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A timely reminder
of the importance of
acting with probity
when pursuing
claims

*Facade Solution Pte Ltd v
Mero Asia Pacific Pte Ltd
[2020] SGCA 88*

16 September 2020

LEGAL
UPDATE

In this Update

In the recent decision of *Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] SGCA 88, the Court of Appeal affirmed the High Court's decision to set aside an adjudication determination on the ground of fraud, due to a party's fraudulent misrepresentation during the adjudication proceedings under the SOP Act.

This article highlights the key parts of this decision.

03
INTRODUCTION

03
BACKGROUND

04
THE HIGH COURT'S
DECISION

04
THE COURT OF APPEAL'S
DECISION

07
COMMENTARY

INTRODUCTION

Against the backdrop of the COVID-19 pandemic and its ensuing impact on the construction industry in Singapore, the issue of cash flow has now become even more critical for the players in our construction industry. During these troubled times, contractors may look to adjudication under the Building and Construction Industry Security of Payment Act (Cap. 30B) (“**SOP Act**”) as a means to obtain cash flow for their businesses.

The recent decision of *Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] SGCA 88 demonstrates how, in the haste to seek cash flow relief through SOP Act adjudication, a contractor runs the risk of having its payment claim and the resultant adjudication determination be tainted by fraud if the contractor’s claim in the SOP Act adjudication was premised on falsehoods.

BACKGROUND

Mero Asia Pacific Pte Ltd (“**Mero Asia**”) was the main contractor of a construction project (“**Project**”). Mero Asia engaged Facade Solution Pte Ltd (“**Facade**”) to fabricate, deliver and install 864 window panels at the Project site. Facade, in turn, engaged a Chinese supplier known as “Rontec” to fabricate the window panels for the Project.

On 25 September 2019, Facade served a payment claim (“**Payment Claim**”) on Mero Asia for the sum of S\$830,938.73, which comprises of payment due to Facade for the fabrication of 864 window panels and the related storage costs.

On the basis that Mero Asia failed to serve a payment response vis-à-vis the Payment Claim, Facade commenced adjudication proceedings against Mero Asia.

While it was not in dispute between parties that at the time of the Payment Claim, 489 of the 864 window panels remained undelivered, Facade claimed throughout the adjudication proceedings that it had control over all the undelivered panels, which were stored in its warehouse, and it was willing and able to deliver these undelivered panels to the Project site.

In the adjudication determination (“**AD**”), the adjudicator awarded Facade the sum of S\$671,081.01 (“**Adjudicated Sum**”), comprising of payment for both delivered and undelivered panels, and storage costs in relation to the undelivered panels. The adjudicator had allowed Facade’s claim for the undelivered panels by virtue of section 7(2)(c) of the SOP Act.

Subsequently, Mero Asia found out from Rontec that it had withheld delivery of 169 window panels to Facade due to an ongoing dispute between Facade and Rontec. Rontec also offered to sell the 169 panels to Mero Asia directly for the sum of S\$251,791.59 (approximately RMB 1.3m).

Mero Asia applied to the High Court set aside the AD on the grounds of fraud and breach of natural justice.

THE HIGH COURT’S DECISION

The High Court Judge accepted that fraud was a valid ground under common law for setting aside an adjudication determination, and ordered that the AD be set aside on the ground of fraud.

In setting aside the AD, the High Court judge adopted the test laid out the New South Wales Supreme Court in *QC Communications NSW Pty Ltd v CivComm Pty Ltd [2016] NSWSC 1095* (“**QC Communications**”), where it was held that a judgment may be set aside on the basis of fraud where:

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

The High Court Judge found that the following three material facts were discovered after the AD was issued:

- (a) The 169 panels were not in Singapore;
- (b) Facade had serious disputes with Rontec regarding the delivery of the 169 panels to Singapore; and
- (c) Facade encountered significant difficulties negotiating with Rontec for the delivery of the 169 panels to Singapore.

Further, the High Court Judge held that a party was not entitled to payment for prefabricated materials if there were a serious dispute with its supplier that renders the party unable to effect delivery when called upon to do so. In this regard, the High Court Judge observed that the adjudication mechanism should not be abused by contractors who are unable to fulfil their contractual obligations for which they are seeking payment, and that such abuse amounted to fraud.

Facade appealed to the Court of Appeal. On appeal, the central plank of Facade’s case was that there was no fraud since it genuinely believed it secured the delivery of the 169 panels by Rontec.

THE COURT OF APPEAL’S DECISION

The Court of Appeal dismissed Facade’s appeal.

In affirming the High Court's decision to set aside the AD on the ground of fraud, the Court of Appeal refined the applicable two-step test, and further held that an adjudication determination obtained by fraud should only be severed in part under exceptional circumstances.

The burden of establishing the elements necessary to set aside an adjudication determination obtained by fraud falls on the innocent party in the adjudication. To set aside an adjudication determination on the ground of fraud, the innocent party will first have to establish:

- (a) the facts which were relied on by the adjudicator in arriving at the adjudication determination;
- (b) that those facts were false;
- (c) that the party seeking the claim either knew or ought reasonably to have known them to be false; and
- (d) that the party seeking to set aside the adjudication determination did not in fact, subjectively know or have actual knowledge of the true position throughout the adjudication proceedings.

Thereafter, the innocent party must establish that the false facts in question were material to the issuance of the adjudication determination, viz there was a real prospect that had the adjudicator known the truth, the outcome of the determination might have been different.

The innocent party is not required to establish that the adjudicator would have arrived at a different outcome had the adjudicator known the truth, as this will require the court to review the merits of the adjudicator's determination, which is not within the supervisory jurisdiction of the court.

Where it is established that an adjudication determination is tainted by fraud, the issue as to whether the fraud could have been discovered by the innocent party by the exercise of reasonable diligence is irrelevant.

KEYPOINT

“... the brief nature of payment claims is not a licence to be economical about the truth of the underlying facts.”

On the facts, the Court of Appeal found that throughout the adjudication proceedings, Facade had fraudulently represented and maintained to Mero Asia and the adjudicator that it had control over *all* the undelivered panels even though it knew that it did not, or may not, have eventual control over the 169 panels. In light of this finding, it is irrelevant whether Mero Asia could have discovered the truth about the 169 panels by the exercise of reasonable diligence.

The Court of Appeal also found that Facade’s fraud was an operative cause of the impugned AD, as the adjudicator had allowed Facade’s claim on the assumption that Facade was able to deliver all the undelivered panels.

In addition, the Court of Appeal made the observation that while the Parliament intended for the SOP Act to facilitate cash flow for downstream players in the construction industry, section 7(2)(c) of the SOP Act was not meant to allow subcontractors to be paid for materials as long as they are fabricated and in existence, regardless of whether actual delivery can take place, as this would ironically place the main contractor at the mercy of the subcontractors.

KEYPOINT

“Parties dealing with the court, and in the same vein, with the adjudicator in adjudication of their dispute under the [SOP] Act are expected to act with utmost probity.”

An adjudication determination obtained by fraud should only be severed in part under exceptional circumstances

The Court of Appeal also refused to sever the AD in part to allow Facade to retain payment for the undelivered panels, less the payment for the 169 panels that are not under Facade’s control.

While the court has the power to sever an adjudication determination in part under common law, when faced with an adjudication determination that was obtained by fraud, the court has to take into account the policy consideration of upholding public confidence in the administration of justice and to balance this against the need to facilitate cash flow under the SOP Act.

The Court of Appeal held that as a starting point, save for extremely limited situations where the fraud involved was not significant both in nature and quantum, the court would generally not exercise its discretion to sever the impugned portion of the adjudication determination to permit a fraudulent claimant to retain the balance adjudicated sum.

KEYPOINT

“The Court will generally not be sympathetic to a claimant who has obtained an [adjudication determination] by fraud, as such a claimant would have engaged in deliberate and dishonest conduct to acquire benefits that it was not entitled to.” ““

The Court of Appeal found Facade's fraud to be significant in both nature and quantum, in that it went towards Facade's entitlement to payment for the undelivered panels, and further the payment for the 169 panels comprised approximately 20% of Facade's claim. The Court of Appeal was also not convinced that Facade's claim for the 169 panels could be textually and substantially severed from the rest of its claim, given that Facade had claimed for payment in relation to the supply of all 864 panels, including the storage costs for all undelivered panels (which the adjudicator allowed entirely). Further, there remained a dispute between parties as to the quantity of panels that Facade was able to deliver, as Mero Asia has only managed to confirm that Facade has physical possession of 173 undelivered panels despite there being 489 undelivered panels in all.

COMMENTARY

This case serves as a timely reminder of the importance of acting with probity when pursuing claims in legal proceedings, be it in the courts, in arbitration or in adjudication under the SOP Act.

As the Court of Appeal rightly pointed out, in the context of adjudication under the SOP Act, the brief nature of payment claims is not a licence to be fraudulent on the underlying facts.

Fraud in this context includes not just misrepresentations that are dishonest but also misrepresentations that are made without belief of its truth or recklessly without caring it is true or false.

The Court of Appeal's decision has demonstrated that in general the courts take a strong stance against adjudication determinations that are obtained by fraud, and will not hesitate to set aside such an adjudication determination save for under exceptional circumstances.

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If you have any questions or
comments on this article, please
contact:



Christopher Chong
Head, Construction & Engineering
Director, Dispute Resolution

T: +65 6531 2743

E: christopher.chong@drewnapier.com



Tan Lee Jane
Associate Director, Dispute
Resolution

T: +65 6531 2711

E: leejane.tan@drewnapier.com

Drew & Napier LLC

10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733

T : +65 9726 0573 (After Hours)

F : +65 6535 4906

 **DREW & NAPIER**