Neutral Citation Number: [2009] EWHC 2645 (TCC)

Case No: HT-09-367

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 29th October 2009

Before :

THE HONOURABLE MR JUSTICE AKENHEAD

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Between:

SG SOUTH LIMITED **Cla**

- **and –**

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(1) KING'S HEAD CIRENCESTER LLP

(2) CORN HALL ARCADE LIMITED **Defe**

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Thomas Lazur (instructed by **BPE Solicitors**) for the **Claimant**

John Virgo (instructed by **Fletcher & Co**) for the **Defendants**

Hearing date: 21 October 2009

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JUDGMENT

Mr Justice Akenhead:

Introduction

1.
By this claim, the Claimant, SG South Ltd, seeks to enforce two adjudicators' decisions made against the Defendants pursuant to a construction contract. Neither decision is challenged on jurisdictional or natural justice grounds. The Defendants however seek to avoid or defer enforcement on the grounds that the final account process will, they argue, be complete soon and that that process will establish that there is a net balance due to them. Alternatively, they seek a stay of execution on the grounds that the Claimant is, or is nearly, insolvent. Issues are also raised by the Defendants as to how the Court should proceed if it is satisfied that there are arguable or credible issues of fraud on behalf of the Claimant.

The background

2.

The Claimant was incorporated in 2007 and began trading in about May 2007; it is a building contractor. Its owner, Mr South, had previously been in the building business and had come to the notice of the Defendants or those advising them. The Defendants are, perhaps amongst other things, commercial developers who owned a site in Cirencester, Gloucestershire.

3.
There is no issue that the Defendants employed of the Claimant in connection with the construction, conversion, restoration, refurbishments and fit out of the King's Head and Corn Hall sites; the work involved the creation of a retail shopping arcade and hotel. The contract, which was formally entered into in late 2007, was an amended JCT Standard Form of Management Contract 1998 Edition. This involved payment on a Prime Cost basis, which in broad terms involves the payments to the contractor of costs reasonably and properly incurred in connection with the works together with a management fee; the Contract Cost Plan indicated an expenditure of £4,276, 848. The contractual Date the Completion was 23 December 2008, subject to any entitlement to extension of time. The payment regime was by way of the certificates issued monthly by the Contract Administrator (appointed by the Defendants). Clause 4.3.1 provided 14 days as the final date for payment of any amount so certified; Clause 4.3.3 required the Employer within five days after the issue of any Interim Certificate to give written notice to the Contractor specifying the amount proposed to be paid in respect of the certified amount; Clause 4.3.4 require the Employer no later than five days before the final date for payment on any Certificate to give written notice with particularisation of any amounts proposed to be withheld or deducted. Finally, Clause 4.3.5 required the Employer pay the sum certified if no such notices had been given.

4.
Each party was entitled to refer disputes to adjudication (Article 8). Clause 9A set out procedures to be followed. Clause 9 A .7 stated:

".1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration…

.2 Parties shall, without prejudice to their own rights under the Contract, comply with the decisions of the Adjudicator; and the Employer and the Management Contractor shall ensure that the decisions of the Adjudicator are given effect.

.3 if either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending a final determination of the referred dispute or difference…"

The parties agreed upon arbitration as the forum for final dispute resolution.

5.
It seems that, at an early stage, given the fact that the Claimant had only recently been incorporated and had little or no trading record, some accommodation was reached between the parties whereby Works Contractors engaged to carry out various works on the project were paid and indeed employed direct by the Defendants.

6.
A number of serious disputes between the parties have arisen at least in 2009 and possibly before. That led to a purported determination of the Claimant's employment under the Management Contract

in May 2009. I am told by Counsel for the Defendants that the works are being completed by others and that they are nearing completion.

The two adjudications

7.
On 30 April 2009, the Claimant issued a Notice of Adjudication in relation to the alleged non-payment of Interim Certificate No 8 which had been issued on 5 September 2008. This led to the First Adjudication in which a Mr Rudd was the adjudicator. The major arguments related to the extent to which the Claimant had in fact been paid the certified sum. The First Adjudicator issued his decision on 25 June 2009. In essence, he found that the whole net sum certified had in fact been paid by one route or another. He found that, of the gross sum certified £1,298,953, £641,939.12 had been paid direct to Works Contractors and £859,443.60 had been paid to the Claimant. There was therefore a negative balance of £202,429.72. However, he did decide that some interest was due to the Claimant in effect because some of the payments were made late; £2112.67 was due for this from the Defendants and payable within seven days. However so far as his fees were concerned, he ordered that the Claimant should pay the sum of £6695.15. The Defendants did not pay what they had been directed to pay within seven days or at all. The Claimant seems to have paid about half of the First Adjudicators' fees and has more recently paid the balance.

8.
The Second Adjudication was initiated by the Claimant's Notice of Adjudication dated 22 July 2009 and related to the non-payment of Interim Certificate No 14 issued on 20 March 2009. The final date for payment was 3 April 2009 and no Clause 4.3.4 or 4.3.5 notices were served in time or at all by the Defendants. The Second Adjudicator was Mr Simpson. Following the service of the Referral Notice by the Claimant on 29 July 2009, the Defendants served their Response on 5 August 2009. In its Summary of Conclusions at Paragraph 4a, the Defendants asserted as follows:

"The Employer has recently become aware of widespread fraud instigated and orchestrated by South, the Referring Party, which draws into question if it is possible for the adjudication to continue mindful of The Proceeds of Crime Act"

At Paragraphs 59 to 86, in a chapter headed "Fraud", the Defendants complained that the Claimant had illegally removed and disposed of steel, fixtures, fittings and equipment from the existing buildings and removed some stone quoins from a barn; and said that it had routinely altered plant hire invoices, "this deception… [is] evaluated to be £87,098". The Defendants in Paragraph 74 indicated that they could not circulate documents about the fraud by reason of the operation, they argued, of the provisions of the Proceeds of Crime Act but they might afford access to the Adjudicator to read the file if he so required.

9.
The Claimant responded to this Response on 7 August 2009 in some detail but broadly to the effect that it was not guilty of fraud and that it was the Defendants and their directors who were trying to deceive the Second Adjudicator.

10.
The Second Adjudicator issued his decision on 19 August 2009. He summarised the Claimant's claim as relating to outstanding payment on Interim Certificate No 14: £968,400.64 gross certified less £831,789.70 paid, leaving £136,610.94 for payment. It was the Claimant's case that payment was due and that, in the absence of notices under Clauses 4.3.4 and 4.3.5, the net sum certified was payable.

The Second Adjudicator at Paragraphs 23 to 34 set out the Defendants' position. He referred to their assertion that they had recently "become aware of widespread fraud instigated and orchestrated by" the Claimants, referring to "a. Charging for things not in the Contract. b. Inflating Works Contractors claims. c. Altering records. d. Disposing of goods belonging to [the Defendants]". Other defences are referred to such as an assertion that more had been paid than the Claimant accepted and various abatements summarised in Paragraph 33 as follows:

"a. Steel disposal

b. FFE disposal

c. Tables and chairs disposal

d. Stone quoins missing

e. Plant overcharging

f. Accommodation charges

g. Security officer/Plant maintenance

h. Dilapidations

i. Clearance of debris

j. Replacement warranties"

11.
The Second Adjudicator set out his views and the decision at Paragraphs 35 to 56. As to the fraud allegations, he said at Paragraph 35:

"Having considered the matter I advised the parties during the course of the reference that I considered that [sic] issue of alleged fraud to be beyond my jurisdiction and a matter for the police and the courts. No authority was offered by [the Defendants] to demonstrate otherwise. The allegations of fraud do not prevent me from deciding the commercial dispute referred to me under the Contract however it will be for the courts to decide whether or not to enforce my decision if fraud is proven before the court."

12.
He found that, on the basis of the First Adjudicator's decision, the sum to be considered as paid was £859,443.70, which thus reduced the Claimant' entitlement. In simple terms, he considered that in the absence of Clause 4.3.4 or 4.3.5 notices "the amount certified is in fact due" (Paragraph 44) and at Paragraph 50 he said:

"I decide that in the absence of payment and withholding notices required by the Contract it is not open to [the Defendants] to resist payment of the certified amounts by way of abatement, cross [claim] or otherwise."

He decided that a net sum of £90,405.38 plus any applicable VAT was due from the Defendants together with interest in the sum of £1634.56 and the sum of £4387.50 plus VAT respect of his fees. This was all payable within five days.

13.

The Defendants have declined to pay out on this decision. Thus it was that the Claimant issued these proceedings to enforce the decisions of the First and Second Adjudicators' decisions.

14.
The Claimant submitted its Final Account on this project on or about 4 August 2009 and it has, relatively recently been reviewed in some detail by the Defendants' Quantity Surveyors, in particular Mr Bristow. Between July and September 2009, the Claimant also submitted a Final Account on another project, the Swan Yard development, respect of which it was engaged by another company in the Defendants' group.

These Proceedings

15.
The Claimant's Claim was issued on 14 September 2009 together with Particulars of Claim which appended the contract and much of the Adjudication documentation referred to above. The Claimant's application for summary judgement is supported by three witness statements from Mr. South dated 7, 16 and 21 October 2009. The Defendants' evidence was contained in five lever arch files and comprised witness statements from Mr Booth (the Managing Partner of the First Defendant and the Managing Director of the Second Defendant), Mr Fletcher (the Defendants' solicitor), Mr Thomas (a project manager retained on the Swan Yard development), Mr Bristow (a quantity surveyor) Ms Riches (a paralegal employed by the Defendants' solicitors) and Ms Jelowicki (a trainee solicitor).

16.
It is accepted that the adjudicators acted within jurisdiction and fairly. However a number of points are deployed by the Defendants:

(a) They assert that they have established a strong prima facie case that the Claimant and in particular Mr South have behaved in a fraudulent way in a number of respects both on this project and the other development to which Mr Thomas speaks.

(b) The Court should not permit itself to be used as a vehicle for a party guilty of such fraudulent behaviour to enforce claims under contracts where it has so behaved.

(c) It is likely, so it is argued, that the parties within a few weeks will be able to finalise an agreement on the Final Account and that will show that the Claimant will owe a substantial sum to the Defendants. Given the timing, it would be inappropriate to allow the Claimant to enforce these decisions.

(d) Finally, a number of circumstances are said to exist, including the above and the actual or impending insolvency of the Claimant, which should lead to a stay of execution on any judgement against the Defendants.

The Law

17.
Subject to issues relating to a stay of execution, it is axiomatic that an adjudicator's decision which requires payment must be honoured and the payer will not be permitted to set off to avoid payment. The JCT Management Contract does not permit set off or deduction; to the contrary, Clause 9 A .7 requires the parties to comply with adjudicators' decisions; one does not comply with an adjudicator's decision which requires payment by not paying. If authority is need for this proposition, one need look

no further, albeit not specifically cited by Counsel, than **Ferson Contractors Ltd v Levolux AT Ltd** [2003] BLR 118 and **William Verry Ltd v London Borough of Camden** [2006] EWHC 761 (TCC).

18.
Before turning to the issue of fraud, I next turn to the question of a stay of execution on the grounds of the poor financial position of the successful claimant. HHJ Coulson QC (as he then was) stated in **Wimbledon Construction Company Ltd v Vago** [2005] EWHC 1086 (TCC) at Paragraph 26:

"…it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

"a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see **AWG**).

d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see **Herschell**).

e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see **Bouygues** and **Rainford House**).

f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see **Herschell**); or

(ii)The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see **Absolute Rentals**)."

This is a fair and proper summary of the practice to be adopted in connection with adjudication enforcements.

19.
So far as fraud is concerned, it is or may be, depending on the facts, a defence in adjudication proceedings as it is in court or arbitration proceedings. There is nothing in the Housing Grants Construction and Regeneration Act 1996 to limit any type of dispute "arising under" the construction contract in question being referred to adjudication (see Section 108). Thus, it might be a defence, for instance, for a defending party to assert that the contract was induced by fraudulent misrepresentation or that the certificate on which the claiming party relies was procured by fraud. It is perhaps more arguable that a claiming party may not be able to refer a claim for the tort of fraud or

deceit to adjudication (depending on the wording of the contractual adjudication clause); it might be arguable that such a claim does not arise “under” the contract as such. I do not have to decide that point, even more so because I have not heard full argument on the point. Obviously it may well properly be a defence to an adjudication claim for work done and materials and plant supplied for the defending party to argue that the work, materials or plant said to have been provided was not in fact provided; part of that defence may be that on the evidence some of the claim is based on forged invoices or on some other criminal or fraudulent behaviour; that may be the “cut and thrust” of some types of construction dispute.

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.

21.
In formulating and applying these propositions, 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; 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. The Court should be astute and cautious on adjudication enforcement applications in assessing pleas of fraud by the party against whom the adjudication decision has been made. I doubt very much whether there will be any significant number of challenges to enforcement on the basis of fraud.

The facts and the evidence

22.
The first argument put forward by the Defendants is that the Final Account on this project can be relatively easily finally negotiated within a matter of weeks and that proper analysis of that Final Account together with the supporting documentation provided by the Claimant will demonstrate that the Claimant has been overpaid by some £320,125. That was based on a detailed analysis carried out by Mr Bristow; this analysis is attached to his 24 page witness statements and runs to some two lever arch files. He has analysed heads of Prime Cost relied upon by the Claimant (Fee, Preliminaries, Subcontract, Plant, Materials, Determination Costs, Student Accommodation, Fee on “Wildmoor Directs”) to which the Claimant had added a 1.9% Fee which produced a total draft final account figure of £1,266,447.88, which after deduction of payments said to have been £831,789.70 left an "Amount Due" of £411,044.33.

23.
For Fee, Preliminaries, Subcontract, Plant, Materials, which on the Claimant’s final account total £860,706.22, he allows £603,501.14. This difference is, I was told by Counsel, made up largely of items for which no invoices had been provided by the Claimant. Mr Bristow then seeks to disallow a number of claims such as the Determination Costs because his clients believe that they were entitled to determine the Claimant’s contractual employment. That is obviously in issue. The determination was, I was told, on the basis of failure to proceed with due diligence and it is likely that the Claimant would argue that it was unjustified. Nothing is allowed for the "Wildmoor Directs" and the claims are "Students Accommodation” is reduced by about 43% to £90,000. No additional Fees are allowed because it is said that they are all covered by the overall Management Fee.

24.
Mr Bristow then introduces what he calls “Dilapidations & Abatement” which in effect include those items raised as abatements or to some extent fraud in the adjudication; a total of some £230,000 is deducted under this heading. There is an issue raised by him to the effect that some £28,000 more has been paid by the Defendants and, after allowing for an apparent arithmetical error (in favour of the Claimant), he then deducts another £24,000 for unpaid adjudication fees and pre-contract payments made to Mr South personally. That leaves the net sum said to be owing by the Claimant to the Defendants of some £320,000.

25.
I have formed a very clear view that there is little or no prospect of the final account being agreed within a few weeks or possibly even at all. The most serious allegations are being made by the Defendants and it is extremely unlikely that the Claimant will accept them. The Claimant is likely to seek to justify those claims for which invoices are said to be missing and assert that the determination was unlawful and that it should be entitled to various costs associated with that. There will doubtless extensive arguments about other matters. The TCC and its judges have substantial experience of how long and complex final account negotiations can be. Whilst I have no wish to be pessimistic, given where the lines are currently drawn, I would be surprised if any substantial measure of agreement was reached within the next 4 to 6 months.

26.
The prospect of bringing the disputes on the final account to arbitration (which is the forum of final resolution) and having them resolved by an arbitrator within less than six months is, unfortunately, fanciful.

27.
I now turn to consider whether or not a proper arguable case on fraud has been raised on the facts. It is of interest that, in his very detailed analysis of the Claimant's Final Account, Mr Bristow does not attempt to quantify the fraud said to have been perpetrated by the Claimant and Mr South. This apparently experienced quantity surveyor does not such suggest or put his observations upon the basis that that there has been fraud. Instead, he makes what might be called relatively common observations on different parts of the account. For instance, he disallows invoices on the grounds that on their face they relate to other contracts; whilst such invoices may be mistakenly included, it is hardly evidence of fraud on the part of the Claimant if the mistake appears on the face of the invoice. Other views are that some invoices and charges appear to be duplicated; again if that is apparent, it is evidence possibly of incompetent and mistaken accounting rather than fraud. He disallows £112,000 for Mr South's time as site manager on the basis, so he argues, that this is covered by the Management Fee; however this claim is made openly by the Claimant and it is properly arguable that the management covered by the Management Fee is different from work actually carried out at site; put another way, if the Claimant had retained a different person to be a full-time site manager, it is eminently arguable that that would be part of the Prime Cost as opposed to being covered by the Management Fee.

28.
Much is made in the Defendants' witness statements about what is said to be the illegal and possibly criminal removal of items from the premises. This is said to account for some £60,000's worth of items. There is no or little doubt that the works involved the demolition and gutting of a number of buildings. The Court has not been provided with any analysis of the contractual documentation, specifications and drawings as to whether or not the Claimant was required to preserve the debris and other items removed during these operations. There is nothing in the contractual documentation provided to the Court which obviously requires the Claimant to do so (save in respect of antiquities and fossils-see Clause 3.22). The position may be complicated by what was required to be agreed with various Works Contractors. Whilst it may be the case that in broad terms fixtures and fittings are the property of the freehold owner, if the freehold owner in effect asks a contractor to remove and dispose of them, I do not begin to see how a contractor can be considered to be fraudulent if it then does that. The mere fact that the Claimant removed these items and sold them does not of itself leads to an inference that he acted dishonestly, fraudulently or even in breach of contract. There is a respectable body of opinion that, in the absence of instructions as to what to do with arisings and debris from a demolition site, it is not necessarily dishonest for Theft Act purposes for the contractor to sell them. The fact that some former employees have provided draft or signed statements to the Defendants (not statements to the Court) which suggest that Mr South may have used language which infers that he believed that he knew that he should not remove or sell some of these items does not get over the hurdle that he may well arguably have been within his contractual rights to do so.

29.
Somewhat different considerations may apply in relation to the quoins which are said to have been removed from the site to a locked barn by the Claimant with the Defendants' knowledge and consent but which are then said to have disappeared from the barn, it being asserted by Mr Booth that it could

only have been the Claimant or Mr South who did it. Apart from a simple denial from Mr South, there is no specific response, although in the Second Adjudication he appears to have said that it was others who had keys to the barn. However, no analysis is done of the contractual requirements as to whether title passed to the Claimant.

30.
Complaint about plant over-charging was raised before the Second Adjudicator and is specifically raised in these proceedings. Much of the complaint, it seems to me, does not raise complaints of fraud. For instance, it is said that small plant was hired when it would have been in the client's best interests to hire or that internal plant hire rates charged by the Claimant were higher than competitors would have charged. The relevant complaints are that some plant records were actually falsified. A Mr Fitzgeorge says in his signed statement (which is not a statement for the Court but was provided to Mr Booth) that he was told in April 2008 by a Mr Huck (who worked for the Claimant) that additional days were being added on to plant records that was not being used on those days. There are two statements from Mr Huck, both unsigned and undated, apparently provided to Mr Booth, which do not address or corroborate this. A Mr Keyte apparently produced an unsigned statement in July 2009 which does not address the issue of falsification of records. If this complaint which relates to fraudulent overcharging for plant is to be treated seriously at this stage, I would expect to have seen signed statements and some analysis of the claims for plant and the alleged reality; there are neither.

31.
It follows that I do not consider that the Defendants have presented a credible case to the Court on the question of the alleged frauds. I will not address the issue as to whether it was improper to raise these matters as fraud. In any event, all these matters were raised by the Defendants in the Second Adjudication. I emphasise that I am not saying that the Defendants do not have an arguable case short of fraud

32.
There is reliance by the Defendants upon alleged fraud by the Claimant and Mr South on the Swan Yard development. There is reliance upon the evidence of Mr Thomas that, on that job, "a vastly inflated Final Account" was submitted. It may or may not be the case that he believes that it is vastly inflated but, without some detailed analysis, it is simply specious to suggest that this in itself implies that it is fraudulent; builders often put in final accounts which exceed by a substantial amount what the Employer and his consultants think is realistic. The only concrete item relied upon is what is said to be a "bogus" (by which is meant forged) invoice from a sub or works contractor on that job (Woodward Projects). Woodward is said to have put in a real invoice dated 6 April 2009 for the sum of £2,500 (exclusive of VAT); it seems that the Claimant initially claimed for this sum. The forged or bogus invoice is very obviously not on Woodward letterhead. The Final Account is said to have claimed that sum plus various others, totalling £9,858.60 plus a claim for £21,600 for "Loss of Profit as order cancelled after start". I do not see that this is a forged invoice: it seems to be on a draft final account pro-forma document of which the author is obviously the Claimant. It would be a very stupid form of fraud given that the Claimant had submitted the smaller claim before. Again, I do not begin to see that a credible case for fraud has been established on the evidence before the Court. Even if it had, it relates to another contract involving a different employer and its utility in this case at this stage is tangential at best.

33.

The final piece of “fraud” specifically asserted in the Defendants’ Counsel’s skeleton argument as having arisen is the Claimant’s claiming for the deployment of plant when it was not being deployed. Whilst I cannot say that there has not been sharp practice by the Claimant, I am unimpressed by the evidence in this regard presented by the Defendants, for the reasons set out above; at best, there is one piece of hearsay evidence for a time in April 2008 which is unsupported by the person who is supposed to have said it. The actual statements provided to Mr Booth from that person, Mr Huck, are unsigned. Mr Bristow, a quantity surveyor, does not on his own account, classify the overcharging as fraudulent. There is on hundreds of jobs argument that plant said to have been deployed on the site or on specific work was not so deployed or that the hire charges claimed are wrong or excessive. There may be many arguments about this which may range from assertion that it was deployed as claimed, that there was a genuine mistake in the records, that even if it was not deployed on the claimed work it was working on other reimbursable work and that it was not working as such but the reason for this is some factor which is the employer’s risk and it has to be paid for by the employer accordingly. There seems to have been a complaint in these proceedings that the Claimant in some way was not permitted to deploy its own plant; that is simply wrong as there is no obvious contractual bar on so doing. Part of the complaint is that the plant was poor and needed maintenance; if that is so, that hardly gives rise to a complaint of fraud. At its highest, the complaint would be one of incompetence.

34.
It follows from the above that a credible case for fraud on any count has not been raised in evidence or argument such that it can be deployed to defeat enforcement. It may be that the Defendants believe that they have been the victims of systematic fraud by a contractor claiming for work not done or who has allegedly misappropriated goods and materials from them but it is clear that there is a history of allegations and cross allegations by these parties and it is certainly unclear as to where fault lies if anywhere. Fraud is a very serious charge to make in civil proceedings of any sort and, whilst of course it is established in a (relatively) few cases, the Court always demands that the allegations are spelt out and are at least on their face supportable by credible evidence. This applies equally if not more in adjudication enforcement proceedings when it would be very easy to “bandy about” fraud allegations to seek to avoid enforcement.

Discussion on fraud

35.
The Defendants simply can not show that the adjudicator’s decisions were procured by fraud. Each adjudicator has been clear as to what he has done. Both decisions were related to allegedly unpaid certificates. There was no issue that the certificates were properly issued by the defendants’ own consultants. One can presume that those consultants actually scrutinised the Claimant’s applications for payment and decided that the certified sums were due. No case has been advanced or even suggested that these certificates were procured by fraud and on well established authority such certificates have to be honoured in the absence of the requisite notices called for by the 1996 Act or the contract in this case. If the Contract Administrator or Quantity Surveyor was misled, I would have expected evidence to be put in to that effect; there is no such evidence.

36.
It is clear that the First Adjudication decision was simply based on the Claimant being unable to prove that it had not been paid albeit to some extent late; it was that lateness which led to the Claimant recovering some interest. The Second Adjudication decision was completely conventional and not obviously wrong: the unpaid certificate was to be honoured because the so-called “abatements” had

not been raised by way of one or other of the requisite notices. It did not matter how good the arguments about the “abatements” were in those circumstances.

37.
In these circumstances, the decisions are enforceable. The decisions are not challenged or indeed challengeable on the grounds of jurisdiction or natural justice. Each adjudicator seems to have done a proper job. There is no sufficient fraud raised and what allegations are raised do not relate to or impact upon the claims allowed by the adjudicators. The Second Adjudicator addressed the “abatements”, which included those now raised by way of allegations of fraud, albeit that he found that they did not give rise to a valid reason for denying payment on the unpaid certificate. There is no authority which permits the Court to defer enforcement because there is a possibility of an imminent resolution of other disputes between the parties which might alter the overall balance between the parties. Even if there was any such allowable practice, the final accounting between the parties has all the hallmarks of taking many months to resolve; the sad probability is that, given the bad blood between the parties and the extent of the differences between the parties, there will be no agreement but most likely an arbitration which will not achieve resolution until well into 2010 if not later. It is quite wrong in principle, having regard to the policy of the 1996 Act to permit, by deferring enforcement, the party which has lost the adjudication to avoid payment for many months by having the very issues unsuccessfully raised by it in the adjudication resolved. There is no effective challenge to the decisions and no grounds upon which to avoid summary judgement.

Discussion on stay of execution

38.
This aspect of the case has been the subject of an almost unseemly late rash of statements and letters to the Court. This resulted in two statements being submitted by the Defendants and one by the Claimant towards the end of the hearing and correspondence about County Court judgements after the hearing was over. I am not going to attribute blame or criticism given that the timetable after the Claimant had served its proceedings was somewhat tight. However, it is incumbent on parties to enforcement proceedings to “get their act” together and I do not consider that either party had done so by the time of the hearing. Fortunately, no adjournment is or was necessary.

39.
Various strands of evidence are relied upon by the Defendants to suggest or assert that the Claimant would be unable to repay any judgement sum in circumstances in which undoubtedly the Defendants has a reasonably arguable case (albeit currently not on fraud on the papers before the Court) that it is in fact owed substantial sums by the Claimant:

(A) The only accounts filed by the Claimant for the year ended 31 May 2008 show a deficit of some £67,000 on its balance sheet albeit that the draft accounts for the year ending 31 May 2009 show a turnover of some £1.6m and profit after tax of some £130,000; the later balance sheet shows a modest £31,065 as the value of assets over liabilities. Cash at the bank is said to be less than £2,000 and there is said to be more than £90,000 in unpaid tax.

(B) Much is made of the fact that the Claimant did not pay the first half of the First Adjudicator’s fee promptly or until recently the second half and that proceedings were commenced by the First Adjudicator against the Defendants after the Claimant indicated to him that it was having difficulties in finding the money to pay. The total bill was some £6,600.

(C) The other contracts or work which the Claimant says that it has are fairly minor or illusory. Mr South identified in his witness statement of 7 October 2009 some 6 current contracts. In a very late witness statement from Ms Riches dated 20 October 2009, she adverts to some detective work done by phone calls and Land Registry searches to the effect that only one was current, two have not been tracked down and on others the clients had not either heard of the Claimant or there was no current contract. Mr South unsurprisingly (albeit during the hearing) put in a late witness statement, verified by an undertaking to the Court, to the effect that on one of the jobs not traced by Ms Riches the address had been mistyped, that one job was to be done for a company (Skelton Thomas Engineering Ltd ("Skelton")) whose full name had been given by acronym before, that he was reluctant to release information about one job and that on another there was a subject to contract arrangement with the work to commence next year and it had been negotiated by a colleague and not by him. This led to two 12th hour statements from Ms Riches and Ms Jelowicki which had obviously been the result of frantic phone calls during the hearing. Ms Jelwoicki had rung a Ms Mills of Skelton who was an office manager and was not "aware" of Skelton having a contract with any of Mr South's companies. Ms Riches rang a person about one of the jobs (the Sheepscombe Village Hall project) who confirmed that a quote or costing had been obtained from the Claimant for work planned in 2010.

(D) Mr South has set up another company, SGS Builders Ltd, in February 2009 which suggests that he will allow the Claimant "to slip into dissolution" as the Defendants' Counsel asserts. A photocopy photograph provided to the Court during the hearing shows a job being worked on which has a board showing "SGS LTD" as the contractor.

(E) No up to date management accounts are provided.

(F) After the 12th Hour, the Defendants' solicitors provided information about 2 supposedly unsatisfied judgements against the Claimant for £477 and £6,662 respectively. The Claimant's replied that for the larger judgement it has been paying what the Court has ordered should be monthly payments (and is not in default); the second judgement was only entered on 15 October and will be dealt with in one month.

Overall, it is said that the picture shows a company which, to use the expression of the learned judge in the **Wimbledon** case, demonstrates the "probable inability of the claimant to repay the judgment sum" .

40.
The overall picture presented is of a company which is undoubtedly in some financial difficulty. There must be some real doubt as to its ability to pay its debts as they fall due. The fact that a County Court judgement of some £6,600 is only being repaid at £100 per month and the late payment of the First Adjudicator's fees suggests financial problems and there appears to have been a real slowdown in work, which is perhaps unsurprising in the current economic climate.

41.
It is unnecessary finally to decide if the Claimant could not repay the judgment sum because on any count the provisos to the judge's judgement in the **Wimbledon** case (Paragraph 26 (f)) have very clearly been made out:

(i) The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made in 2007. The Claimant was not even incorporated when work began and it was with their eyes open that the Defendants decided contractually to engage the Claimant; they knew from an early stage that the Claimant was such a new company and so lacking in

creditworthiness that the bulk (at least in terms of value of work) of the Works Contractors who were to be engaged on the project were simply not prepared to contract with or to seek payment from the Claimant. Its Balance Sheet for its first year convincingly demonstrates its lack of value and creditworthiness.

(ii)The claimant's financial position is due, either wholly, or in significant part, to the Defendant's failure to pay those sums which were awarded by the adjudicators. The Defendants have failed to pay the Claimant the sums of £2112.67 from 23 June 2009 and £ 92,039.93 from 1 July 2009. There was no justification for not paying these sums. I have no doubt that for a small contractor to be denied some £94,000 has been a very real hardship and must have contributed materially to its problems in paying its suppliers and sub-contractors and others. To that is coupled a liability to pay its solicitors some £18,000 for the costs of these enforcements which is doubtless adding to the Claimant being seriously stretched. Whilst it is accepted that the Claimant is struggling financially, it is most likely that this is in the context of cash flow; the injection of £94,000 plus whatever it has paid to its solicitors into its cash flow would give a much greater chance of it continuing with its business. There is no real evidence (only suspicion) that the Claimant is deliberately running its business down or that Mr South is using his newer company for all work. There seem to be some contracts for the Claimant either proceeding or in the offing. Mr South has verified in statements that this is the case and undertaken the truth of that to the Court and, there being some corroborative evidence relating to what Mr South has told the Court following Ms Riches detective work, I can not say that he is wrong; if it turns out that he has misled the Court he may face criminal charges or contempt proceedings. It does seem, however, that there is a concerted effort to do what is necessary to avoid or defer payment to the Claimant. For instance, the Defendants' associated company on the Swan Yard development (owned at least partly by Mr Booth who controls either or both of the Defendants) has refused to pay some £100,000 to the Claimant pursuant to another adjudicator's decision dated 22 July 2009; it is not suggested that this decision is invalid. If that is brought into the calculation of the Claimant's current worth, together with the matters due on the Defendants' project, a very substantial total (in relative terms) is being wrongfully withheld by the Defendants or its associated company.

42.
There is of course a balance to be applied here and, if a stay of execution is granted, there is a real risk in consequence that, like a self-fulfilling prophecy, the Claimant will not survive; against that, there is a significant chance, albeit no certainty, that the Claimant will survive if the money is paid over.

43.
This is not a case in which it is appropriate that there is a stay of execution on the judgement enforcing these valid adjudicators' awards. No supportably credible or relevant case on fraud has been advanced. Whilst the Claimant is primarily by reason of cash flow in difficulties at the moment, it is certainly no worse off than when the Defendants took the risk of entering into the contract with it and it is more likely than not that its current difficulties have been significantly caused or contributed to by the Defendants' unjustified non-payment.

Conclusion

44.
It follows from the above that there will be judgement for the Claimant in respect of the sums awarded to the Claimant by the adjudicators. There will be no stay of execution.

Time for Payment, Costs and interest

45.
At the time of delivering to the parties' legal teams the draft judgement, I invited the parties to submit in writing any submissions on ancillary matters. Those were provided by the Claimant's and Defendant's Counsel respectively on 26 October and 28 October 2009.

46.
As to time for payment, the Defendants ask for 28 days whilst the Claimant asks for seven days for the Defendants to pay. The normal period is 14 days and I see no reason to depart from that. On the one hand, the Defendants have defaulted already by about four months and 10 weeks in honouring the First and Second Adjudication decisions and clearly by doing so have significantly affected the cash flow of the Claimant; they should not be permitted any extra leeway to continue doing so. On the other hand, the Defendants are commercial organisations who will need some time to organise payment. Accordingly, payment should be made no later than close of business on 12 November 2009.

47.
So far as costs are concerned, the Defendants properly accept that they must pay the Claimant's reasonable costs but ask for an assessment by a costs judge. This is clearly, however, a case which calls for summary assessment. The hearing lasted half a day and the matter is relatively simple in terms of costs likely to have been incurred. To defer the costs to assessment by a costs judge, even with an interim payment of costs on account, would extend the cash flow problems which the Claimant has on the evidence been suffering as a result of the Defendants' (unjustified as I have found) stance in these proceedings.

48.
The Claimant asks that costs be summarily assessed on an indemnity basis. In most cases of summary assessment, it probably does not matter very much, if at all, because the judge will usually allow everything which is reasonable. If it was necessary for me to decide, I would accept that a proportion of the costs bill should reflect allowance on an indemnity basis because a fair amount of the fraud allegations were not adequately supported by the evidence before the Court. Against that, the whole issue of fraud in relation to adjudication enforcements has received little attention from the TCC and it was not inappropriate for that to be discussed as a matter of principle as well as the extent to which material fraud must be supported by evidence. I make it clear that I do not seek to prevent the Defendants from pursuing the fraud allegations in further proceedings; I have simply found that for the purposes of this enforcement claim the evidence as presented was insufficient to prevent summary enforcement.

49.
The Claimant's summary costs bill totals £22,465.80, exclusive of VAT (which is not allowable because the Claimant is registered for VAT). Some specific objection is raised by the Defendants against this bill which in broad terms is not obviously unreasonable. It seems to me appropriate however in summarily assessing this bill to reduce it to £20,000 to reflect the statistical probability that it would be reduced somewhat on a detailed scrutiny by a costs judge and to take into account the points raised by the Defendants' solicitors in their letter dated 27 October attached to their Counsel's Supplementary Note. Additionally, I would anticipate that the approximately 40 hours of solicitors time spent on "attendances on documents" would probably be somewhat reduced on a detailed analysis. The sum of £20,000 should also be payable by close of business on 12 November 2009.

50.

So far as interest is concerned, both parties accept that interest at the rate of 5.5% is payable from the dates from which each decision called for payment, namely from 2 July and 24 August 2009 respectively. That should be calculated up to the date of the judgement; the order on judgement should also require that interest at that rate should be payable until payment or 12 November 2009 whichever is the earlier and that interest at the judgement rate should be payable thereafter. The Claimant should draw up the final order.