Neutral Citation Number: [2018] EWHC 227 (TCC)

Case No: HT-2017-000377

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date 28 March 2018

**Before** :

**THE HONOURABLE MR JUSTICE FRASER**

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**Between :**

**Gosvenor London Limited** **Cla**

**- and -**

**Aygun Aluminium UK Limited** **Defe**

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**Helena White** (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Claimant**

**Timothy Sampson** (instructed by **Arlington Crown**) for the **Defendant**

Hearing date: 1 and 27 February 2018, 21 March 2018

**Judgment Approved**

**Mr Justice Fraser :**

Introduction

1. This is an application for summary judgment by the claimant, Gosvenor London Ltd ("Gosvenor") in respect of an adjudicator's decision dated 16 November 2017 which was made in its favour against the defendant, Aygun Aluminium Ltd ("Aygun"). The amount of the decision is £553,958.47 plus Value Added Tax and the adjudicator was Mr Simon Whitfield. Mr Whitfield was appointed, having been nominated by the Chairman of TECBAR, which is the specialist Bar Association that deals with this type of work. The application was resisted by Aygun on the basis of fraud. Aygun also brought its own application for a stay of execution, in the event that its opposition to the summary judgment application was unsuccessful. Following the distribution of the draft judgment on these two applications to the parties on 20 February 2018, Gosvenor made an application to recall and reconsider the findings following further argument; made an application to adduce fresh evidence; and also (in the alternative) sought permission to appeal. Aygun opposed these applications. I deal with this further in the section of the judgment headed "Events following distribution of the First Draft Judgment."

The facts

2. Gosvenor and Aygun were parties to a contract entered into in May 2016 ("the Contract") for Gosvenor to perform certain cladding and other associated works for the installation of a façade at the Ocean Village Hotel in Southampton. Aygun was itself a sub-contractor to the main contractor for the project, which was Bouygues (UK) Ltd. The Contract was described as a Secondary Sub-Contract and was for installation only, with the design of the installation and supply of all necessary materials being provided by Aygun. The contract sum was approximately £440,000 and the works were intended to run from 20 June 2016 to 11 November 2016. The project fell into delay, and there was a meeting between the parties on 15 March 2017 to discuss the way forward. This meeting led to what was called in the adjudication itself the Completion Agreement, which was reached between Aygun and Gosvenor.

3. Notwithstanding that agreement, the parties later found themselves in dispute and a Notice of Adjudication was served by Gosvenor on 29 September 2017, and Gosvenor also requested appointment of an adjudicator from TECBAR. Mr Whitfield was nominated and confirmed his willingness to act to the parties on 3 October 2017. He also indicated his intention to apply the TECBAR Adjudication Rules 2012 to the adjudication; those rules incorporate the adjudication rules in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment)(England) Regulations 2011 ("the Scheme"). These set out, amongst other things, the timetable for different steps for service of the Referral and so on, and these were applied during the adjudication. There were no challenges to the jurisdiction of Mr Whitfield – he expressly confirmed this with the parties at the earliest stage of the adjudication on 3 October 2017 – and he conducted the adjudication. Although there were some muted expressions of breaches of natural justice in some of the pre-action correspondence, these formed no part of the arguments before me. From the papers in the adjudication that I have studied, this was no doubt because Mr Whitfield conducted the adjudication fairly, as one would expect. Both sides were represented by counsel and solicitors, the same solicitors and counsel who acted for each of the parties in the proceedings before me. Mr Whitfield decided that the amount due to Gosvenor in respect of the sum claimed, which was for outstanding labour costs, was £553,958.47 plus Value Added Tax.

4. There is no question that Mr Whitfield had jurisdiction to determine the dispute, and there is no question of any arguable breaches of natural justice being alleged by Aygun. The substance of the adjudicator's decision would therefore ordinarily be enforced by means of granting summary judgment in the relevant amount. As is well known, and as was stated in **Amey Wye Valley Ltd v The County of Herefordshire District Council** [2016] 2368 EWHC (TCC) at [30], as a way of a reminder to parties generally rather than stating any innovative principle:

"Adjudicators' decisions will be enforced by the courts, regardless of errors of fact or law. This has been stated many times. **Carillion v Devonport Royal Dockyard** [2005] EWCA Civ 1358 is the most often quoted appellate authority."

There are so many other well-known cases that state, re-state, and emphasise this fundamental point that those who practice in this field barely need such reminders. They include the first judgment on this topic, by Dyson J (as he then was) in **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] EWHC 254 (TCC) [1999] BLR 93; the first Court of Appeal authority in **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] EWCA Civ 1358 [2000] BLR 49; and an enormous number since.

5. Mr Sampson for Aygun accepts all of these authorities, but in the particular circumstances of this case relies upon fraud by Gosvenor to justify his defence to the application, and to lead to what he submits should in this case be a refusal by the court to grant summary judgment.

6. The evidence before the court on 1 February 2018 on these two applications (namely summary judgment and for a stay on enforcement) was contained in the following witness statements. Mr Skelton of the solicitors acting for Gosvenor served a witness statement dated 7 December 2017 in which he set out the grounds for summary judgment, supporting as it did the Part 7 proceedings issued in the Technology and Construction Court as adjudication business in the usual way, and he sought directions including the usual abridgement of time. That witness statement did not address fraud, nor could one expect or require it to do so. No allegations of fraud were raised in the adjudication proceedings themselves at all. Mr Skelton's witness statement was entirely sensible and proportionate, and included all that could have been expected at that stage on what may have appeared at the time to be a completely standard adjudication enforcement. On 19 December 2017 directions were given by Coulson J, in accordance with the usual approach to adjudication proceedings in this court, with evidence (if any) from Aygun to be served by 15 January 2018 and any evidence in response thereto from Gosvenor to be served on 22 January 2018, one week afterwards. The hearing was set down for 2 hours on 1 February 2018.

7. This is, so far, an entirely conventional narrative for adjudication enforcement proceedings. The judges of the Technology and Construction Court issue such directions on a regular basis, and they are effectively standard ones. The aim is to achieve a hearing of an opposed adjudication enforcement as speedily as possible, bearing in mind that a defendant may wish to serve its own evidence, and to ensure that time is available for this to be done without oppression. Section 9.2 of the Technology and Construction Guide (2nd ed, 3rd revision) makes this clear. An acknowledgement of service was required from Aygun but nothing more in terms of any pleading. However, on 15 January 2018 Aygun served a Defence, settled by counsel, together with three witness statements. The pleading was supported by a statement of truth from Esser Guneysel, who is a director of Aygun. It contained the following statements. "As a direct result of those enquiries it is now the Defendant's case that a substantial proportion of the Claimant's award is based on sums fraudulently invoiced to the Defendant by the Claimant in the period between 15 May 2017 and the end of October 2017." The pleading accepted that "the allegations of fraudulent invoicing set out below were not and could not reasonably have been raised during the adjudication process as much of the relevant information was not available to the Defendant at the time and/or could not have been obtained in the highly restricted timetable imposed on statutory adjudication under the 1996 Act."

8. The allegations of fraudulent invoicing were set out in a great number of paragraphs between paragraphs 23 and 43 of the Defence. There is no one particular section of that pleading that sets out "Particulars of Fraud" or something similar, which in the usual way is to be expected, if fraud is being alleged. Fraud must be properly particularised. However, upon analysis, the complaints are clear and are that the sums invoiced by Gosvenor for operatives simply could not reflect the amounts due as a result of an "enormous discrepancy" in sums invoiced to Aygun, and works actually done or labour actually provided. A valuation assessment had been performed by Aygun that showed that the very maximum of £100,000 of labour costs could and/or should have been invoiced, rather than the figure of over five times that. Indeed the The sums claimed in the adjudication were for the period from 12 November 2016. range of "proper" labour costs is said to have been between £20,000 and £100,000. By 15 May 2017 (the date of the Completion Agreement) the works were 97% completed. It was said by Aygun that Gosvenor "deliberately slowed progress of the works to further increase its opportunity to overcharge Aygun" and that Mr Popa, the controlling mind of Gosvenor "was entirely aware that was the position but intended to obtain as much illicit profit from the remaining months of the Ocean Village Project as he could". The competence of the Gosvenor operatives was said to have been

misrepresented – this was said to be an additional or aggravating factor in the fraud. The conclusion was stated to be that “Aygun must have been fraudulently invoiced for at least £300,000.”

9. The pleading was settled by counsel, and as such he was under a professional obligation in respect of such allegations, in that they can only be pleaded on specific instructions and supported by prima facie evidence. It was entirely proper of Aygun to have served a Defence, as indeed fraud can only be alleged if specifically pleaded. The evidence that supported the pleading came in the form of three witness statements, all dated 15 January 2018, by three different people all of whom work for Aygun. They were from Alper Amucer, the Country Manager for the UK for Aygun; Anna Mela, a Site Supervisor and Health and Safety Officer, who has a degree (BEng Hon) and masters (MSc) in Civil Engineering, who was on site from October 2016; and Ali Sahin, who is a qualified Civil Engineer and has worked for Aygun since November 2014, mostly in Turkey. He was the site design manager between 21 May 2017 and 10 June 2017; then again from 9 September 2017 and 10 October 2017.

10. Mr Amucer had given a witness statement in the adjudication, and he also exhibited to his statement in the proceedings before me the statement (also given in the adjudication) of Mr Guneysel. He accepted that neither he nor Mr Guneysel had raised the subject of fraudulent invoicing by Gosvenor in the adjudication itself. He stated that “we simply did not have the evidence to hand at the time to make such a serious allegation”.

11. All three of the witness statements broadly supported what was said in the Defence, with some distinct and important differences, which supplemented the allegation of fraudulent invoicing. The role of one Alex Wilkinson was explained in some detail. He had worked for Aygun at the project as the Project Manager. The witnesses explained that Mr Popa was a director of Gosvenor, and Ms Mela said that Mr Wilkinson was very close with Mr Popa. She said that during her time on site she specifically raised with Mr Wilkinson her concern at the progress of the works, the lack of skill on the part of Gosvenor’s workers, their inefficient working and the fact that the labour was withdrawn at critical times. When she raised these matters with Mr Wilkinson, he downplayed her concerns, and also offered her a bribe. When her superiors at Aygun requested that she obtain fingerprint records from the main contractor Bouygues UK Ltd to ascertain actual labour attendances of Gosvenor personnel (as that was the modern method of recording site attendances), and she requested these records, Mr Popa immediately found out about this. She said that he contacted her, and challenged her about this. Mr Wilkinson then disappeared, leaving site altogether and taking all the Aygun site labour records away on the site laptop which he took with him. This is not his property and all requests from Aygun’s solicitors to him to return this had simply been ignored. He has not been seen since by the Aygun witnesses and the important records that he took with him are not available. Ms Mela also added that in her view, Mr Popa and Mr Wilkinson had planned the action against Aygun, and she was in no doubt that the unlawful taking of the records by Mr Wilkinson was deliberate, and was done to deprive Aygun from having evidence against Gosvenor. She also added that in January 2018 (therefore after the adjudication decision, and during the enforcement proceedings) she had been intimidated on two separate occasions by Gosvenor employees. She stated that they were seeking to obtain her address, and that “I now feel extremely afraid and am quite wary of providing this information as I feel that I will be harassed or bullied by Gosvenor’s men. They…. are fearless, and I am worried for my own safety. My employers have reassured me that the police would be notified if I am to receive any threats.”

12. There was no evidence at all served by Gosvenor in response to these witness statements. After the first draft judgment was distributed under CPR Part 40 for clerical corrections and typographical errors to be identified by the parties, and as part of the two applications to which I have referred in

paragraph 1 of this judgment, Ms White for Gosvenor sought to adduce evidence in different witness statements that addressed these substantive allegations, and others raised in the three witness statements to which I have referred. For the reasons that I provide in the section of the judgment headed “Events following distribution of the First Draft Judgment” it was far too late for Gosvenor to do so and I refused to admit such evidence. It could, and should, have been deployed for the hearing on 1 February 2018, and also should have been served in accordance with the order of Coulson J on 19 December 2017. Simply because Gosvenor did not like the conclusions reached by the court on the basis of the evidence relied upon at the hearing of 1 February 2018 (which, for Gosvenor’s part, consisted of the witness statement of Mr Skelton only), this did not entitle Gosvenor to serve evidence in response after the actual substantive hearing and after receiving the first draft judgment.

The principles that arise on enforcement

13. There are three cases which deal with the situation where fraud is alleged on an adjudication enforcement. They are as follows. Firstly, **SG South Ltd v Kingshead Cirencester LLP** [2009] EWHC 2645 (TCC) a decision of Akenhead J. This was then followed by **GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd** [2010] EWHC 283 (TCC), a decision of Ramsey J, which was handed down after argument, but before the judgment in, the only relevant appellate authority namely **Speymill Contracts Ltd v Eric Baskind** [2010] EWCA Civ 120. That latter authority expressly, in the judgment of Jackson LJ at [36], approved the dicta of Akenhead J in **SG South v Kingshead.**

14. In these circumstances, the first case in the series is the correct place to start, even though the Court of Appeal decision is of higher authority. In **SG South v Kingshead** the adjudication concerned the non-payment of an interim Certificate and an issue was whether withholding notices (as they were then called, termed Clause 4.3.4 or 4.3.5 notices in the judgment) were served in time or at all by the defendants. The claimant’s case was that no such notices were served. Following service of the Referral, the defendants served their Response and in the Summary of Conclusions in that document served in the adjudication, 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 of the Referral, 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 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 of such documents if he so required. The claimant responded to this response 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 adjudicator. The adjudicator issued his decision in the claimant’s favour on the interim certificate and referred to the defendants’ assertion that they had only recently "become aware of widespread fraud instigated and orchestrated by” the claimant. He said in relation to the fraud (which is referred to at [11] in the judgment):

“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."

15. The issue for the court in that case therefore was the impact of the fraud allegations and the extent to which these would affect the enforcement proceedings on the adjudicator's decision. In dealing with that, Akenhead J set out the following:

"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."

It should be noted, as it is relevant to the application by Gosvenor to adduce further evidence following receipt of the first draft judgment, that proposition (b) expressly states "if fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgment" (emphasis added). This authority therefore expressly envisages that fraud might be relied upon by a party in seeking a stay of enforcement, as well as might be relied upon the oppose summary judgment too. This is relevant to the attempt by Ms White for Gosvenor to portray as unfair her inability to rely upon the new evidence which was served after receipt of the first draft judgment.

16. These four principles were applied and followed by Ramsey J in the **GPS Marine** case, another case of alleged fraud, and expressly approved by Jackson LJ in **Speymill v Baskind.** In that case, Speymill brought an adjudication in relation to interim payments. One of the issues was whether withholding notices had been served in the adjudication. The fraud is explained at [14] in the judgment:

"Mr Baskind alleged that he had served withholding notices. Speymill asserted that he had not. Mr Baskind was unable to produce to the adjudicator any copies of the withholding notices that allegedly he had served. Mr Baskind's explanation for the absence of copy withholding notices was as follows. On 14th September 2006 two employees of Speymill, namely Mr Cowlin and Mr Harrington, stole from Raby House some files belonging to Mr Baskind. These files included copies of the withholding notices. Electronic copies remained on Mr Baskind's computer, but most unfortunately there was a lightning strike and power surge in October 2006 which damaged that computer beyond repair. Speymill, for its part, denied that its employees had stolen any files belonging to Mr Baskind."

17. The allegations of fraud were ventilated before the adjudicator. Indeed, Mr Baskind relied upon those allegations (which were hotly disputed) as justification for the adjudicator making no decision in favour of Speymill, because (as Mr Baksind submitted) the adjudicator should not and could not resolve such a controversial issue of fact. The adjudicator decided that he would deal with the point, and issued a decision in favour of Speymill. The adjudicator ordered Mr Baskind to pay to Speymill £100,704 plus VAT in respect of interim payment certificates 12, 13, 14 and 15. The adjudicator also ordered Mr Baskind to pay £264,039 plus interest in respect of a further interim valuation of the works together with interest. HHJ Platts in the Technology and Construction Court in Liverpool heard the application for summary judgment. Mr Baskind had served a defence which included the following passages at paragraph 33 (as well as many other ingenious arguments upon which he also relied).

"33. The Defendant contends that in various ways the Claimant has undertaken conduct amounting to fraud in that inter alia it has……

33.3. stolen crucial documents from the Defendant and in particular the withholding notices which were issued by the Defendant in the course of the Claimant's performance of the Works.

33.4 denied receipt of the said withholding notices notwithstanding that the Claimant had, by its former managing director Andrew Latham, and by Ron Parsons, discussed the said notices with the Defendant and further had copies of the said withholding notices at the time of the said meetings."

18. The Judge declined to give summary judgment on the decision, rejecting all of the other arguments raised by Mr Baskind but accepting that there was an issue to be tried on the fraud allegations. He did, however, have reservations about these allegations and so he granted conditional leave to defend, and ordered Mr Baskind to pay the entire sum into court. Speymill appealed. The Court of Appeal unanimously allowed the appeal, and in doing so Jackson LJ stated the following at [37], after quoting the full text of [19] and [20] in the judgment of Akenhead J in **SG South** which I have reproduced above:

"37. Counsel have also cited numerous authorities concerning the effect of fraud upon judgments and arbitration awards. For my part I do not find these authorities to be of direct assistance. Judgments of the court and arbitration awards are of permanent effect unless and until reversed on appeal or set aside on some ground such as fraud. An adjudicator's decision, however, under the 1996 Act or equivalent contractual provisions is of a different character. The adjudicator's decision merely establishes the position from which the parties shall start their arbitration or litigation. This judgment is not the place to review the policy considerations underlying the adjudication system or the Latham Report on which that system is based. It is sufficient for the purposes of this appeal to state that I agree with Akenhead J's analysis of the effect of fraud upon adjudication decisions."

(emphasis added)

This must mean, in my judgment and rather obviously, that Jackson LJ agreed with Akenhead J's proposition (b), namely that 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. This must mean, therefore, that fraud can be potentially relevant to an application to stay execution as well as enforcement. That may appear to be stating the obvious too, but is a subject to which I will return in the section of the judgment "Events since distribution of the First Draft Judgment".

19. The policy considerations in respect of the temporary finality of adjudication decisions have been well ventilated elsewhere in many cases. The policy considerations in respect of the approach of the courts to allegations of fraud on enforcement are similar, but also include not allowing parties a "second bite of the cherry" if such allegations could have been raised before the adjudicator. It is also the case that enforcement of decisions is almost always done with a hearing under CPR Part 24, with argument based upon written evidence, and without actually calling witnesses. If all a party has to do to avoid summary judgment is to raise allegations that have to be resolved with oral evidence, the system of enforcement would become nigh on impossible to manage, and speedy conversion of adjudication decisions into actual payment received would be frustrated. I consider the general direction of all the cases on adjudication enforcement to be in the same direction. Adjudication enforcement proceedings are to be resolved by applications for summary judgment under CPR 24. It is only in extremely rare cases, which hardly ever arise, that issues that arise on enforcement will themselves be tried. This is because adjudication does not definitively resolve the parties' rights and obligations under a contract. All it does is result in a decision that has the status of what has been called "temporary finality".

Analysis

20. The factual issues that arise in this case present an unusual picture. What is extraordinary, however, in my judgment is that in the face of what are very clearly serious allegations (whether they are eventually made out or not) Gosvenor chose not to put in a single word of evidence in response for the hearing of 1 February 2018. No evidence was served in response, whether in accordance with the

order of Coulson J or otherwise, until after the first draft judgment was distributed. I find this most surprising. The theft of records has been raised in other adjudication cases where fraud is alleged, as has been seen. However, in those cases the opposing party had put its case on such serious matters clearly before the tribunal, and denied it. This case is different. Two applications were before the court, one for enforcement and one for a stay. The fact that reliance was placed upon the fraud allegations in both respects was clear in Mr Sampson's written skeleton served before the hearing. I do not consider that it is to reverse the burden of proof by making the obvious point that where complaints are made of a plan hatched in advance to engage in fraudulent over-charging, collusion with the Aygun Project Manager, theft of the site laptop, attempted bribery, threats and intimidation, one could at least expect some sort of denial in a witness statement. This observation is not diluted by Gosvenor, after reading the first draft judgment that made these observations, then deciding (extremely belatedly) to put in some evidence in response. That approach is, with respect, verging on inexplicable. This is a point to which I will return in the section "Events after distribution of the First Draft Judgment".

21. However, as stated by Akenhead J, "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" (emphasis added). This is a major obstacle to the majority of the allegations raised by Aygun. The adjudication commenced on 29 September 2017. Mr Wilkinson is said to have mysteriously disappeared with the entirety of the Aygun site labour records before that. Indeed, his absence and the lack of those records is what is said to have hampered the Aygun defence in the adjudication. I do not accept that the timetable of the adjudication was too tight to permit Aygun to raise such matters at the time. Adjudication timetables are supposed to be tight; it is one of the features of the particular dispute resolution process. Further, the valuation evidence produced before me by Mr Amucer – which I accept shows an enormous disparity - could have been produced in the adjudication. The evidence produced in the adjudication by Aygun itself was rather different. I make no findings in respect of the disparity now alleged, because there is only one side of the story before the court, and no-one has been tested in cross-examination. However, Mr Amucer sensibly accepts that from an administrative point of view the project had run out of Aygun's control, and coupled with this "was the constant and pressing problem of actually completing the contract works". He also says that this left Aygun open to unwarranted demands from Gosvenor. Mr Sahin says that Gosvenor could therefore claim whatever it wanted for its operatives. None of this is sufficient explanation in my judgment to surmount the basic hurdle, that all of this should have been deployed in the adjudication, and could have been deployed, had Aygun organised its defence to the claim properly (which it could have done) and had it chosen to do so. Nor does it suggest that the project itself was properly managed. Parties to construction contracts who do not manage their own projects properly are not granted some sort of immunity in terms of adjudications, or the enforcement of adjudicators' decisions.

22. There is one specific set of allegations that could not have been ventilated before the adjudicator, and that is those concerning intimidation and threats directed to Ms Mela in January 2018. This post-dates the decision itself. I was told at the hearing (although it was not in her witness statement before the court) that the reason that she did not give evidence in the adjudication was because she was frightened to do so. That statement should have been included in her witness statement. Submissions in court are not evidence. However, if that was the case and such fears existed at that time, that nettle should have been grasped at the time, and this was again something that occurred during the

adjudication. That part of the story (her fear of giving evidence) could therefore have been ventilated before the adjudicator.

23. I wish to be perfectly clear about this so that there can be no misunderstanding whatsoever going forwards, either in this case or any other. Threats and intimidation of witnesses is wholly and completely unacceptable, whether in adjudication or court proceedings. There is no place for such behaviour in any civilised society and it simply will not be tolerated. If any has taken place, it must cease immediately. Any judge has the power to refer matters to the Director of Public Prosecutions if circumstances permit. I am making no findings in this case that it has happened, but there is an allegation that it has, which has not been rebutted.

24. However, the two instances to which Ms Mela refers in her witness statement, which occurred in January 2018, do not assist Aygun in terms of resisting summary judgment of the adjudicator's decision. This is because, as stated by Akenhead J in **SG South** and approved by Jackson LJ in **Speymill**, one needs to differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it. These allegations are independent to the subject matter of the decision. They are not therefore matters which can properly be taken into account in considering the application for enforcement by way of summary judgment. It is not therefore necessary to analyse the nature of these threats and consider whether they amount to fraud. They certainly constitute reprehensible behaviour, if true. However, they do not go to the subject matter of the decision itself. I do not consider them to be relevant to the issue of whether summary judgment should be granted on Gosvenor's application.

Conclusion on summary judgment

25. For all these reasons, in my judgment the correct result on the application for summary judgment of the decision itself is to grant that application. However, Aygun brought its own application for a stay of execution in the event that Gosvenor succeeded in obtaining summary judgment. I now turn to consider that.

The application for a stay

26. The evidence in respect of this for the hearing of 1 February 2018 was as above, with other stay-specific factors relied upon, which are contained in the witness statement of Mr Amucer. In summary, they are as follows:

1. All of the points relied upon in respect of what is said to be the fraud by Gosvenor during the works themselves, including the gross disparity in the value of the works which has now been considered and assessed by the Aygun witnesses.

2. The financial viability of Gosvenor, or to be more accurate, the lack of it.

3. If paid, the money would be dissipated before the hearing of Aygun's challenge to the substantive dispute dealt with in the adjudicator's decision.

4. Statements made by Mr Popa himself at the meeting of 15 March 2017 that if Gosvenor were to face a claim from Aygun he would "immediately wind up the company" and Aygun "would never get a penny out of him".

5. The fact that other companies in which Mr Popa was a director have been liquidated.

27. There is one other point, which is highly material and falls to be considered under [26(2)], namely the financial viability of Gosvenor. At the hearing of 1 February 2018, Mr Sampson for Aygun relied upon two sets of statutory accounts for Gosvenor, namely those with year end 30 April 2016 ("the 2016 accounts"), and those with year end 30 April 2017 ("the 2017 accounts"), together with the filing history from Companies House itself which is freely available online. These are public documents and the court can and does take judicial notice of them. Notice that this would be done was provided to Gosvenor by a letter, enclosing the relevant accounts, from the solicitors acting for Aygun dated 31 January 2018. This predated the hearing. That letter made the point that the 2017 accounts had only been filed with Companies House on 20 January 2018.

28. Mr Sampson drew attention to the following discrepancies. In the 2016 accounts on the Abbreviated Balance Sheet, the figure for Debtors is a negative one and in the sum of £14,650. With the £128 for cash at the bank and in hand, the figure for Current Assets is a negative one of £14,522. That feeds into the figure for Net Assets by being taken against the figure for Creditors within one year of £27,455 to give Net Assets in the sum of £12,933. For what it is worth this compares with Net Assets for the year ending 2015 of £4,386 (shown on the 2016 accounts because the previous year is shown on each year's accounts). However, that was not the point being made.

29. The point being made was that when a comparison is made with the 2017 accounts, the figures on the balance sheet in those accounts shown for the previous year of 2016 (which should be the same as those figures in the 2016 accounts) are markedly different. Debtors for 2016 is now shown, in the 2017 accounts, as a positive figure of £622,644 (as opposed to minus £14,650). Curiously, the company still had exactly £128 in cash at the bank and in hand, and Creditors falling due within one year is now shown as a negative figure of £581,290. The overall net assets were now £41,482. That two sets of statutory accounts could show such a different picture for the same year end is a puzzle.

30. Ms White for Gosvenor took instructions during the hearing of 1 February 2018 on these points. I have to say that the explanation that she was given on instructions was wholly unsatisfactory, although no criticism is intended of her. She explained at the hearing that the 2016 figures on the balance sheet that were shown on the 2016 accounts had been changed, because she said the 2016 accounts themselves had been changed. She explained that an updated set of 2016 accounts had been lodged with Companies House with the same figures shown on those accounts, as the 2016 figures now shown on the 2017 accounts. She also explained, in response to one or two questions from the court, that the reason the filing history at Companies House did not show these amended accounts was that they had been sent to Companies House by post, and not electronically, and the filing history only shows online filings and does not show documents lodged by post. These instructions were given to her in court by the company's accountant.

31. Without in any way criticising Ms White, because these were doubtless the instructions she was actually given in the hearing – indeed the hearing paused so that she could take specific instructions – on the basis of the material available on 1 February 2018, I wholly rejected that explanation in my first draft judgment. Company information is made freely available by Companies House through the website www.gov.uk/government/organisations/companies-house. This permits anyone to access information about a company. This information is accessible online through the page whose web address I have just provided, and if one clicks on "Get information about a company" one is redirected to a service at www.gov.uk/get-information-about-a-company. There is nothing to suggest, on these government service websites, that the title should more accurately be "get-information-about-a-company-but-not-if-that-information-has-been-sent-by-post". I would not readily accept, in the absence of any evidence, that those responsible at Companies House would only provide important information

(that is to be publicly available) if it were filed electronically, and would simply ignore other information such as that which Ms White on instruction told me had been sent by post. The Registrar of Companies has a statutory obligation to keep company records. There is nothing to suggest that the Registrar in this case considered that obligation unnecessary because something had been sent by post. Nor was a copy of these supposedly changed 2016 accounts made available to the court. There was ample time to have done so, given notice of this point was given to Gosvenor the day before the hearing. For a company to produce a copy of its own, most recent, statutory accounts is not a difficult task. Nor was any adjournment sought so that they could be provided.

32. Further, the filing history of Gosvenor – again kept as a record by the Registrar, and available online - shows no amendment to the 2016 accounts having been filed at all. The only activity between the date they were filed in January 2017, and the 2017 accounts being filed in January 2018, was the appointment of Mr Popa as a director on 1 April 2017 filed on 30 July 2017, and a confirmation statement dated 14 July 2017 which was filed on 1 September 2017. That confirmation statement on form CS01(ef) states:

“I confirm that all information required to be delivered by the company to the registrar in relation to the confirmation period concerned either has been delivered or is being delivered at the same time as the confirmation statement”.

That form is to be used in accordance with section 853A of the Companies Act 2006 to confirm that the company has made all necessary filings and is up to date. It is designed to verify that the information on the public register is accurate. This means that the supposed updated or different paper accounts for 2016 which Ms White told me about – and no copy of these was produced for the court – must have occurred after the date of the confirmation statement. Thus for a period of months following filing of the original 2016 accounts the court is being asked to accept that the figures for both Debtors and Creditors were incorrect to the tune of approximately £636,000 and £608,000 respectively, without the company being aware of it (or if it was aware, without correcting the situation by notifying Companies House). This is stretching credulity.

33. All of this is very unsatisfactory, to put it at its mildest. Not only that, but on 24 May 2016 the Registrar gave notice to the company Gosvenor that unless cause was shown to the contrary it would be struck off compulsorily at the expiry of 2 months from that date. This action was then discontinued; however, it all adds to the air of suspicion over the financial affairs and probity of this company. Indeed, air of suspicion is putting it mildly as well.

34. Mr Sampson for Aygun sought, after the first draft judgment had been distributed, and after Gosvenor had made its application to adduce new evidence and (effectively) re-argue the substantive matters, particularly on the stay application, himself to be given the opportunity to rely upon new evidence concerning whether amended accounts had really been lodged by Gosvenor at Companies House. I refused to allow Aygun to do this. He had not asked for an adjournment during the hearing of 1 February 2018 when Ms White explained these matters to the court. Both parties were content to argue both applications on 1 February 2018 on the basis of the material then before the court. Such points cannot be argued back and forth in the manner attempted by the parties in this case. I deal with the point concerning finality in litigation in the penultimate section to this judgment. However, finally on the account discrepancy point I should add this. It was accepted by Ms White in her written skeleton for the further hearing on 21 March 2018 that the account she provided to the court on 1 February 2018 (which came to her directly from the company accountant) about the revised accounts was wrong. Rather bullishly, this was deployed by her as a point in her favour as to why Gosvenor

should be permitted to adduce new evidence with yet a further explanation. There are two points I wish to make about that. Gosvenor had specific notice in advance that Aygun would rely upon Gosvenor's own accounts at the hearing on 1 February 2018. There was ample time for a proper explanation to have been given to the court. Further time could have been sought if that was necessary, but it was not, nor was any adjournment of the hearing of 1 February 2018 sought. Secondly, the explanation given at the hearing of 1 February 2018 was so obviously wrong, that had the matter not been so serious, it would have been verging on the comical. A High Court Judge is entitled to rely upon what he or she is told at hearings. This was not an irrelevant sideshow (not that this would justify the court being told obviously wrong matters in any event). This went to the central issue of Gosvenor's financial standing, its very own statutory accounts, and was in the context of serious allegations of fraud. On those grounds alone I would refuse, as a matter of discretion, to permit Gosvenor to adduce fresh evidence on this point, quite apart from the separate issue that arises on finality of litigation.

35. I shall turn therefore to the principles that apply to a stay of enforcement of a judgment given on an adjudicator's decision. These are well known. It is important however to remember that the court's powers to order a stay of execution do not originate in the following authority. The provisions that govern a stay of execution are currently contained in CPR Part 83.7(4) which are new parts of the Civil Procedure Rules and were effected by the Civil Procedure (Amendment) Rules 2014 (SI. 2014/407). These came into force on 6 April 2014. Prior to that, their predecessor was RSC Ord 47. In **Wimbledon Construction Company 2000 Ltd v Derek Vago** [2005] EWHC 1086 (TCC) [2005] BLR 374 HHJ Coulson QC (as he then was) set out the principles that apply, by drawing together the different strands in all the cases that had by that stage considered the matter in the context of adjudication enforcement and stay of execution of summary judgment. In that case he granted summary judgment. The defendant had also sought a stay of execution, the basis for which was said to be concerns that the claimant would be unable to repay the sum if the defendant were successful in an arbitration on the substantive issues. The application was refused and a stay was not granted. The judge considered all the relevant authorities as at that point, and distilled their reasoning. In reaching that decision, the judge set out the principles that apply at [26] in a section headed "Applicable Principles". Those principles have been applied time and again in the 13 years since then, and that passage in his judgment is generally accepted as being the foundation for consideration of whether a stay of execution of an adjudicator's decision should be granted or not. I consider the same approach is to be adopted under CPR Part 83.7 as it was under RSC Ord 47. The test under Part 83.7(4) is "if the court is satisfied that (a) there are special circumstances which render it inexpedient to enforce the judgment or order…. then …. the court may by order stay the execution of the judgment or order."

36. The relevant passage is as follows, omitting only the references to the then pre-existing authorities to which the judge had regard. In my judgment, the judge was addressing "special circumstances" in the context of an adjudicator's decision:

"26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, 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.

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.

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.

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; 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."

37. The principles set down in **Wimbledon v Vago** have been followed over 40 times in the Technology and Construction Court, at least three times in the High Court of Northern Ireland, and also considered in other jurisdictions such as in Scotland. They have undoubtedly stood the test of time. I consider that there are special circumstances in this case that justify the grant of a stay of execution under CPR Part 83.7(4)(a). These facts are all the matters to which I have already referred in [26] above, plus the highly unsatisfactory nature of the accounts themselves, plus the suspicious explanation of the account discrepancies (which is now accepted to have been wrong). These different matters fall into three categories. They are:

1. Facts relating to the alleged fraudulent acts that should have been deployed before the adjudicator.

2. Facts relating to the behaviour in January 2018 by Gosvenor's employees towards Ms Mela of threats and intimidation in relation to the enforcement proceedings.

3. Facts relating to the unsatisfactory and contradictory accounts of Gosvenor, which are exacerbated by the attempts at explaining away the discrepancies on the face of the accounts before me at the hearing of 1 February 2018, an explanation which I reject.

38. Not all of those three categories can properly be described as "evidence of the claimant's present financial position" as set out in [26](f) of the principles in **Wimbledon v Vago**. In fact, only the third category even arguably does. I consider that all three categories are special circumstances, and are relevant to whether a stay should be ordered. If all three categories are relevant matters of which account should be taken in deciding whether to order a stay of execution or not, this must mean that the time has come to finetune the statement of the principles in **Wimbledon v Vago** to reflect that these are proper matters to which the court can, and should, have regard when considering the defendant's application for a stay of execution of summary judgment granted on an adjudicator's decision. There was no question of fraud in the **Wimbledon** case, and that case could not be expected

to deal with such a situation. I note that in a case handed down by Coulson J (as he then was) after the hearing of 1 February 2018 in this case, namely **Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd** [2018] EWHC 177 (TCC), the same judge again considered the principles set down in **Wimbledon**. He stated at [62] that they were a summary that was not set in stone, and also specifically identified that they did not deal with the position where allegations of fraud were made. Because of the peculiar (and unanswered) questions on the accounts of Gosvenor, this is not one of those cases such as **LXB RP (Crown Road) Ltd v Squibb Group Ltd** [2016] EWHC 2669 (TCC) where I would be in a position to perform a comparison between the financial state of Gosvenor when it contracted with Aygun, and its state now. This is a situation of an entirely different character to the one dealt with by Stuart-Smith J in that case.

39. Accordingly, in my judgment, a further principle should be added to those in **Wimbledon v Vago** and I expressed myself in these terms in the first draft judgment. I expressed in that draft that in my judgment, the principles set out in **Wimbledon** should have added to them a further one, namely this one following on from the existing (f)(i) and (f)(ii):

(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay.

40. I also, in the first draft of this judgment, made a number of points which I considered to be important:

1. This refinement of, or addition to, the principles in **Wimbledon v Vago** was expressly explored in argument on 1 February 2018, but the point was not fully argued on that occasion, and neither counsel had notice of it. Accordingly, I stated in the first draft that it may be that the wording falls itself to be refined in a later case. I was, at that stage and without hearing further argument, then satisfied that the new principle (g) as drafted in [39] properly reflected the correct approach.

2. Such a feature is only likely to arise in a very small number of cases, and in exceptional factual circumstances. This addition to the principles is not intended to re-open the whole issue of the basis upon which stays of execution will be ordered in adjudication enforcement cases, or to define a specific, exhaustive and closed set of circumstances that can constitute “special circumstances” in the terms of CPR Part 83.7(4). In the vast majority of cases, the existing principles in **Wimbledon v Vago** will suffice and recourse to principle (g) will be extremely rare.

3. A high test will be applied as to whether the evidence does indeed reach the standard necessary for this principle to apply. I consider that in order to fall into this category the standard is broadly the same as that necessary to justify the grant of a Freezing Order (what used to be called Mareva relief).

4. The addition of this further principle is not designed to prevent a claimant from dealing with the adjudication sum in the ordinary course of business, or make evidence of what a claimant may be intending to do in the future, in the ordinary course of business, relevant or admissible under this head. The whole purpose of adjudication decisions being summarily enforceable would be frustrated if all a winning party in an adjudication could do with any payment was to place it in an account, and not use it, to avoid the risk of a stay of execution being ordered. That is not the purpose of principle (g).

42. This additional sub-paragraph (g) to those listed in **Wimbledon v Vago** is to make it clear that circumstances such as those in this case, which I have explained in the body of this judgment, justify a stay of execution being granted. In my judgment, principle (g) is satisfied here.

43. In my judgment, on the evidence before me on 1 February 2018, and without hearing any cross-examination, the clear inference (which I consider to be an inevitable one) was that Gosvenor (or those who control it) would specifically organise its financial affairs, other than in the ordinary course of business, to ensure that the adjudication sum paid to it would be dissipated or disposed of so that any future judgment against it would go unsatisfied. That, in my judgment, justifies the grant of a stay of execution.

Events following distribution of the First Draft Judgment

44. The conclusion at [43] on the stay application, contained in the First Draft Judgment, led to the following events. Shortly after distribution of that draft to the parties under CPR Part 40, on 23 February 2018 Gosvenor lodged a document entitled "Claimant's Note following Draft Judgment". In addition to typographical errors, that sought three things.

(1) That the court should recall and reconsider its draft judgment.

(2) If the court were not willing to do that, the grant of permission to appeal.

(3) In any event, to make the stay of execution conditional upon Aygun issuing proceedings against Gosvenor in relation to the substantive dispute, and pay the sum ordered by the adjudicator into court pending resolution of those proceedings.

There was a further matter dealt with in the Note, namely a factual correction to [8] of the draft judgment. That passage had stated "Further, by 15 May 2017 (the date of the Completion Agreement) the works were 97% completed. The sums claimed in the adjudication were for the period after that." Ms White for Gosvenor drew my attention to the fact that the documents showed the sums claimed in the adjudication were for the period from 12 November 2016, not 15 May 2017.

45. Aygun served its own document in response, opposing the application to recall and reconsider the draft judgment. At the hearing of 27 February 2018, which had been set for the handing down of the draft judgment, I heard submissions on this subject. Various witness statements were put before the court in relation to the evidence that would be adduced were permission given. I ruled that I would not admit such evidence, but also that I would not hand down the draft judgment and would have a further short hearing solely to deal with the addition to the **Wimbledon v Vago** principles as set out in [39] above. I also explained that I would provide my detailed reasons for this approach in the judgment that would follow that further hearing. That hearing took place on 20 March 2018.

46. The principles that apply to such an application are as follows. It is within the powers of the judge to alter his or her judgment at any time before it is entered and perfected (per the Court of Appeal in **Re Barrell Enterprises** [1973] 1 WLR 19; **Robinson v Fernsby** [2003] EWCA Civ 1820). Given a judgment is simply in draft form until it is handed down, there is no doubt therefore that the jurisdiction exists.

47. In **Egan v Motor Services (Bath) Ltd** [2007] EWCA Civ 1002, [2008] 1 All E.R. 1156, the Court of Appeal noted and deprecated the growing practice of counsel writing to the judge upon receipt of draft judgment, asking for reconsideration of the conclusions contained within it. It is my experience that this occurs far more frequently than ought to be expected; it could be described as now being

almost routine. Of course, there are very occasionally particular circumstances that warrant it. As a single example, in **Energysolutions EU Ltd v Nuclear Development Authority (No.2)(Liability)** [2016] EWHC 1988 (TCC), very shortly before the formal handing down of a very lengthy judgment concerned with public procurement, the NDA discovered that every single witness of fact called by the claimant had a contractual agreement in place with the claimant for payment of a cash bonus in the event of success in the litigation. This had only just come to the notice of the solicitors acting for the claimant, who acted very promptly and properly and disclosed this fact, and the agreements. This led to further hearings, cross-examination both of solicitors themselves (not previously called as witnesses) and of the factual witnesses themselves, and reconsideration of all the findings in that judgment.

48. In **Egan v Motor Services (Bath) Ltd** the Court of Appeal made it clear that circulation of a draft is not intended to provide counsel with an opportunity to re-argue the issues in the case, and also it was only in the most exceptional circumstances that it was appropriate to ask the judge to reconsider a point of substance. Examples given were where counsel feels that the judge (i) had not given adequate reasons for some aspect of his decision, or (ii) had decided the case on a point which was not properly argued or has relied on an authority which was not considered. However, in the case of **In re L (Children) (Preliminary Finding: Power to Reverse)** [2013] UKSC 8; [2013] 1 W.L.R. 634 the Supreme Court held that a judge's power to recall and reconsider his or her judgment is not restricted to "exceptional circumstances". Whether a judge should exercise the discretion to recall a judgment will depend upon all the circumstances of the case. That is the approach that I adopted here.

49. In **Space Airconditioning Plc v Guy** [2012] EWCA Civ 1664; [2013] 1 W.L.R. 1293, the Court of Appeal stated that: (1) a judgment should be an accurate record of the judge's findings and of the reasons for the decision; (2) if a judgment contains what the judge acknowledges is an error when it is pointed out, the judgment should be corrected, unless there is some very good reason for not doing so; (3) it should not normally be necessary for a party to bring an appeal to correct an error, if it turns out that the parties and the judge agree that there is an error and that a correction should be made. In that case, the court directed a re-trial on the basis that the erroneous finding in the judgment could properly be described as an "irregularity in the proceedings" which made the decision an "unjust" one within the meaning of the old RSC r.52.11(3) – now CPR Part 52.21(3)(b).

50. Further guidance is given in other cases, and a similar situation applies so far as review of findings of fact is concerned, even after handing down. The ability to ask the court to reconsider findings sits next to the ability of a disgruntled litigant to appeal. For example, in **Kazakhstan Kagazy PLC and others v Baglan Abdullayevich Zhunus** [2018] EWHC 369 (Comm) Picken J dealt with a similar situation where the defendant sought to adduce new evidence which was said at [22] as being "of central importance to the issue of quantum and which therefore must be taken account of when the Court is assessing quantum" and of which the defendant had no awareness at the trial. Picken J made the following statements in this respect:

"27. As I have explained, this is not a case where the Judgment left open any issue concerning Penalties and Interest other than the matter of calculation. It is not, therefore, a case where there can be said to be any error or misunderstanding which needs to be corrected and which it is appropriate to raise with the trial judge to allow him or her an opportunity address the point.

28. Mr Foxton cited in this context **Spice Girls Limited v Aprilla World Service BV** 20 July 2000, 2000 WL 1212985, in which Arden J (as she then was) had this to say at [9]:

“I now turn to set out my conclusions on these submissions. At the outset I observe that counsels' submissions conflate two issues, first, whether the court can and should review its earlier finding of fact and second, whether the result of the case would be different if the admitted fact had been stated in substitution for the fact as found. As to the first issue, it is clear that the court has jurisdiction to correct an error of material fact before the order is drawn (see for example Stewart v Engel [2000] 3 All ER 518, The Times 26 May 2000; Pittalis and others v Sherefettin [1986] 1 QB 868; [1986] 2 All ER 227; Charlesworth v Relay Roads Ltd [2000] 1 WLR 230). It inevitably happens with complex cases that from time to time a fact which is material is overlooked. But the jurisdiction to correct an error is to be exercised cautiously and sparingly, and the question of review should be raised as promptly as possible. An application to the court to vary a finding of fact is not to be encouraged as it may lead to groundless applications. In this instance, as I have said, Mr Mill's approach was not to apply to the court to review its finding of fact but rather to use it as a basis for seeking permission to appeal. In my judgment, an appeal is not the appropriate course where there are errors in judgments which can be corrected by the court which conducted the trial. To leave such matters to an appeal means further delay, uncertainty and costs, which is not in the interests of the litigants. The trial judge is in a strong position to consider the effect of the error in the context of the entire case. Moreover, since there is no doubt now that AWS intended to make the concession, in my judgment it would not be just (see Civil Procedure Rules 1998 r 1.1(1)) for me not to review the finding of fact and accordingly I propose so to do by substituting, for my finding that AWS did not sell Sonic scooters, a finding that AWS distributed and/or sold such scooters outside Italy pursuant to its standing arrangements with Aprilia. There is no evidence as to whether or not AWS made any profits from these activities.”

This was a case, however, as the passage makes clear, and as explained at [8], where there was an error on the part of the judge when preparing the judgment. It was not a case such as the present where the Court has made no error but one of the parties is seeking to re-open an issue based on evidence which has come to light after the judgment has been handed down. That is a very different situation.

29. Nor is this a case like **Compagnie Noga D’Importation ET D’Expropriation SA v Abacha** 2001 WL 606396, where Rix LJ (but sitting in his capacity as the trial judge) was faced with a request that he reconsider his judgment (a judgment arrived at after a trial lasting some six months) on the basis that he was said to have “got the answer wrong” (see [44]). As Rix LJ explained, the right course, in such circumstances, is to appeal. As he put it at [47]:

“I do not wish to say anything against the usefulness of the reconsideration jurisdiction, within its proper limits. I have made use of it myself. However, it is in the nature of the legal process that, once judgment has been rendered, analysis thereafter becomes clarified and refined, and citation of authority is applied to the findings made at first instance so as to illuminate that clarification and refinement of analysis of which I speak. But that is the function of the appeal process. In my judgment, to grant this application that I reconsider my judgment would subvert the appeal process itself. In doing so, it would not answer the interests of justice, but would be the antithesis of justice according to law. There are of course cases where an error of fact or law may be too clear for argument. The best test of that is perhaps – but not necessarily – where the judge himself identifies the error which concerns him. In such a case, it is better that the error is corrected without imposing on the parties the need for an appeal. But no parallel to Noga’s application has been cited to me. It is in my judgment wrong for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances a judge should be tempted to open up reconsideration of his judgment, an appeal would not be avoided, it would be made inevitable. Every case would become

subject to an unending process of reconsideration, followed by appeal, both on the issue of reconsideration and on the merits."

30. As Rix LJ had earlier explained, when describing the circumstances in which it is appropriate to invite a judge to reconsider, the jurisdiction is limited to "exceptional circumstances". He stated as follows at [41]-[43]:

"41. Nevertheless, in my judgment, I am bound by the decision in Stewart v. Engel , following the spirit, if not the letter, of the decision in Barrell in the light now of the requirements of the overriding principle, to regard the need for exceptional circumstances as a requirement for the proper exercise of the jurisdiction to reconsider a decision. If in Pittalis Dillon LJ is to be understood as saying by reference to Millensted that the discretion is a wide open one, unrestricted by the requirement of exceptional circumstances, then I would with respect feel bound to disagree. In my judgment the width or narrowness of the discretion was simply not in issue in Millensted . As for Pittalis , both Fox LJ and Dillon LJ accepted that the circumstances in that case were exceptional.

42. Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the floodgates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of the drawing up of an order. As Jenkins LJ said in In Re Harrison's Share (at 276):

'Few judgments are reserved, and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae.'

43. Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary, or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."

31. Clearly, in view of these authorities, there is no justification in the present case to permit Mr Arip and Ms Dikhanbayeva to re-open the Penalties and Interest issue. There needs to be finality in litigation. This applies as much to high-value and complex litigation as it does to low-value and simple litigation.....I repeat that this litigation, like other cases in every court in the country, must have some finality about it. Were it otherwise, the courts system could potentially descend into chaos."

51. Similar statements to those in the last quoted passage of Picken J concerning the requirement for finality in litigation have been made at appellate level too. In **Ogale Community and others v Royal Dutch Shell and another** [2018] EWCA Civ 191, a lengthy appeal was heard in November 2017 from a first instance decision striking out a claim against the defendants in relation to oil pollution in the Niger Delta in Africa. In January 2018 the (ultimately unsuccessful) appellants made an application to the Court of Appeal that giving judgment should be postponed until after the appellants had the opportunity to consider "a whole raft of yet further Shell documentation" that had come into their

possession and which could be potentially relevant. In stating why this application was refused, the Chancellor of the High Court stated at [178] “In my judgment, there has to be finality to litigation determining jurisdictional questions within a reasonable timescale and, for that reason alone, proceedings cannot be delayed to allow for unlimited attempts to gather evidence that might be said to support the claim.” I would only add to those observations that it is equally, if not more important, that resolution of disputes concerning enforcement of adjudication decisions (and any stay upon enforcement) be dealt with in a reasonable timescale too. Indeed, a reasonable timescale in terms of adjudication business is likely to be far shorter than in other spheres of litigation. The intention of Parliament, as has been stated many times in a wide number of judgments, both at first instance and appellate level, is for adjudication to provide a speedy mechanism for the resolution of disputes, but only in an interim manner. Adjudicators’ decisions do not determine the parties’ substantive rights in a final and binding way. That is done by litigation or arbitration. It is therefore entirely counter-productive, in proceedings for adjudication enforcement, to permit those proceedings to be re-opened in the way Gosvenor seeks in this case, so that further evidence and argument can be deployed on issues that were already before the court, and in my judgment clearly before the court, on the last occasion.

52. In my judgment, all these statements point in the same direction. Very careful consideration must be given to such applications, and litigants should not be given the ability to have a second bite at the cherry. The distribution of a draft judgment under CPR Part 40 should not be seen (as it seems to be, by many legal advisers currently) simply as an open invitation to embark upon an additional round of the litigation, remedying lacunae in their own evidence and raising further arguments. If a matter could have been raised at the first hearing, then it should be. If time is needed to deal with something, then the court must be asked for time – this will not always be given, but the matter must be dealt with then. It is against those principles that I consider Gosvenor’s applications.

53. In my judgment, the factual correction sought by Gosvenor to [8] of the draft judgment is a factual error and I am grateful to Ms White for drawing it to my attention. The passage that had stated “Further, by 15 May 2017 (the date of the Completion Agreement) the works were 97% completed. The sums claimed in the adjudication were for the period after that” was factually incorrect and upon closer analysis the sums claimed in the adjudication were for the period from 12 November 2016, not 15 May 2017. I have therefore corrected that passage in this judgment which makes it clear from what date the sums sought in the adjudication related. However, this does not make any difference to the analysis that Gosvenor was entitled to summary judgment on the decision, nor does it make any difference to the analysis concerning the stay of execution. Adjudication is a temporarily binding dispute resolution process that is always subject to the final resolution of the dispute in litigation or arbitration. The details of the underlying substantive claim, resolved on that basis by an adjudicator, and to which date range that dispute relates, are not relevant to the matters before me. I have found that the allegations of fraud by Aygun could and should have been raised in the adjudication.

54. Also, I recited in my first draft judgment that the parties had not been given an opportunity fully to address the addition of the new principle (g) to the **Wimbledon v Vago** principles. Although the issue of fraud impacting upon a stay of execution was argued – indeed, it was a mainstay of Mr Sampson’s approach, and it is not accurate to submit as Ms White does that the point was not argued – I did not provide the parties with any opportunity to make submissions on the addition of principle (g) as drafted. In my judgment therefore, both parties should have such an opportunity, and that was why I re-listed the matter for a hearing on 21 March 2018 to address that one issue.

55. I should also add, as pointed out already at [18] above, that the issue of fraud being potentially relevant to an application for a stay of execution is expressly referred to in Akenhead J's proposition (b) in **SG South** with which Jackson LJ agreed. The submission by Ms White that the only case that Gosvenor had to meet on 1 February 2018 was on the basis of "existing law", that this explained why no evidence was put in by Gosvenor to rebut the fraud allegations, and that I have now applied different or "new" law, is simply wrong. I would go further. CPR Part 83.7(4) identifies "special circumstances" in respect of the grant of a stay. It was clear from the evidence served on 15 January 2018 by Aygun that the fraud allegations were being relied upon in this respect; indeed, given the terms of that evidence, I do not see how that can be sensibly argued to the contrary. As a single example only, Mr Amucer's witness statement stated in paragraph 25 "in addition to the question of fraud Aygun is also extremely concerned about the financial viability of Gosvenor" before going on to deal with the Companies House information then available.

56. I do not consider that any of the requirements for either party to put in new evidence are satisfied in these circumstances, and I am not prepared to allow them to do so. Gosvenor argued that no stay should be granted, and if the approach of new (g) was to be similar to the approach taken on the grant of a Freezing Order, then Aygun should be required to obtain such an order instead. I reject those submissions, which again are misconceived. The overriding objective does not require such an artificial, expensive and convoluted approach. In the case of **Bouygues v Dahl-Jensen** itself, not only had a formal application for a stay not been issued, it had not even been argued below before Dyson J (as he then was). This is clear from [36] of the judgment of Chadwick LJ:

"But the point was not taken before the judge and his attention was not, it seems, drawn to the provisions of the Insolvency Rules 1986. Nor was the point taken in the notice of appeal. Nor was it embraced by counsel for the appellant with any enthusiasm when it was drawn to his attention by this court."

A stay was ordered in that case, nevertheless.

57. Gosvenor also argued that Aygun should be required to pay the sum into court instead of being allowed to retain it. That is sometimes done, but I see no reason to make such an order in this case. In any event, the submissions that any conditions should be attached to the imposition of a stay, such as a requirement upon Aygun to commence substantive proceedings, are in my judgment misconceived. Gosvenor is as entitled as Aygun to issue substantive proceedings in relation to the substantive dispute, regardless of the outcome on either of these applications. Although Mr Sampson for Aygun has submitted that Aygun is anxious to issue proceedings itself and will do so, I am not prepared to make an order compelling Aygun to that effect. If Gosvenor wishes to do so it can issue proceedings itself, regardless of the outcome concerning the adjudicator's decision. Nor am I prepared to order Aygun to pay the sum the subject of the adjudicator's decision into court.

58. The issue upon which I did hear further argument, namely the then-proposed addition of principle (g) as set out at [39], was further argued before me on 21 March 2018. Although Ms White did her best to persuade me that the Freezing Order jurisdiction should be sufficient, and should be utilised, rather than imposing a say in the circumstances of this case, I do not accept that. In order for the court to grant a domestic Freezing Order, three requirements must be satisfied:

1. The claimant must have a good arguable case on a substantive claim over which the court has jurisdiction;

2. The defendant must have assets within the jurisdiction;

3. There must be a real risk of dissipation or secretion of assets which wold render the claimant's relief nugatory.

It must also be just and convenient in all the circumstances of the case to grant the relief.

59. Where an adjudicator's decision is concerned, the first requirement alone would involve a detailed consideration of the claimant's case (here, the claimant would be Aygun) on the substantive claim in relation to which that decision has been issued. This the court will not embark upon when adjudication enforcement is sought, and I do not consider that it should do so if a stay of execution is sought. It would be verging on impossible, given the nature of the disputes decided by adjudicators, for the court to do this in many (if not all) cases, and it is not what Parliament intended when it passed the legislation, and it is not what is required under CPR Part 83.7(4).

60. I have concluded after hearing the further argument to which I have referred that a further principle should be added to those in **Wimbledon v Vago** and that it should be in the term in which I expressed it in the first draft judgment, and at [39] above. I will repeat it here for convenience. The principles set out in **Wimbledon** should have added to them a further one, namely this one following on from the existing (f)(i) and (f)(ii):

(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay.

61. I also wish to repeat the following important points:

1. Such a feature is only likely to arise in a very small number of cases, and in exceptional factual circumstances. This addition to the principles is not intended to re-open the whole issue of the basis upon which stays of execution will be ordered in adjudication enforcement cases, or to define a specific, exhaustive and closed set of circumstances that can constitute "special circumstances" in the terms of CPR Part 83.7(4). In the vast majority of cases, the existing principles in **Wimbledon v Vago** will suffice and recourse to principle (g) will be extremely rare.

2. A high test will be applied as to whether the evidence does indeed reach the standard necessary for this principle to apply. I consider that in order to fall into this category the standard is broadly the same as the level of evidence necessary to justify the grant of a Freezing Order (what used to be called Mareva relief). Mere assertions will not be sufficient. Isolated discrepancies on statutory accounts will not be sufficient either.

3. The addition of this further principle is not designed to prevent a claimant from dealing with the adjudication sum in the ordinary course of business, or make evidence of what a claimant may be intending to do in the future, in the ordinary course of business, relevant or admissible under this head. The whole purpose of adjudication decisions being summarily enforceable would be frustrated if all a winning party in an adjudication could do with any payment was to place it in an account, and not use it, to avoid the risk of a stay of execution being ordered. That is not the purpose of principle (g).

4. The evidence served on an application for summary judgment to enforce an adjudicator's decision is important, and the standard directions issued by the Technology and Construction Court have been refined over many years to achieve two things. One is the speedy resolution of disputed enforcement proceedings, which is what Parliament intended. The other is the fair resolution of issues that may arise on enforcement. These directions provide for service of evidence in support by the claimant;

service of evidence by the defendant; and evidence in reply (if so advised) by the claimant. Usually, the dates will be such that the evidence will all have been served between 1 to 2 weeks before the hearing date. The dates in this case were for evidence (if any) from Aygun to be served by 15 January 2018 and any evidence in response thereto from Gosvenor to be served on 22 January 2018. They were ordered by Coulson J (as he then was) as the Judge in Charge of the TCC. The substantive hearing was on 1 February 2018 and those time intervals were more than sufficient for Gosvenor to have served evidence in response had it wished to do so.

Conclusion

62. The claimant Gosvenor is entitled to summary judgment on the sum awarded to it by the adjudicator in his decision. The principles set out in **Wimbledon v Vago** concerning the grant of a stay of execution of judgment upon an adjudicator's decision should have added to them the one at (g) set out at [60] above. In all the circumstances of this case, the defendant Aygun is entitled to a stay of execution in respect of the judgment sum.