IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 88

Civil Appeal No 44 of 2020

Between

Facade Solution Pte Ltd

… *Appellant*

And

Mero Asia Pacific Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] — [Setting aside adjudication determination on ground of fraud] — [Severance] — [Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)]

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Facade Solution Pte Ltd
v
Mero Asia Pacific Pte Ltd

[2020] SGCA 88

Court of Appeal — Civil Appeal No 44 of 2020
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
4 August 2020

7 September 2020

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 Assured cash flow is essential to the commercial sustainability of contractors in the construction and building industry. The purpose and the guiding philosophy of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") is to facilitate cash flow to downstream players in this industry. The Act achieves this purpose in two principal ways. First, by providing that parties who have done work or supplied goods or services are entitled to payment as of right. Second, by creating an efficient and low cost provisional dispute resolution platform that empowers adjudicators to award adjudication determinations ("ADs" or "AD" in the singular) with temporary finality (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113 (Cedric Foo Chee Keng, then Minister of State for National Development); *W Y Steel Construction Pte Ltd v*

Osko Pte Ltd [2013] 3 SLR 380 ("*Osko*") at [18]–[20]; *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall*") at [48]).

2 Against this background and the tight timelines in which payment claims and responses must be filed (see *Osko* at [24]–[25]), the essence of claims submitted for adjudication would typically lack the comprehensive details as would be expected for claims filed in court or arbitral proceedings given the provisional status of ADs. That being said, the brief nature of payment claims is not a licence to be economical about the truth of the underlying facts. In the haste to proceed with an adjudication to achieve cash flow, a claimant runs the risk that a payment claim and the resultant AD might be infected by fraud if it was filed based on *subsequent* developments which the claimant is *anticipating* may happen. Accordingly, if any information contained in the payment claim or any material representation made at the adjudication proceedings in support of the payment claim is not true at the time of its submission, but which the claimant, legitimately or otherwise, anticipates or hopes may develop in the near future, it would not alter the fact that such a payment claim would nonetheless be premised on facts which were untrue at the time of submission.

3 We heard and dismissed the appeal on 4 August 2020 with brief oral grounds and stated that we will issue our detailed grounds in due course. This, we do so now. These grounds of decision will examine the applicability of the fraud exception in the context of adjudication proceedings, its breadth and effect on an AD and whether and under what circumstances should a court exercise its discretion to sever the offending parts of an AD infected by fraud.

Facts

4 This was the appellant's, Facade Solution Pte Ltd, appeal against the decision of the High Court judge ("the Judge") to set aside an AD made on 15 November 2019 under the Act. The respondent, Mero Asia Pacific Pte Ltd, was the main contractor of a development project ("the Project"). On 3 August 2018, the appellant was engaged by the respondent as a subcontractor to fabricate, deliver and install 864 window panels at the Project site ("the Sub-Contract").[1] The appellant in turn, engaged a Chinese supplier, known as "Rontec", to fabricate the window panels for the Project.

The Adjudication Determination

5 The dispute involved payments which were payable to the appellant under the Sub-Contract. The appellant commenced adjudication proceedings on the basis that no payment response was served in response to its payment claim dated 25 September 2019 ("the Payment Claim"). The Payment Claim was for a total sum of $830,938.73, which substantially comprised payments due to the appellant for the fabrication of 864 window panels and related storage costs. It was not disputed that at the time of the Payment Claim, 489 out of the 864 window panels remained undelivered ("undelivered panels").[2] The adjudication proceedings were heard over two days, on 25 October 2019 and 6 November 2019 leading to the issuance of an Adjudication Determination in the sum of $671,081.01 ("the Adjudicated Sum") on 15 November 2019.

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1 *CFA v CFB* [2020] SGHC 101 ("GD") at [2]; Agreed Bundle of Documents ("ABOD") Vol I at p 30 (Mr Lim Kian Seng (respondent)'s 1st affidavit dated 9 December 2019 at [5]–[9]).

2 ABOD Vol I at p 179.

6 For the purposes of this appeal, the only relevant issue arising from the adjudication proceedings was whether the appellant was entitled to payment for the undelivered panels that had been fabricated but not delivered. The appellant submitted that it was so entitled by virtue of s 7(2)(*c*) of the Act, while the respondent contended otherwise that the appellant was only entitled to payment upon delivery of all the undelivered panels.[3] The adjudicator followed the High Court decision of *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 ("*Chuang Long*") and held that the appellant was entitled to claim payment for the undelivered panels valued under s 7(2) of the Act. The appellant also claimed storage costs for "materials … kept in [its] warehouse for 6 months". The "materials" here referred to the undelivered panels and this claim for storage costs was included as part of the Adjudicated Sum.

7 In the appellant's written submissions for the adjudication proceedings ("appellant's AD Submissions"), the appellant claimed that it was entitled to payment as it had "completed all of the supply works" and that "some of the materials [were] stored at [the appellant's] warehouse and some [were] stored at the [respondent's] warehouse".[4] Throughout the adjudication proceedings, it was the appellant's case that it had control over *all* the undelivered panels and was hence, willing and able to perform the Sub-Contract, *ie*, deliver the undelivered window panels to the Project site. The appellant, however, failed to disclose the difficulty that it had encountered in obtaining the undelivered panels from Rontec. These facts, which will be elaborated below, were crucial in our dismissal of the appeal.

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3 ABOD Vol I at pp 182, 184, 185 and 186, 187, 188 (paras 14, 17, 19, 29 and 30).

4 ABOD Vol 1 at p 62.

Subsequent events

8 After the issuance of the AD, it transpired that the appellant had, throughout the adjudication proceedings, faced difficulty in securing delivery of 169 of the undelivered panels ("the 169 panels") from Rontec. Following the AD, on 19 November 2019, the respondent asked the appellant to confirm if it would deliver the undelivered panels in exchange for the Adjudicated Sum.[5] The appellant did not respond. Two days later, the appellant submitted an additional claim for the storage of "3rd & 4th batch materials in Singapore warehouse", which presumably referred to the undelivered panels, at $15,000 per month for six months ("the November Storage Claim").[6] On 22 November 2019, Rontec emailed the respondent and introduced itself as the supplier of the window panels for the Project. Rontec informed the respondent in the same email that it had withheld the 169 panels in the light of ongoing disputes with the appellant. Rontec then offered to sell those panels directly to the respondent for a sum of S$251,791.59 (RMB1.3m).[7] On 7 December 2019, the appellant exercised a lien on the goods that it had supplied to the respondent and suspended all works in relation to the Project.

9 Following Rontec's contact with the respondent, the respondent engaged a lawyer in China, visited Rontec's factory in China on 2 December 2019 and confirmed that Rontec indeed had possession of the 169 panels.[8] The respondent then requested documentation from the appellant in support of its November Storage Claim and proposed a visit to the appellant's warehouse to

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5 ABOD Vol II at p 89.

6 ABOD Vol II at p 122.

7 ABOD Vol II at p 95.

8 ABOD Vol I at p 40 (Mr Lim's 1st Affidavit at [40]–[41]).

physically verify that the undelivered panels were in the appellant's possession as claimed.[9] The appellant once again did not respond to this request. On 9 December 2019, the respondent applied in Originating Summons No 1448 of 2019 ("the Suit") to set aside the AD on the grounds of fraud and breach of natural justice.

10 The appellant sought to explain the background of its dispute with Rontec. The appellant denied that it had made any representation at the adjudication proceedings that all the window panels were in its possession in Singapore.[10] According to the appellant, it had engaged Rontec to fabricate and supply the window panels for the Project for a total sum of $1,441,151.65 ("the Fabrication Contract"). The fabrication was completed by Rontec in April 2019 and was fully paid for by the appellant. From October 2019, 169 panels remained in Rontec's warehouse in China due to disputes between the appellant and Rontec. On 13 October 2019, the appellant purported to terminate the Fabrication Contract. From 4 November 2019 to 3 December 2019, the appellant and Rontec were in negotiations for the delivery of the 169 panels but were unable to reach an agreement.[11] The appellant accepted in this appeal that the information relating to its dispute with Rontec over the delivery of the 169 panels was not disclosed at the adjudication proceedings.

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9 ABOD Vol II at p 129.

10 ABOD Vol II at pp 141–142 (Mr Wang Weiyuan's 1st affidavit at [21]–[26]).

11 ABOD Vol III at pp 43–46 (Mr Hu Yungang's 1st affidavit at [6]–[27]); ABOD Vol III at pp 198 and 212 (Mr Lim's 3rd affidavit at [8]).

The decision below

11 On 10 March 2020, the Judge set aside the AD on the ground of fraud. The Judge accepted that fraud was a valid ground under common law for setting aside an AD and adopted the following test as laid out by the New South Wales Supreme Court in *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095 ("*QC Communications*") at [32]:[12]

> 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: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534; and
>
> (b) It is reasonably clear that the fresh evidence would have provided an opposite verdict: *Orr v Holmes* [1948] HCA 16; (1948) 76 CLR 632 at 640.

12 The Judge termed the two requirements as the "Material Fact Requirement" and the "Opposite Verdict Requirement" respectively. On the Material Fact Requirement, the Judge found three material facts that were discovered after the AD was issued. First, the 169 panels were not in Singapore. Second, the appellant had serious disputes with its supplier regarding the delivery of those panels to Singapore. The disputes caused the appellant to terminate the Fabrication Contract on 13 October 2019. Third, the appellant was encountering significant difficulties negotiating with Rontec for the delivery of those panels to Singapore.[13]

13 As regards the Opposite Verdict Requirement, the Judge held that a party was not entitled to payment for fabricated materials if there was a serious dispute with its supplier that rendered the claimant unable to effect delivery if

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12 GD at [14].

13 GD at [16]–[18].

called upon to do so. The Judge observed that the adjudication mechanism should not be abused by contractors who were unable to fulfil their contractual obligations for which they were seeking payment. That, in the Judge's opinion, amounted to fraud. The Judge held that it was clear that the appellant was in serious disputes with Rontec throughout the course of the adjudication proceedings. The appellant therefore, was in no position to secure delivery of the 169 panels and its fraud was in claiming payment for the panels which it knew it could not deliver.[14]

14 For the above reasons, the Judge set aside the AD. The appellant appealed against the Judge's decision.

Parties' cases on appeal

The appellant's case

15 The crux of the appellant's case on appeal was that there was no fraud since it genuinely believed that it had secured the delivery of the 169 panels for three reasons. First, the panels were fabricated and ready to be delivered. Second, it had entered into an agreement with Rontec on 14 November 2019, under which the appellant would pay Rontec RMB1.3m for the delivery of the 169 panels. Third, there were no other buyers for these customised panels and Rontec therefore had no incentive not to deliver them. The appellant claimed that notwithstanding their agreement, Rontec subsequently changed its mind and restarted negotiations on the basis that the settlement sum should cover a dispute that it had with the appellant in relation to another company in China. The appellant further alleged that the respondent had sabotaged its negotiations

[14] GD at [19]–[26].

with Rontec and this prevented the appellant from securing delivery of the 169 panels.[15]

16 In addition, the appellant submitted that it was self-evident from the Payment Claim and the documents tendered in the adjudication proceedings that the 169 panels had yet to be delivered to Singapore. This, according to the appellant, was on the basis that: (a) the appellant had claimed for the cost of storage of panels in China from 1 April to 30 September 2019; and (b) the respondent could have independently calculated the number of panels that had arrived in Singapore with reference to the packing lists and arrival notices provided by the appellant.[16]

17 Contesting the Judge's findings on the Opposite Verdict Requirement, the appellant submitted that even if it had disclosed all the material facts in relation to its dispute with Rontec, it would not have changed the outcome of the AD. This, the appellant argued, was because the disclosed facts would have shown that the appellant had secured and was able to deliver the 169 panels notwithstanding that the panels had yet to be delivered to Singapore.[17] Lastly, the appellant submitted that if this court was minded to set aside the AD, the impugned portion of the AD in relation to the 169 undelivered panels should be severed leaving the balance Adjudicated Sum payable.[18]

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15 Appellant's written submissions dated 12 June 2020 ("Appellant's Subs") at [1.20], [1.22.11]–[1.22.18], [2.4] and [2.5.4]–[2.5.7], and [3.5]–[3.11].

16 Appellant's Subs at [2.3.2]–[2.3.6].

17 Appellant's Subs at [4.3]–[4.8].

18 Appellant's Subs at [6.1]–[6.5].

The respondent's case

18 As against this, the respondent's case on appeal was that none of the Judge's findings were plainly wrong or against the weight of the evidence, and therefore, they should not be disturbed. The respondent submitted that the appellant had falsely given the impression at the adjudication proceedings that *all* the panels had arrived in Singapore. After all, the appellant had claimed for the costs of storing the window panels in *its* warehouse. Further, the appellant did not produce evidence of any agreement with Rontec for the delivery of the 169 panels and there was no interference by the respondent in the appellant's negotiations with Rontec.[19]

19 In that light, the respondent argued that the appellant could not have genuinely believed that it had secured the delivery of the 169 panels. In addition, the respondent alleged that the appellant's fraud persisted as it not only failed to disclose its dispute with Rontec, it claimed for the storage of all the undelivered panels in Singapore under the November Storage Claim when 169 of them were not in its possession (see [8] above).[20] Lastly, the respondent submitted that severance was not an appropriate remedy as the appellant's fraud in claiming for the supply of *all* 864 panels inclusive of the 169 panels unravels all.[21]

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19 Respondent's written submissions dated 26 June 2020 ("Respondent's Subs") at [4] and [21]–[30].

20 Respondent's Subs at [30]–[46].

21 Respondent's Subs at [55]–[57].

The legal framework for setting aside an AD on the ground of fraud

Whether fraud is an accepted ground in common law for setting aside an AD

20 On 15 December 2019, s 27(6) of the Act, enacted via the Building and Construction Industry Security of Payment Amendment Act 2018 (No 47 of 2018), came into force. This provision sets out the grounds on which a party may set aside ADs, which include the ground of fraud (s 27(6)(*h*)):

> **Enforcement of adjudication determination as judgment debt, etc**
>
> **27. –**
>
> …
>
> (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section …
>
> (6) The grounds on which a party to an adjudication may commence proceedings under subsection (5) include, but are not limited to, the following:
>
> …
>
> (*h*) the making of the adjudication determination was induced or affected by fraud or corruption.

21 Section 27(6)(*h*) was strictly not applicable in these proceedings as it came into force after the appellant's adjudication application on 10 October 2019. At the Second Reading of the Building and Construction Industry Security of Payment (Amendment) Bill, the Minister of State for National Development, Mr Zaqy Mohamed, stated that the grounds introduced in s 27(6) aimed to specify a "non-exhaustive list of grounds on which parties [could] commence proceedings to set aside [ADs]" and these grounds were "consistent

with those that have been developed by the Courts over time".[22] In the light of the legislative framework under which s 27(6)(*h*) was introduced into the Act, we first considered whether fraud is an accepted ground under common law for setting aside an AD.

22 The Judge held, and we agreed, that fraud is an accepted ground for setting aside an AD under common law. As succinctly enunciated by Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712, no court would allow or assist a person to retain any advantage obtained by fraud since fraud unravels everything:

> … No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything…

23 It was also common ground between the parties that fraud is a valid ground for setting aside ADs. In *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264, the appellant applied to set aside the AD on, among others, the ground that the respondent had misrepresented the value of its claim in its adjudication application and therefore, its claim was made fraudulently or in bad faith (at [30]). Tan Siong Thye JC (as he then was) held that the court should not be prevented from intervening if it was later discovered that an AD was made as a result of fraudulent misrepresentations (at [31]). In that case, the appellant failed to establish that the respondent had made fraudulent misrepresentations in its adjudication application (at [32]). On appeal, this court in *Citiwall* confirmed and explained that the power to set aside an AD is a common law power that is derived from the High Court's supervisory

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[22] *Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 (Zaqy Mohamad, Minister of State for National Development).

jurisdiction "to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions" (at [41]–[42] and [47]).

24 In *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2018] 3 SLR 1031, the issue of setting aside an AD on the ground of fraud was again before Tan Siong Thye J. In that case, the respondent applied to set aside the AD on the basis that there was a fraudulent conspiracy involving the appellant which resulted in the appellant presenting inflated invoices for work done. Tan J held that where an AD was obtained by fraud that did not pertain to the adjudicator, it may be set aside as the court would not allow its processes to be used to facilitate fraud (at [36]–[37]) although on the facts in that case, the respondent failed to establish the alleged fraud (at [38]).

25 In Australia, fraud is also an established ground for setting aside an AD. As Hodgson JA enunciated in *Brodyn Pty Ltd (trading as Time Cost and Quality) v Davenport and another* [2004] NSWCA 394 at [60]:

> If the determination is induced by fraud of the claimant in which the adjudicator is not involved, then I am inclined to think that the determination is not void but voidable; and it is *liable to be set aside by proceedings of the kind appropriate to judgments obtained by fraud.*
>
> [Emphasis added in italics]

26 Hodgson JA's pronouncement was affirmed by the New South Wales Supreme Court in *QC Communications* ([11] *supra*). In *QC Communications*, the Supreme Court set aside the AD on the ground of fraud, as there was evidence that the respondent had relied on invoices that it knew were fraudulent since the invoices included claims that the respondent had not performed (at [33]). The Supreme Court found the fraud to be sufficiently significant and

widespread such that it had a substantial effect on the AD and thus set aside the whole determination (at [36]).

27 To borrow the words of Kourakis J (as he then was) in the Supreme Court of South Australia's decision of *Clone Pty Ltd v Players Pty Ltd (in liquidation receivers appointed) and others* [2012] SASC 12 at [97], "there is little or no public interest in allowing a litigant who has cheated justice to retain the fruits of his or her fraud". The court's overriding constitutional remit and objective is to promote, dispense and achieve justice between the parties and uphold public confidence in the administration of justice (see *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 at [36] and [76]). Accordingly, the court will not allow its processes to be used to facilitate fraud and has the power to set aside an AD that had been procured by fraud. Having considered the relevant case law on this issue, we have refined the following two-step test to be applied in setting aside an AD on the ground of fraud.

The two-step test in setting aside an AD on the ground of fraud

Step 1: The AD must be based on facts which the party seeking the claim knew or ought reasonably to have known were untrue

28 The hallmark of fraud is dishonesty (see *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [34]). The classic exposition of fraud was enunciated by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 371:

> [F]raud 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 …

29 This exposition has been endorsed by the Singapore courts on numerous occasions (see for example, *Panatron Pte Ltd and another v Lee Cheow Lee and*

another [2001] 2 SLR(R) 435 at [13]; *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [16] and *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [35]; and *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [38]–[40]). This fraud exception unravels the temporal finality of ADs by allowing the court to set them aside. A party seeking to set aside an AD ("the innocent party") must first establish that it was based on facts which the party seeking the claim ("the claimant") knew or ought reasonably to have known were untrue. This objective test of knowledge would encompass constructive knowledge and would apply to every stage of the adjudication proceedings. Although the distinction between actual and constructive knowledge may in theory and practice be difficult to draw, it is important to recognise that constructive knowledge is not directed at what the claimant actually knew, but whether a reasonable person in the claimant's position would have known of the facts alleged to be false (see *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [105] and [108]).

30 In seeking to set aside an AD, the innocent party would have to establish:

(a) the facts which were relied on by the adjudicator in arriving at the AD;

(b) that those facts were false;

(c) that the claimant either knew or ought reasonably to have known them to be false (see [29] above); and

(d) that the innocent party did not in fact, *subjectively* know or have *actual* knowledge of the true position throughout the adjudication proceedings.

31 Our reason for restricting the requirement at [30(d)] to subjective or actual knowledge is to preclude a claimant, *ie*, the fraudulent party, from asserting that the innocent party could have discovered the true position and therefore *ought* to have known of the facts. In other words, there is no requirement on the innocent party to show that the evidence of fraud could not have been obtained or discovered with reasonable diligence during the adjudication proceedings. The UK Supreme Court in *Takhar v Gracefield Developments Ltd and others* [2019] 2 WLR 984 ("*Takhar v Gracefield*") addressed this issue, albeit in relation to setting aside fraudulently obtained judgments. In that case, the appellant transferred properties to the respondents. The appellant sought to set aside the transfers on grounds of undue influence or unconscionable conduct. This was rejected by the trial judge on the basis of a written profit sharing agreement between the parties, whereby the properties were to be renovated and sold with the profits split between the parties pursuant to an agreed percentage ("the agreement"). After the trial, the appellant obtained expert handwriting evidence which suggested that her signature on the agreement was forged. The appellant then commenced proceedings to set aside the judgment on the ground of fraud. The issue on the appeal was whether there was a requirement for her to show that the expert evidence could not have been obtained with reasonable diligence at the trial. The UK Supreme Court held in the negative, stating that "where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment" (at [54]). The court caveated that it remains open as to whether the court would exercise its discretion to set aside a judgment obtained by fraud if the innocent party had deliberately decided not to investigate the possibility of fraud in the first trial even if that had been suspected (at [55]).

32 The issue as to the relevance of whether the fraud could have been discovered by the innocent party with the exercise of reasonable diligence was also squarely answered in the negative by the High Court of Australia in *Clone Pty Ltd v Players Pty Ltd (in Liquidation) (Receivers & Managers Appointed) & Ors* [2018] HCA 12 in the context of fraudulently obtained judgments. That case involved a dispute over a lease agreement between the first respondent and the appellant. The trial judge found in favour of the appellant. After the trial, the Legal Practitioners Conduct Board investigated Mr Griffin's (who represented the first respondent in its negotiations with the appellant) evidence at the trial. In the course of that investigation, further copies of the lease agreement were found and it was discovered that the appellant's lawyers had withheld information concerning the provenance of copies of the lease agreement. The first respondent applied to set aside the judgment, which was allowed at first instance. This was ultimately overturned on appeal as the High Court of Australia held that the conduct of the appellant's lawyers did not amount to fraud (at [52]–[62]). An issue on appeal was whether there was a condition requiring an innocent party to establish that reasonable diligence was exercised prior to the judgment to discover the fraud. The High Court of Australia held that "[r]easonable diligence was never a requirement of an original action based upon fraud to set aside a judgment" (at [64]).

33 Where it is established that an AD is infected by fraud, it is neither material nor relevant to inquire as to whether the innocent party could have discovered the truth by the exercise of reasonable diligence. A fraudulent party cannot be allowed to claim that he could have been caught had reasonable diligence been exercised, but because he was not caught, he should be allowed to get away with it. Such a view would bring the administration of justice into disrepute and it would be unprincipled to hold in effect that there is no sanction

on the fraudulent party because he could have been found out earlier. Parties dealing with the court, and in the same vein, with the adjudicator in the adjudication of their disputes under the Act are expected to act with utmost probity.

Step 2: Whether the facts in question were material to the issuance of the AD

34 Second, the innocent party has to establish that the facts in question were material to the issuance of the AD. We found force in the English Court of Appeal's pronouncement of materiality in relation to setting aside judgments on the ground of fraud in *Royal Bank of Scotland plc v Highland Financial Partners LP and others* [2013] 1 CLC 596 at 630 ("*RBS v Highland*") (re-affirmed in *Takhar v Gracefield* at [56]–[57]):

> 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment *was an operative cause of the court's decision to give judgment in the way it did*. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be *causative* of the impugned judgment being obtained in the terms it was … [T]he question of materiality of fresh evidence *is to be assessed by reference to its impact on the evidence supporting the original decision*, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.
>
> [Emphasis added in italics]

35 We were persuaded that the above pronouncement equally applies to setting aside ADs on the ground of fraud. Materiality is established if there is a real prospect that had the adjudicator known the truth, the outcome of the determination *might* have been different. In other words, the facts must have been an *operative cause* in the issuance of the AD. It matters not what the claimant did or did not think was material at the relevant time. What matters is

that the court is satisfied that the false facts were *material* to the making of the original order based on the reasoning and arguments at the time the order in question was made. The objective of the Act is to facilitate cash flow in the building and construction industry, by among other methods, creating an intervening process of adjudication, which, although provisional in nature, is final and binding on the parties until their differences are ultimately and conclusively determined (see s 21 of the Act; *Osko* at [18] and *Citiwall* at [48]). The requirement of materiality provides the right balance in promoting the objective of achieving temporal finality in ADs by prescribing the circumstances under which they may be set aside on the ground of fraud. This would ensure that ADs will not be set aside based on mere allegations of fraud. There must be compelling evidence of fraud before the court.

36 In our judgment, we prefer the materiality requirement established in *RBS v Highland* over the Opposite Verdict Requirement pronounced in *QC Communications* (see [11]–[12] above). This is because the latter test would in effect require the supervisory court to consider the merits of the AD and conclude that a different outcome would have ensued. In our view, this would place an unnecessarily high burden on the supervisory court in circumstances where there is no particular interest in upholding orders that were impacted by fraud. As we had previously established in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401, in an action to set aside an AD, the court *does not* review the merits of the adjudicator's determination (at [66]). That is not within the supervisory jurisdiction of the court. Rather, the setting aside must be premised on issues relating to jurisdiction, breach of natural justice, non-compliance with the provisions of the Act (including those as stated under s 27(6) of the Act) or in this case, fraud.

37 This is consistent with the position that we had taken in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 in relation to setting aside arbitral awards on the ground of breach of natural justice where we held that the test for materiality should be whether it "could reasonably" rather than "would necessarily" have led to a difference in the arbitrator's deliberations (at [54]):

> To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. …
>
> [Emphasis in original]

38 In conclusion, the burden of establishing all the components necessary to set aside an AD falls on the innocent party. An AD obtained by fraud should be *voidable* at the instance of the innocent party. It is after all, for the innocent party to decide whether or not it wishes to abide by the AD even if it was procured by fraud. Applying this test to the facts of the case, we affirmed the Judge's decision to set aside the AD on the ground of fraud as explained below.

Whether the Judge erred in setting aside the AD on the ground of fraud

Step 1: Whether the AD was based on facts which the appellant knew or ought to have known were untrue

39 We found that the appellant had fraudulently represented that it had control over *all* the undelivered panels. The fact that 169 panels were not within the possession or control of the appellant was deliberately withheld from the respondent and the adjudicator throughout the adjudication proceedings.

The appellant represented that it had control over all the undelivered panels

40 Throughout the course of the adjudication proceedings, the appellant represented that it was willing and able to perform the Sub-Contract, *ie*, deliver the window panels to the Project site. During the adjudication proceedings, the evidence presented by the appellant portrayed the impression that it had control over all the undelivered panels. Notably, in the appellant's AD Submissions, it claimed that it "has completed all the supply works" and that some materials were "stored at [its] warehouse and some [were] stored at the [respondent's] warehouse" (see [7] above). There was no mention that some of the undelivered panels were being stored at Rontec's warehouse in China. The appellant's AD Submissions at [29] stated as follows:[23]

> For supply, the [appellant] has *completed all the supply works.* Please refer to Tab 3 for packing lists of all the Claimant's materials fabricated. Due to site constraints, *some of the materials are stored at the [appellant's] warehouse and some are stored at the [respondent's] warehouse.* The [appellant] submits that even though some materials are not delivered to site, they must be valued in the payment claim under s 7(2)(*c*) of the [Act] …
>
> [Emphasis added in italics]

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[23] ABOD Vol 1 at p 62.

41 The appellant submitted that it was clear from the Payment Claim that some of the undelivered panels were not stored in Singapore as the Payment Claim stated that some of the undelivered panels were in China. The Payment Claim stated as follows:[24]

> In addition, we are instructed to keep store 3rd and 4th batch materials in China warehouse which cost us S$5,900.00/ month. Overall for 6 months S$35,400.00.

42 In our view, this submission did not advance the appellant's case. The fact that some of the undelivered panels were stored in China did not necessarily mean that the appellant had no control over these panels. On the contrary, the impression given by the appellant in its Payment Claim was not that some of the undelivered panels were stored with *its supplier* in China, *ie*, Rontec, but that the panels were instead stored at *its warehouse* in China. This implied that the appellant had control over the undelivered panels and this was made evidently clear in its AD Submissions (No 2) at [8(8)] in claiming that it was entitled to the storage costs for the "materials kept in [*its*] warehouse for 6 months":[25]

> For VO-08, the [r]espondent informed the [appellant] that the structure works is delayed by the Main Contractor and requested the materials to be stored in the [appellant's] warehouse on 17 April 2019. The [appellant] wrote to the [respondent] on 22 April 2019 with confirmation of verbal instruction and total costs of $35,400, being $5,900/month * 6 months. *The materials were kept in the [appellant's] warehouse for 6 months* so the [appellant] is entitled to the full amount claimed …
>
> [Emphasis added in italics]

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24 ABOD Vol 1 at p 107.

25 ABOD Vol 1 at p 231.

43 Faced with such incontrovertible evidence, the appellant accepted at the hearing of this appeal that it neither disclosed that the 169 panels were kept in Rontec's warehouse in China nor its dispute with Rontec at any time during the adjudication proceedings. Even after the AD, the appellant kept up its appearance that it had control and could deliver all the undelivered panels. Since 19 November 2019, the respondent had been attempting to pay the Adjudicated Sum in exchange for the undelivered panels. The appellant however, not only ignored the respondent's proposal, but also made no mention of its inability to secure the delivery of the 169 panels from Rontec, and instead proceeded to suspend works on the Project. We now know the reason for the appellant's failure to respond to the respondent's eminently fair proposal to pay the Adjudicated Sum in exchange for all the undelivered panels. It was simply because the appellant knew that it could not do so as it did not have possession or control over the 169 panels. The appellant then claimed for storage costs for the undelivered panels in its "Singapore warehouse" at $15,000 per month under the November Storage Claim when it *knew* for a fact that the 169 panels were still in Rontec's possession in China (see [8] above). The appellant, through its conduct after the issuance of the AD, made the continuing representation that it had control over the undelivered panels.

The appellant's representation was false as it knew or ought to have known that it had no control over the 169 panels

44 We rejected the appellant's submission that there was no fraud as it genuinely believed that it had secured the delivery of the 169 panels from Rontec. The evidence clearly suggested otherwise. First, the appellant claimed that it had an agreement with Rontec on 14 November 2019, after amicable negotiations, for the delivery of the 169 panels. In support of its submission, the appellant referred to WeChat records and transcript of telephone conversations

of negotiations with Rontec, produced earlier drafts of the alleged agreement, and photos of persons signing indecipherable papers, but *not the actual signed agreement*.[26] Faced with this conspicuous lack of evidence of any signed agreement, the appellant acknowledged at the appeal hearing that it had at best, an in-principle agreement with Rontec for the delivery of the 169 panels.

45 Second, there was a serious dispute between the appellant and Rontec which cast serious doubts on the appellant's ability to secure delivery of the 169 panels at the time of the adjudication proceedings. In fact, the dispute between the parties escalated to the point where the appellant had, on 13 October 2019, 12 days *before* the first adjudication hearing on 25 October 2019, sent the following notice to Rontec:[27]

> **Subject: Notification of Termination of Sub-Contract Agreement**
>
> In accordance with our above project supply & fabrication contract … we have made full payment for you as per our contract conditions by June 2019 …
>
> Please be informed that as a result of your non-cooperation, outstanding material delivery (9 containers of materials) and more than this holding out direct supply material at your factory … there is heavy liquidity damages, loss and other damages incurred and we are unable to meet our customer requirement as well.
>
> We hereby notify you that ***you have committed a breach of contract by failing to deliver all necessary material*** and failing to execute our representative instructions … Arising from your breach of contractual obligation ***we hereby reserve our right to terminate your sub-contract*** and engage third-party fabricator to carry out the balance material works.
>
> [Emphasis added in bold italics; Emphasis in original in bold underline]

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26 ABOD Vol 3 at pp 49–79.

27 ABOD Vol 3 at pp 212–213.

46 The appellant submitted that it had not terminated the Fabrication Contract as the notice was merely to pressure Rontec to perform the Fabrication Contract.[28] Be that as it may, the indisputable fact remained that Rontec had, in its dispute with the appellant, withheld delivery of the 169 panels. Further, the nature of the dispute between Rontec and the appellant was not merely commercial in nature, but involved serious allegations of bribery against the appellant. A representative of Rontec alleged that the appellant's sole director and shareholder had offered bribes to the top management personnel of Rontec, and was being investigated by the public authorities in China.[29] In these circumstances, the appellant knew or ought to have known during the adjudication proceedings that it had *no control* over the 169 panels in Rontec's possession in China. Yet, none of these facts were brought to the respondent or the adjudicator's attention. As the Judge pointed out, the appellant had been operating on mere hope that matters would work out rather than a genuine belief that they had indeed been worked out.[30]

47 *Even if* the appellant had genuinely believed that it could secure the delivery of the 169 panels from Rontec, it did not change the fact that when the appellant filed its Payment Claim, it represented that it had control and was able to deliver *all* the undelivered panels. In our view, it did not matter whether the appellant genuinely believed that it would eventually secure delivery of the panels. Neither was it relevant to examine the nature of the dispute with Rontec to determine whose fault led to the non-delivery. These inquiries ultimately could not alter the undeniable fact that the appellant's Payment Claim was filed

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28 Appellant's Subs at [2.4.4]–[2.4.5].

29 ABOD Vol 2 at p 135.

30 GD at [26].

on the false representation that it was able to deliver *all* the undelivered panels despite knowing that it was not in control of 169 of them.

The respondent was unaware that the appellant had no control over the 169 panels

48 We next considered whether the respondent had actual knowledge of the true position, *ie*, that the appellant had no control over the 169 panels during the adjudication proceedings. We accepted the respondent's evidence that it only became aware that the 169 panels were in Rontec's possession after it received an email from Rontec offering to sell the 169 panels directly to the respondent (see [8] above). This was entirely consistent with the respondent's proposal to pay the Adjudicated Sum in exchange for the undelivered panels after the AD. Clearly the proposal was made in the belief that the appellant had possession and control of all the undelivered panels.

49 Although the appellant *accepted* at the hearing of the appeal that it neither disclosed its disputes with Rontec nor the fact that the 169 panels were in Rontec's possession, the appellant nonetheless submitted that the respondent could have independently calculated the number of panels in the appellant's possession from the packing lists and arrival notices that had been provided (see [16] above).[31] However, as we have explained above, it is irrelevant whether the innocent party, *ie*, the respondent, could have discovered the truth by the exercise of reasonable diligence (see [31]–[33] above). In any event, since the appellant had represented at the adjudication proceedings that it had control over *all* the undelivered panels, regardless of their location, there was simply no

[31] ABOD Vol I at pp 112–169.

cause for the respondent to verify the same by examining the packing lists and arrival notices.

50 The appellant also claimed that the respondent had sabotaged its negotiations and deliberately prevented the appellant from obtaining the 169 panels from Rontec. Relying on the email from Rontec to the respondent on 22 November 2019 (see [8] above), the appellant claimed that it was clear that Rontec and the respondent had prior negotiations and therefore, the respondent must have sabotaged its negotiations with Rontec.[32] This argument was a *non sequitur*. It was clear from the email that: (a) the respondent's prior negotiations with Rontec were in connection with an *unrelated* project; (b) it was the *first time* that Rontec had introduced itself to the respondent as the fabricator of the panels; and (c) it was Rontec who offered to sell the 169 panels directly to the respondent:[33]

> Dear Sir,
>
> I am so glad to *contact you again* and thanks for your help on sharing information on *Clark international airport façade project.*
>
> The company [Rontec] *have [sic] signed façade supplying contract of [the Project] with [the appellant]. As far as we knew that [sic] you are the contractor of [the appellant*].
>
> Unluckily, due to the implementation of the contract by [the appellant] through bribery and other improper means to defraud of high profits, our company suffered serious economic losses … So that the contract cannot be performed normally. In order to reduce the economic loss and avoid the project delay, *we are willing to sell the remaining products at the price of 251791.59 Singapore dollar* (approximate 1.3 million RMB)
>
> …
>
> [Emphasis added in italics]

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32 Appellant's Subs at [1.22.17]–[1.22.18]; Appellant's Reply Submissions at [1.2(j)].

33 ABOD Vol II at p 95.

51 The appellant was not able to refer to *any* evidence suggesting that the respondent had interfered with its negotiations with Rontec. Indeed, if it was the appellant's claim that it had entered into an in-principle agreement for payment of RMB1.3m in exchange for the delivery of 169 panels on 14 November 2019, we fail to understand why Rontec would have reneged on the agreement and offered to sell the same to the respondent eight days later at the *same* price. In any event, *even if* the respondent had interfered with the appellant's negotiations with Rontec, that would have occurred long after the appellant filed its Payment Claim on the false premise that it had control over all the undelivered panels. Accordingly, the alleged sabotage, even if true, could not possibly have excused or justified the fraud retroactively.

52 For the above reasons, we held that the AD was obtained on the appellant's fraudulent misrepresentation that it had control over all the undelivered panels. We turned then to consider whether this misrepresentation was material to the AD.

Step 2: Whether the fraudulent misrepresentation was material to the AD

53 The appellant submitted that *even if* it had disclosed the relevant facts at the adjudication proceedings, it was immaterial for two reasons. First, the disclosed facts would have shown that it had secured the delivery of the 169 panels and would be able to deliver the undelivered panels if called upon to do so. This, we had established, was false (see [40]–[47] above). Second, the appellant argued that the respondent's objection in the adjudication proceedings was merely on the ground that the panels had not been delivered, and not that the appellant could not have delivered them.[34] We disagree as the evidence

[34] Appellant's Subs at [4.3]–[4.8].

plainly supported the finding that the appellant could not have delivered the 169 panels. Further, the distinction drawn by the appellant was irrelevant. What mattered was not *how* the respondent had objected to the appellant's claim, but *why* the adjudicator had allowed the appellant's claim (see [35] above). In the AD, the adjudicator framed and decided the issue in the appellant's favour as such:[35]

> 14. In summary, the [appellant] submitted, in its [Adjudication Application], that:
>
> …
>
> d. The [appellant] was *entitled to payment for the materials that it had prefabricated for the Project* even though these materials *had yet to be delivered* to the Respondent, citing *Chuang Long* …
>
> 52. As rightly submitted by the [appellant], *Chuang Long*'s case clearly stands for the proposition that *prefabricated materials are claimable under section 7(1)(b) of the [Act]* …
>
> 64. … I therefore accepted the [appellant's] submission that the Works were to be valued in accordance with section 7(1)(b) of the Act, and allow the [appellant's] claim for the Works, including the prefabricated materials, up to 80% of the Sub-Contract value, namely S$1,824.000.00
>
> [Emphasis added in italics]

54 In *Chuang Long*, the applicant subcontracted works under a construction project to the respondent. The respondent filed a payment claim for unpaid works, including materials which had been fabricated but not delivered or installed. The adjudicator allowed this claim, and the applicant applied to the High Court to set aside the AD. The High Court held that if the respondent was entitled to payment only after the materials have been affixed onto the building,

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[35] ABOD Vol 1 at pp 182, 197 and 202 (AD at [14], [52] and [64]).

it would place the respondent, as a subcontractor, "at the mercy of the main contractor", as the main contractor could refuse delivery and/or installation of such materials and consequently avoid making payment. This was contrary to parliament's intention and was the precise problem that the Act sought to address (at [31]–[32]). As such, the High Court held that the respondent was entitled to payment for fabricated materials even though it had not been delivered, given that these materials would constitute the property of the main contractor upon payment (at [20] and [33]).

55 As astutely pointed out by the Judge, the issue before the adjudicator was whether the appellant was entitled to payment notwithstanding that the undelivered panels had been fabricated but not delivered.[36] The adjudicator relied on *Chuang Long* and held in the affirmative. Implicit in the adjudicator's decision was that the appellant was in a position to deliver all the undelivered panels including the 169 panels. Had the adjudicator known the true facts, *ie*, that the appellant had no control over the 169 panels, the *real inquiry* would have been whether the appellant was still entitled to payment for *all* the undelivered panels.

56 In the context of the "real inquiry", the adjudicator could not have relied on *Chuang Long* because *Chuang Long* did not stand for the proposition that a subcontractor was entitled to payment for fabricated materials even though it was not able to deliver them under the contract. Parliament's intention to facilitate cash flow for downstream players in the construction industry was not meant to allow subcontractors to be paid for materials so long as they are fabricated and in existence, regardless of whether actual delivery can take place.

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[36] GD at [20].

This would ironically place the main contractor at the mercy of the subcontractors. The appellant's fraud in deliberately omitting to disclose that it had no control over the 169 panels was an *operative cause* of the impugned AD, as the adjudicator had allowed the appellant's claim on the assumption that it was able to deliver *all* the undelivered panels. Had the adjudicator known the truth, in our judgment, there was a real prospect that the outcome of the determination might have been different, *ie*, the appellant's claim might not have been allowed.

57 For the above reasons, we were satisfied that the appellant's fraudulent misrepresentation was material to the AD. There was no requirement for this court to be satisfied that the adjudicator would have arrived at different outcome based on the true facts before this court (see [36]–[37] above). We next considered the possibility of severance.

Severance

58 The issue at this juncture was whether the AD may be severed in part to allow the appellant to retain payment for the undelivered panels, save for the 169 panels. The appellant submitted that this could and should be done, and referred us to the decision of *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [155] ("*Rong Shun*") where the High Court severed part of an AD for jurisdictional error.[37] In *Rong Shun*, the parties had a dispute in relation to the payment for work done under a subcontract. The applicant commenced adjudication proceedings and in the course of the adjudication, invited the adjudicator to adjudicate upon its claim to recover the retention sum, even though this was not included in the

[37] Appellant's Subs at [6.2]–[6.3]

applicant's payment claim. The adjudicator found for the applicant including its claim for the retention sum. The issue that arose before the High Court was whether the adjudicator had acted in excess of his jurisdiction in allowing the applicant to recover the retention sum. The High Court held that the adjudicator had no jurisdiction to adjudicate upon the retention sum as the applicant had expressly excluded the retention sum from its payment claim (at [103] and [105]–[106]). Consequently, the High Court severed the adjudicator's determination on the retention sum as it was: (a) textually severable, *ie*, disregarding the adjudicator's reasons for allowing the claim for the retention sum left the other reasons "grammatical and coherent"; and (b) substantially severable, *ie*, the adjudicator's decision on the retention sum involved separate considerations of fact and law, and the remainder of applicant's claim could be identified easily and with certainty on both liability and quantum (at [155], [158]–[163]).

59 In our view, *Rong Shun* was of no assistance to the appellant's case. The AD in *Rong Shun* was set aside for want of jurisdiction which involved considerations that are distinct from those governing the setting aside of ADs on the ground of fraud. This was acknowledged in *Rong Shun* when the court emphasised that the legal principles enunciated were restricted to setting aside an AD for want of jurisdiction (at [156]):

> *I have accommodated in these principles only a challenge which succeeds for jurisdictional error.* I have not attempted to accommodate a challenge which succeeds on natural justice grounds. There is no doubt that, in a suitable case, a severable part of a determination which is tainted by a breach of natural justice may be set aside without disturbing the remainder. But identifying when that can occur is unnecessary for my decision and is best done when the issue actually arises for decision.
>
> [Emphasis added in italics]

60 It was not disputed that the court has the power under the common law to sever an AD in part (see *Rong Shun* at [157]). This is also recognised under the newly enacted s 27(8)(*a*) of the Act. In situations where an AD was invalidly obtained for want of jurisdiction, the court may well be inclined to sever the impugned portions of the AD if it was textually and substantially severable (see [58] above). This is because the "error" purely relates to the adjudicator acting in excess of the jurisdiction conferred upon him or her. Where the impact of the relief to avoid the consequence of a jurisdictional error may be quantified, the court may exercise its discretion to sever the AD in part so as not to deprive the claimant of the benefit of the entirety of the adjudicator's decision. This would be consistent with the objective of the Act to facilitate cash flow to downstream players in the building and construction industry.

61 In circumstances where an AD was obtained by fraud however, different considerations come into play. The court in exercising its discretion to sever an AD in part has to additionally, 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 Act. The court will generally not be sympathetic to a claimant who has obtained an AD by fraud, as such a claimant would have engaged in deliberate and dishonest conduct to acquire benefits that it was not entitled to. In that light, fraud unravels all and the starting point is that an AD that was corrupted by fraudulent conduct would be tainted in its entirety, and the whole must fail (see *Hip Foong Hong v H Neotia and Company* [1918] AC 888 at 894 in relation to judgments obtained by fraud). This serves to discourage claimants from committing fraud in the hope that they would not be caught, and even if caught, that the impugned portion of the AD could simply be severed. In our view, an AD obtained by fraud should only be severed in *exceptional* circumstances. The factors that the court would take into

account would include, the *nature* of the fraud, the *quantum* of the claim affected by the fraud and the requirements of textual and substantial severability as enunciated by the High Court in *Rong Shun* at [155]. Given the court's disapprobation towards allowing its processes to be used to facilitate fraud, save for extremely limited situations where the fraud was *de minimis* both in terms of nature and quantum, the court would generally not exercise its discretion to sever the impugned portion of an AD to permit the claimant to retain the balance adjudicated sum. It would only be in exceptional circumstances will the policy consideration of facilitating cash flow under the Act outweigh the need to uphold public confidence in the administration of justice.

62 We turn to the Queensland Supreme Court decision of *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting* [2011] QSC 327 ("*Hansen Yuncken*") to illustrate what *de minimis* fraud might possibly mean, *ie*, fraud not sufficiently serious in nature to warrant the court's sanction against the unaffected portions of an AD. In *Hansen Yuncken*, the applicant engaged the respondent as the subcontractor for concreting works for the redevelopment of Cairns Airport. The respondent, in its adjudication application, fraudulently inflated his actual labour costs incurred by adding a profit margin and overhead of 12% to his labour rates. The Supreme Court held that the fraud related to a discrete component of the claim and the impact of the fraud had been precisely proved (at [146]). Further, while the fraudulent claimant should be deprived of the benefit of his fraud, to deprive him of the benefit of the entirety of the adjudicator's decision, where most of his claim is unaffected by the fraud, would be to penalise him (at [150]–[151]). Consequently, the Supreme Court severed the impugned portions of the AD and the applicant paid the amount of the claim less the overcharges for the labour costs (at [152]–[153]). The fraud in that case, *ie*, inflation of labour costs, was not sufficiently serious in nature

as it impugned the *quantum* of the applicant's claim rather than the *entitlement* to the claim itself. Nevertheless, as the fraud had impacted approximately *half* of the applicant's total claim, we express doubt as to whether we would have severed the impugned portions of the AD were we faced with the same circumstances. This is especially so because the claimant would be entitled to file a fresh payment claim without the false inflation. While this would entail additional costs and expenses and cause delay in the adjudication, we would not be sympathetic to such a claimant since the additional costs and delay would have been entirely self-induced.

63 In this case, the appellant's fraud was in filing its Payment Claim on the representation that it had control over all the undelivered panels. The appellant maintained this misrepresentation throughout the adjudication proceedings even though it knew at the relevant time that it did not, and may not, have eventual control over the 169 panels. The nature of the appellant's fraud was sufficiently serious in nature as it went towards the appellant's *entitlement* to payment for the undelivered panels itself. In addition, the appellant deliberately misled the respondent and the adjudicator into thinking that the appellant could, when called upon to do so, deliver all the undelivered panels and fulfil its Sub-Contract when this was certainly not the case. After the AD, the appellant ignored the respondent's offer to pay the Adjudicated Sum in exchange for the undelivered panels and continued to allow the respondent to operate on the mistaken impression that it had control over the undelivered panels. This was aggravated by the fact that the appellant had purported to claim for storage costs of *all* the undelivered panels under the November Storage Claim when it did not have physical possession of or control over the 169 panels.

64 Further, the 169 panels comprised approximately 20% of the appellant's total claim and in this regard, it could hardly be said that the fraud in terms of

quantum was *de minimis.* Finally, we were also not convinced that the appellant's claim for the 169 panels could be textually and substantially severed. The appellant had claimed for payment in relation to the supply of all 864 panels including storage costs for *all* the undelivered panels and this entire claim was allowed by the adjudicator. However, the respondent thus far, has only managed to confirm that the appellant has physical possession of 173 of the undelivered panels.[38] It should be recalled that the undelivered panels was 489 in total – see [5] above. As such, there remained a dispute as to the quantity of panels which the appellant was able to deliver. For these reasons, it was wholly inappropriate to sever the AD in part and we declined to do so.

Conclusion

65 For the reasons above, we dismissed the appeal with costs of the appeal fixed at $20,000 plus disbursements of $450 and affirmed the Judge's decision to set aside the whole of the AD. It remains open to the appellant to file another payment claim for the panels that they are in a position to deliver.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

[38] ABOD Vol III at pp 206–209 (Mr Lim's 3rd affidavit at [25]–[33])

Chong Kuan Keong, Ernest Sia, Andy Yeo Yong Chuan, Gan Siu Min Cheryl and Tay Yi Ru Derek (Chong Chia & Lim LLC) for the appellant;
Neo Kim Cheng Monica and Oung Hui Wen Karen (Chan Neo LLP) for the respondent.
