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Fraud and foreign judgments under Singapore law

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A foreign judgment is generally not to be reviewed on the merits at the recognition and enforcement stage. Yet, an exception has always been carved out for fraud under the common law rules on the basis that 'fraud unravels everything' (*Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712 *per* Lord Denning). Thus, English courts allow a judgment debtor to raise fraud at the recognition and enforcement stage even if no new evidence is adduced and fraud had been considered and dismissed by the court of origin (*Abouloff v Oppenheimer & Co* (1882) 10 QBD 295). This seeming anomaly with the prohibition against a review of the merits of a foreign judgment has been justified on the basis that where fraud is concerned, the court of origin is misled, not mistaken (*Abouloff*). The *Abouloff* rule has been much criticized, but successive courts have refused to depart from it (see also *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [116] (Privy Council)). Further, in *Takhar v Gracefield Developments Ltd* ([2019] UKSC 13, [2020] AC 450) which is a case on fraud and domestic judgments, the Supreme Court held that, generally, no requirement that the fraud could not have been uncovered with reasonable diligence in advance of obtaining the judgment would be imposed on the party seeking to set aside the judgment on the basis of fraud. As one of the oft-cited criticisms for the *Abouloff* rule is that it is out of step with how English courts deal with domestic judgments, *Takhar* may have the effect of further embedding the *Abouloff* rule.

In *Hong Pian Tee v Les Placements Germain Gauthier* ([2002] SGCA 17, [2002] 1 SLR(R) 515), the Singapore Court of Appeal criticized the *Abouloff* rule on the basis that it would encourage 'endless litigation' and 'judicial chauvinism' (at [27]-[28]). Drawing on Canadian and Australian authorities on fraud and foreign judgments, the Court held that insofar as intrinsic fraud (ie, fraud which goes to the merits of the case) is concerned, the foreign judgment may only be impeached where 'fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case' (at [30]).

The current position on fraud and domestic judgments under Singapore law is

that the fresh evidence rule applies, albeit flexibly (see, eg, *Su Sh-Hsyu v Wee Yue Chew* [2007] SGCA 31, [2007] 3 SLR(R) 673). However, the Court of Appeal recently considered *Takhar* in a decision concerning a domestic adjudication determination (AD). Adjudication is available under the Building and Construction Industry Security of Payment Act (Cap 30B, Rev Ed 2006) and is a quick and inexpensive process to resolve payment disputes arising from building and construction contracts. In *Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* ([2020] SGCA 88), the Court of Appeal held that an AD could be set aside on the ground of fraud. The party raising fraud would have to establish that the facts which were relied on by the adjudicator were false; that the other party either knew or ought reasonably to have known them to be false; and that the innocent party did not in fact, subjectively know or have actual knowledge of the true position throughout the adjudication proceedings (at [30]). The Court emphasised that '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 proceeding' (at [31]). It cited *Takhar* and the High Court of Australia decision of *Clone Pty Ltd v Players Pty Ltd (in Liquidation)* [2018] HCA 12 with approval, the High Court of Australia having also rejected the reasonable diligence requirement in the context of a fraudulently obtained domestic judgment in the latter case.

The Court held (at [33]; emphasis added):

'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.'

This passage suggests that the position on fraud and domestic judgments would change in the near future. It also raises the question whether the requirement of reasonable diligence in respect of intrinsic fraud and foreign judgments would survive for long. On the one hand, the Court in *Hong Pian Tee* had said that:

‘There is no logical reason why a different rule should apply in relation to a foreign judgment’ (at [27]) (ie, vis-à-vis a domestic judgment). The requirement of reasonable diligence has also been criticized on the basis that the court would be ‘taking the side of the fraudster against his negligent opponent’ (Briggs, ‘Crossing the River by Feeling the Stones; Rethinking the Law on Foreign Judgments’ (2005) 8 *SYBIL* 1, 21). On the other hand, there was a heavy emphasis on judicial comity in *Hong Pian Tee*. The Court observed that: ‘It is … vitally important that no court of one jurisdiction should pass judgment on an issue already decided upon by a competent court of another jurisdiction …. It must be borne in mind that the enforcement forum is not an appellate tribunal vis-à-vis the foreign judgment’ (at [28]).

It remains to be seen whether the Singapore Court of Appeal would in future resile from *Hong Pian Tee.* At least, the recent developments in the domestic context intimate that the point is arguable.