above, per Lord Sumption at paragraphs 60, 66.

⁵⁶ *Park v CNH Industrial Capital Europe Ltd (t/a CNH Capital)* (CA) [2021] EWCA Civ 1766; [2022] 1 WLR 860; [2022] 3 All ER 867, per Andrews LJ at paragraph 42, *Tinkler v Esken Ltd (formerly Stobart Group Ltd)* (CA) [2023] EWCA Civ 655; [2023] Ch 451; [2023] 3 WLR 457, *Goddard-Watts v Goddard-Watts* (CA) [2023] EWCA Civ 115; [2023] 4 WLR 20.

⁵⁷ *Takhar*, fn 6 above, per Lord Sumption at paragraph 66; *PBS Energo AS v Bester Generacion UK Ltd* (CA) [2020] EWCA Civ 404; [2020] BLR 355; [2020] 4 All ER 1101; 191 Con LR 121, per Coulson LJ at paragraph 23.

B. The Nature of Fraud, Its Scope and Its Enforceability in Australia

Statutory adjudication was introduced into Australia when the New South Wales Parliament enacted the Building and Construction Industry Security of Payment Act 1999 (SOPA (NSW))⁵⁸ and “has heavily influenced all other Australian security of payment legislation”.⁵⁹ It was swiftly followed by similar enactments in Victoria, Queensland, Western Australia, Northern Territory, Australian Capital Territory, Tasmania and South Australia.⁶⁰

Fraud is also not an express statutory defence, or ground to set aside, to an adjudication determination in SOPA (NSW). However, the Australian High Court in *McDonald v McDonald*,⁶¹ Menzies J reiterated that the law in Australia is also that “a judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail”.⁶²

The New South Wales Court of Appeal in *Toubia v Schwenke*⁶³ was confronted with an appeal from insurers to recover under section 66(1)(b) of the Motor Accidents Act⁶⁴ a fraudulent compensation arbitration award paid to an insured, resulting from false evidence given at the arbitration that the insured was not able to work. The insurers had evidence at the hearing that the insured was giving false evidence but did not present such evidence. However, further evidence discovered subsequent to the award proved that the insured had given false evidence at the arbitration proceedings and obtained the award fraudulently. The insurers then applied to recover the compensation awarded to the insured in the sum of AUS\$19,500 (including costs and interest) under section 66(1)(b) Motor Accident Act, on the grounds that the insured had obtained the benefit of the award fraudulently, by false evidence before the arbitrator. The insured raised, inter alia, the defence that the application to set aside the arbitration award on the ground of fraud was an abuse of the court process, because

⁵⁸ As amended on 2002, 2010, 2013 and the current version of SOPA (NSW).

⁵⁹ Dr Samer Skaik, ICSA, page 41.

⁶⁰ See Maginathan, S, “Unravelling the Quagmire of Setting Aside Adjudication Determination on the Grounds of Jurisdictional Errors and Non-jurisdictional Errors on the Face of the Record in Australia: *Shade System* and *Maxcon*”, [2018] 34 Const LJ 329, pages 329 and 330.

⁶¹ *McDonald v McDonald* [1965] 113 CLR 529, per Menzies J at page 542, the case which Lord Sumption in *Takhar*, fn 6 above, approved and applied.

⁶² Citing and apply dicta of Lord Buckmaster in *Hip Foong Hong v H Neotia & Co* (PC) (1918) AC 888 at page 894.

⁶³ *Toubia v Schwenke* [2002] NSWCA 34; (2002) 54 NSWLR 46, per Handley JA (with whom Heydon and Hodgson JJA agreed) also the case which Lord Sumption in *Takhar*, fn 6 above, approved and applied.

⁶⁴ Section 66 of the Motor Accidents Act, “Remedy Available where Claim is fraudulent (1) This section applies to a claimant if it is established that, for the purpose of obtaining a financial benefit, the claimant did or omitted to do anything (including the making of a statement) concerning a motor accident or any claim relating to a motor accident with knowledge that the doing of the thing or omission do the thing was false or misleading ... (b) a person who has paid an amount to the claimant in connection with a claim (whether under a settlement, compromise or judgment, or otherwise) is entitled to recover from the claimant the amount of the financial benefit so obtained by the claimant and any costs incurred in connection with the claims.”.

the insurers were fully aware at the arbitration hearing that the insured had lied and, further, such fraud on the part of the insured was discoverable by the insurer if due diligence was employed by the insurers to investigate the truth of the evidence at the hearing.

Handley JA⁶⁵ conducted a detailed consideration of the law on the requirement for due diligence on the part of the defrauded party from being prevented from applying to set aside a judgment obtained by fraud and emphatically rejected such a principle.⁶⁶

Handley JA reiterated and relied upon the “long established and fundamental principles” set out by the Privy Council in *Hip Foong v H Neotia & Co*⁶⁷ and the House of Lords in *Jonesco v Beard*⁶⁸ that a “fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, it spreads to and infects the whole body of the judgment”.

The Australian High Court recently in *Clone v Players*⁶⁹ reiterated the fraud unravels everything principle in confirming⁷⁰ that the court exercised its equitable jurisdiction in setting aside a perfected judgment, which was obtained by fraud, but reinforced that there must, in the interest of finality in litigation,⁷¹ be evidence of actual fraud and that mere misconduct, or constructive fraud, was insufficient to set aside a perfected judgment. Significantly, the Australian High Court rejected the requirement for due diligence on the part of the innocent party in the hearing below, in order to engage the court’s powers to set aside a perfected judgment, if actual fraud was proved, reiterating⁷² the apt dicta of Brennan J in *Gould v Vaggelas*⁷³ that “[a] knave does not escape liability because he is dealing with a fool”.

In the context of setting aside a judgment and a decision of an inferior tribunal on the grounds of fraud, the Australian High Court had, in *Craig v South Australia*,⁷⁴ confirmed that a judgment and decision of an inferior court, or other tribunal, are subject to judicial review by the Supreme Court inter alia on the ground of fraud. The court reiterated that the nature and powers of the Supreme Court’s power of judicial review were on distinct grounds and this included fraud.

⁶⁵ *Toubia*, fn 63 above paragraphs 1–47 applying at paragraph 43, the dicta of Menzies J in *McDonald v McDonald*, fn 65 above.

⁶⁶ Rejecting dicta of Lord Bridge in *Owens Bank Ltd v Bracco* (HL) [1992] 2 AC 443 at page 489.

⁶⁷ *Hip Foong Hong v H Neotia & Co* (PC) (1918) AC 888 per Lord Buckmaster at 894.

⁶⁸ *Jonesco v Beard* (HL) [1930] AC 298 per Lord Buckmaster at 301–302.

⁶⁹ *Clone Players*, fn 10 above.

⁷⁰ *Clone Players*, fn 10 above at paragraphs 43–62.

⁷¹ *Clone Players*, fn 10 above at paragraphs 69–71.

⁷² *Clone Players*, fn 10 above at paragraph 63.

⁷³ *Gould v Vaggelas* (1984) 157 CLR 215 at 252.

⁷⁴ *Craig v South Australia* (1995) 184 CLR 163 per Brennan, Deane, Toohey, Gaudron and McHugh JJ at page 175–176. Affirmed by the Australian High Court in *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v Work Cover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 per French CJ at paragraph 97 (with whom Gummow, Hyne, Crennan, Kiefel and Bell JJ agreed).

In *SZFDE v Minister for Immigration*,⁷⁵ the Australian High Court considered fraud in law, the nefarious nature of fraud, the equitable nature of fraud and its application in public law, the principle that fraud unravels everything⁷⁶ and concluded that fraud by a party, or even a third party, on an inferior court, or tribunal, will render the decision or judgment, procured by fraud to be quashed by way judicial review and an order for certiorari will be issued.

In *Chase Oyster Bar*,⁷⁷ the New South Wales Court of Appeal authoritatively clarified⁷⁸ that the adjudicator's role under the SOPA (NSW) and, it is submitted, in all the states of Australia, is that of an administrative tribunal, not an expert,⁷⁹ or an inferior court,⁸⁰ and that the adjudication determination is subject to judicial review and issuance of certiorari to quash, or set aside, an adjudication determination.

In the context of fraud as a ground to set aside an adjudication determination in Australia, Hodgson JA held in *Brodyn*,⁸¹ in the New South Wales Court of Appeal, that an adjudication determination obtained by fraud was amenable to judicial review and to be set aside because it was not void, but voidable.⁸²

In *Hansen Yuncken Pty Ltd*,⁸³ McMurdo J, in the Supreme Court of Queensland, was concerned with, inter alia, an application to set aside an adjudication determination on the ground of fraud exercised on the adjudicator by the claimant, who had provided false evidence with regard to labour costs, which induced the adjudicator to award the claimant the substantial adjudication determination and the defence of abuse of process,

⁷⁵ *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35, decision of Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ at paragraphs 8–27.

⁷⁶ *SZFDE*, fn 75 above citing at paragraph 15 the “principle that fraud unravels everything” enunciated by Denning LJ in *Lazarus Estates*, fn 4 above at 712–713 and at paragraph 19 as the “example” of the application of the “principle that fraud unravels everything” in the dicta of Lord Bridge in *Al-Mehdawi v Secretary for State for the Home Department* (CA) [1990] 1 AC 876 at 895; [1989] 1 All ER 777.

⁷⁷ *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 comprising of Spigelman CJ, Basten JA and McDougall J.

⁷⁸ *Chase Oyster Bar*, fn 77 above, per Spigelman CJ at paragraphs 3, 10; Basten JA at paragraphs 63–66, 70 and 71; 84; McDougall J at paragraphs 11–113, 207, 245–262; Maginathan, S, “Unravelling the Quagmire of Setting Aside Adjudication Determinations on the Grounds of Jurisdictional Errors and Non-jurisdictional Errors on the Face of the Record in Australia: *Shade System* and *Maxcon*”, (2018) 34, Issue No 5, Constr L J page 329, at 353–355.

⁷⁹ As McDougall J had previously held in *Musico v Davenport* [2003] NSWSC 977 at paragraph 51, approved and applied by Hodgson JA in the NSWCA in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421 at paragraph 58.

⁸⁰ Per Beech J in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at paragraphs 101–102 approved and applied by the WACA in *Perrinpod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASC 217 at paragraph 188 (Murphy JA with whom Martin CJ agreed) c/f *Grocon Constructions Pty Ltd v Plant Coccianti Joint Venture (No 2)* [2009] VSC 426; See S Maginathan, *Unravelling the Quagmire of Setting Aside Adjudication Determinations on the Grounds of Jurisdictional Errors and Non-jurisdictional Errors on the Face of the Record in Australia: Shade System and Maxcon* [2018] 34, Issue No: 5, Constr. L J page 329, at 353–355

⁸¹ *Brodyn Pty Ltd v Davenport (t/a Time Cost & Quality)* [2004] NSWCA 394; (2004) 61 NSWLR 421.

⁸² *Brodyn*, fn 81 above at [54].

⁸³ *Hansen Yuncken Pty Ltd v Ian James Ericson Trading as Fleas's Concreting* [2011] QSC 327.

because the respondent had failed to exercise due diligence to pursue the issue of fraud before the adjudicator.

McMurdo J reviewed the law in Australia on “*Fraud – the consequences*”⁸⁴ and confirmed, *inter alia*, that, in Australia:

- (a) Fraud was an equitable remedy;⁸⁵
- (b) Fraud is a ground for judicial review of a decision of an inferior court, or tribunal, including the adjudicator’s decision;⁸⁶ and
- (c) The relief⁸⁷ for an adjudication determination procured by fraud is that generally the whole adjudication determination, or judgment, will be set aside, subject, however, to the court’s discretion to sever⁸⁸ that part of the determination tainted by fraud from that which was not tainted and allowed the enforcement of the untainted adjudication determination.

Applying the court’s discretion, the public policy undergirding statutory adjudication (namely to preserve the cash flow of the downstream contractor for construction works carried out), His Honour severed the adjudication determination procured by fraud from the untainted portion decision, set aside the tainted determination, whilst granting leave to enforce the substantial, untainted statutory adjudication determination.⁸⁹

In *QC Communications NSW Pty*,⁹⁰ Ball J also considered an application to set aside an adjudication determination on the ground of fraud. Ball J found on the fresh evidence that the determination was induced by fraud, consisting of the claimant relying upon invoices to support its claims, which they knew were false, because they included claims for works which the claimant knew they had not performed.⁹¹ His Honour reviewed the law on setting aside an adjudication determination in Australia and set out the following important propositions when a judgment may be set aside on the basis of fraud:

- “(a) The application is based on facts discovered after the judgment, which are material;⁹² and (b) It is reasonably clear that the fresh evidence would have provided an opposite verdict”.⁹³

⁸⁴ *Hansen Yuncken*, fn 83 above at paragraphs 124–159.

⁸⁵ *Hansen Yuncken*, fn 83 above at paragraphs 126–130. See also similar dicta of Lord Sumption in *Takhar*, fn 6 above at paragraph 67.

⁸⁶ *Hansen Yuncken*, fn 83 above paragraphs 124–131.

⁸⁷ *Hansen Yuncken*, fn 83 above at paragraphs 132–159.

⁸⁸ *Hansen Yuncken*, fn 83 above at paragraphs 146–157.

⁸⁹ See a similar approach adopted in severing the “jurisdictional errors” in an adjudication determination and enforcing the remainder unaffected by such errors under SOPA NSW in the recent case of *Ceeroose Pty Ltd v A-Civil Aust Pty Ltd (No 2)* [2023] NSWSC 401 affirmed on appeal in *A-Civil Aust Pty Ltd v Ceeroose Pty Ltd* [2023] NSWCA 144, judgment released on 29 June 2023 per Payne JA, Simpson AJA; Basten AJA.

⁹⁰ *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095.

⁹¹ *QC Communications*, fn 90 above.

⁹² *Wentworth v Rogers (No 5)* (1986) NSWLR 534.

⁹³ *Orr v Holmes* [1948] HCA 16; (1948) 76 CLR 632 per Latham CJ at 640.

Ball J found, on the facts, that “the fraud was sufficiently significant and widespread that it had a substantial effect on the Adjudicator’s determination” and therefore set aside the whole adjudication determination.

The Test to Set Aside Upon Judicial Review of A Statutory Adjudication Decision on The Ground Of Fraud In Australia: The “Materiality” of Fraud Test v “Opposite Verdict” Test?

In Australia, the High Court had, in *Orr v Holmes*,⁹⁴ which was a case where a new trial was ordered based upon fresh evidence, held, allowing the appeal, that:

- (a) A new trial will not be ordered in a case where the defendant had failed in their duty of reasonably due diligence to discover the fraud at the first trial; and
- (b) New evidence will not be allowed, unless “a reversal of the former result ought certainly to ensure” (opposite verdict principle).

In *QC Communication*,⁹⁵ Ball J applied the opposite verdict principle, in arriving at his decision to set aside the whole adjudication determination.

It is respectfully submitted that the opposite verdict principle in setting aside an adjudication determination, or judgment, must be read together with the principles set out by the Australian High Court in *McDonald v McDonald*,⁹⁶ the NSW Court of Appeal in *Toubia v Schwenke*⁹⁷ and now the judgment of the Supreme Court of the UK in *Takhar*,⁹⁸ which reiterate that the test for whether a judgment, or adjudication determination, is to be set aside on the ground of fraud is whether the fraud was material to the procurement of the earlier decision, or judgment, regardless as to whether the defrauded party had acted with due diligence to discover the fraud at the first trial, unless there was a deliberate decision not to raise the fraud before the court, or tribunal, making the first decision.

In any event, it is respectfully submitted that the opposite verdict test in Australia is, in fact and in practice, the same as the materiality test for the question, since the real question before the court is always whether the fraud was “sufficiently significant and widespread that it had a substantial effect on the adjudicator’s determination”.⁹⁹

⁹⁴ *Orr v Holmes*, fn 93 above, per Latham CJ and Dixon J (with Rich J dissenting).

⁹⁵ *QC Communications*, fn 90 above,

⁹⁶ *McDonald v McDonald*, fn 61 above.

⁹⁷ *Toubia v Schwenke*, fn 63 above.

⁹⁸ *Takhar*, fn 6 above.

⁹⁹ As held by Ball J in *QC Communication*, fn 90 above and similarly, per McMurdo J, in *Hansen Yuncken*, fn 83 above at paragraphs 124–159.

C. The Nature of Fraud, Its Scope and Its Enforceability in Malaysia

Statutory adjudication was introduced in Malaysia by Parliament enacting the Construction Industry Payment and Adjudication Act 2012 (CIPAA).¹⁰⁰ CIPAA is the first statutory adjudication enactment, which expressly provided that fraud is a ground for the High Court to set aside, or challenge, the statutory adjudication determination. Section 15 of CIPAA provides as follows:

“An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

- (a) the adjudication decision was improperly procured through fraud or bribery;
- (b) there has been a denial of natural justice;
- (c) the adjudicator has not acted independently or impartially; or
- (d) the adjudicator has acted in excess of his jurisdiction”. (emphasis added)

Notwithstanding that fraud is expressly provided as a ground to set aside an adjudication decision since 2014, in the recent Malaysian High Court decision of *KPF Niaga Sdn Bhd*,¹⁰¹ Her Honour Aliza Suliaman J noted that, “Unlike limbs (b) and (d) under section 15 CIPAA where there is an ever-growing collection of Malaysian cases, the only known decision on limb (a)” (ie fraud) is *Gumi Asli Elektrikal Sdn Bhd*.¹⁰²

This is understandable in practice for, in Malaysia, the burden of proof for fraud in law, in a civil case, was in a flux, the onerous beyond reasonable doubt (the criminal standard),¹⁰³ until the civil standard of balance of probabilities was realigned, or restated, only in 2015 by the Federal Court in *Sinnaiyah & Sons Sdn Bhd*.¹⁰⁴

Notwithstanding, in *Gumi Asli Elektrikal*,¹⁰⁵ the Malaysian High Court was concerned with the first case of an application to set aside an adjudication decision under section 15(a) of the CIPAA. His Honour Wong Kian Kheong J reviewed¹⁰⁶ the law on setting aside adjudication determination (AD) in the UK, in particular the basic propositions set out by Akenhead J

¹⁰⁰ CIPAA only came into force on 15 April 2014: Minister’s Gazette Notification.

¹⁰¹ *KPF Niaga Sdn Bhd v Vigour Builders Sdn Bhd* [2021] MLJU 229, per Her Honour Aliza Suliaman J at paragraph 56; see also the recent decision of Her Honour Aliza Suliaman J in *JEKS Engineering Sdn Bhd PALI PTP Sdn Bhd* [2022] 9 MLJ 451 at paragraphs 29–37, dismissing a challenge to set aside the adjudication determination on the ground of fraud, because the applicant failed to establish the necessary “clear and unambiguous” evidence for fraud, but allowing the setting aside application on the ground of breach of “core jurisdiction”.

¹⁰² *Gumi Asli Elektrikal Sdn Bhd Dazzling Electrical (M) Sdn Bhd* [2020] MLJU 314 per Wong Kian Kheong J.

¹⁰³ See the Privy Council decision of *Saminthan v Pappa* [1981] 1 MLJ 121 at 126; *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at 38, SC; *Chong Kee Seng v Che Chik* [1964] MLJ 144 at 145, FC; *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, FC.

¹⁰⁴ *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 1 MLJ 1, FC at paragraphs 20–53; *Sykt Hing Lee Fishing (Sabah) Sdb Bhd v Lin Yeen Thai* [2019] 4 MLJ 54 at 102–106, CA.

¹⁰⁵ *Gumi Asli Elektrikal*, fn 102 above.

¹⁰⁶ *Gumi Asli Elektrikal*, fn 102 above at [15].

in *SG South Ltd*¹⁰⁷ and summarised¹⁰⁸ the law for setting aside statutory adjudication under section 15(a) of the CIPAA on the ground of frauds, as follows:

“(a) X had the legal burden to satisfy the court that an AD had been improperly procured through fraud. Y has no legal onus to prove that the AD has not been improperly procured through fraud, and (b) X is only required to prove that an AD had been improperly procured through fraud on a balance of probabilities (not beyond all reasonable doubt) ...”

Applying the principles enunciated by His Honour, the Learned Judge evaluated the evidence¹⁰⁹ and held that there was insufficient evidence for him to set aside the AD pursuant to section 15(a) of the CIPAA on the ground that the AD has been improperly procured through fraud and dismissed the application to set aside the adjudication on the grounds of fraud.

On the contrary, in *KPF Niaga Sdn Bhd*,¹¹⁰ Her Honour Aliza Suliaman J held in a Malaysian High Court case, evaluating the law and facts,¹¹¹ that “*KPF has proved, on a balance of probabilities, that the AD was improperly procured through fraud*”,¹¹² for the claimant had fraudulently misled the adjudicator and obtained the adjudication determination on the false evidence that, inter alia;

- (a) The claimant was registered under the Construction Industry Development Board Act (the CIDB Act) and therefore entitled to the CIDB levy, when they were not¹¹³
- (b) Deliberately concealed the full text of WhatsApp messages before the adjudicator, which proved that the claimant had not carried out the claycrete works and were not entitled to the substantial adjudicated amount claimed;¹¹⁴ and
- (c) Found that the “AD was improperly procured through fraud”.¹¹⁵

¹⁰⁷ *SG South Ltd*, fn 24 above per Atkenhead J at paragraphs 19–21 approved by the English Court of Appeal in *Speymill Contracts*, fn 26 above, per Jackson LJ at paragraphs 36 and 37 and applied in *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* (QBD (TCC)) [2010] EWHC 283 (TCC); [2010] BLR 377, per Ramsey J at paragraphs 80 and 84.

¹⁰⁸ *Gumi Asli Electrical*, fn 102 above at paragraph 15.

¹⁰⁹ *Gumi Asli Electrical*, fn 102 above at paragraph 16.

¹¹⁰ *KPF Niaga Sdn Bhd*, fn 101 above paragraphs 21–67.

¹¹¹ *KPF Niaga Sdn Bhd*, fn 101 above paragraphs 23–67.

¹¹² *KPF Niaga Sdn Bhd*, fn 101 above at paragraph 24.

¹¹³ *KPF Niaga Sdn Bhd*, fn 101 above at paragraphs 31–39.

¹¹⁴ *KPF Niaga Sdn Bhd*, fn 101 above at paragraphs 40–52.

¹¹⁵ *KPF Niaga Sdn Bhd*, fn 101 above at paragraphs 53–67 applying the English cases of fraud in adjudication determination namely, *SG South Ltd*, fn 24 above, *PBS Energo AS* (TCC), fn 30, and the decision of *Gumi Asli Electrical*, fn 102 above at paragraph 61.

The Test to Set Aside Upon Judicial Review of A Statutory Adjudication Decision on The Ground of Fraud In Malaysia: The “Materiality” of Fraud Test

It is apparent that the Malaysian High Courts have adopted the English test of materiality¹¹⁶ for setting aside an adjudication determination improperly procured by fraud under section 15(a) of the CIPAA, albeit the courts have not yet referred to the Supreme Court’s decision of *Takhar*.¹¹⁷

D. The Nature of Fraud, Its Scope and Its Enforceability in Singapore

Statutory adjudication was introduced into Singapore in 2004, with Parliament enacting the Building and Construction Industry Security of Payment Act 2004 (the SOPA).¹¹⁸ The SOPA, when enacted in 2004, provided, under section 27(3), that an adjudicated determination may be set aside by the court, but did not provide the express grounds for setting aside an adjudication determination.

S Magintharan has noted¹¹⁹ that fraud is now an express statutory ground under section 27(6) (h) of the SOPA (as amended). The Singapore High Courts in *Mansource Interior Pte Ltd*,¹²⁰ *OGSP Engineering Pte Ltd*,¹²¹ *CFA v CFB*¹²² and *Dongah Geological*¹²³ and the Singapore Court of Appeal had recently in *Façade Solution Pte Ltd*¹²⁴ confirmed fraud as a distinct ground to set aside adjudication determination, applying the materiality test, following the UK Supreme Court decision in *Takhar*.¹²⁵

In the recent Singapore High Court of *LJH Construction*,¹²⁶ the court set aside the *entire* adjudication determination and refused to enforce the same on a number of grounds, including, importantly, the ground of fraud, which the court found, in applying the materiality test, to be an operative cause¹²⁷ for the grant of the adjudication determination. The High Court considered, but refused to sever, the adjudication determination not tainted

¹¹⁶ The “basic propositions” in *SG South Ltd*, fn 24 above, *PBS Energo AS (TCC)*, fn 30 above; *PBS Energo, CA*, fn 35 above and the decision of *Gumi Asli Electrical*, fn 102 above at paragraph 61.

¹¹⁷ *Takhar*, fn 6 above at paragraphs 66 and 67.

¹¹⁸ SOPA come into force in 31 January 2016.

¹¹⁹ Magintharan, S, “Fraud as a ground to set aside a statutory adjudication determination in Singapore”, [2022] Const LJ 38(2) pages 93–101.

¹²⁰ *Mansource Interior Pte Ltd v Citivall Safety Glass Pte Ltd* [2014] 3 SLR 264 per Tan Siong Thye J at paragraphs 30–32 per Tan Siong Thye J.

¹²¹ *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2018] 3 SLR 3 SLR 1031, per Tan Siong Thye J at paragraphs 34–45.

¹²² *CFA v CFB* [2020] SGHC 101 per Lee Sieu Kin J at paragraphs 12–27.

¹²³ *Dongah Geological Engineering Co Pte Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 per Tan Siong Thye J at paragraphs 33–77, affirmed by the Appellate Division of the General Division of the High Court (unreported).

¹²⁴ *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 1 SLR 1125.

¹²⁵ *Takhar*, fn 6 above.

¹²⁶ *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2023] 3 SLR 792 per Ang Cheng Hock J at paragraphs 67–127.

¹²⁷ Applying the principles set out by the Singapore Court of Appeal in *Façade*, fn 124 above.

by the fraud, on the ground that it should only be severed in an exceptional type of case.¹²⁸

Significantly, in the recent case in *JP Nelsson Equipment*¹²⁹ the Singapore High Court, applying the *Façade* test,¹³⁰ upheld the adjudication determination, despite finding that fraud was committed by the claimant only discovered *after* the adjudication determination, on the ground that the respondent had failed to prove that the fraud was *material* in the adjudication proceedings and an operative cause of the claimant obtaining the adjudication determination. Notwithstanding the findings, Lee J relied upon the fraud unravels everything principle, severed the adjudication determination and disallowed the claimant to benefit from the fruits of its fraud (S\$155,160.00), by severing the adjudication determination and allowing the remainder of the adjudication determination to remain, by balancing the objective of the SOPA as against the public interest against fraud, because, although the court takes a serious view towards fraud, to invalidate the entire payment claim would unfairly punish the contractor because the contractor had carried out works far in excess of the amount tainted by fraud.¹³¹

IV. SUMMARY AND CONCLUSION

In summary, it is apparent from the comparative study of the authorities in all the common law jurisdictions that fraud is now an entrenched ground to set aside an adjudication determination, *albeit* the courts in the UK and Australia have sought to introduce subtle nuances on the requirement of due diligence, the essential question as to when fraud is discovered and the test for challenging, or setting aside, the adjudication determination.

S Magintharan notes¹³² that it is understandable for fraud to be an entrenched ground to challenge, or set aside, an adjudication determination because, fraud is an insidious act, striking at the very core of public confidence in the administration of justice.

However, there is a need for the courts, in considering challenges to any statutory adjudication determination on the ground of fraud, to balance the need to facilitate the cash flow objective of statutory adjudication regimes, with the need to preserve the public confidence in the administration of justice. May LJ in *Pegram Shopfitters*¹³³ aptly referred to these cases as “when

¹²⁸ *LJH Construction*, fn 126 at paragraph 175.

¹²⁹ *JP Nelson Equipment Pte Ltd v Builders Hub Pte Ltd* [2023] SGHC 168, per Lee Sieu Kin J.

¹³⁰ *Façade*, fn 124 above.

¹³¹ *JP Nelson*, fn 129 at [84].

¹³² Magintharan, S, “Fraud as a ground to set aside a statutory adjudication determination in Singapore”, fn 119 above.

¹³³ *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* (CA) [2003] EWCA Civ 1750; [2004] 1 WLR 2028; [2004] 1 All ER 818 at paragraph 9.

legal principles have to prevail over a broad brush of policy” and the King’s College London, First Report affirmed that the TCC in the UK were not merely simply rubber stamping¹³⁴ adjudicator’s determinations.

The balance (as S Magintharan notes)¹³⁵ is judicially maintained by the requirement for compelling evidence and satisfying the materiality test on the part of the applicant seeking to set aside an adjudication determination on the ground of fraud in *all* the common law jurisdictions. The materiality test will prevent undesirable attempts by the losing party to an adjudication to comb through the adjudicator’s reasons and identify points to present a challenge¹³⁶ under the label of excess of jurisdiction or a breach of natural justice. It is also fraudulent in itself by seeking to raise fraud as a sham, last ditch attempt¹³⁷ to set aside an adjudication determination subsequent (and not raised in the course of the adjudication) to an adjudication determination on allegedly newly-discovered evidence.

Justice is best served, it is respectfully suggested, in the courts’ balancing of the two significant interests in statutory adjudication cases where fraud is proved. It is for the court to sever and not allow, if the fraudulent amount is distinct¹³⁸ from the actual work carried out and proved by the contractor, the amount tainted by the fraud, whilst enforcing the remainder, if justice permits in each case, when the contractor has, in fact, carried out construction work far in excess of the amount tainted by the fraud.

This is particularly so because the contractor’s claim under statutory adjudication is essentially for the work completed (if proved before the adjudicator); it is entrenched that the statutory adjudication determination is only of temporary finality effect in law and the detailed examination, consideration of the evidence on the allegation of fraud (including hearing of oral evidence and subject to cross-examination) is best and should be justly dealt with at the final determination of the dispute at trial and/or arbitration and not in any setting-aside application.¹³⁹

In the premises, it is suggested that the court, even when fraud is proved at the enforcement stage of the adjudication determination, should not

¹³⁴ King’s College First Report, fn 22 above, Chapter 7, page 58.

¹³⁵ Magintharan, S, “Fraud as a ground to set aside a statutory adjudication determination in Singapore”, fn 1 above.

¹³⁶ *Carillion Construction Ltd v Davenport Royal Dockland Ltd* (CA) [2005] EWCA Civ 1358; [2006] BLR 15; 104 Con LR 1, per Chadwick LJ.

¹³⁷ *Dongah Geological*, fn 123, as per Tan J.

¹³⁸ *Carillion Ltd v Uruwasco Ltd* (QBD (TCC)) [2008] EWHC 282 (TCC), [2008] BLR 250; [2008] CILL 2564, per Akenhead J at paragraphs 64 and 65; *Bovis Lend Lease Ltd v The Trustees of the London Clinic* (QBD (TCC)) [2009] EWHC 64 (TCC); [2009] CILL 2672; [2009] 123 Con LR 15, *Working Environment Ltd v Greencoat Construction Ltd* (QBD (TCC)) [2012] EWHC 1039 (TCC); [2012] BLR 309; 142 ConLR 149, *Beck Interiors Ltd v Classic Decorative Finishing Ltd* (QBD (TCC)) [2012] EWHC 1956 (TCC), *Lidl UK GmbH v RG Carter Colchester Ltd* (QBD (TCC)) [2012] EWHC 3138 (TCC); 146 Con LR 133 – albeit cases not considering fraud but see *Hasen Yuncken Pty Ltd*, fn 83 above and *JP Nelson*, fn 129 above, where the courts severed the adjudication determination from those tainted by fraud.

¹³⁹ *Hansen Yuncken*, fn 83 at paragraphs 132–159 per Murdo J; *JP Nelson*, fn 129 above per Lee J at paragraph 84.

deprive the contractor of the life-blood for construction works, which have been properly undertaken, completed as determined by the adjudicator and which are not tainted, or which are remote from the amount alleged to be tainted by fraud.

It is submitted that, in so doing, the court will not be condoning the contractor's alleged fraud by not allowing the contractor of their fruits of fraud, but, at the same time, the court will not be punishing¹⁴⁰ the contractor by depriving the contractor of his lifeblood for construction works which have been properly determined by the adjudicator, thereby justly giving effect to the temporary finality, "pay now, argue later" principles intended by Parliament under all the statutory adjudication régimes in the common law jurisdictions. Such a balance by the court will also in practice facilitate the "pay now, argue later" principle and be an invaluable guide to claimants, adjudicators and practitioners in the developing law of statutory adjudication in all the common law jurisdictions.

¹⁴⁰ As per Lee J in *JP Nelson*, fn 129 above at paragraph 84.