



Neutral Citation Number: [2019] EWHC 996 (TCC)

Case No: HT-2018-000382

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

Rolls Building  
Fetter Lane, London EC4A 1NL

Date: 17/4/2019

Before :

**THE HONOURABLE MR JUSTICE PEPPERALL**

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Between :

**PBS ENERGO A.S.**

**Claimant**

- and -

**BESTER GENERACION UK LIMITED**

**Defendant**

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**Karen Gough** (instructed by **Keystone Law**) for the **Claimant**  
**Steven Walker QC** and **Tom Owen** (instructed by **Watson Farley & Williams LLP**)  
for the **Defendant**

Hearing date: 13 February 2019  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**MR JUSTICE PEPPERALL:**

1. By an adjudication decision dated 7 December 2018, Douglas Judkins ordered that Bester Generacion UK Limited should pay PBS Energo A.S. the sum of £1,701,287.22 plus interest of £81,801.62 by 14 December 2018. No payment was made and PBS now seeks summary judgment upon its claim to enforce the decision. Bester resists the application on the basis that the decision was procured by fraud.

**THE BACKGROUND**

2. On 29 April 2016, Bester entered into a contract with Equitix ESI CHP Wrexham Limited to design and build a biomass-fired energy-generating plant in Wrexham. On 10 May 2016, Bester entered into a sub-contract with PBS for the engineering, procurement, construction and commissioning of the plant. The sub-contract price was £14,230,000 plus VAT.
3. Unfortunately, the parties fell into dispute. On 24 May 2017, PBS gave notice of its intention to terminate the sub-contract. On 14 June 2017, it confirmed its purported termination. PBS asserted a claim upon termination in the sum of £7,711,818.71. Bester did not accept that PBS was entitled to terminate the sub-contract. It first sought to affirm the sub-contract and then, by letter dated 7 August 2017, purported to terminate the contract. Equitix called on the performance security provided by Bester, which in turn triggered the counter-guarantees provided by PBS in the sum of £2,709,277.99. Bester asserted a claim against PBS on an interim account in the sum of £7,467,660.29. Meanwhile, Equitix gave notice and subsequently terminated the main contract with Bester.
4. On 14 November 2017, PBS issued proceedings against Bester in claim number HT-2017-000330. The claim is defended and indeed Bester counterclaims on the basis that it maintains that PBS wrongfully terminated the contract. This main action is listed for a 12-day trial in July 2019.
5. Meanwhile, the parties' respective claims were referred to adjudication and Simon Tolson, a partner of Fenwick Elliott LLP was appointed. By his decision dated 23 January 2018, Mr Tolson decided that PBS was entitled to terminate, and had validly terminated, the sub-contract with effect from 15 June 2017. Mr Tolson did not deal with the quantum of PBS's claim, but he did order that Bester should repay the performance security of £2,709,277.99.
6. Bester did not pay and accordingly PBS commenced further proceedings in this court in order to enforce the Tolson adjudication. On 13 April 2018, Stuart-Smith J gave summary judgment in favour of PBS. It is clear from his subsequent costs decision that the judge was not impressed by Bester's conduct in respect of the Tolson adjudication:

“Bester's conduct has been unreasonable at almost every turn. Having started and lost the adjudication before Mr Tolson, it did not pay, did not respond to requests for payment and, when PBS issued proceedings, indicated an intention to defend proceedings although there was no defence to the claim. It raised spurious issues in its Defence which, apparently, it never had any real intention of pursuing. It unreasonably did not consent to judgment and only acknowledged that PBS was

entitled to judgment when submitting its skeleton argument for the hearing on 13 April 2018. Bester says that evidence submitted on 8 March 2018 ‘was clear in seeking a stay.’ But given Bester’s previous record of non-cooperation, non-payment and non-response, the material fact is that it never consented to judgment, formally or otherwise. In the light of my ruling rejecting the stay of execution, given on 13 April 2018, it is not unfair to characterise Bester’s conduct as adopting every and any device to stave off the evil moment of payment.”

Even then, Bester did not pay either the judgment sum or Mr Tolson’s fees. PBS only received full payment on 16 July 2018.

7. The Tolson adjudication dealt with questions of liability and the repayment of the performance security. On 5 November 2018, PBS served notice of adjudication seeking the valuation and payment of its claims under clauses 15.8 and 16.4 of its contract with Bester. Mr Judkins accepted his appointment on 9 November 2018 and, after considering the parties’ submissions, issued his decision on 7 December 2018.
8. In the Judkins adjudication, PBS pursued a claim under clause 15.8(i) of the contract, which provided that following termination of the contract under clause 16.4:

“The Employer [Bester] shall ... take over and pay the corresponding part of the Contract Price for the Works, including the Temporary Works, which have been performed up to the termination of the Contract.”
9. The principal issue in the Judkins adjudication was whether the value of the works that had been performed exceeded, and if so by how much, the payments already made and the value of the equipment that had been manufactured at the time of termination of the contract. Bester argued that no further sums were due under clause 15.8(i). It specifically argued that PBS was required to give credit for the value of the equipment that had not been delivered up under the contract and which PBS retained.
10. The adjudicator first considered the value of the milestone payments. At paragraph 2.67 of his decision, he found that the total value of milestone payments to which PBS was entitled at termination was £3,842,100. At paragraphs 2.22 and 2.70, he rejected, however, any direct connection between the milestones and the proper valuation of the “corresponding part of the contract price for the works ... performed up to the termination of the contract.”
11. Both parties’ experts sought to value the works performed to termination by reference to the fourteenth monthly progress report issued by PBS (“MPR14”). MPR14 recorded that the close-up progress was then 43%, but also showed overall progress (calculated by reference to PBS’s cost-value reconciliations) at 54%. Although not his original approach, PBS’s expert, David Daly, offered valuations based on both 43% (the close-up progress number from MPR14) and 54% (the overall progress calculation from the same report). In turn, Bester’s expert, Carlos Loayza, offered valuations on the basis of 43% and 33.7%, being his own recalculation of the true value of the works carried out to termination. Rejecting the two extremes, Mr Judkins found, at paragraph 2.89 of his decision, that PBS had completed 43% of the contract works.

12. On the basis of that finding, Mr Judkins found that Bester was liable to pay £1,701,287.22 pursuant to clause 15.8. The agreed maths that underlies this finding was as follows:

43% of the contract price	6,118,900.00
Value of variations	120,173.00
Total value of work done	<hr/> 6,239,073.00
Less monies paid	(4,537,785.78)
Net liability	<hr/> <b>£ 1,701,287.22</b>

13. At paragraph 2.90, the adjudicator considered Bester's mitigation argument. He said:

“The respondent submits that the claimant is required to mitigate against its loss by selling on or using the items of plant on some other facility. I disagree; it is the respondent which has caused the claimant to manufacture the plant items which the evidence shows that it has done and which, as Mr Košťál has averred, are now stored at the claimant's factories in the Czech Republic. When the relevant proportion of the Contract Price has been fully paid over to the claimant the plant belongs to the respondent which is responsible for collecting and disposing of the plant as it sees fit.”

14. Accordingly, Mr Judkins ordered Bester to pay the sum of £1,701,287.22 plus interest of £81,801.62 by 14 December 2018. Upon Bester's failure to pay, PBS issued this third set of proceedings on 19 December 2018 in order to enforce the Judkins adjudication. PBS now seeks summary judgment. Bester resists the application on the basis that the decision was procured by fraud. In the alternative, it argues that the court should give Bester conditional leave to defend. Bester's case is set out in the witness statement of its solicitor, Rebecca Williams, dated 25 January 2019.

## **THE LAW**

15. Rule 24.2 of the Civil Procedure Rules 1998 provides that, on a claimant's application for summary judgment, the court may give judgment if it considers that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial. The onus is upon the claimant to establish the absence of a triable issue.
16. Summary judgment is of course the usual means by which parties enforce adjudication decisions in their favour made pursuant to the statutory scheme in the Housing Grants, Construction & Regeneration Act 1996. By section 108(3) of the Act and regulation 23(2) of The Scheme for Construction Contracts (England & Wales) Regulations 1998, the decision of the adjudicator is binding upon the parties and must be complied with unless or until their underlying dispute is finally determined whether by litigation, arbitration or agreement. Adjudication is founded on the “pay now, argue later” principle: per Dyson J (as he then was) in Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] B.L.R. 93 and Coulson J (as he then was) in Mead General Building Ltd v. Dartmoor Properties

Ltd [2009] EWHC 200 (TCC); [2009] B.L.R. 225, at [5]. Adjudicators' decisions will be enforced by the courts, regardless of errors of procedure, fact or law, provided that the adjudicator has not acted in excess of his jurisdiction and there has been no serious breach of the principles of natural justice: Carillion v. Devonport Royal Dockland [2005] EWCA Civ 1358; [2006] B.L.R. 15, at [52].

17. The challenge in this case is that the decision was procured by fraud. Akenhead J set out the proper approach to allegations of fraud in adjudication cases in SG South Ltd v Kingshead Cirencester Ltd [2009] EWHC 2645 (TCC); [2010] B.L.R. 47 at [20]:

- “(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.”

18. These observations were expressly approved by Jackson LJ in Speymill v. Baskind [2010] EWCA Civ 120; [2010] B.L.R. 257. In Gosvenor London Ltd v. Aygun Aluminium UK Ltd [2018] EWHC 227 (TCC); [2018] B.L.R. 353, Fraser J reviewed the authorities in respect of allegations of fraud. He said, at [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.’”

19. In SG South, Akenhead J urged some caution in labelling alleged overcharging as fraud. He said, at [21]:

“In formulating and applying these propositions, courts need to be aware and take into account what goes on construction sites up and down the country. On numerous occasions, contractors and subcontractors and even consultants will submit bills or invoices which are or are believed by the recipient to overstate the entitlement. Whilst there are some ‘cowboy’ and fraudulent builders who prey on the public, it will only rarely be the case that one can presume fraud to have taken place where an invoice or bill is overstated. The claiming party may believe that it is entitled to what it is claiming; there may be a simple and honest mistake in the formulation of the claim; the claim may be based on a speculative but arguable point of law or construction of the contract. In none of these cases can it be said that there was fraud on the part of the claiming party. The Court should be astute and cautious on adjudication enforcement applications in assessing pleas of fraud by the party against whom the adjudication decision has been made. I doubt very much whether there will be any significant number of challenges to enforcement on the basis of fraud.”

20. In each of SG South, Gosvenor and Speymill, the question of fraud was in issue in the adjudication. In the first two cases, it was alleged that the contractor had fraudulently overcharged for work done. Both SG South and Speymill involved allegations of theft. Where - as in these cases - the alleged fraud has been adjudicated upon, then, as Akenhead J made clear in SG South, the adjudicator’s decision should without more be enforced. So too, an adjudicator’s decision should usually be enforced where the defendant failed to take an allegation of fraud which should reasonably have been taken before the adjudicator. There is, however, an important distinction between cases in which the fraud was, or should have been, put in issue in the adjudication and cases in which the adjudication decision was itself procured through fraud that was reasonably discovered after the adjudication was over.
21. The statutory policy of enforcing the temporary finality of an adjudication decision is important. As Fraser J rightly observed, the court must be robust not to allow such policy to be undermined simply by the assertion of fraud. In my judgment, such policy consideration must, however, yield to the well-established principle that the court will not allow its procedures to be used as a vehicle to facilitate fraud. Where, exceptionally, it is properly arguable on credible evidence that the adjudication decision was itself procured by a fraud that was reasonably discovered after the adjudication, the court is unlikely to grant summary judgment. I say unlikely rather than never since it is possible to conceive of a case in which the claimant might be able to establish that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial even without relying on the impugned adjudication.

### **THE ALLEGATION OF FRAUD**

22. Steven Walker QC, who appears for Bester with Tom Owen, argues that PBS informed Mr Judkins that equipment manufactured for the Wrexham project was stored to Bester’s order and would be available to Bester upon payment of the sums found to be due. Mr Walker submits that this was simply untrue in relation to the water-cooled grate, the flue gas treatment equipment and selective non-catalytic reduction equipment (“SNCR”). Further, he argues that the evidence that PBS had been able to cancel its order for some equipment indicated that MPR14 overstated PBS’s claim.

23. Bester alleges that PBS knew or must have known that these statements were false. Alternatively, it argues that PBS was, at the very least, reckless as to the truth of its statements. Further, Mr Walker argues that the false statements influenced Mr Judkins' decision.
24. Karen Gough, who appears for PBS, accepts that its evidence in the adjudication was mistaken as to the location of the water-cooled grate. Further, she accepts that Bester will not be able to obtain all of the equipment and that no credit has in fact been offered for the equipment that is no longer available. She asserts, however, that a significant value of equipment remains stored in good condition in the Czech Republic. Further, she rejects criticism of the valuation based on the close-up percentage obtained from MPR14 contending that such method of valuation was introduced by Bester's expert in the adjudication, Mr Loayza, and not by PBS's expert, Mr Daly.
25. Ms Gough strongly argues that there was no fraud. She disputes that the admitted mistake as to the water-cooled grate influenced Mr Judkins. Further, she argues that it has throughout been PBS, and not Bester, that has driven the proper resolution of this dispute. Even if some credit should have been given for the water-cooled grate or any other equipment no longer available to Bester, she argues that Bester should take comfort from the fact that PBS has an outstanding claim in the main action for in excess of £3.9 million in addition to the £1.7 million claimed in this application. Further, she points to the evidence of Bester's parlous financial position and asserts that, by contrast, PBS is a solvent and established business.
26. In analysing the defence of fraud, I consider:
  - 26.1 First, the alleged representations made in the adjudication.
  - 26.2 Secondly, the question of falsity.
  - 26.3 Thirdly, any evidence as to whether PBS knew the true position or was reckless as to falsity.
  - 26.4 Fourthly, the question of whether any false representations induced the adjudicator's decision.
  - 26.5 Fifthly, the issue of whether Bester could or should have taken the point in the adjudication.
  - 26.6 Sixthly, I consider other submissions made as to whether I should or should not grant summary judgment.

### 1. REPRESENTATIONS

27. MPR14, on which the Judkins adjudication decision was based, showed the progress on manufacture of various parts. Specifically, it showed that the water-cooled grate (also referred to as the stoker), the flue gas cleaning equipment, the SNCR and the boiler pressure parts had been fully manufactured. In response to Bester's argument that credit should be given for the value of these parts, PBS asserted in its Reply:
  - “7. Equally Bester seeks to introduce into this Adjudication some obligation on PBS to sell or use the equipment which was substantially bespoke for use on this project and for which Bester was liable to pay. Without prejudice to its rights,

PBS has made attempts to sell it or reuse it but without success (see the witness statement of Mr Ondřej Košťál served herewith). The equipment is stored, as Mr Tolson found, and as was evidenced to PBS in early 2017, to Bester's order and is available to Bester upon payment, as it always was.

8. If/when the plant/equipment can be sold, PBS will give credit to Bester for any value obtained, however PBS denies that it is under any obligation to secure onward sales for the equipment which is substantially bespoke for the Wrexham project and if Bester is able to use it or sell it, upon payment of the Contract value, it is available in storage and at Bester's disposal.
  9. There is no basis to seek to reduce the contract value which attaches to the various items of plant and equipment manufactured for the Contract.”
28. At paragraphs 19-20 of the body of the Reply, PBS cited clause 7.7 of the contract and asserted that Bester would not obtain title to the plant and equipment until it had paid. The Reply continued, at paragraph 21:

“In respect of [PBS's] a Contractor's termination under clause 16.2 of the Subcontract conditions, the Contractor is obliged to hand over Contractor's Documents, Plant, Materials and other work, for which the contractor has received payment, and work in progress up to the date of termination (clause 16.3). On the basis that no payment has been made in respect of the Equipment, although it has been undertaken in accordance with the Contract and offered to Bester upon terms that it is paid for, PBS has no further obligation to Bester in relation to the plant and equipment other than to keep it safely stored/protected, for which it is entitled also to be paid. Upon payment by Bester, the plant and equipment can be made available to Bester. Bester is liable to pay for the equipment such as was procured at termination, it does not have the right to refuse to pay and insist that PBS takes the risk on an onward sale or disposal for the contract value on the open market. If and to the extent that PBS is able to dispose of any of the equipment, then it will give credit for any sums received.”

29. PBS added, at paragraph 24:

“As the witness statement of Mr Ondřej Košťál explains, PBS has tried to find buyers for the equipment but has failed thus far to conclude a contract for the sale of any of the equipment or realise any cash payment in respect of the same.”

30. These submissions were founded upon Mr Košťál's evidence in the adjudication. He is the CEO and President of PBS's board of directors. By his statement dated 26 November 2018, he gave the following evidence about the plant and equipment:

- “11. I confirm, that PBS remains in possession of the Grate. No payment has been made by Bester in respect of Milestone 8 (Water Cooled Grate Ready to Ship).
12. The amount we consider the equipment was valued at the date of termination is 11.718 million CZK.
13. Between the date of the termination and today the grate was transported to the storage place of our mother company – PBS Velka Bites, where they are professionally stored as per the EPPs noted in paragraph 9 above. The manufacturer of the Grate, before delivery, performed the proper conservation



in accordance with stated technology rules. We have an invoice confirming this was done, however and as for the boiler such sum is not included in the value of the works claimed in this adjudication.

14. We tried to find a buyer for this equipment or use it in another project. A contract for sale has been concluded but the purchase price has not been paid. The contract for sale of the Grate requires payment to be made before transfer of title occurs, as such the sale has not yet been concluded and unless and until a sale is concluded, payment made, and title passed to another party this equipment is held to the order of Bester under the Contract.”
31. In my judgment, the following representations were made in the adjudication:
  - 31.1 The bespoke equipment had been fully manufactured for the Wrexham project and was held to Bester’s order.
  - 31.2 Such equipment would be available to Bester upon payment.
  - 31.3 PBS had made efforts to sell the equipment to no avail, save that there was a contract for the sale of the water-cooled grate.
  - 31.4 While PBS had sold the water-cooled grate, it had not been paid. Title to the grate would not pass under that contract until PBS was paid and meanwhile PBS continued to hold the equipment to Bester’s order.
  - 31.5 Upon achieving a sale, PBS intended to give credit to Bester.

## 2. FALSITY

### *The water-cooled grate*

32. At paragraph 59 of her statement, Ms Williams explained in cautious terms that she had “reason to suspect” that, by the time of Mr Košťál’s statement in the adjudication, the water-cooled grate had already been installed on a project in Olsztyn, Poland. Her suspicion was founded upon the following matters:
  - 32.1 PBS’s refusal to allow Bester to inspect the equipment.
  - 32.2 Statements in the correspondence with other sub-contractors that indicated that much of the equipment procured for the Wrexham project had been used in Olsztyn.
  - 32.3 Articles found online indicating that key items of equipment for the Olsztyn project had been sourced from the same countries as on the Wrexham project.
  - 32.4 A YouTube video uploaded on 1 October 2018 showing that the installation of the biomass boiler was then well underway in Olsztyn.
  - 32.5 Evidence from industry experts that installation of the biomass boiler would typically take place very soon after the installation of the grate, and that the grate used on the Polish project was “almost certainly” the same type as that procured for the Wrexham project.
33. Any doubt on the matter was resolved by Mr Košťál’s statement dated 5 February 2019. He explains that the water-cooled grate has “now” been used on another project and that it is “no longer” available. At paragraphs 23-24 he said:

- “23. Following termination of the PBS/Bester Contract, in order to try and mitigate the losses incurred, PBS B started to look for a project in which to use the equipment. In 2018 it was decided to use the grate for the Olsztyn project. In May 2018 the purchase price and storage costs were fully paid to Detroit Stoker and in the summer 2018 the grate was transported to the Czech Republic and subsequently to Poland in late September 2018.
24. I referred to these matters in my witness statement in the adjudication at paragraphs 11-15. The payment for the sale of the grate for use in the Olsztyn project has not yet been determined as it is wrapped up in the overall account for the project. This piece of equipment is therefore now no longer available to provide to Bester.”
34. In my judgment, it is properly arguable upon this evidence that the sale of the grate had been completed during September 2018 when the equipment was transported to Poland and installed at Olsztyn and that each of the representations set out at paragraph 31 above were false in respect of the grate:
- 34.1 Contrary to the assertion in his latest statement, Mr Košťál did not tell the adjudicator that the grate had been transported from the Czech Republic to Poland in late September 2018. On the contrary, he told the adjudicator as late as 26 November 2018 that it was stored with PBS Velka Bites.
- 34.2 Mr Košťál does not dispute Ms Williams’ evidence, at paragraph 58 of her statement, that the grate was installed in Poland before 1 October 2018.
- 34.3 Despite PBS’s acceptance in the adjudication that it would have to give credit for any value achieved upon sale of equipment, no credit has in fact been offered. While PBS suggests that the difficulty with giving credit is that the sale price has not yet been determined, there are two problems with this explanation:
- a) First, in his statement in the adjudication, Mr Košťál indicated that a sale had been agreed but title would not pass until PBS had been paid. There was no suggestion that there was a further issue as to identifying a proper value within a larger price but, in any event, there seems to be no good reason why PBS could not by now have allocated a notional value to the resale of the grate.
- b) More fundamentally, it is clear from Mr Košťál’s recent statement that the failure to give credit even after sale is a matter of design. He said, at paragraph 33:
- “It is because of Bester’s probable insolvency and potential for it to be wound up in the near future that I am not happy to provide any credit for equipment sold or used elsewhere against the sum awarded by Mr Judkins in the second adjudication.”
35. While no credit has been given, I note the evidence in Mr Košťál’s statement in the adjudication that the grate had a value of 11.718 million CZK. This would suggest a likely sterling value of around £400,000.

*The flue gas cleaning equipment*

36. On 10 October 2016, PBS entered into a sub-contract with Lodge Cottrell Limited for the supply and delivery of the flue gas treatment system for the Wrexham project. The sub-contract price was £654,450.
37. By MPR14 and in the adjudication, PBS maintained that it had procured the manufacture of the flue gas cleaning equipment. Accordingly, this was part of the equipment that PBS represented to the adjudicator that it held to Bester's order and which would be made available upon payment. Yet, when PBS gave disclosure in the main action on 5 December 2018, a number of documents painted a different picture:
- 37.1 An e-mail exchange in May 2017 recorded that PBS had not then made any payment under the sub-contract. Lodge Cottrell indicated that it would not give title to the fabric filter and reactor until it had received 60% of the contract price.
- 37.2 Following the termination of PBS's contract with Bester, it opened dialogue with Lodge Cottrell in order to avoid having to purchase all of the equipment. In this vein, on 7 September 2017, Lodge Cottrell offered to compromise its claim on the basis that PBS would take the fabric filter but not the reactor, cyclone or sorbent injection system. On that basis, Lodge Cottrell offered to accept the reduced price of £450,000 in full and final settlement.
- 37.3 By an e-mail from PBS's Project Manager, Marek Novotný, to Mr Košťál dated 14 September 2017, Mr Novotný referred to the proposed settlement. He explained:
- “Since the bulk of the supply has already been produced, these costs have been calculated by the supplier on the CA. 16,441,000.0-Kč. At the meeting with the representation of the FY Lodge Cottrell, it was agreed that PBS would purchase a part of the equipment usable for the boiler and its use in another project. The supplier shall retain unnecessary parts of the Nakontrahované supply for PBS ... The resulting price of buying part of the technology and thus the termination contract is ca. 13,050,000.0- Kč.”
- 37.4 Commenting favourably on the saving of over 7,000,000 CZK, Petr Kádner said, in an e-mail copied to Mr Košťál, that he was in favour of the deal. He added:
- “I believe that the boiler uplacírujeme somewhere”
- In her evidence, Ms Williams helpfully translates: “I believe that the boiler was being modified for re-use somewhere.”
- 37.5 While PBS has not disclosed the terms of any final settlement, it appears probable that some such deal was done. Indeed, an e-mail exchange between Mr Novotný and Lodge Cottrell in April 2018 was disclosed in which the parties made arrangements for the fabric filter to be shipped to PBS's order and Mr Novotný expressed his appreciation that they had been able to resolve “a difficult situation with the Wrexham project in a way that was acceptable to both our companies.” Again, Mr Košťál was copied in to the e-mail chain.
- 37.6 Finally, e-mails in August and September 2018 made arrangements for the shipping of the filter, but made no reference to the reactor, cyclone or sorbent injection system.
38. In these proceedings, Mr Košťál says that this evidence shows the steps taken by PBS's sister company to deal with the cash flow problems caused by Bester's non-payment. He

says that a revised payment was agreed to take into account that its supplier would no longer be carrying out the commissioning and installation supervision work, and that “some desulphurization components were not now to be delivered.”

39. Mr Košťál does not explain what equipment was not to be delivered, but the evidence identified by Ms Williams indicates that a credit of circa £200,000 was agreed with Lodge Cottrell in September 2017.
40. In my judgment, it is properly arguable upon this evidence that, contrary to the representations made to Mr Judkins:
  - 40.1 PBS has neither paid for nor obtained title to the entire flue gas cleaning equipment.
  - 40.2 It has never held the entire flue gas cleaning equipment to Bester’s order.
  - 40.3 PBS achieved a saving of circa. £200,000.
  - 40.4 The fabric filter, being the only component actually acquired by PBS, was considered useful for other projects.
  - 40.5 Further, given the fact that it was neither photographed nor recorded as being present in storage in January 2019, it might be inferred that the fabric filter has indeed been reused and that it is no longer available to Bester.

*SNCR*

41. Again, by MPR14 and in the adjudication, PBS maintained that it had procured the manufacture of the SNCR. This was therefore further equipment that PBS represented to the adjudicator that it held to Bester’s order and which would be made available upon payment.
42. The SNCR was to be supplied by a Swedish supplier, Yara Environmental Technologies AB. After termination of the Wrexham project, PBS and Yara exchanged e-mails in November and December 2017 in which they explored the possibility of either reusing the raw material from the Wrexham project for the bigger tanks required for Olsztyn or alternatively negotiating a settlement sum for cancelling the Yara contract without PBS taking ownership of the manufactured parts. Yara was willing to agree a reduced settlement sum and not supply various other parts, but it had no use for the tank. Yara then offered either a price for the sale of the tank or a settlement that allowed PBS a credit against the tank for its scrap value.
43. Pressed for a decision on the tank, PBS wrote on 29 January 2018, in an e-mail copied to Mr Košťál:

“The decision on the tank is from our point of view linked to the Olsztyn (Poland) project. The contract should be signed within about two weeks. Then it would be very likely that Yara was the supplier of SNCR for this project as well and we could achieve a comfortable solution for both parties.”

44. Mr Košťál again accepts that its sister company took steps to mitigate PBS's losses. He explains:
- “19. After some negotiation, Yara agreed to use some of the manufactured material elsewhere and only charge PBS B for the equipment that could not be used. A mechanism was agreed in which this amount was paid to Yara on the basis of the invoice already issued to PBS B and the difference was the subject of a credit note from Yara.
  - 20. Yara offered to purchase the tank for its raw material value and PBS E negotiated with Yara for use of the tank in the Olsztyn project in Poland. Yara offered to provide a tank for the Olsztyn project using the material from the Wrexham tank. The manufactured tank was thereafter deconstructed and a new tank built for the use by PBS E in the Olsztyn project. PBS E paid the full value for that tank to PBS B.
  - 21. The SNCR was not a necessary boiler component for construction, and the boiler would be fully operation without SNCR for uncontaminated biofuels and in countries with free emission standards, other than in EU countries. Therefore, the absence of the SNCR was not material to the state of completion of the boiler.”
45. Further e-mails exhibited by Mr Košťál indicate that final agreement was reached in February 2018.
46. Accordingly, I consider that it is properly arguable that, contrary to the representations made to Mr Judkins, none of the SNCR is now available to Bester:
- 46.1 Save for the tank, Yara agreed to keep the SNCR for use on other projects.
  - 46.2 The tank was deconstructed and the materials reused to build a larger tank for the Olsztyn project.

*Equipment report*

47. PBS commissioned an expert to inspect and assess the equipment. The report demonstrates that the steam turbine and the boiler pressure parts from the Wrexham biomass power plant exist and are being carefully stored in good condition in the Czech Republic. Ms Gough points to the significant value of this equipment and argues that such evidence is wholly inconsistent with Bester's general allegation of fraud.
48. Mr Košťál says, at paragraph 27 of his statement in these proceedings:
- “It is clear that there may be some slight variation in what equipment is available to hand over to Bester should it eventually make payment of its debt to PBS, however PBS is not seeking to recover anything more than it is due.”
49. This is not good enough. PBS seeks summary judgment and it is incumbent upon it to explain any discrepancy openly and fully. This has not been done and I am driven to the conclusion that PBS would not now be making such concession but for Ms Williams' diligent analysis of PBS's disclosure.

50. Mr Walker submits that, having identified clear misrepresentations in PBS's case to the adjudicator, that there is reason to call into question the existence and availability of other equipment. I agree. That said, there is evidence before the court that at least the equipment recorded in the expert report both existed and was well stored in the Czech Republic in January 2019.

### 3. KNOWLEDGE OF FALSITY

51. Fraud is proved where a false representation has been made knowingly, or without belief in its truth, or recklessly in the sense of not caring whether the statement be true or false: Derry v. Peek (1889) 14 App. Cas. 337.
52. I have already referred to evidence of Mr Košťál's knowledge of the true position. In my judgment, it is properly arguable that PBS made false representations to the adjudicator knowing them to be false, alternatively without belief in their truth or, at the very least, recklessly. Accordingly, there is an arguable case of fraud.

### 4. INDUCEMENT

53. In Zurich Insurance Co. plc v. Hayward [2016] UKSC 48; [2017] A.C. 142, Lord Clarke adopted the following formulation from Chitty on Contracts, at [34]:

“Once it is proved that a false statement was made which is ‘material’ in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent.”

54. In Pan Atlantic Insurance Co. Ltd v. Pine Top Insurance Co. Ltd [1995] 1 A.C. 501, Lord Mustill observed at page 551 that the representor “will have an uphill task in persuading the court that the ... misstatement ... has made no difference ... there is a presumption of causative effect.” As Briggs J, as he then was, observed in Ross River Ltd v. Cambridge City Football Club Ltd [2008] 1 All E.R. 1004, at [241]:

“First and foremost, in a case where fraudulent material misrepresentations have been deliberately made with a view ... improperly to influence the outcome of the negotiation of the contract in favour of the maker and his principal, by an experienced player in the relevant market, there is the most powerful inference that the fraudsman achieved his objective, at least to the limited extent required by law, namely that the fraud was actively in the mind of the recipient when the contract came to be made.”

55. Here, it is clear that the adjudicator rejected Bester's argument that credit should be given for the value of undelivered parts and equipment on the basis that these were bespoke items that had been manufactured to Bester's order and which PBS had, to that point, been unable to resell or use in other projects. Mr Judkins understood that the parts were held to Bester's order and would be available upon payment; alternatively, that credit would be given for any parts that were subsequently resold or used.

56. In my judgment, it is properly arguable that the alleged false representations were intended to and did influence Mr Judkins in rejecting Bester's argument as to credit and that PBS thereby obtained a material advantage in the adjudication proceedings.

#### **5. COULD OR SHOULD THE FRAUD POINT HAVE BEEN TAKEN DURING THE ADJUDICATION?**

57. The documents upon which Ms Williams relies in her evidence were obtained from PBS's disclosure in the main TCC litigation. PBS gave disclosure on 23 November 2018 by uploading documents to an online transfer site. Ms Williams explains that Bester was only able to start reviewing disclosure on 5 December 2018. That was not simply because of the weight of work upon the adjudication case, but because that was the first date when her firm was given access to the documents. While disclosure had been given on 23 November, there was some delay in Bester's e-disclosure consultants being able to process the data because of initial problems with the log-in details and then the need for PBS to upload a zip file before any documents could be copied or downloaded. As a result, Bester's consultants were not able to provide its solicitors with access to the disclosed documents until 5 December 2018.
58. Ms Williams says that more than 57,000 documents were disclosed. They were not ordered chronologically. PBS's list of documents purported to be in chronological order but the vast majority of documents bore an incorrect November 2018 date. To add to the complexity of the review task, approximately 17,000 documents were disclosed in Czech or Slovak without an English translation.
59. PBS has not challenged this evidence. Instead, it has sought to assert in general terms that Bester had already had significant disclosure. Mr Tinkler asserts that Bester had copies of the sub-contracts in both March and December 2017 and that there was disclosure in the Tolson adjudication. Importantly, however, he neither asserts that any of the documents now relied upon by Bester had been disclosed before 23 November 2018 nor does he exhibit other previously disclosed documents that would have allowed Bester to establish the facts now relied upon.
60. I am therefore satisfied that Bester could not reasonably have been expected to have argued its fraud allegation in the adjudication.

#### **6. OTHER ISSUES**

##### *The absence of a defence*

61. Ms Gough complains that Bester first raised the allegation of fraud in Ms Williams's evidence in response to this application. She criticises Bester for failing to file a defence and submits that an allegation of fraud should be properly and clearly pleaded. In my judgment, this criticism is entirely misconceived. Rule 24.4(2) of the Civil Procedure Rules 1998 provides:

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

62. Claimants considering an application for summary judgment have a choice. They can either make an immediate application or they can await sight of the defence. If they choose the former course, as most will in adjudication cases, they cannot complain if the defendant elects not to file a defence and if the first they know of the defendant's case is when evidence is filed in response to the application.
63. Ms Gough is right to say that an allegation of fraud should be clearly pleaded. No doubt it will be in the event that I do not give summary judgment in this case, but for the reasons already explained, that obligation has not yet arisen. In so far as Ms Gough asserts that the need to plead fraud provides an important safeguard by reason of counsel's duty not to plead such fraud without a proper evidential foundation, I accept Mr Walker's submission that neither counsel nor their instructing solicitor could properly allege fraud in a witness statement or in submissions to the court without the same evidential foundation. Indeed, a solicitor must not suggest fraud unless the allegation goes to a matter in issue which is material to the client's case and is "supported by reasonable grounds": Solicitors Regulation Authority's Code of Conduct (Version 21), IB(5.7) and IB 5.8. Equally, barristers' professional duty not to draft a document containing an allegation of fraud without both clear instructions and "reasonably credible material which establishes an arguable case of fraud" extends to skeleton arguments as well as formal pleadings: Bar Standards Board's Code of Conduct (9<sup>th</sup> Ed.), para. rC9.

*Bester's financial position*

64. Ms Gough took me to Bester's accounts to 31 December 2017. While the accounts showed a positive net asset position of £2.82 million, such balance would have been almost entirely wiped out by the enforcement of the Tolson adjudication. Ms Gough argues that Bester is "barely an entity at all."
65. By a solicitor's letter dated 14 December 2018, Bester asserted that it could not then pay the adjudication award but that it would be in funds by mid to late January 2019. The source of the funds was not explained, but it is worthy of note that Bester does not seek to rely on its impecuniosity to resist the imposition of a condition that it now pay money into court as a condition of having leave to defend this claim.
66. Ms Gough observes, correctly, that there was then no suggestion of fraud. Such allegation was only made in Ms Williams' evidence filed in response to this summary judgment application on 25 January 2019.

*The residual claims*

67. Ms Gough also relies on the fact that PBS pursues Bester for some £3.9 million in the litigation listed for trial in July 2019. Such observation is apparently intended to give the court comfort that, even if there might be merit in the argument that Mr Judkins was probably influenced by fraud in declining to give Bester any credit for the value of the equipment that was not delivered under the sub-contract, there were nevertheless more significant sums owed to PBS. If that is the argument, it is plainly flawed:



- 67.1 This is a summary judgment application to enforce the Judkins adjudication. Judgment is not obtained by showing that there might be other claims against the defendant of equal or greater value.
- 67.2 The mere assertion of other claims does not prove that Bester has any such liability. That will, no doubt, be the question for trial.
- 67.3 In any event, it remains open to Bester in that trial (but not upon this application for summary judgment) to argue that it has no liability because it was PBS who had repudiated the sub-contract.

## **CONCLUSIONS**

68. In my judgment, it is therefore properly arguable on credible evidence that the Judkins adjudication decision was obtained by fraud:
  - 68.1 First, it is clear that PBS made a number of representations to the adjudicator as to the existence of the bespoke parts and equipment manufactured pursuant to the sub-contract with Bester for use on the Wrexham project, that such parts and equipment were held to Bester's order and that they would be made available to Bester upon payment.
  - 68.2 Secondly, there is good evidence that representations about the water-cooled grate, the availability of all of the flue gas cleaning equipment and SNCR were false.
  - 68.3 Thirdly, there is credible evidence before the court upon which it is properly arguable that PBS made false representations knowing them to be false, alternatively without belief in their truth or recklessly, not caring whether such statements were true or false.
  - 68.4 Fourthly, it is properly arguable that PBS thereby obtained some advantage in the adjudication.
69. It appears that PBS thinks that this was fair game. That Bester was in the wrong for cancelling the sub-contract and that it was doing no more than doing its best to mitigate its losses. Certainly, Mr Tolson found that Bester had repudiated the contract and the Judkins adjudication necessarily proceeded on that basis. Further, there are real questions over Bester's solvency, there appears to have been no merit in its defence to earlier adjudication enforcement proceedings and PBS might be right that there remains a further significant liability arising from the Wrexham project. Further, it may be that the fraud argument is something of a windfall for an insolvent party that was always going to seek to avoid payment in any event, just as Bester did in 2018 when confronted with proceedings to enforce the Tolson decision. None of this is, however, an answer to the short point that, by this application, PBS seeks to enforce an adjudication decision which was arguably procured by fraud.
70. Further, I am satisfied that Bester could not reasonably have discovered the alleged fraud before the conclusion of the Judkins adjudication.
71. For all of these reasons, this is one of those rare adjudication cases where there is a properly arguable defence that the decision was obtained by fraud. In such circumstances, I agree with Mr Walker that it is not for this court to seek to re-engineer Mr Judkins' decision and to identify what, if any, sum might have been ordered to be paid in the event that there had

been no arguable fraud. Accordingly, PBS's application is not saved by proof that some valuable equipment is stored in good conditions to Bester's order. Indeed, severance is not available and an adjudicator's decision on a single dispute is either valid and enforceable or invalid and not enforceable: Cantillon Ltd v. Urvasco Ltd [2008] EWHC 282 (TCC); [2008] B.L.R. 250.

72. I therefore dismiss PBS's application for summary judgment.