Neutral Citation Number: [2020] EWCA Civ 404

Case No: A1/2019/1035

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
THE HONOURABLE MR JUSTICE PEPPERALL
HT-2018- 00382

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2020

Before:

LORD JUSTICE COULSON
LADY JUSTICE ROSE
and
SIR TIMOTHY LLOYD

Between:

PBS ENERGO A.S.	**Appellant /Claimant**
- and -	
BESTER GENERACION UK LIMITED	**Respondent /Defendant**

- -
- -

Dr Timothy Sampson and Mr Ryan Turner (instructed by **Keystone Law**) for the Appellant
Mr Steven Walker QC and Mr Tom Owen (instructed by **Watson Farley & Williams**) for the Respondent

Hearing date: 10th March 2020
- -

APPROVED JUDGMENT

LORD JUSTICE COULSON :

1 INTRODUCTION

1. This is an appeal against the decision of Pepperall J ("the judge") dated 17 April 2019 ([2019] EWHC 996 (TCC)) in which he dismissed the appellant's claim for summary judgment in the sum of £1.7 million odd, together with interest. The claim had been made to enforce the decision of an adjudicator, Mr Douglas Judkins, dated 7 December 2018. The judge's order was, therefore, a rare example of a TCC judge refusing to enforce the decision of the adjudicator.

2. The judge refused to enforce the adjudicator's decision because he found that the respondent could properly argue that the adjudicator's decision had been procured by fraud. Although permission to appeal was granted to the appellant on two limited grounds only, this appeal therefore provides a further opportunity, following the decision in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWCA Civ 2695, to address the interface between the 'pay now, argue later' philosophy inherent in construction adjudication, and allegations of fraud raised on enforcement applications. *Gosvenor* was a case where the allegations of fraud could and should have been raised in the underlying adjudication; this is a case where, on the judge's findings, that would not have been possible.

3. A further relevant matter concerns the final resolution of the disputes between the parties. Mr Judkins' decision was properly based on an earlier adjudicator's decision that the appellant had been entitled to terminate the relevant sub-contract. In a recent TCC judgment concerned with all the disputes between the appellant and the respondent, Cockerill J held that the appellant had *not* been entitled to terminate and that the respondent had lawfully terminated the sub-contract. As Dr Sampson accepted on behalf of the appellant, that gives rise to a separate ground supporting the judge's order, refusing to enforce the decision of Mr Judkins. In one sense, therefore, this appeal was principally about costs.

4. I set out the factual background in Section 2 below. I summarise the judge's judgment in Section 3. I summarise the law relating to adjudication and fraud in Section 4. Thereafter, in Section 5, I identify the two particular Grounds of Appeal for which permission was granted and then, in Sections 6 and 7, I address each ground in turn. I deal with the effect of the judgment of Cockerill J in Section 8. There is a short summary of my Conclusions in Section 9.

2 THE FACTUAL BACKGROUND

5. By a main contract dated 29 April 2016, the respondent was engaged by Equitix ESI CHP Wrexham Limited to design and build a biomass-fired energy-generating plant in Wrexham. The following month, on 10 May 2016, the respondent engaged the appellant to act as sub-contractor in respect of the engineering, procurement, construction and commissioning of the plant. The sub-contract price was £14,230,000 plus VAT.

6. Within a year or so, the respondent and appellant had fallen out such that, on 14 June 2017, the appellant confirmed its purported termination of the sub-contract. In consequence, Equitix called on the performance security provided by the respondent

under the main contract, which then triggered similar guarantees provided by the appellant under the sub-contract in the sum of £2.7 million. Eventually, Equitix gave notice and subsequently terminated the main contract with the respondent, and the subsequent dispute involved an adjudication and then enforcement proceedings in the TCC (see *Equitix ESI CHP (Wrexham) Ltd v Bester UK Ltd* [2018] EWHC 177 (TCC)).

7. There have been two separate strands to the sub-contract disputes between the appellant and the respondent. First, there were two adjudications. In the first adjudication, conducted by Mr Simon Tolson, the parties argued about the appellant's entitlement to terminate the sub-contract. By a decision dated 23 January 2018, Mr Tolson decided that the appellant had validly terminated the sub-contract. Although he concluded that the respondent had to repay the performance security of £2.7 million, Mr Tolson did not otherwise deal with quantum.

8. On 5 November 2018, the appellant began a second adjudication seeking to quantify and recover their losses arising from the termination. The second adjudicator, Mr Judkins, had to calculate the value of the work which the appellant had carried out prior to the termination and then, having allowed for the sums previously paid to the appellant, to work out the respondent's net liability to the appellant. He calculated that net liability in the sum of £1,701,287.22. That was the subject of his adjudication decision dated 7 December 2018 which the appellant was seeking to enforce before the judge.

9. The second, parallel set of proceedings began in the TCC on 14 November 2017 when the appellant issued proceedings claiming loss and damage due to its termination of the sub-contract. The respondent counterclaimed in those proceedings, maintaining its contention that the appellant wrongfully terminated the sub-contract. At the time of the hearing before the judge, the TCC action was due for trial in July 2019. That trial duly went ahead before Cockerill J and, following final submissions at the end of October, her detailed judgment was handed down on 7 February 2020 ([2020] EWHC 223 (TCC)). Contrary to the decisions in the adjudications, she found for the respondent on all issues.

3 THE JUDGMENT OF PEPPERALL J

10. At the hearing of the appellant's summary judgment application, enforcement of the adjudicator's award was resisted on the ground that the respondent had a reasonably arguable case of fraud. That arose in the following way.

11. In the adjudication, the respondent had argued that the appellant was obliged to mitigate its loss by selling on or using elsewhere the large bespoke items of plant which it had manufactured for the Wrexham facility. In paragraph 2.90 of his decision, Mr Judkins disagreed. He said that it was the respondent who had caused the appellant to manufacture the plant items and, he said, that the evidence showed that those items of plant "are now stored at [the appellant's] factories in the Czech Republic. When the relevant proportion of the Contract Price has been fully paid over to [the appellant] the plant belongs to the respondent which is responsible for collecting and disposing of the plant as it sees fit."

12. However, by the time of the enforcement hearing, the work done by the respondent's legal representatives on the large volume of documents disclosed in the TCC proceedings showed that the evidence relied on by Mr Judkins in paragraph 2.90 of his decision was arguably untrue. The respondent contended that certain large items of plant, which formed a crucial part of Mr Judkins' valuation of the sub-contract work completed at the time of the termination, had been sold to third parties or otherwise disposed of. Accordingly, they argued that these large items of plant were not stored to the respondent's order and would not be available to the respondent upon payment of the sums found to be due.

13. The judge identified the issues of fraud at [22] - [26] of his judgment. He identified the relevant representations made by the appellant in its evidence at [31]. He then went on to deal, item by item, with the alleged falsity of those representations. Thus:

    a) In respect of the water-cooled grate, he found that it was arguable that the grate had been sold by the time of the relevant witness statement in the adjudication (which represented that the grate was in the possession of the appellant) and that each of the appellant's relevant representations in respect of the grate were arguably false.

    b) In respect of the flue gas cleaning equipment, the judge concluded at [40] that it was properly arguable that, contrary to the representations made to Mr Judkins, the appellant had neither paid for nor obtained title to the entire flue gas cleaning equipment and had never held the entire flue gas cleaning equipment to the respondent's order.

    c) In respect of the selective non-catalytic reduction equipment ("SNCR"), the judge found at [46] that it was properly arguable that, contrary to the representations made to Mr Judkins, none of the SNCR was now available to the respondent.

    d) In respect of the equipment report, the evidence in the summary judgment proceedings demonstrated that the equipment available for handover was not the same as had been stated by the appellant in the adjudication. As the judge said at [49], the subsequent acceptance of discrepancies by the appellant was "not good enough". They sought summary judgment, so it was incumbent upon them to explain any discrepancy openly and fully. He found that they had not done so and that he was driven to the conclusion that the appellant would not have been making any concessions, but for the diligent analysis of the appellant's disclosure undertaken by the respondent's legal representatives.

14. The judge then dealt with the appellant's knowledge of the falsity of the representations and concluded at [52] that it was properly arguable that the appellant had made false representations to the adjudicator knowing them to be false, alternatively without belief in their truth or, at the very least, recklessly. Accordingly, the judge found that there was an arguable case of fraud.

15. The judge concluded at [56] that the alleged false representations were intended to and did influence Mr Judkins in rejecting the respondent's argument as to mitigation/credit (paragraph 11 above) and that the appellant thereby obtained a material advantage in the adjudication proceedings. He held that, in the

circumstances, the respondent had an arguable case in fraud and that, in consequence, it was inappropriate to grant the appellant summary judgment.

4 THE GENERAL LAW: ADJUDICATION AND FRAUD

16. Before coming to the Grounds of Appeal themselves, it is necessary to set out the general law in this area, not because – by the time of the appeal - it was controversial, but because it informs the discussion of the two Grounds of Appeal now raised by the appellant.

17. Compulsory adjudication in the construction industry was introduced by the Housing Grants (Construction and Regeneration) Act 1996 ("the 1996 Act"). The classic statement of the purpose of the 1996 Act is found in the judgment of Chadwick LJ in *Carrillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358; [2006] BLR 15 when he said that the underlying objective "requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided is not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator" [85]. He went on to say at [86] that "the need to have the 'right' answer has been subordinated to the need to have an answer quickly".

18. The current approach to the interface between allegations of fraud and the enforcement of the adjudicator's decision can be traced back to the decision in *S G South Ltd v Kingshead Cirencester LLP* [2009] EWHC 2645; [2010] BLR 47. Akenhead J formulated a number of propositions to be applied when allegations of fraud arose on adjudication enforcement:

> "20 Some basic propositions can properly be formulated in the context albeit only of adjudication decision enforcements:
>
> (a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.
>
> (b) If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgement, it must be supported by clear and unambiguous evidence and argument.
>
> (c) A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former.
>
> (d) Addressing this latter case, one needs to differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it. Examples of the first category are where it is later

> discovered that the certificate upon which an adjudication decision is based is discovered to have been issued by a certifier who has been bribed or by a certifier who has been fraudulently misled by the contractor into issuing the certificate by a fraudulent valuation. Examples of the second category are fraud on another contract or cross claims arising on the contract in question which can only be raised by way of set off or cross claim. Whilst matters in the first category can be raised, generally those in the second category should not be. The logic of this is that it is the policy of the 1996 Act that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims; put another way, enforcement should not be used to facilitate fraud; fraud which does not impact on the claim made upon which the decision was based should not generally be deployed to prevent enforcement."

19. This approach was subsequently followed by Ramsey J in *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC); [2010] BLR 377 and expressly approved by Jackson LJ in this court in *Speymill v Baskind* [2010] EWCA Civ 120.

20. All of the cases noted above were situations in which allegations of fraud were expressly raised in the adjudication itself. The issue in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWHC 227 (TCC); [2018] BLR 353 concerned allegations of fraudulent invoicing which had not been raised in the adjudication, but which Fraser J held could and should have been raised there. Applying the principles in *S G South* and *Speymill*, he gave summary judgment in favour of the claimant. The appeal against Fraser J's decision was dismissed: see [2018] EWCA Civ 2695.

21. Thus, where allegations of fraud were made or should have been made in the adjudication, those allegations were not permitted to prevent the enforcement of the adjudicator's decision. In the present case, the judge was very alive to that:

> "20 In each of *SG South*, *Gosvenor* and *Speymill*, the question of fraud was in issue in the adjudication. In the first two cases, it was alleged that the contractor had fraudulently overcharged for work done. Both *SG_South* and *Speymill* involved allegations of theft. Where - as in these cases - the alleged fraud has been adjudicated upon, then, as Akenhead J made clear in *SG South*, the adjudicator's decision should without more be enforced. So too, an adjudicator's decision should usually be enforced where the defendant failed to take an allegation of fraud which should reasonably have been taken before the adjudicator. There is, however, an important distinction between cases in which the fraud was, or should have been, put in issue in the adjudication and cases in which the adjudication decision was itself procured through fraud that was reasonably discovered after the adjudication was over.
>
> 21. The statutory policy of enforcing the temporary finality of an adjudication decision is important. As Fraser J rightly observed, the court must be robust not to allow such policy to be undermined simply by the assertion of fraud. In my judgment, such policy consideration must, however, yield to the well-established principle that the court will not allow its procedures to be used as a vehicle to facilitate fraud. Where, exceptionally, it is properly arguable on

> credible evidence that the adjudication decision was itself procured by a fraud that was reasonably discovered after the adjudication, the court is unlikely to grant summary judgment. I say unlikely rather than never since it is possible to conceive of a case in which the claimant might be able to establish that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial even without relying on the impugned adjudication."

22. Prior to the present case, the only example of an adjudication decision which had arguably been procured by fraud, and/or where the allegations could not have been made prior to the enforcement hearing, was *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC) where enforcement was refused.

23. Accordingly, I would identify the following principles as to enforcement where there are allegations of fraud:

a) If the allegations of fraud were made in the adjudication then they were considered (or will be deemed to have been considered) by the adjudicator in reaching his decision, and cannot subsequently amount to a reason not to enforce the decision: see *S G South, GPS Marine,* and *Speymill.*

b) The same principle applies if the allegations of fraud were not made in the adjudication but could and should have been made there: see *Gosvenor.*

c) If the adjudicator's decision was arguably procured by fraud (such as in *Eurocom)* or where the evidence on which the adjudicator relied is shown to be both material and arguably fraudulent (as here) then, on the assumption that the allegations of fraud could not have been raised in the adjudication itself, such allegations can be a proper ground for resisting enforcement.

5. THE GROUNDS OF APPEAL

24. The appellant originally sought permission to appeal on four Grounds. They were:

a) Ground 1: The judge erred in concluding that the allegations of fraud were relevant to the adjudicator's decision;

b) Ground 2: The allegations of fraud could/should have been raised in the adjudication:

c) Ground 3: The judge should have found that, because the respondent had not filed a defence alleging fraud, the allegations of fraud were not open to the respondent:

d) Ground 4: The judge had failed to distinguish between granting summary judgment and enforcing judgment. He ought to have granted summary judgment, even if he had then stayed some or all of that judgment.

25. Permission to appeal on Grounds 1 and 2 was refused. As to Ground 1, the judge had explained at [53] - [56] that the false representations were arguably intended to and had influenced the adjudicator's decision. In my view, that link can be seen most clearly in paragraph 2.90 of Mr Judkins' decision, where he rejected the mitigation

argument on the basis that these large bespoke items of plant, once they had been paid for, would belong to the respondent and were therefore of potential value to the respondent. The findings as to intention and the influence upon the adjudicator were conclusions on the evidence to which the judge was entitled to come and could not be matters for an appeal.

26. As to Ground 2, the judge found on the evidence that the allegations of fraud could not have been discovered during the adjudication. He addressed the point head-on at paragraphs [57] - [60] of his judgment. He pointed out that the chain of inquiry as to what had actually happened to the items of plant, and how this was arguably contrary to what the appellant had said in its evidence in the adjudication, arose out of the 57,000 documents that had been disclosed in the TCC proceedings, many of which were disclosed without an English translation. By the time the review of that documentation began on 5 December 2018, the adjudication in front of Mr Judkins was almost over. In addition, I note that none of the evidence relied on by the respondent (as to how and why these allegations of fraud could not have been raised until enforcement) was challenged by the appellant at the enforcement hearing. It was therefore unsurprising that at [60] the judge concluded that the respondent "could not reasonably have been expected to have argued its fraud allegation in the adjudication." For these reasons, permission to appeal on Ground 2 was also refused.

27. The refusal of permission to appeal on Grounds 1 and 2 is important, because it provides the backdrop against which Grounds 3 and 4 fall to be considered. This is a case where it is at least arguable that the adjudicator's decision was procured by fraud, which allegations of fraud could not have been raised in the adjudication itself. In accordance with the principles noted in paragraph 23 above, that was sufficient to justify the judge's refusal to enforce the adjudicator's decision, subject only to Grounds 3 and 4.

28. Ground 3 raises a purely procedural issue. The appellant maintains that the judge had been wrong even to entertain the allegations of fraud at the enforcement hearing because those allegations had not been pleaded. There is a suggestion that, in dismissing this argument, the judge's conclusion was contrary to the reasoning of Fraser J in *Gosvenor*. Ground 4 is concerned with a stay of execution. I had originally thought that Ground 4 proceeded on the basis that if, contrary to Ground 3, the judge had been entitled to consider the allegations of fraud at all, this should not have prevented him from entering summary judgment in the appellant's favour but, as per *Gosvenor*, should have led to some kind of stay of execution. However, Dr Sampson maintained that Ground 4 arose even if he was right about Ground 3, but the court remained troubled about the fraud allegations.

6. GROUND 3: THE ABSENCE OF A PLEADED DEFENCE

29. To support the proper operation of the 1996 Act, the TCC created its own speedy adjudication enforcement procedure. A claimant seeking to enforce the decision of an adjudicator can make an application for summary judgment at the same time as serving the claim form. The process is described in paragraph 9.2.4 of the 2nd edition of the TCC guide as follows:

> "The claim form should be accompanied by an application notice that sets out the procedural directions that are sought. Commonly, the claimant's

> application will seek an abridgement of time for the various procedural steps, and summary judgment under CPR Part 24. The claim form and the application should be accompanied by a witness statement or statements setting out the evidence relied on in support of both the adjudication enforcement claim and the associated procedural application. This evidence should ordinarily include a copy of the Notice of Intention to Refer and the adjudicator's decision. Further pleadings in the adjudication may be required where questions of the adjudicator's jurisdiction are being raised."

30. The CPR provides that, where there is an application for summary judgment (such as the application envisaged by paragraph 9.2.4 of the TCC Guide), no pleaded defence is necessary. Rule 24.4(2) states:

> "If a claimant applies for summary judgment before a defendant against whom the application is made has filed a defence, that defendant need not file a defence before the hearing."

On the face of it, therefore, r.24.4(2) would appear to be a complete answer to the suggestion that a defendant in adjudication enforcement proceedings is required to plead a defence alleging fraud before those allegations can be considered at the summary judgment/enforcement hearing.

31. In answer to that, Dr Sampson argued that, merely by utilising the accelerated procedure, the appellant in the present case had not agreed to or accepted the absence of a pleaded defence, and had certainly not waived its entitlement to have detailed allegations of fraud properly pleaded. In respect of that general entitlement, Dr Sampson relied on, amongst others, the decisions in *Jonesco v Beard* [1930] AC 298 and the statement of Lord Hope in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, at paragraph [51], that "the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis of the allegation".

32. Speaking for myself, I was not greatly assisted by these unexceptionable statements of general principle, which in *Three Rivers* went to a claimant's obligation to plead proper allegations of fraud that would survive an application to strike out. What the appellant needed in the present case was authority for the proposition that a defendant faced with a summary judgment application was still required to plead a defence of fraud, notwithstanding the clear words of r.24.4(2). It was common ground that there were no authorities to that effect noted in the White Book and neither counsel had been able to find any.

33. It does not appear that this pleading point has ever arisen in the adjudication enforcement cases. In some, like *GPS Marine*, there was a pleaded defence; in others, such as *Grandlane Developments Ltd v Skymist Holdings Ltd* [2019] EWHC 747 (TCC), where there were detailed allegations of fraud which were ultimately rejected by Jefford J, there was no pleaded defence. It appears that, prior to the present case, nobody has ascribed any importance to the pleading point, although Dr Sampson relied on the first instance decision in *Gosvenor*, where, at paragraph 9 of his judgment, Fraser J referred to the fact that there was a pleaded defence in that case and went on to say:

"It was entirely proper of *Aygun* to have served a defence, as indeed fraud can only be alleged if specifically pleaded."

At paragraph 14 of my judgment on appeal, I identified the service of the pleaded defence together with 3 witness statements but (since the point was not in issue) I made no comment as to whether or not the service of such a defence was a condition precedent to the ability to raise the allegations of fraud.

34. I have concluded that, although a defendant seeking to resist the summary enforcement of an adjudicator's decision by raising an allegation of fraud may be well-advised to plead a defence (as happened in *Gosvenor*), the pleading and service of such a defence is not a condition precedent which has to be fulfilled before the defendant can rely on such an allegation. My reasons are as follows.

35. A claimant who uses the TCC accelerated procedure does so because it wishes to enforce the adjudicator's decision as swiftly as possible. It is a procedure which is expressly designed to assist claimants such as the appellant. But claimants are not obliged to use that procedure: that remains a matter of choice. There will always be a residual risk to any claimant seeking to use the accelerated procedure that something may arise on enforcement which had not arisen in the adjudication. The only way to eliminate that risk is to wait until the defendant had pleaded a defence and then seek summary judgment. In this case, it was the appellant's decision not to wait.

36. The TCC accelerated procedure was plainly not intended to qualify or modify r.24(2) and does not purport to do so. On the contrary, it presupposes that this procedural step - namely the serving and filing of a defence - will not take place before the hearing of the summary judgment application. The accelerated procedure is therefore entirely consistent with the CPR. It would be illogical if adjudication enforcement, where speed is of the essence, mandated an additional procedural step which the CPR generally does not require.

37. In summary, therefore, in accordance with r.24(2), there was no requirement for the respondent to provide a pleaded defence prior to the hearing of the summary judgment application. There was therefore no mandatory requirement for the respondent to plead the allegations of fraud upon which they relied to resist enforcement.

38. Further and in any event, I do not consider that this conclusion prejudices the appellant in this case or claimants generally. Dr Sampson endeavoured to persuade us that the absence of a pleading ran the risk that the fraud allegations would be unclear or unfocussed, but that was plainly not the case here. No-one has suggested that either the parties or the judge were in any doubt as to the complaints being made. In addition, in so far as the requirement to plead fraud provides an important general safeguard (because of the obligation not to plead a case of fraud without proper evidential foundation), precisely the same is true for allegations of fraud made in a witness statement or in the submissions of counsel in open court. It was not controversial that IB5.7 and IB5.8 of the Solicitors Regulation Authority's Code of Conduct (version 21) requires that fraud cannot be alleged unless the allegation goes to a matter in issue which is material to the client's case and is "supported by reasonable grounds". Similarly, paragraph rC9 of the Bar Standards Board's Code of Conduct (9th edition) says that a barrister cannot draft a document containing an

allegation of fraud without both clear instructions and "reasonably credible material which establishes an arguable case of fraud". That paragraph plainly extends to skeleton arguments. In this way, the allegations of fraud in the present case, made both in the witness statements and Mr Walker QC's skeleton argument before the judge, were in accordance with the applicable Codes of Conduct.

39. For all those reasons, I reject Ground 3.

7. GROUND 4: SUMMARY JUDGMENT AND STAYS OF EXECUTION

40. Ground 4 asserts that the judge failed properly to distinguish between refusing summary judgment on the one hand, and granting summary judgment and then staying its execution, on the other. The suggestion is that the judge should have granted summary judgment in this case, and then, if he had been concerned about the allegations of fraud, he could have stayed its execution, in whole or in part.

41. On the basis that Ground 3 has failed, Dr Sampson accepted that Ground 4 must also fall away. I am in no doubt that, given the findings of the judge (noted at paragraph 25 above) in which he concluded that the fraud had had a material effect on the outcome of the adjudication, he was quite entitled to refuse the application for summary judgment in its entirety. On the basis that fraud generally unravels everything then, just as had happened in *Eurocom*, it was impossible to say that this was a case in which summary judgment should be granted. It was not suggested to the judge that Mr Judkins' decision was severable, or that it was possible to enforce at least a part of his decision, regardless of the allegations of fraud, as per *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC); [2008] BLR 250. On the contrary, as the judge pointed out at [71], severance was not available in this case and nobody suggested otherwise.

42. At the appeal hearing, Dr Sampson argued that, if he had been successful on Ground 3, but the court remained concerned about the fraud allegations, it was open to the judge to give summary judgment in respect of a part of the £1.7 million, and to stay the judgment for the remainder. However, it seems to me that that submission was not only academic, but it was not even open to the appellant, because the argument was not raised before the judge. In addition, strictly speaking, if the appellant had been successful on Ground 3, then it would have been for the respondent to raise an issue as to a stay, not the appellant. For these reasons, it is unnecessary to say any more about Ground 4.

8. THE EFFECT OF COCKERILL J'S JUDGMENT

43. By this appeal, the appellant was seeking to overturn the judge's order refusing to enforce the decision of Mr Judkins. That decision was, in turn, dictated by the earlier decision of Mr Tolson to the effect that the appellant had been justified in terminating the sub-contract.

44. The issue as to the validity or otherwise of the termination has now been finally determined in favour of the respondent as a result of the judgment of Cockerill J. As a result, even putting the issues of fraud to one side, it would not now be appropriate to enforce the decision of Mr Judkins in any event. The philosophy behind the adjudication process is the production of a quick decision which is temporarily binding until the underlying issues are either agreed, or the subject of final

determination by the court or an arbitrator. In the present case, the underlying issues have been finally determined by Cockerill J. Her judgment therefore supersedes the decisions of both adjudicators. It would be wrong in principle now to enforce Mr Judkins' decision, even if the appellant had been successful on Grounds 3 and 4.

9. CONCLUSIONS

45. For the reasons set out above, I would dismiss this appeal. Although a defendant to an adjudication enforcement claim may be well-advised to provide a pleaded defence setting out any allegations of fraud, there is no mandatory requirement that the defendant do so if the claimant is seeking summary judgment. CPR 24.4(2) provides to the contrary. Moreover, in a case where substantial allegations of fraud are found to be arguable, the right course will usually be the one taken by the judge, namely to refuse summary judgment. In such a case, no question of a stay of execution then arises. Further and in any event, the final determination of the issues by Cockerill J in favour of the respondent provides a separate, stand-alone reason why the adjudicator's decision cannot now be enforced.

46. For those reasons, if my Lady and my Lord agree, I would dismiss this appeal.

LADY JUSTICE ROSE:

47. I agree.

SIR TIMOTHY LLOYD:

48. I also agree.