

## Legal Briefing

### Were allegations of fraud sufficient to prevent enforcement of an adjudicator's decision?

*Gosvenor London Limited v Aygun Aluminium UK Limited*  
[2018] EWHC 227 (TCC)

Before the Honourable Mr Justice Fraser  
In the Technology and Construction Court  
Judgement delivered 28 March 2018

#### The facts

In 2016 Aygun engaged Gosvenor to install cladding at a hotel project in Southampton. The works were delayed and in September 2017 Gosvenor commenced adjudication. In a decision dated 16 November 2017 the adjudicator awarded Gosvenor £553,958.47 plus VAT. Gosvenor then commenced enforcement proceedings in the TCC.

On 15 January 2018 Aygun served its defence alleging for the first time that a substantial proportion of the sum awarded to Gosvenor was based upon fraudulent invoices. Aygun contended that: the maximum valuation of the work was around £100k; that the overcharging had been deliberate; that there had been collusion between Gosvenor and Aygun's own project manager, who had since disappeared with a laptop containing Aygun's site labour records; and, that one of Aygun's witnesses had been intimidated by Gosvenor employees. Aygun said that fraud had not been raised in the adjudication because the relevant information had not previously been available and/or could not have been obtained in the context of the tight adjudication timetable. Aygun therefore opposed Gosvenor's application for summary judgment and in the alternative sought a stay of execution.

Gosvenor did not serve any reply evidence and the parties' applications came before the court on 1 February 2018. Following the distribution of the draft judgment on 20 February Gosvenor applied to adduce fresh evidence and sought an opportunity to make further submissions.

#### The issue

Was Gosvenor entitled to summary judgment and if so was Aygun entitled to stay?

#### The decision

The judge thought it extraordinary that Gosvenor had not served any reply evidence prior to the 1 February hearing and rejected the application to serve evidence after circulation of the draft judgment.

As regards enforcement the judge applied the principles set out in *SG South Limited v King's Head Cirencester LLP* i.e. that when fraud is alleged a distinction must be made between fraudulent acts or omissions which could have been raised as a defence in the adjudication and those which neither were nor could reasonably have been raised but which emerged after the adjudication. With the former where the fraud has in effect been adjudicated upon that should not prevent enforcement. In the latter scenario a further differentiation must be applied between fraud which directly impacts the subject matter of the adjudication decision and that which is independent of it. Generally speaking it is only fraudulent acts that directly impact the decision that may be raised when opposing enforcement.

Applying these principles the judge thought that the material relied upon by Aygun in January 2018 could and should have been deployed in the adjudication had Aygun properly organised its defence. The one element of the fraudulent allegations that could not have been raised in the adjudication i.e. witness intimidation, was reprehensible but did not go to the subject matter of the decision itself. Therefore Gosvenor was entitled to summary judgment.

The judge nevertheless granted Aygun a stay of execution. The judge noted the allegations of fraud and witness intimidation and also highlighted some glaring discrepancies between Gosvenor's 2016 and 2017 accounts that Gosvenor was unable to satisfactorily explain at the hearing. The judge thought that each of these elements was a relevant matter to be taken into consideration when granting a stay, in addition to the six principles (a) – (f) established in *Wimbledon v Vago*. The judge distilled these elements into an additional principle (g) for consideration when a stay of execution is claimed i.e. whether or not there is a real risk that the claimant would organise its finances with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid.

#### Commentary

The judgment includes an important caution against parties raising substantive arguments when asked to comment upon a draft judgment. More significantly this judgment

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augments the *Wimbledon v Vago* principles with a new principle (g). However, the judge specifically pointed out that only in very rare cases will this new principle be relevant and said that a high standard of proof – equivalent to that required in a freezing order – will apply when it comes to demonstrating an intention to dissipate the adjudication sum. The well-established principles in *Wimbledon v Vago* will otherwise suffice and the judge made clear that he did not intend by his new principle (g) to prevent a claimant from dealing with the adjudication sum in the ordinary course of its business. Thus adjudication award monies need not be ring-fenced and cashflow can be maintained.

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