

## Construction Law Update

### Resisting Enforcement of an Adjudicator's Decision – The Fraud Defence

Attempts to resist enforcement of adjudication decisions by alleging they were procured by fraud are becoming more common, *PBS Energo A.S v Bester Generacion UK Limited* [2019] was “one of those rare adjudication cases” whereby the defence was successful and enforcement was denied – but what led the judge to hand down such an unusual decision?

#### Background

Bester Generacion UK Limited (“**Bester**”) engaged PBS Energo A.S. (“**PBS**”) under a sub-contract for the engineering, procurement, construction and commissioning of a biomass-fired energy-generating plant in Wrexham.

A dispute arose which led to the termination of the sub-contract. Several adjudications followed, the last of which was decided by Mr Judkins and considered whether the value of the works undertaken at the time of termination exceeded (a) the payments already made to PBS; and (b) the value of the equipment which had already been manufactured at the time of termination.

#### The Judkins adjudication

Mr Judkins calculated that Bester was liable to pay PBS £1,701,287.22. Bester attempted to lessen this by arguing that PBS had a duty to sell any undelivered plant it had manufactured under the sub-contract and give credit to Bester for the same. Mr Judkins disagreed, holding that Bester had caused PBS to manufacture the plant and was thus obliged to pay for, collect and dispose of the items as it saw fit.

PBS applied for a summary judgment to enforce Mr Judkins’ decision. Bester challenged the application, arguing that the decision had been obtained by fraud.

#### A high hurdle

Successfully challenging an adjudicator’s decision on grounds of fraud is not an easy feat. The courts have established that (a) fraud can be raised as a defence

provided that it is a real defence to the claims; (b) a challenge to enforcement on the grounds of fraud must be supported by clear and unambiguous evidence and argument; and, most importantly for this case, (c) generally, fraud may only be raised as a defence to enforcement where it could not reasonably have been raised as a defence during an adjudication.

#### Bester’s challenge

Bester’s challenge was based upon representations given by PBS’ witnesses, during the adjudication, relating to Bester’s mitigation argument that PBS should sell any undelivered plant. Crucially, the statements said that PBS had attempted to sell some of the plant manufactured for the sub-contract but had failed due to the plant’s bespoke nature. The plant was therefore being “stored to Bester’s order” and would be available to Bester upon payment of the sums due.

It was later discovered (via documents disclosed in separate litigation) that – at the time these statements were made – one item of plant had been sold and installed on a project in Poland and various other items of plant had never been/were no longer in PBS’ possession. Evidence also proved that the witnesses were aware of these facts when they made their representations to the contrary. These falsehoods were intended to, and did, influence Mr Jenkins therefore giving PBS a material advantage in the adjudication. It was found that it was properly arguable on credible evidence that the Judkins adjudication decision was obtained by fraud.

#### Could/should fraud have been raised earlier?

The documents which arose Bester’s suspicions of fraud were among 57,000 documents disclosed, 17,000 of which were in Czech without English translation. Due to this and the timeline of the disputes, the judge held that Bester could not reasonably have been expected to have alleged fraud during the adjudication, meaning it was now available as a defence to enforcement. The

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defence was accepted and PBS' application for summary judgment was dismissed.

### Analysis

Due to the 'temporary finality' of adjudicator's decisions, there is a robust policy to enforce - it is thus only in exceptional cases that enforcement will be declined. It is also well established, however, that adjudication should not be used as a vehicle to facilitate fraud. This case is a rare example where clear evidence of fraud was discovered *after* the adjudication and was shown to have had a genuine impact on the adjudication proceedings making the decision unfair. These circumstances led the judge to depart from the general rule and deny PBS' application for enforcement.

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