

Adjudication: Fraud, Forgery and Theft

By Peter Sheridan

Introduction

Adjudicators' decisions do not normally have such criminal associates, but such is the nefarious subject matter of Construction Act Review (CAR) on this occasion. Adjudicators have from time to time had to consider the effect of allegations of fraud, forgery or theft on a claim made in adjudication and so have the courts, on the issue of enforcement.

There are relatively few cases, which are considered in chronological order below, but there has been a recent small flurry, including the first consideration of these issues by the Court of Appeal.

Pro-Design

The untypically picaresque content of this issue CAR starts with a case concerning the Millenium Dome, as the O2 concert venue was called in 2001. In *Pro-Design Ltd v New Millenium*,¹ Judge Mackay declined to give summary judgment to the claimant, a company which provided lighting systems for the Dome and had been successful in obtaining a monetary decision in an adjudication. Enforcement was resisted by the defendant on the grounds that the claimant company was a fraudulent vehicle owned by a senior employee ("head of lighting") of the defendant. The defendant alleged that this employee had entered into a fraudulent conspiracy to create the company and to use his position to see that the company got the work. If the defendant was correct, the court would be assisting the claimant in obtaining monies as the result of fraudulent and criminal conspiracy if it gave summary judgment. The judge asked counsel for the claimant whether he was in a position to comment on the essential allegations of fraud, to which counsel replied that he had no instructions on the matter.

The principle that the court will not give summary judgment to enforce an adjudicator's decision if to do so would entail the court assisting the claimant in perpetrating a fraud was accepted as correct in the *Andrew Wallace* case,² although on the facts of *Andrew Wallace* to enforce the decision would not assist in perpetrating a fraud.

Andrew Wallace

The claimant was an architectural company engaged by a developer, the defendant, on the terms of RIBA standard form, SFA/99. After succeeding in adjudication, the claimant sought to enforce the decision.

¹ *Pro Design Ltd v New Millennium Experience Co Ltd* Unreported September 26, 2001 (Liverpool TCC).

² *Andrew Wallace Ltd v Artisan Regeneration Ltd* [2006] EWHC 15 (TCC).

One of the defendant's reasons for resisting enforcement was that the words "Architects Limited" had, the defendant alleged, been added in manuscript to the name of the claimant in the SFA/99 agreement fraudulently, and unknown to the defendant until recently (at the time of the court hearing). The defendant's case was that it contracted with the individual, Mr Andrew Wallace, and not his company.

The judge found on the facts that the defendant had no realistic prospect of succeeding in the defence that the correct contracting party was Mr Wallace and not the company.

The defendant also submitted that the claimant had committed offences by reason of alleged breaches of section 67 of the Value Added Tax Act 1994 and pursuant to section 4(6) of the Business Names Act 1985. Counsel for the defendant invited the court to make a finding that the claimant was guilty of such offences. Judge Kirkham stated:

"That is a startling proposition. In this case, I am dealing with a civil dispute between the parties with a different standard of proof from that required in criminal proceedings. It would not in my judgment be appropriate for me to express any view as to any liability on the part of the claimant in respect of these matters."³

These allegations of illegality were apparently put by counsel for the defendant as matters which, along with other matters, indicated a significant lack of credibility on the part of the claimant which was of "fundamental importance". This point does not appear to lead anywhere, as there is no principle established in case law that where there is a significant lack of credibility on the part of the claimant, the claimant will fail to enforce an adjudicator's decision. The judge stated:

"The defendants' 'credibility' point does not in my judgment assist the defendants. It cannot be said that the lack of credibility on the part of the claimant affected the adjudicator's jurisdiction to decide as he did."⁴

Although the judge was not prepared to consider the allegations relating to the Value Added Tax Act 1994 and the Business Names Act 1985, she did consider the allegations of fraud and forgery. In addition to the allegation about the contracting party's name, the defendant alleged that sub-clause 5.6 of the contract had been amended in manuscript, again fraudulently and unknown to the defendant. The defendant's case was that it had never agreed to the amendment. The court's task was described as follows.

"It is necessary for me to consider whether the defendants have a real prospect of demonstrating that the claimant has fabricated documents, such that it can be said that the defendants have a real prospect of successfully defending the claim. I must do so without falling into the trap of conducting a mini-trial [*Swain v Hillman*]."⁵

Applying this test to the facts of the case, the judge was not persuaded that the defendant had a real prospect of defending the claim on the basis that sub-clause 5.6 was not amended by agreement. On the *Pro-Design* principle, the court would on the facts of this case not be assisting in perpetrating a fraud by enforcing the adjudicator's decision.

*SG South*⁶

³ *Andrew Wallace*, above, at [43].

⁴ *Andrew Wallace*, above, at [51].

⁵ *Andrew Wallace*, above, at [44].

⁶

SG South was the successful claimant in two adjudications and sought to enforce the two adjudicators' decisions. In the second adjudication, the defendant had asserted:

“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.”

The defendant complained in the adjudication that the claimant had illegally removed and disposed of steel, fixtures, fittings and equipment for 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 second adjudicator set out his views on the fraud allegations in his decision as follows:

“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 defendant] 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.”

It was accepted by the defendant at the enforcement hearing that the two adjudicators acted within jurisdiction and fairly. However, the defendant took the following points (among others):

- (1) the defendant asserted it had established a strong prima facie case that the claimant and in particular Mr South had behaved in a fraudulent way in a number of respects;
- (2) the court should not permit itself to be used as a vehicle for a party guilty of such fraudulent behaviour to enforce claims under contracts where it has so behaved.

Akenhead J stated as follows.

“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 produced 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 judgment, 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 contractor or cross-claims arising on the contract in question which can only be raised by way of set-off or cross-claim. Whilst matters in the first category can be raised, generally those in the second category should not be. The logic of this is that it is the policy of the 1996 Act that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims; put another way, enforcement should not be used to facilitate fraud; fraud which does not impact on the claim made upon which the decision was based should not generally be deployed to prevent enforcement.
21. In formulating and applying these propositions, courts need to be aware and take into account what goes on in construction sites up and down the country. On numerous occasions, contractors and sub-contractors and even consultants will submit bills or invoices which are or are believed by the recipient to overstate the entitlement. Whilst there are some 'cowboy' and fraudulent builders who prey on the public, it will only rarely be the case that one can presume fraud to have taken place where an invoice or bill is overstated. The claiming party may believe that it is entitled to what it is claiming; there may be a simple and honest mistake in the formulation of the claim; the claim may be based on a speculative but arguable point of law or construction of the contract. In none of these cases can it be said that there was fraud on the part of the claiming party. The court should be astute and cautious on adjudication enforcement applications in assessing pleas of fraud by the party against whom the adjudication decision has been made. I doubt very much whether there will be any

significant number of challenges to enforcement on the basis of fraud.”⁷

The possibility of an allegation of fraud does from time to time arise in connection with construction claims, often in the context of an allegation of highly exaggerated and/or unsubstantiated claims for alleged losses arising from delay or disruption. Akenhead J’s sensible note in the last paragraph is a realistic assessment of the relative rarity of such allegations being sustainable in the corporate construction and engineering industries.

*GPS Marine*⁸

Ringway operated a business importing aggregates by boat and engaged GPS to carry out dredging work at a berth. GPS started an adjudication over a payment dispute and obtained a decision in its favour. Ringway did not pay the amount ordered by the adjudicator and GPS issued enforcement proceedings. One of the grounds on which Ringway resisted enforcement was that the adjudicator’s decision was obtained by fraud.

Ringway did not allege that GPS acted with deliberate dishonesty, but that GPS acted recklessly as to the truth of statements made in support of its claim in the adjudication, which was then upheld by the adjudicator. Specifically, Ringway’s case was that it was clear from timesheets that GPS made claims for labour in which the hourly rates and hours spent were incorrect, and GPS ought to have known they were incorrect.

Ramsey J quoted paragraphs 20 and 21 from the judgment of Akenhead J in *SG South* with apparent approval and stated:

- “81. I was also referred to the decision of Teare J in *Enka Insaat v Banca Popolare*⁹ where there was an allegation of fraudulent demands on guarantees. He set out the test as being whether there was a real prospect that a party could establish at trial that the only realistic inference was that the other party could not honestly have believed in the validity of the demand: see the decision at [24] and [40].
82. It can be seen that this is a case where Ringway was aware of the inconsistency between the invoices and the claimed figures during the course of the adjudication and put forward a case based on that inconsistency. At that stage it did not allege fraud. Ringway’s new case on fraud depends on inferences to be drawn from the very inconsistencies which formed part of Ringway’s submissions in the Rejoinder. Nothing further has arisen.
83. As Ringway had raised the inconsistencies in the adjudication then, like any other matter raised in the adjudication, they cannot later rely on that matter to challenge the findings of fact or law of the adjudicator so as to resist enforcement. In my judgment a party cannot reconstitute a case based on an inconsistency and then by alleging fraud seek to rely on the same matters to resist enforcement of the decision of the adjudicator.

⁷ *SG South*, above.

⁸ *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC).

⁹ [2009] EWHC 2410.

84. As Akenhead J said in *SG South Limited*, if the behaviour, acts or omission are raised and adjudicated upon in the adjudication, the decision without more is enforceable. In this case Ringway raised the inconsistencies in the Rejoinder which the adjudicator refused to take into account. Ringway raises a separate issue of whether the adjudicator acted in breach of the rules of natural justice in refusing to take into account that Rejoinder.¹⁰ That means that the adjudicator did not, in this case, adjudicate on the question of the inconsistency. However, where a party is aware of a matter and does not raise it during the adjudication, it cannot then raise to seek to challenge enforcement. I consider that the same should apply to allegations of fraud. That party always has the opportunity to deal with the matter in court or arbitration when it seeks a final determination. If new matters come to be known after the adjudication and before enforcement then, provided they are properly supported, they might form a basis for resisting enforcement as set out by Akenhead J at [20(c) and [20(d)] in *SG South Limited*.
85. In deciding the issue of whether Ringway's allegation of fraud based on inconsistencies can be raised as a defence to enforcement, it seems to me that I should approach the case on the basis that Ringway were aware of the inconsistencies during the adjudication but did not raise them in an effective way. If the adjudicator was in breach of the rules of natural justice in failing to allow them to put in a Rejoinder then the fact that Ringway were not able to raise the question of inconsistencies will go to the question of the materiality of the breach. If, however, the adjudicator was not in breach of the rules of natural justice then the fact that Ringway was unable to deploy their contention of inconsistencies cannot mean that they can now raise that contention, reformulated as fraud, to challenge enforcement of the decision. Otherwise a party could challenge enforcement on the basis of matters they knew about at the time of the adjudication but failed to deploy.
86. I therefore find that Ringway were aware of the inconsistencies during the adjudication and, subject to my findings on breach of natural justice, cannot now raise those matters, reformulated as fraud, to seek to resist enforcement.
87. Even if that were not right, the question is whether there is a real prospect that Ringway would establish at trial that the only reasonable inference from the evidence is that GPS were reckless so as to be deceitful in putting forward the claim. The evidence shows that there were timesheets on which they did not base the claim. Rather they based the claim on details of personnel on site and rates paid. The fact, which is not challenged, that the claim underestimated the hours shown on the timesheets is powerful evidence that there was an absence of fraud. Why would a party deceitfully seek to put forward a claim for fewer hours than might be made on the basis of the evidence in timesheets? It seems to me to be fanciful to say that GPS were acting dishonestly having no honest belief in the truth of what they were putting forward. This is a case where there were inconsistencies between the timesheets and the claims but I do not accept that there

¹⁰ The judge found on the facts that there was no breach of the rules of natural justice.

is a real prospect that Ringway will establish at trial that GPS were reckless, in the sense set out in *Derry v Peek*,¹¹ in putting forward the claim.

88. As I have said when Ringway put in the Rejoinder they did not seek to allege fraud based on the facts. Even now at paragraph 30 of his submissions Mr Mort says that he is not making an allegation either of deliberate dishonesty or dishonest conduct by Mr Spencer.
89. Therefore I do not consider that Ringway have established that they have real prospects of successfully defending the enforcement of the adjudicator's decision in relation to the cost of labour on the basis that the award was procured by fraud."¹²

Speymill v Baskind

The Court of Appeal heard this case before judgment in the *GPS* case, although the Court of Appeal gave judgment a few days after and made a brief reference to the *GPS* case as taking the same approach as in the *SG South* case. In *Speymill*, Judge Platts in the Technology and Construction Court in Liverpool had declined to give summary judgment enforcing an adjudicator's decision in favour of Speymill, on the basis that Mr Baskind had an arguable defence that the claimant's conduct amounted to fraud.

Mr Baskind engaged Speymill as contractor to convert Raby House, a former country house hotel, into a house which was to be Mr Baskind's home. During the course of the building works, 15 interim payment certificates were issued. Mr Baskind made payment against those certificates up to certificate 12, which he paid in part. He made no payment in respect of certificates 13-15. Speymill served notice of adjudication, seeking payment of outstanding sums.

One of the issues in the adjudication was whether Mr Baskind had served withholding notices in respect of interim certificates 12, 13, 14 and 15. Mr Baskind's position was that he had; Speymill asserted he had not. Mr Baskind was unable to produce to the adjudicator any copies of the withholding notices and his explanation was described by Jackson LJ 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."¹³

Speymill denied that its employees had stolen any files belonging to Mr Baskind. The parties referred to this area of dispute as the "fraud" issue; Jackson LJ not surprisingly called it the "theft" issue.

The adjudicator set out the approach he would adopt to this issue as follows.

¹¹ (1889) 14 App. Cas. 337.

¹² *GPS Marine*, above.

¹³ *Speymill*, above, at [14].

“I note that serious allegations have been made by the Responding Party in this adjudication. Allegations of fraud and theft are criminal matters which I clearly have no jurisdiction to deal with in their own right. Nevertheless, to the extent that the Responding Party is able to prove its assertions of fact with respect to the alleged fraud on the part of the Referring Party, I will consider these assertions as a defence to the Referring Party’s claims in this adjudication.”

This approach was quite correct, it is respectfully submitted. On the facts and the evidence, the adjudicator found that no valid and/or effective withholding notices were issued by Mr Baskind in respect of interim certificates 12, 13, 14 and 15.

The judgment of the Court of Appeal was given by Jackson LJ, who quoted and agreed with paragraphs 19 and 20 from Akenhead J’s judgment in *SG South*. The Court of Appeal did not add anything to the *SG South* analysis, except for the following:

“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.”¹⁴

Applying the *SG South* principles to the facts, Jackson LJ found that this was a case where the adjudicator’s decision should be enforced¹⁵; the appeal was allowed. The main point was that the adjudicator had addressed the allegation of theft to the extent that it was necessary for him to do so and had made a decision which was open to him. The allegation of theft was raised directly before him; it did not come to light after his decision and therefore, applying the *SG South* principles, it did not provide a basis for refusing to enforce the adjudicator’s decision.

The *SG South/Speymill* approach does have this consequence: although the court will not generally assist a claimant in perpetrating a fraud, it will do so in the following circumstances. Where an allegation of fraud is made by the responding party in adjudication as an unsuccessful defence before the adjudicator, but it is on a proper analysis a good defence, the claimant will succeed before the court on enforcement. Similarly, where an allegation of fraud could have been made by the responding party in adjudication, but was not made, and it is on a proper analysis a good defence, again the claimant will succeed before the court on enforcement.

The justification for this approach is the temporary nature of adjudication and the “pay now, argue later” policy of the Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act). One can, however, envisage circumstances in which it is something of an unseemly embarrassment that the court has assisted a claimant in perpetrating a fraud, and that the defendant, whilst attempting to “argue later” in arbitration or court, finds the funds are no longer available to make good the injustice in which the court is implicated.

¹⁴ *Speymill*, above, at [37].

¹⁵ The decision remained subject to a stay of execution imposed by the trial judge, against which there was no appeal, by reason of *Speymill*’s financial position.

Conclusions

1. A responding party in adjudication may defend a claim on the basis of an allegation of fraud, forgery or theft on the part of the claimant.¹⁶
2. A claiming party may not be able to refer a claim for the tort of deceit to adjudication (depending on the wording of the contractual adjudication clause); it may be arguable that such a claim does not arise “under” the contract.¹⁷
3. Where a responding party runs a defence of fraud, forgery or theft, the adjudicator should consider and decide on the merits of that defence as part of his or her decision, as the adjudicator did in the *Speymill* case.
4. This does not mean that the adjudicator decides on criminal matters or on matters outside his or her jurisdiction. The adjudicator is deciding, on the civil law standard of proof, the merit of a defence like any other.
5. 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.¹⁸
6. In an action before the court to enforce an adjudicator’s decision, if fraud, forgery or theft is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgment, it must be supported by clear and unambiguous evidence and argument.¹⁹
7. The court will not normally give summary judgment to enforce an adjudicator’s decision if to do so would entail the court assisting the claimant in perpetrating a fraud.²⁰
8. If an allegation of fraud, forgery or theft was raised as a defence in the adjudication and was adjudicated upon, then the decision is enforceable; the same allegation will not provide a basis for resisting enforcement.²¹
9. Similarly, if an allegation of fraud, forgery or theft is an alternative legal means of putting a case that was put on another basis in the adjudication and was adjudicated upon, then the decision is not rendered unenforceable.²²
10. Similarly, if an allegation of fraud, forgery or theft could have been made in the adjudication but for any other reason the responding party elected not to make the allegation, that allegation will not provide a basis for resisting enforcement.²³
11. If an allegation of fraud, forgery or theft neither was nor reasonably could have been raised in the adjudication, the allegation may be raised by the defendant as a ground for resisting enforcement of the adjudicator’s decision.²⁴

¹⁶ *SG South*, above, at [19].

¹⁷ *SG South*, above, at [19].

¹⁸ *SG South*, above, at [20].

¹⁹ *SG South*, above, at [20].

²⁰ *Pro-Design*, above; *Andrew Wallace*, above; *SG South*, above.

²¹ *SG South*, above, at [20]; *GPS Marine*, above.

²² *GPS Marine*, above, at [83].

²³ *SG South*, above, at [20].

²⁴ *SG South*, above, at [20]; *Speymill*, above.

12. When the court considers such a ground for resisting enforcement, a distinction is drawn between fraud, forgery or theft which directly affects the subject matter of the decision and fraud, forgery or theft which is independent of the decision.²⁵ It is only fraud, forgery or theft which directly affects the subject matter of the decision that will provide a valid basis for resisting enforcement.²⁶
13. When considering an allegation of fraud, deceit, forgery or theft which may provide a valid basis for resisting enforcement, the court has to consider whether the defendant has a real prospect of demonstrating that the claimant acted fraudulently, forged documents or whatever the allegation is, such that it can be said that the defendant has a real prospect of successfully defending the claim. The court must do so without conducting a mini-trial.²⁷
14. The court will not be assisted in its enquiry by the citation of authorities concerning the effect of fraud upon judgments and arbitration awards. 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 under the Housing Grants, Construction and Regeneration Act 1996 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. Therefore, it is only the authorities described in this edition of CAR that should be cited.²⁸

²⁵ Examples are given of each category in *SG South* at [20(d)], quoted above.

²⁶ *SG South*, above, at [20]; *Speymill*, above.

²⁷ *Andrew Wallace*, above.

²⁸ *Speymill*, above.