

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Adjudication: fraud

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

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 Aygun 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.

The e-disclosure pilot **UTB LLC v Sheffield United Ltd & Ors** [2019] EWHC 914 (Ch)

This case was one of the first to discuss the provisions of the new Practice Direction 51U ("PD51U") or the "Disclosure Pilot for the Business and Property Courts" (the "Pilot"), which came into effect in January 2019. What is interesting is that Sir Geoffrey Vos at the outset made it quite clear that the Business & Property Courts, which include the TCC, expect parties to cooperate during the disclosure process:

"This dispute has generated thousands of pages of inter-solicitor correspondence, and a dispiriting volume of mistrust. As I said repeatedly in the course of argument, the parties will need to keep proportionality in the forefront of their minds as matters proceed. The Business and Property Courts are indeed willing and able to resolve the most complex of commercial disputes. But the parties must focus on the issues that require resolution, and not allow themselves to take every point, however small, nor to permit their mistrust of their opponents to become the driving force behind the litigation. There is, I am afraid, a danger of that here. The court expects the parties to cooperate to allow it to achieve a just, expeditious and proportionate resolution of the real commercial issues that separate them. Court proceedings are not a stage for a grudge match."

Part of the case related to "Extended Disclosure." The basic idea behind Extended Disclosure is that the parties must make a request for the type of disclosure they are seeking. This is for consideration at the first Case Management Conference. The Judge noted that the introduction of the Pilot was intended to effect a culture change. The Pilot operates along new and different lines driven by reasonableness and proportionality, with disclosure being directed specifically to defined issues arising in the proceedings. First they must seek to agree the "Issues for Disclosure", essentially those issues that need to be determined by the court by reference to contemporaneous documents, for there to be a fair resolution of the claim.

Then consideration needs to be given to what type of model for Extended Disclosure, is most appropriate. It may well be Model C, which is similar in style to the Redfern Requests in International Arbitration, where parties ask for the disclosure of particular documents or classes of documents. In the case here, the Judge noted that in deciding whether to allow Extended Disclosure, the court has to consider whether the application is "reasonable and proportionate having regard to the overriding objective" and that the requirements for the parties to cooperate and to act with proportionality are of the greatest importance:

- (1) Paragraph 18.2 of PD51U provides that "[t]he party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate".
- (2) Para 3.2(3) provides that there is an obligation "to liaise and cooperate with the legal representatives of the other parties ... so as to promote the reliable, efficient and cost-effective conduct of disclosure".
- (3) Para 7.3 emphasises that the Issues for Disclosure are "only those key issues in dispute" and "does not extend to every issue which is disputed in the statements of case by denial or non-admission".
- (4) Para 6.3 makes clear that the court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.

The Judge was concerned that neither side had taken this sufficiently seriously. Extended disclosure was not:

"something that should be used as a tactic, let alone a weapon, in hard fought litigation. It is all about the just and proportionate resolution of the real issues in dispute."

Notice of completion of making good defects

Swansea Stadium v City and County of Swansea
[2019] EWHC 989 (TCC)

A claim was pursued against the Contractor, Interserve, on the basis that it failed to make good defects during the Defects Liability Period. On 26 May 2011, the Notice of Completion of Making Good Defects was issued formally recording that the defects which the Council had required to be made good had been made good as of 14 April 2011. This led to the release of the final tranche of retention monies. Mr Justice Pepperall said that the Notice was of conclusive effect and that any defects required to be rectified under the defects liability clauses of the contract were deemed to have been made good. This meant that the claims against Interserve for alleged breaches of its obligations to identify and make good defects that became apparent during the defects liability period failed.

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Edited by [Jeremy Glover, Partner](#)

jglover@fenwickelliott.com

Tel: + 44 (0)20 7421 1986

Fenwick Elliott LLP

Aldwych House

71 - 91 Aldwych

London WC2B 4HN



www.fenwickelliott.com