

# Fraud in Applications for Payment



*We have all experienced applications for payment wherein the contractor has been overly optimistic, whether it be in relation to valuations attached to variations or in the percentages of work completed on site. The Contract Administrator balances these with a more pessimistic view and adjusts accordingly. Even then, at times an adjudicator needs to be used to find the reality of the situation.*

*But what happens when a contractor goes beyond being optimistic? When does it become fraud, and what are the consequences?*

## **What is fraud?**

As a starting point, we must be clear on what fraud actually is. Fraud is where:

- (a) A representation of fact is made by one party in order to make a gain or cause a loss to another; and
- (b) The person making the representation either:
  - (i) Knew that the representation was untrue or misleading; or
  - (ii) Was reckless as to whether it was untrue or misleading.

## **What are some examples of fraud?**

In light of the above, let's discuss some examples with reference to a builder who makes a claim in relation to a variation to increase the size of a window opening.

In the first scenario, the builder doesn't check how much time it took, but somehow comes up with a figure of £300. The builder does not claim that the window cost a certain amount or that it took a certain amount of time to do, all he is doing is claiming that he believes the work was worth £300. In this scenario the builder is not making any representation of fact and so this would not be fraud.

Now imagine that the application the builder submits looks like the below:

Bricklayer 10 hours @ £25 per hour	£250
Plus overheads @ 20%	£50
Total	£300

What if the builder looks at the timesheet from his bricklayers and sees it was three hours work, but claims for 10 hours anyway?

In this scenario, the builder is representing that it took 10 hours, even though he knows it only took three. That is fraud.

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However, what if the builder, while claiming for 10 hours, had never looked at the timesheet? In this case, the builder does not knowingly make a false statement, but is he reckless by not checking the timesheet? Some would say yes, in which case it is fraud. Some would say no, in which case it is not fraud.

Lastly, would the situation be any different if there were no timesheets? Would the builder have to make it clear that he cannot know for sure how long the task took but believes 10 hours is about right?

### *Is fraud a black and white issue?*

Hopefully you can see that, although in some cases it is clear that fraud has taken place, in others it is not clear at all. Akenhead J said the following in *SG South Limited v King's Head Cirencester LLP & Anor* [2009] EWHC 2645 (TCC) ("*SG South v King's Head Cirencester*"):

*... courts need to be aware and take into account what goes on construction sites up and down the country. On numerous occasions, contractors and subcontractors and even consultants will submit bills or invoices which are or are believed by the recipient to overstate the entitlement. Whilst there are some 'cowboy' and fraudulent builders who prey on the public, it will only rarely be the case that one can presume fraud to have taken place where an invoice or bill is overstated. The claiming party may believe that it is entitled to what it is claiming; there may be a simple and honest mistake in the formulation of the claim; or the claim may be based on a speculative but arguable point of law or construction of the contract. In none of these cases can it be said that there was fraud on the part of the claiming party.*

It is a serious business to allege fraud, and for that reason solicitors and barristers are not permitted to make such cases in pleadings unless there is a *prima facie* case made out. That said, it is certain that some in the industry do happily commit fraud when they make applications for payment, and when they do, they should be called out for doing so.

## **Fraud and Dispute Resolution**

Of course, fraud does not just happen in applications for payment. If those applications become a dispute in front of an adjudicator, then the fraudulent statements may be relied on in that adjudication. If so, one of the consequences of making fraudulent claims in an adjudication is that, even if the adjudicator decides in the claimant's favour, the decision may not be enforced.

Akenhead's view, some 10 years ago in *SG South v Kings Head Cirencester*, was that:

*I doubt very much whether there will be any significant number of challenges to enforcement on the basis of fraud.*

He was right for some time, but we are now seeing fraud being used as the basis for a challenge to enforcement more regularly. In *PBS Energo AS v Bester Generacion UK Limited* [2019] EWHC 996 (TCC), the court did not enforce an adjudicator's decision because it determined there were fraudulent statements made to the adjudicator.

However, if you want to raise fraud as a defence to enforcement then, if you could have done so, you must have raised it in the adjudication. It will not apply if you try to keep it up your sleeve for later, as in the case of *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWHC 227 (TCC).

## **Conclusion**

Fraud is not always a completely black and white issue. It could be that those making the claim legitimately believed what they were stating, or it was a genuine mistake. However, as soon as one becomes suspicious it is to your advantage to question it, as, if it is ignored in the first instance, you may not be able to raise it later.

If you have any further questions on fraud, or are experiencing something of this at the moment, you can get in contact with Edward at: [Edward.Quigg@QuiggGolden.com](mailto:Edward.Quigg@QuiggGolden.com)

