

## COURT OF APPEAL CONFIRMS WFW'S LANDMARK SUCCESS ON CHALLENGES TO ENFORCEMENT OF ADJUDICATION DECISIONS

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On 19 March 2020, the English Court of Appeal handed down judgment in *PBS Energo AS v Bester Generacion UK Limited* [2020] EWCA Civ 404, confirming the Technology and Construction Court's ("TCC") decision to refuse enforcement of an adjudication award on the basis of a properly arguable defence that the award had been obtained by fraud.

The case, in which Watson Farley & Williams ("WFW") acted for the successful party, Bester Generacion UK Ltd ("Bester"), was the first in which the TCC refused to order enforcement in such circumstances where the allegations of fraud could not have been raised in the underlying adjudication, and is a landmark decision for the construction industry.

The Court of Appeal's decision comes against the backdrop of PBS Energo AS' ("PBS") purported termination of a subcontract between it and Bester for the engineering, procurement, construction and commissioning of a biomass fired energy generating plant in Wrexham, Wales. In a set of adjudications it was held that the PBS' termination was valid and a damages award was made in PBS' favour. However, Bester successfully opposed the enforcement of the damages award in proceedings before the TCC on the basis that there was an arguable case the award had been procured by fraud which could not have been raised in the adjudication. PBS obtained permission to appeal that finding, but on the limited grounds that fraud should have been pleaded in the defence to the enforcement proceedings, or on the basis that enforcement should only have been stayed (either in whole or in part). In a judgment given by Lord Justice Coulson, the Court of Appeal has now confirmed that, although a defendant to an adjudication enforcement claim may be well-advised to plead any allegations of fraud, it was not necessary for Bester to have done so, as well as endorsing the TCC's decision that if an adjudicator's decision was arguably procured by fraud or where evidence relied on by the adjudicator is shown to be both material and arguably fraudulent, then, if the allegations of fraud could not have been raised in the adjudication itself, such allegations can be a proper ground for resisting enforcement.

"This is a fantastic result for the client, and also a significant decision for the construction industry."

Rebecca Williams, Co-head of London Dispute Resolution Group

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The decision follows the TCC’s judgment in parallel proceedings on the termination of the subcontract, in which Mrs Justice Cockerill found that PBS’ termination was unlawful, resulting in its claims being dismissed in full and Bester’s counterclaim succeeding (see here). The WFW London Dispute Resolution team acting for Bester was led by Partner and London Dispute Resolution Co-Head Rebecca Williams, supported by Senior Associates Andreas Efstathiou, Alexander Creswick and Mark McAllister-Jones, and counsel Steven Walker QC of Atkin Chambers and Tom Owen of Keating Chambers. The team has received numerous accolades as a result of the TCC’s enforcement decision, including being named “Construction and Engineering Litigation Team of the Year” at the Legal Week Commercial Litigation and Arbitration Awards 2019 (see here) and nominated for “Commercial Litigation team of the Year” at the upcoming Legal Business Awards 2020. In addition, the case was key to Rebecca’s personal nomination to The Lawyer’s Hot 100 2020 for dispute resolution (see here).

Rebecca commented: “This is a fantastic result for the client, and also a significant decision for the construction industry, confirming as it does that while the “pay now, argue later” principle of adjudication remains alive and kicking, there are circumstances in which businesses that are arguably the victims of fraud can prevent enforcement. The decision is also further testament to the dedication and hard work of the WFW team, without whose efforts the key evidence in this case would not have been recovered”.

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