

## Construction Law Update

### Fraud, Duress and Undue Influence – Guidance from the TCC

A recent TCC decision considered the hurdles to overcome in order to prove whether agreements are executed in circumstances of fraud, duress and/or undue influence. In the recent case of *Nua Facades Limited; Nua Interiors Limited; Silk Property Developments Limited* (“**Claimant Companies**”) v *Brady* (“**Mr Brady**”), the hurdles seem to be set very high indeed.

#### Background

Mr Brady owned a site in London which he proposed to develop and engaged Four Square Management Limited (“**FSM**”) as the project manager. FSM was a new company incorporated by Mr Sims and Mr Pierce. Mr Pierce had been introduced to Mr Brady by Mr Singh, who controlled each of the Claimant Companies.

Mr Brady engaged Maybury Construction Limited (“**Maybury**”) as the main contractor. The Nua companies (together “**Nua**”) tendered for several sub-contract packages and were successful in respect of the windows, dry lining and joinery packages. Maybury left the site before the development was completed and Mr Brady appointed Nua directly on further packages (including as principal contractor).

Nua alleged that when Maybury left the site, an agreement was reached with Mr Brady that Nua would continue its works under the windows and dry lining packages and Mr Brady would pay any amounts unpaid by Maybury directly to Nua. Mr Brady reneged on this agreement and when Mr Singh chased payments of £200,000 based on Nua’s valuations, Mr Brady said he would only pay £85,000. Nua then removed windows and doors from the site. Mr Pierce reported Nua to the police for theft and Nua was barred from the site. Mr Brady then appointed a replacement main contractor, Madigan Gill Construction Limited (“**MG**”).

FSM settled Nua’s final accounts on behalf of Mr Brady who subsequently ratified the settlement agreements (the “**Settlement Agreements**”). During this period,

MG’s employment had been terminated and Silk Property Developments Limited (“**Silk**”) had taken on the role of principal contractor. Mr Brady eventually disposed of Silk’s services as well and FSM settled Silk’s final account on his behalf (the “**Silk Agreement**”).

Each of the Nua companies issued statutory demands to recover the monies due under the Settlement Agreements and Mr Brady sought to avoid payment on the basis that the Settlement Agreements had been entered into under duress and later argued that Nua and FSM had fraudulently conspired to award works to Nua and devised Settlement Agreements which constituted vast overpayments to Nua and Silk.

#### The Settlement Agreements

Mr Brady’s primary case was that the Settlement Agreements were so disadvantageous to him that they warranted an explanation. As FSM had signed the Settlement Agreements on Mr Brady’s behalf and he was not directly involved in the process, this allegedly indicated something suspicious having occurred. Namely, there was dishonesty and improper collusion between Mr Singh and FSM.

In respect of allegations of fraud, the court confirmed that the standard of proof remains the civil standard of the balance of probabilities but that the court will require cogent evidence commensurate with the seriousness of the conduct alleged. The court concluded that although the Settlement Agreements required an explanation because they were so poorly negotiated, there was nothing to suggest impropriety on FSM’s part. Although FSM allowed the Settlement Agreements to include significant claims for loss of profit from Nua, these claims had been isolated in the final accounts and specific attention had been drawn to them. Accordingly, it did not make sense that FSM had included them as part of a fraud.

As to the claims of undue influence, the court held that Mr Brady had to demonstrate that:

## Construction Law Update

- i. the claimants had the capacity to influence him;
- ii. that influence was exercised;
- iii. the influence was undue; and
- iv. it brought about the transaction in question.

*not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.*

© Hawkswell Kilvington Limited 2019

Further, Mr Brady had to prove that the influence had been exercised within a relationship of trust and confidence. However, the court was not persuaded that Mr Singh had any influence over Mr Brady. In any case, Mr Brady took his own decisions and had acted on FSM's advice. Although the Settlement Agreements were executed in circumstances where the parties had unequal bargaining power, that did not amount to undue influence. The court found that this argument was simply an alternative attempt to allege fraudulent conspiracy.

### The Silk Agreement

The court found that the Silk Agreement had been entered into by FSM on Mr Brady's behalf with his actual authority and that, for the same reasons as above, no undue influence had been exerted on him.

Accordingly, the court held that the settlements agreed by FSM with both Nua and Silk were enforceable, and the Claimant Companies were entitled to be paid the sums set out under them.

### Analysis

This decision builds on existing case law affirming the strict interpretation of the requirements of fraud, duress and undue influence. In particular, the factual circumstances surrounding an agreement need to justify a finding that it came into being with significant impropriety. The evidential burden is necessarily high and the TCC, in this case, has reaffirmed existing principles that unequal party bargaining power and perceived unfairness on the face of the agreement will not, without hard evidence and justification, undermine the enforceability of the agreement and the parties' obligations within.

*This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should*