

CASE IN BRIEF 1

PBS Energo AS v Bester Generacion UK Ltd [2019] EWHC 996 (TCC)

By Jeremy Glover

PBS sought the summary enforcement of an adjudication decision in the sum of £1.8 million. Bester resisted on the basis that the decision had been procured by fraud. Bester had entered into a subcontract with PBS for the engineering, procurement, construction and commissioning of a biomass-fired energy-generating plant. Disputes arose, and proceedings were issued in the TCC arising out of an alleged termination. The full hearing is currently listed for July 2019. In the interim, PBS commenced an adjudication where the adjudicator decided that PBS had validly terminated the subcontract. He also ordered that Bester should repay the performance security of £2.7 million. PBS had to enforce this decision, with the Judge commenting that it was not: *"unfair to characterise Bester's conduct as adopting every and any device to stave off the evil moment of payment."*

PBS started a second adjudication seeking the valuation and payment of certain claims. Issues included the value of the equipment that had been manufactured at the time of termination of the contract. The adjudicator here found that Bester was liable to pay £1.8 million. Bester had claimed that PBS was required to mitigate against its loss by selling on or using the items of plant on some other facility. The adjudicator disagreed, noting that there was evidence that Bester had caused PBS to manufacture the plant items which were now stored at factories in the Czech Republic.

Mr Justice Pepperall having reviewed the existing authorities, including *Gosvenor London Ltd v Aysun Aluminium UK* (see Issue 215) noted that where the alleged fraud has been adjudicated upon, then the adjudicator's decision should, without more, be enforced. Further, an adjudicator's decision should usually be enforced where the allegation of fraud should reasonably have been taken before the adjudicator. The Judge continued that there was 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."

Further, whilst the temporary finality of an adjudication decision was important, and the courts must be "robust" not to allow such policy to be undermined simply by the assertion of fraud, that policy consideration must:

"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".

Bester said that PBS told the adjudicator that equipment manufactured for the project was stored to

Bester's order and would be available to Bester upon payment of the sums found to be due. However, this was "simply untrue" in relation to the water-cooled grate and other items. Bester alleged that PBS knew or must have known that these statements were false. Alternatively, PBS was, at the very least, reckless as to the truth of its statements. These false statements influenced the second adjudicator's decision.

PBS accepted that its evidence in the adjudication was mistaken as to the location of the water-cooled grate. PBS also agreed that Bester would not be able to obtain all of the equipment and that no credit had in fact been offered for the equipment that was no longer available. However, there was no fraud. Throughout, it had been PBS, and not Bester, that had driven the proper resolution of this dispute. Even if some credit should have been given for the water-cooled grate, which had a value of around £400k, or any other equipment no longer available to Bester, PBS had a claim in the main action for in excess of £3.9 million in addition to the sums claimed here. There was also evidence of Bester's weak financial position. By contrast, PBS was a solvent and established business.

On reviewing the evidence, the Judge considered that it was "properly arguable" that a number of representations made in the adjudication were false. For example, the grate had been installed in Poland in September 2018, before the representations to the contrary were made to the adjudicator some two months later. It was also "properly arguable", that PBS had made false representations to the adjudicator knowing them to be false, without belief in their truth or, at the very least, recklessly. Accordingly, there was an arguable case of fraud. And given that it was clear that the adjudicator had 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, up to that point, been unable to resell or use in other projects, it was "properly arguable" that the alleged false representations were intended to, and did, influence the adjudicator and that PBS thereby obtained a material advantage in the adjudication proceedings.



The information came to light during the disclosure process in the TCC claim, there being some 57,000 documents of which 17,000 were disclosed in Czech or Slovak without an English translation. PBS were not able to point to any documents which would have allowed Bester to establish the facts now relied upon, during the adjudication. Hence, the Judge was satisfied that Bester could not reasonably have been expected to have argued its fraud allegation in the adjudication.

The Judge concluded that it was “properly arguable on credible evidence” that PBS had obtained some advantage in the adjudication and that the adjudication decision was obtained by fraud. The Judge made clear his views about this:

“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...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...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.”

The Judge was further satisfied that Bester could not reasonably have discovered the alleged fraud before the conclusion of the adjudication. Therefore, this was “one of those rare adjudication cases” where there was a properly arguable defence that the decision, was obtained by fraud. It was not for the court to seek to “re-engineer” the decision or sever part of the decision for example to give credit for the value of the water-cooled grate, and to identify what, if any, sum might have been ordered to be paid in the event that there had been no arguable fraud. The application for summary judgment was dismissed.

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 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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