

Construction Act Review

By Peter Sheridan*

Adjudication: Fraud and Misrepresentation

Introduction

In a previous edition of Construction Act Review,¹ the writer reviewed the following cases concerned with fraud, forgery and theft in relation to adjudicators' decisions: *Pro-Design Ltd v New Millenium*,² *Andrew Wallace*,³ *SG South*,⁴ *GPS Marine*⁵ and *Speymill v Baskind*⁶ in the Court of Appeal. The writer drew the following conclusions.

1. A responding party in adjudication may defend a claim on the basis of an allegation of fraud, forgery or theft on the part of the claimant.⁷
2. A claiming party may not be able to refer a claim for the tort of deceit to adjudication (depending on the wording of the contractual adjudication clause); it may be arguable that such a claim does not arise "under" the contract.⁸
3. Where a responding party runs a defence of fraud, forgery or theft, the adjudicator should consider and decide on the merits of that defence as part of his or her decision, as the adjudicator did in the *Speymill* case.
4. This does not mean that the adjudicator decides on criminal matters or on matters outside his or her jurisdiction. The adjudicator is deciding, on the civil law standard of proof, the merit of a defence like any other.
5. It is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.⁹

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¹ Sheridan, Adjudication: Fraud, Forgery and Theft

² *Pro Design Ltd v New Millennium Experience Co Ltd* Unreported September 26, 2001 (Liverpool TCC).

³ *Andrew Wallace Ltd v Artisan Regeneration Ltd* [2006] EWHC 15 (TCC).

⁴ *SG South Ltd v King's Head Cirencester LLP* [2009] EWHC 2645 (TCC); [2009] All E.R. (D) 120; [2010] BLR 47; [2010] C.I.L.L. 2793.

⁵ *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC).

⁶ *Speymill Contracts Ltd v Baskind* [2010] EWCA Civ 120; [2010] All E.R. (D) 285; [2010] B.L.R. 257.

⁷ *SG South*, above, at [19].

⁸ *SG South*, above, at [19].

⁹ *SG South*, above, at [20].

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6. In an action before the court to enforce an adjudicator's decision, if fraud, forgery or theft 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.¹⁰
7. The court will not normally give summary judgment to enforce an adjudicator's decision if to do so would entail the court assisting the claimant in perpetrating a fraud.¹¹
8. If an allegation of fraud, forgery or theft was raised as a defence in the adjudication and was adjudicated upon, then the decision is enforceable; the same allegation will not provide a basis for resisting enforcement.¹²
9. Similarly, if an allegation of fraud, forgery or theft is an alternative legal means of putting a case that was put on another basis in the adjudication and was adjudicated upon, then the decision is not rendered unenforceable.¹³
10. Similarly, if an allegation of fraud, forgery or theft could have been made in the adjudication but for any other reason the responding party elected not to make the allegation, that allegation will not provide a basis for resisting enforcement.¹⁴
11. If an allegation of fraud, forgery or theft was not nor reasonably could have been raised in the adjudication, the allegation may be raised by the defendant as a ground for resisting enforcement of the adjudicator's decision.¹⁵
12. When the court considers such a ground for resisting enforcement, a distinction is drawn between fraud, forgery or theft which directly affects the subject matter of the decision and fraud, forgery or theft which is independent of the decision.¹⁶ It is only fraud, forgery or theft which directly affects the subject matter of the decision that will provide a valid basis for resisting enforcement.¹⁷
13. When considering an allegation of fraud, deceit, forgery or theft which may provide a valid basis for resisting enforcement, the court has to consider whether the defendant has a real prospect of demonstrating that the claimant acted fraudulently, forged documents or whatever the allegation is, such that it can be said that the defendant has a real prospect of successfully defending the claim. The court must do so without conducting a mini-trial.¹⁸

¹⁰ *SG South*, above, at [20].

¹¹ *Pro-Design*, above; *Andrew Wallace*, above; *SG South*, above.

¹² *SG South*, above, at [20]; *GPS Marine*, above.

¹³ *GPS Marine*, above, at [83].

¹⁴ *SG South*, above, at [20].

¹⁵ *SG South*, above, at [20]; *Speymill*, above.

¹⁶ Examples are given of each category in *SG South* at [20(d)], quoted above.

¹⁷ *SG South*, above, at [20]; *Speymill*, above.

¹⁸ *Andrew Wallace*, above.

14. The court will not be assisted in its enquiry by the citation of authorities concerning the effect of fraud upon judgments and arbitration awards. Judgments of the court and arbitration awards are of permanent effect unless and until reversed on appeal or set aside on some ground such as fraud. An adjudicator's decision under the Housing Grants, Construction and Regeneration Act 1996 or equivalent contractual provisions is of a different character. The adjudicator's decision merely establishes the position from which the parties shall start their arbitration or litigation. Therefore, it is only the authorities described in this edition of CAR that should be cited.¹⁹

This Article

The purpose of this article is to consider further point 11 above, in the light of cases since the writer's previous article; and to consider fraud-related and misrepresentation cases since that article relating to the process of adjudication itself.

Disclosure

Point 11 above was that if an allegation of fraud, forgery or theft neither was nor reasonably could have been raised in the adjudication, the allegation may be raised by the defendant as a ground for resisting enforcement of the adjudicator's decision.

To arrive at that position, the party resisting enforcement will often have to investigate the factual position so as to provide evidence to the court. One method for seeking documentary evidence is disclosure, but in this context there will not usually be legal proceedings in progress in which disclosure is to be given, or if there are such legal proceedings, disclosure may not yet have occurred.

PBS Energo A.S. v Bester Generacion UK Limited²⁰

This case is a recent illustration of the principle at paragraph 11 of the summary above. It is an enforcement case, in which it was reasonably arguable that the adjudicator's decision had been obtained by fraud. The fraud was only reasonably discoverable after the adjudication, by reference to documents disclosed by the claimant after the adjudication in full-scale court proceedings that were proceeding between the parties. This was therefore not a case in which the fraud point should have been taken during the adjudication.

Bester resisted enforcement successfully on the basis that it was a reasonably arguable defence to the claim that the adjudicator's decision was procured by fraud. Pepperall J stated that where, exceptionally, it is properly arguable on credible evidence that the

¹⁹ *Speymill*, above.

²⁰ *PBS Energo A.S. v Bester Generacion UK Ltd* [2019] EWHC 996 (TCC).

adjudication decision was itself procured by a fraud that was reasonably discovered after the adjudication, the court is unlikely to grant summary judgment.²¹

Contrary to representations that PBS Energo had made to the adjudicator, it was properly arguable on the evidence before the court that PBS Energo had not paid for nor obtained title to certain equipment, it did not hold certain equipment to Bester's order, it achieved a saving of circa £200,000 and a fabric filter was useful for other projects and may well have been re-used. It was properly arguable that PBS Energo made false representations to the adjudicator about these matters, knowing them to be false or without belief in their truth, or recklessly. It was properly arguable that the alleged false representations were intended to and did influence the adjudicator's decision.

Grandlane Developments²²

This recent case also illustrates points 6 and 10 from the summary above. Skymist suspected fraud in this case, arising from suspected collusion between Grandlane and architects PTP with a view to PTP recovering an excessive sum and arising from suspected excessive overcharging. Skymist sought and obtained pre-action disclosure to investigate these matters further. On the facts of this case, Jefford J found that there was no clear and unambiguous evidence of fraud and, if there had been, fraud should have been but was not raised in the adjudication.

Jofa²³

Evidence of fraud may be established by seeking disclosure from another party than the other party to the construction contract and therefore another party from the party successful in an adjudication, by applying for a *Norwich Pharmacal* order. As stated by Leggatt LJ in the *Jofa* case, this type of order acquired its name from the seminal case in which the House of Lords established the principle that, where a wrong has been done or arguably done, a third party who has got mixed up in the wrongdoing so as to facilitate it, albeit innocently, may be ordered to provide information which is needed to enable the victim to sue the alleged wrongdoer.

The respondents in this action, Benherst Finance Ltd and Chestone Industry Holding, were investors in a joint venture to purchase and redevelop a flat in London. The investors alleged that a company called JMT Property Ltd, which was retained to manage the project, and its sole director Mr Taktouk, had defrauded them. Mr Taktouk made periodic cash calls, mostly for money said to be required to pay building contractors and suppliers. Most of the cash calls were supported by invoices or quotations, many of which were apparently issued by Jofa Ltd, the first appellant and a small building company. The total amount of the cash calls was over £2.2m, of which the investors paid their share of £925,000. It transpired when

²¹ *PBS Energo*, above, at [21].

²² *Grandlane Developments Ltd v Skymist Holdings Ltd* [2019] EWHC 747 (TCC).

²³ *Jofa Ltd v Benherst Finance Ltd* [2019] EWCA Civ 899.

the property was inspected by a chartered surveyor that the value of the work was estimated to be in the region of only £250,000. A lender which held a mortgage exercised its power to sell, with the result that the investors lost their entire investment.

The investors sought a *Norwich Pharmacal* order in respect of Jofa Ltd's documents, to seek to establish what invoices and quotations had actually been issued by Jofa Ltd

Although this is not a case concerning adjudication, such a procedure might be used in a suitable case where it became necessary to seek disclosure from a third party to provide evidence of this type of fraud or forgery, for example if the only documentary evidence provided in the adjudication was or was suspected to be forged or other fraudulently produced material.

Disclosure in an action between the parties to the adjudication, pre-action disclosure and a *Norwich Pharmacal* order are accordingly all means by which evidence of fraud may be sought post adjudication in order to resist enforcement.

Misrepresentation and fraud concerning the adjudication process

***Beumer Group UK Ltd v Vinci Construction UK Ltd*²⁴**

This case illustrates the problems that can arise where an adjudicator is appointed in two adjudications involving one common party and provides guidance as to how these adjudications should be conducted.

Vinci was engaged as main contractor to provide a baggage handling system at Gatwick Airport and sub-contracted the whole package, which included a tilt tray sorter, to Beumer. Beumer sub-sub-contracted the tilt tray sorter works to Logan. There was an adjudication between Beumer and Logan (BL1) and an adjudication between Beumer and Vinci (BV1). Dr Chern was appointed as adjudicator in each case, although the issues in court did not arise from these first two adjudications.

Beumer then started a second adjudication against Vinci (BV2), in which the issue was whether certain instructions amounted to compensation events under the parties' NEC 3 sub-contract. On the same day, Beumer started a second adjudication against Logan (BL2), in which delay was a central issue. Dr Chern was appointed in each case, which was of course known to Beumer and to Dr Chern, but Vinci did not know that Dr Chern was appointed in BL2 or that BL2 existed.

Vinci succeeded in resisting enforcement of the adjudicator's decision in BV2, which was in Beumer's favour, relying on breaches of natural justice. The judge took the view that the adjudicator should have told Vinci that he was acting on another adjudication involving Beumer. This would apply even if BL2 were not about the same project.

²⁴ *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC).

In this case of course BL2 concerned the same project and it was inevitable that the adjudicator would acquire information about the project in BL2, but Vinci would have no opportunity to consider that material and make submissions about it. The judge considered that the submissions made in BL2 (Referral etc) should have been provided to Vinci, because the disputes in the two adjudications were closely connected; this would not be so in all cases.

From the natural justice point of view, there was material before the adjudicator in BL2 which was highly relevant in BV2 and if Vinci had had that material, as it should have, it could have used it to support its own case and to submit to Dr Chern that Beumer was advancing two different factual cases concerning the correct date for AOR. The loss of this opportunity impaired Vinci in presenting its case in BV2 and therefore infringed the rules of natural justice.

Fraser J based his decision on breach of the rules of natural justice. In the course of the judgment, though, he took a dim view of the fact that Beumer advanced factually inconsistent cases in BV2 and BL2. In BV2, Beumer's case was that Airport Operational Readiness (AOR), an important date relevant to completion, was achieved by 16 December 2015; in BL2 Beumer claimed substantial delay damages and a key part of its case was that Logan had not completed its work to permit AOR by 16 December 2015 and had still not reached that stage as at 12 April 2016. Although the judge considered it was not necessary to go into the legal analysis of Beumer's inconsistent cases, the judge observed that a director of the company could not have signed a statement of truth in support of both cases in a court case.

Fraser J did not further address the correct legal analysis of advancing two inconsistent factual cases in two adjudications. However, implicit in his observation about the statement of truth is the proposition that as a matter of logic both of the two inconsistent facts or set of facts cannot be true. It would therefore seem that in at least one of the adjudications, Beumer was misrepresenting the factual position to the adjudicator. Although describing this as "impropriety" and clearly seeking to discourage it, Fraser J did not refer to misrepresentation, but one can see that this might be another way of putting it in another case. Such misrepresentation could, depending on the facts, be fraudulent. See the consideration of the *Eurocom* case below. Furthermore, it is not normally permitted to advance one position in one set of proceedings, and then to advance the contrary in order to gain an advantage in another set of proceedings, on the approbation and reprobation principle.

This impropriety is a different matter from a contractor properly protecting its position in separate proceedings in respect of different adversaries in the contractual chain. It is permissible for a contractor in dispute, for example, with both an employer and a sub-contractor, in separate (or in the same) proceedings to advance the employer's arguments against the sub-contractor and the sub-contractor's arguments against the employer, without necessarily considering those arguments to be correct. However, this needs to be done in such a way that there is no misleading of the tribunal or another party. It is not permissible, though, to assert facts that are not true.

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Eurocom²⁵

Eurocom’s representatives, Knowles Ltd, served notice of adjudication on Siemens and applied to the RICS for the nomination of an adjudicator. The RICS standard document for applying for a nomination (form DRS2C) has a box underneath the following question: “Are there any Adjudicators who would have a conflict of interest in this case?” Knowles completed the box as follows:

“We would advise that the following should not be appointed:

Mr Leslie Dight and Mr Nigel Dight of Dight and partners; Mr Siamak Soudagar of Soudagar associates; Rob Tate regarding his fees – giving rise to apparent bias; Peter Barns for dispute of a minimum fees charge and apparent bias; Additionally Keith Rawson, Mark Pontin, J R Smalley; Jamie Williams, Colin Little, Christopher Ennis and Richard Silver, Mathew Molloy who has acted previously or anyone connected with Fenwick Elliott solicitors who have advised the Referring Party.”

It was correct that Mr Molloy had been the adjudicator in a first adjudication between the parties, but it was not the case that there was any conflict of interest.

The RICS notified Siemens that it would nominate an adjudicator, but did not send Siemens a copy of the application form completed by Knowles.

The RICS nominated Anthony Bingham as the adjudicator in the second adjudication.

The true position was that, in addition to there being no conflict of interest in relation to Mr Molloy, there was also no conflict of interest in relation to a number of the other potential adjudicators listed by Knowles as having a conflict of interest. Mr Giles of Knowles completed the box concerning conflict of interest falsely.

The matter was before the court on Eurocom’s application for summary judgment to enforce Mr Bingham’s decision. In the absence of cross-examination, it was not appropriate for Ramsey J to come to a concluded view as to whether Mr Giles acted fraudulently in making that false statement.

“However, the evidence gives rise to a very strong *prima facie* case that Mr Giles deliberately or recklessly answered the question as to whether there were conflicts of interest so as to exclude adjudicators who he did not want to be appointed.”²⁶

...

It follows that there is a very strong *prima facie* case that Mr Giles deliberately or recklessly answered the question ‘Are there any Adjudicators who would have a conflict in this case?’ falsely and that therefore he made a fraudulent representation to the RICS as the adjudicator nominating body.”²⁷

²⁵ *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC).

²⁶ *Eurocom*, above, at [63].

²⁷ *Eurocom*, above, at [65].

Ramsey J found that the effect of a party making a material fraudulent representation to an independent body which is exercising a discretion is that the exercise of the discretion is invalidated. He stated that he considered that the authorities²⁸ make it clear that the principle applies in any case where a party is seeking an advantage by making the fraudulent representation and continued:

“Where a party applies to an adjudicator nominating body and makes a fraudulent representation then the fraud cancels the advantage which would otherwise have been obtained from the transaction by voiding the transaction altogether. In my judgment, applying the principles set out in *Rous v Mitchell*, where there has been a material fraudulent misrepresentation in the process of applying to the adjudication nominating body, the application for a nomination of an adjudicator is invalid and it is as if no application had been made. The state of mind of the RICS on receiving the application is irrelevant and it does not matter whether the RICS was deceived or not.”²⁹

²⁸ See *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702; *Rous v Mitchell* [1991] 1 W.L.R. 469; *Prest v Petrodel Resources Ltd* [2013] 2 A.C. 415

²⁹ *Eurocom*, above, at [72].

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