FRAUD VS FINALITY: A "BARE-KNUCKLE FIGHT" FOR JUSTICE

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WHAT HAPPENS IF, AFTER A JUDGMENT OR ARBITRAL AWARD IS RELEASED, A PARTY TO THE PROCEEDINGS DISCOVERS THAT THE OTHER SIDE PRESENTED FALSIFIED DOCUMENTS AT THE HEARING?

This can justifiably give rise to a great sense of injustice for an innocent losing party. In litigation, the innocent party can apply to have the judgment set aside on the grounds that it was obtained by fraud. In arbitration, the innocent party can seek to resist enforcement on the basis that it would be contrary to public policy or challenge the award on the basis that there has been a serious irregularity which has caused serious injustice. This briefing explores recent cases of the English courts where such applications have been made[1]. These cases show that the applicant's knowledge about the circumstances giving rise to the fraud at the time of the original hearing will be of key importance, as will the causal relevance of the fraud to the conclusion that had been reached in the original judgment or award.

FRAUD IN LITIGATION – TAKHAR V GRACEFIELD DEVELOPMENTS LTD

In order to successfully set aside a judgment on the basis that it has been obtained by fraud an applicant must show:[1]

- There has been "conscious and deliberate dishonesty" in relation to the evidence given at the original trial, and that evidence was relevant to the judgment eventually obtained;
- The original evidence given was "material", which means that it must be shown that fresh evidence of the true position would have "entirely changed the way in which the first court approached and came to its decision"; and
- Materiality of the fresh evidence is 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 retried on honest evidence."

In *Takhar*, the Supreme Court considered whether the applicant also had to show that it would have been unable to discover the fraud at the time of the trial by applying reasonable diligence. In the underlying proceedings, Mrs Takhar had unsuccessfully claimed that Gracefield Developments had obtained ownership of various properties from her as a result of exercising undue influence or unconscionable conduct. A significant piece of evidence in favour of Gracefield had been a scanned copy of an agreement containing Mrs Takhar's signature. At trial Mrs Takhar was unable to explain how her signature had come to be on this document, but she did not argue (and, importantly, did not know) that the copy was a forgery. After trial, Mrs Takhar's new solicitors obtained an expert opinion that the agreement was a forgery. Mrs Takhar therefore issued proceedings to have the original judgment set aside, alleging that it had been obtained by fraud. Gracefield argued that the application should be struck out as an abuse of process, as Mrs Takhar could have obtained the evidence as to fraud before the original trial by application of reasonable diligence.

"THE SUPREME COURT ACCEPTED THAT THERE IS A GENERAL PRINCIPLE THAT PARTIES MUST PRESENT THEIR ENTIRE CASE AT TRIAL. A KEY EXCEPTION TO THIS IS THE PRESENCE OF FRAUD."

The Supreme Court accepted that there is a general principle that parties must normally present their entire case at trial. However, a key exception to this is the presence of fraud, which occupies a "special place … in the setting aside of judgments obtained by its use". Because of this, the Supreme Court did not consider that a reasonable diligence requirement should be imposed. Such a requirement would unjustly allow a defrauding party to profit from passivity or lack of reasonable diligence by the innocent party, and would undermine the principle that "a reasonable person is entitled to assume honesty in those with whom he [or she] deals."

The Supreme Court however did note two possible qualifications to this principle:

- If fraud *had been raised* at the original trial, but a party sought to advance *new* evidence in relation to that fraud after the trial in order to have the judgment set aside, a judge might have a discretion as to whether to allow an application to set aside the judgment rather than allowing the application as of right; and
- If the party who now objected to the fraud had taken a *deliberate decision to not investigate the possibility of fraud* before the trial (although being suspicious at the time), a judge might have a discretion as to whether to allow an application to set aside the judgment rather than allowing the application as of right (or, in Lord Sumption's view, such a scenario would likely entirely prevent an application from succeeding).

The most prudent course is clearly to raise the issue of fraud at the first trial (or hearing) where possible.[1] However, it should be kept in mind that the threshold for establishing fraud is a high one and that lawyers owe professional duties to properly particularise fraud allegations. Nevertheless, where there are sufficient grounds to doubt a judgment's authenticity, court rules require prompt notice of such a challenge[1].

FRAUD IN ARBITRATION – SINOCORE INTERNATIONAL CO LTD V RBRG TRADING (UK) LTD

When it comes to an application to set aside an order enforcing an arbitral award on the basis that the award was obtained by fraud, the starting point is the strong presumption under the Arbitration Act 1996 that New York Convention awards are enforceable. To this end, section 103 provides that recognition or enforcement of a New York Convention arbitral award "shall not be refused except … if it would be contrary to public policy to recognise or enforce the award."[1]

In *Sinocore*, RBRG applied to set aside an order giving Sinocore permission to enforce an arbitral award against it, arguing that the award gave effect to a claim which was based on forged documents and enforcement would be contrary to the English courts' policy of not allowing their processes to be used to give effect to fraud. Similarly to the Supreme Court in *Takhar*, the court in this case was concerned with a balancing exercise between the competing principles of finality and fraud prevention. However, here the issue of forgery had been explored in detail by the arbitral tribunal itself, and was found not to be causally significant. The tribunal had found there to be no fraud; only an attempt at fraud[2]. In this respect, the court emphasised that where an arbitral tribunal has jurisdiction to determine the relevant issue of illegality and has found that there was no illegality on the facts, then a court should not allow those facts to be re-opened, save in exceptional circumstances.

In any event, the court went on to indicate that even if the public policy principle had been engaged (as a result of the fraud aspect of the claim having causal significance) then "any public policy considerations are clearly outweighed by the interests of finality". In the context of a challenge to enforcement of an arbitral award, the exceptional circumstances in which a court would allow facts to be re-opened are also likely to be very narrowly construed indeed[3].

CONCLUSION

This discussion shows that if a judgment or award is made against a party on the basis of fraudulent evidence, mechanisms are available for the innocent party to either have that judgment set aside or to avoid enforcement of the award.

"A JUDGMENT OR AWARD MADE ON THE BASIS OF FRAUDULENT EVIDENCE CAN BE SET ASIDE OR ENFORCEMENT CAN BE AVOIDED"

As memorably put by Lord Briggs in *Takhar*, whether or not such applications are successful will depend on "the outcome of the bare-knuckle fight between two important and long-established principles… the fraud principle and the finality principle". Which of those principles prevails will depend on the circumstances of each case. The outcome in *Sinocore* (and the generally robust pro-enforcement stance of the English courts in respect of arbitration) might suggest that the pendulum is weighted more heavily towards finality in circumstances where enforcement of an arbitral award is being challenged. However, the fact that the arbitral tribunal had already investigated the fraud and found it to be of no causal significance was central to that finding.

Takhar on the other hand concerned a very different factual background where the fraud was not previously known to or raised by the claimant. There, the finality principle argument was supplemented by submissions that the fraud could or should have been discovered by reasonable diligence. However, the court found – in the context of a serious fraud that was material to the judgment – that "there is not, and should not be, a rule that want of reasonable diligence in the first action of itself leads to a blanket ban on bringing an action to rescind a judgment which the claimant can properly allege the defendants obtained by fraud".

Whilst it is rare for new evidence to emerge after a judgment or award is issued, it is important that remedies are available where a fraud is discovered late. It is similarly reassuring that the English courts will be careful to appropriately weigh the balance between preserving the finality of proceedings and upholding justice, such that a party will not be allowed a second bite at the cherry if either the fraud was considered in the first proceedings and determined not to be relevant/causal to the loss and/or if a party had known of the fraud but deliberately not taken steps to address it.

This article was co-authored by Alexandra Allen-Franks.

Footnotes:

[1] *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2018] EWCA Civ 838
[2] *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328
[3] See also *PBS Energo A.S. v Bester Generacion UK Ltd* [2019] EWHC 996 (TCC), where the High Court refused to enforce an adjudication award on the basis that there was a properly arguable defence that the award had been obtained by fraud. WFW's briefing on the case is available here.
[4] See *UTB LLC v Sheffield United Ltd* [2019] EWHC 1377 (Ch), where the defendant alleged that two documents were not genuine just before trial began but the judge refused to allow the allegation to be made, noting that the authenticity of the documents was only of collateral relevance to the case. However, had the judge considered that the documents were central to the eventual judgment, he may have been happier to allow the application, notwithstanding its lateness.
[5] See https://globalarbitrationreview.com/article/1171806/what-rbrg-v-sinocore-tells-us-about-resisting-enforcement-of-awards-on-public-policy-grounds for discussion of public policy grounds.
[6] It found this to be analogous to the finding in *National Iranian Oil v Crescent Petroleum* [2016] 2 Lloyd's Rep 147, in which there was a failed attempt to bribe and the court established that "there is certainly no English public policy to refuse to enforce a contract which has been preceded, and is unaffected, by a failed attempt to bribe".
[7] See *ZCCM Investments Holdings Plc v Kansanshi Holdings Plc, Kansanshi Mining Plc* [2019] EWHC 1285 (Comm) where, had the decision under consideration been properly characterised as an award so that a challenge under s68 Arbitration Act 1996 would be possible, the claimant's argument that the decision had been obtained by fraud would have failed.

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