

# CASE IN BRIEF

## Dawnus Construction Holdings Ltd v Marsh Life Ltd [2017]

*by Jeremy Glover*

Marsh had engaged Dawnus to design and build a hotel plus retail and restaurant units in Poole. The project fell into delay and the contract was terminated. A number of disputes arose and there had been four adjudications. This adjudication enforcement case concerned the fourth, a referral by Marsh seeking a valuation of the account upon termination. Although it was Marsh who had made the adjudication referral, the Adjudicator held in favour of Dawnus. The total amount said by the Adjudicator to be due to Dawnus came to just under £1.5 million (inclusive of VAT and interest).

Marsh said there had been a breach of natural justice in that the Adjudicator had failed to consider and deal with various defences that they had put forward. However, as a starting point, HHJ McKenna had to consider whether Marsh, by inviting the Adjudicator to correct errors in the Decision under the slip rule, was accepting the validity of the Decision. By doing this without a general reservation of rights, Dawnus said that Marsh was electing to forego any opportunity it might otherwise have had to challenge the Decision.

Following the issue of the Decision, both parties had written to the Adjudicator raising a number of slips, Dawnus raising mathematical errors but Marsh raised more substantive issues, namely alleged breaches of natural justice going to whether or not the Adjudicator had considered the arguments raised by Marsh during the adjudication. Marsh said that the failure by the Adjudicator to have considered the arguments, must have been a slip. The Adjudicator revised the quantum of his Decision but rejected the more substantial points raised.

HHJ McKenna explained that the doctrine of election prevents a party from "approbating and reprobating" or "blowing hot and cold" in relation to an adjudicator's award. Here Marsh could have, but did not, expressly reserved its right to pursue a claim of breach of the rules of natural justice when inviting the Adjudicator to make corrections under the slip rule. By not doing this, when inviting the Adjudicator to exercise his powers under the slip rule, Marsh had waived or elected to abandon its right to challenge enforcement of the Decision since it had thereby elected to treat the Decision as valid:



**“Assuming that good grounds exist on which a decision may be subject to objection, in the absence of an express reservation of rights, either the whole of the relevant decision must be accepted or the whole of it must be contested...”**

Marsh was therefore precluded from challenging the Decision in the enforcement proceedings. However, in case he was wrong, the Judge did go on to review the natural justice challenge. Before doing so, HHJ McKenna reminded the parties that for a breach of natural justice to be a bar to enforcement, the breach must be plain, significant and causative of prejudice.

Here, the Judge accepted that the Adjudicator may have misunderstood the nature of certain of Marsh's arguments. However, the Judge then reviewed in general terms what it was the Adjudicator had been asked to do. Here, the Adjudicator was specifically asked to determine the issue of loss and expense and that was what he did. Marsh had argued that contractually there was no entitlement to loss and expense and the Adjudicator had rejected that argument. In doing so, the Adjudicator accepted Dawnus' contractual arguments about which were the relevant events that should be taken into account. He had therefore addressed the question that had been put to him. The Judge concluded that Dawnus:

***"may not like that conclusion but to my mind it is stuck with it."***

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## About the Author



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Jeremy has specialised in construction energy and engineering law and related matters for most of his career. He advises on all aspects of projects both at home and abroad, from initial procurement and strategic project advice to dispute avoidance and resolution. He acts across a wide range of construction sectors in the UK and internationally, including general construction, transport, communications, process plant, oil, gas, nuclear and renewables.

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