

LANDMARK DECISION ON RESISTING ENFORCEMENT OF ADJUDICATION DECISION ON GROUNDS OF FRAUD

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"THE ENGLISH HIGH COURT HAS REFUSED TO ENFORCE AN ADJUDICATION DECISION ON THE BASIS THAT THERE WAS A PROPERLY ARGUABLE DEFENCE THAT THE DECISION HAD BEEN OBTAINED BY FRAUD."

In a very significant decision handed down today, the English High Court has refused to enforce an adjudication decision on the basis that there was a properly arguable defence that the decision had been obtained by fraud [1]. The case, in which Watson Farley & Williams acted for the successful party, appears to be the first occasion on which the court has refused to order enforcement in such circumstances.

BACKGROUND

In May 2016, Bester Generacion UK Limited ("Bester") entered into a contract with PBS Energo A.S ("PBS") for the engineering, procurement, construction and commissioning of a biomass-fired energy-generating plant in Wrexham, Wales. A

dispute arose between the parties and PBS purported to terminate the contract. It brought proceedings against Bester in the High Court, in relation to which a trial is listed for July 2019.

In the meantime, in parallel adjudication proceedings, Bester was ordered to pay PBS £1.7m pursuant to a contractual provision that it should pay for works performed up to the date of termination. PBS issued proceedings to enforce that decision and sought summary judgment. However, Bester contended that the decision was procured by fraud and should not be enforced.

FRAUD AND THE ENFORCEMENT OF ADJUDICATION DECISIONS

The process of adjudication introduced by the Housing Grants, Construction and Regeneration Act 1996 is founded on the “pay now, argue later” principle, enabling parties to resolve disputes quickly and economically, whilst maintaining cash-flow in the course of a construction project. The decision of an adjudicator is binding upon the parties and must be complied with unless or until the underlying dispute is finally determined. Adjudicator’s decisions will therefore usually be enforced, regardless of error, provided that the adjudicator has not acted in excess of their jurisdiction and there has been no serious breach of the principles of natural justice. However, as Mr Justice Pepperall noted, the statutory policy of enforcing the temporary finality of an adjudication decision must yield to the well-established principle that the court will not allow its procedures to be used as a vehicle to facilitate fraud. Whilst such allegations must be supported by clear and unambiguous evidence and argument, if it is properly arguable that an adjudication decision itself has been procured by a fraud that was reasonably discovered after the adjudication, the judge considered that the court would be unlikely to grant summary judgment.

"THE STATUTORY POLICY OF ENFORCING THE TEMPORARY FINALITY OF AN ADJUDICATION DECISION MUST YIELD TO THE WELL-ESTABLISHED PRINCIPLE THAT THE COURT WILL NOT ALLOW ITS PROCEDURES TO BE USED AS A VEHICLE TO FACILITATE FRAUD."

THE VERDICT

Bester’s allegations of fraud concerned submissions made by PBS in the adjudication that certain equipment for the project had been manufactured, was stored to Bester’s order and would be made available to Bester upon payment. Bester contended that PBS knew, or must have known that these statements were false and Mr Justice Pepperall accepted that these submissions were arguable. In particular, it was properly arguable that, prior to the adjudication, a water cooled grate had already been re-purposed and sent for use at another project in Poland and that orders for flue gas cleaning equipment and selective non-catalytic reduction (SNCR) equipment had each either been partially cancelled or re-deployed in another PBS project.

It was also properly arguable that PBS made such false representations to the adjudicator knowing them to be false, alternatively without belief in their truth or, at

the very least, recklessly, and further it was properly arguable that the false representations were both intended to influence the adjudicator and did so, giving PBS a material advantage in the proceedings.

As to whether Bester could have raised its allegations of fraud earlier, the judge noted that the evidence relied on by Bester was obtained from PBS’s disclosure in the main litigation proceedings. The documents were provided on 23 November 2018, prior to the adjudication decision being issued on 7 December. However, Bester submitted that it was only able to begin reviewing the documents on 5 December, and that of the over 57,000 documents provided, approximately 17,000 were in Czech or Slovak with no English translation, and the documents were not initially in chronological order. In light of those facts, Mr Justice Pepperall was satisfied that Bester could not reasonably have been expected to have argued its case of fraud in the adjudication.

Mr Justice Pepperall rejected further arguments raised by PBS, including a suggestion that Bester should have filed a defence or that the existence of a claim in the main proceedings for £3.9m was relevant, noting that none of these arguments detracted from the fact that PBS was seeking to enforce a decision which was arguably procured by fraud. The application for summary judgment was therefore dismissed.

CONCLUSION

Although the dispute between PBS and Bester continues, Mr Justice Pepperall's decision to refuse summary judgment in respect of the enforcement of the adjudication decision is a significant one for both the parties and the construction industry as a whole.

"WHERE THERE IS A PROPERLY ARGUABLE DEFENCE THAT A DECISION HAS BEEN OBTAINED BY FRAUD, THE COURTS WILL NOT ENFORCE THE DECISION SUMMARILY."

The decision confirms that, where there is a properly arguable defence that a decision has been obtained by fraud, the courts will not enforce the decision summarily. This should be welcome news to parties to construction contracts. Whilst the certainty provided by the adjudication regime is undeniably vital to the smooth running of construction projects, where a party has made fraudulent misrepresentations to obtain an adjudication decision in its favour, the court should clearly not allow its process to be used to secure summary judgment. It will of course remain possible for a claimant to pursue its claim to a full hearing, but they will be unable to benefit from the fast track nature of adjudication.

This judgment reinforces the importance of good behaviour in the adjudication process. The abridged timetable of an adjudication and the pro-enforcement stance of the courts does not mean that parties can cut corners. However, it must be emphasised that such cases of fraud are exceptional. Parties will not be able to rely on vague allegations, or matters which they were or should have been aware of at the time of the adjudication. It remains the case that, in the vast majority of cases, the fundamental policy of "pay now, argue later" will prevail.

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1 PBS Energo A.S. v Bester Generacion UK Limited (2019)

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