IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)

No. HT-2018-000378

[2019] EWHC 413 (TCC)

Rolls Building,
Fetter Lane,
London
EC4A 1NL

Tuesday, 29 January 2019

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

OVE ARUP & PARTNERS INTERNATIONAL LIMITED — Claimant

- and -

COLEMAN BENNETT INTERNATIONAL CONSULTANCY PLC — Defendant

MR D. CHURCHER (counsel) appeared on behalf of the Claimant.

MR C. DARTON (counsel) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE O'FARRELL:

1 This is an application by the claimant, Ove Arup & Partners International Limited ("Arup"), against the defendant, Coleman Bennett International Consultancy Plc. ("CBI"), for summary enforcement of the decision of an adjudicator dated 19 October 2018, pursuant to which the defendant, CBI, was required to pay the claimant, Arup, the sum of £389,268.43 plus interest. The application to enforce the decision by summary judgment is resisted on the part of CBI by reference to a number of jurisdictional challenges.

2 The background to the dispute can be summarised as follows. In early 2016, CBI approached Arup regarding the possibility of engaging Arup to provide engineering services in relation to an investigation of the feasibility of using Hyperloop technology to link Manchester and Leeds as part of the Northern Powerhouse scheme. A Hyperloop is a mode of passenger and/or freight transportation in which pods are propelled by magnetic levitation technology through a partially evacuated tube, which is mounted on stilts or sited underground, at speeds of up to 760mph.

3 By letter dated 14 April 2016, Arup sent to CBI its proposal for an outline scope of work for the feasibility study that it had been asked to consider. The general level of work that was proposed by Arup in that letter was as follows:

> "(1) Arup will provide assistance with the overall project management of the Northern Powerhouse feasibility study programme, noting that other consultants will also be working on the feasibility study and their work will need to be coordinated with the Arup activities;
>
> (2) Arup will carry out focused technical feasibility studies in the areas of tunnel design, route selection and station layout;
>
> (3) Arup will carry out limited operational assessments and transport capacity assessments sufficient to define the system for tunnel and station design purposes;
> (4) Arup will carry out preliminary costing exercises and system economic assessments.
>
> (5) Arup will provide output material for inclusion in the Northern Powerhouse feasibility study report, which will be produced by others."

4 More specifically, Arup set out in its letter that the studies would comprise:

i) Outline definition of an initial ultrafast transport system, sufficient to enable work to begin in the absence of detailed information from HTI.
ii) Limited operational assessments and transport capacity assessments, sufficient to define the system for tunnel and station concept definition purposes.
iii) The development of generic conceptual designs for the stations.
iv) The development of generic conceptual designs for the tunnels and their interfaces with the stations.
v) Desk studies of the city centre areas of Leeds and Manchester, sufficient to identify appropriate sites and platforms for each station and to enable the following design requirements to be assessed, namely orientation, number and arrangement of platforms, depth and number of operational levels, passenger

and baggage connections to the existing mainline stations, potential for aboveground developments.

vi) Desk studies of the Leeds/Manchester regional level geology and identification of significant obstructions along the selected route. The overall tunnel design approach will be formed around a fatal floor assessment of the alternatives and will include route definition, developing horizontal and vertical alignment corridors between Leeds and Manchester, assessing the impact of topography on the feasibility of a partially/fully tunnelled route, estimating the expected size of the tunnel based on space proofing requirements, defining the interfacing tunnelling aspects of any stations.

vii) Preliminary construction cost estimates and system economic assessments.

viii) Development of text and other suitable material for inclusion in the final Northern Powerhouse feasibility study report to be produced by others.

5 The fees and commercial terms were set out at section 1.4 of the letter as follows:

> "The fee for conducting the studies defined above will be £350,000 plus VAT, costed at our normal rates. A definition of the anticipated expenditure profile for the project is appended. We are prepared to discount the above fee to £150,000 plus VAT in exchange for a 20% share in the ownership of the enterprise which is to be established as soon as possible between DC and HTI."

6 It is common ground that that proposal was accepted and that Arup commenced the work as set out in its letter. An initial payment of £75,000 was made by CBI on 6 May 2016.

7 By October 2016, it had become apparent that Arup would not take a 20 percent stake in the potential joint venture. A discussion took place between Sir Peter Michael, of DCN, and Arup, as a result of which an email was sent on behalf of Sir Peter Michael on 11 October 2016 stating as follows:

> "Further to our telephone call this morning, this note confirms that DCN/CBI acknowledge the debt total of 350k for work undertaken. We are only able to settle this debt in instalments as follows:
>
> (1) 75k paid to date;
> (2) A further 75k to be paid 30 days from the date of invoice;
> (3) A further 75k to be paid three months later;
> (4) The balance to be arranged according to cash availability.
>
> I trust that you will accept the above as good intention and that all material required to complete the DCN brochure currently in preparation will be available by close of business Thursday, 13th October 2016."

8 In fact, no further payment was made by either CBI or DCN to Arup. Arup submitted invoices to CBI in respect of the work carried out and, by letter dated 8 June 2017, Arup demanded payment in full of the balance of the £350,000 fee for work that had been carried out to date. CBI refused to make such payment and, therefore, on 12 September 2018, Arup commenced an adjudication seeking balance of the sum due.

9 In its notice of adjudication, Arup stated at paragraph 3:

> "Arup has provided professional engineering services to CBI pursuant to a contract between the parties ("The Appointment") entered into on or around 14 April 2016 and varied by agreement on or around 11 October 2016."

At paragraph 4, Arup stated that the appointment was a construction contract and the services to be performed were in relation to construction operations within the meaning of the Housing Grants, Construction and Regeneration Act 1996. Arup further stated that the appointment did not contain any express provision for adjudication and, therefore, by reason of section 108 of the Act, the adjudication's statutory scheme applied.

10 In due course, Mr Stephen Bickford-Smith was appointed as adjudicator and, by his decision dated 19 October 2018, he provided for CBI to pay, by 2 November 2018: the sum of £275,000 plus VAT, being the balance of the fee payable under the appointment; £44,146.43 by way of interest; statutory compensation by way of £300; and the adjudicator's fees of £350, plus £12,060, plus VAT.

11 The defendant has failed to pay those sums. On 23 November 2018, Arup commenced proceedings and issued an application by way of summary judgment in order to enforce the adjudicator's decision.

12 The defendant resists the application for summary judgment based on three jurisdictional grounds. Firstly, it is submitted that the contract (or contracts) on which the adjudication was brought were not construction contracts for the purposes of Part 2 of the Housing Grants, Construction and Regeneration Act 1996, as they were not agreements in relation to the carrying out of construction operations for the purposes of section 105 of the Act; alternatively, they included matters which were not construction operations and which were not severed off from the dispute (or disputes) which were referred to the adjudication and on which the decision was made and could not in fact have been so severed.

13 Secondly, it is submitted by the defendant that the referral was concerned with more than one contract or dispute, namely a contract as set out in the claimant's letter of 14 April 2016 and an alleged contract of 11 October 2016 that was said to have varied the original contract. The adjudicator therefore made decisions on more than one contract or dispute and so did not have jurisdiction.

14 Thirdly, the application is disputed on the ground that the adjudicator's jurisdiction turned on questions of fact that could not be properly determined in the adjudication and cannot now be justly decided on an application for summary judgment, namely (1) the extent to which the claimant's services did or did not fall within the definition of a construction contract; (2) whether there had in fact been a variation of the contract of 14 April 2016; and (3) whether Sir Peter Michael had authority to vary the contract.

15 The court is very grateful to the written and oral submissions from both counsel. It has assisted the court in identifying the real issues in dispute and determining the way forward.

16 The first jurisdictional challenge is whether or not the contract (or contracts) fell within the ambit of the Housing Grants Act and, therefore, whether the adjudicator had jurisdiction.

17 That is objected to by the claimant, Arup, firstly on the grounds of waiver. Fortuitously for the court, but perhaps not so much for the defendant, the Court of Appeal has very recently handed down a decision which is on point in respect of the issue of waiver and reservations of jurisdictional points taken in the context of adjudication.

18 In the case of *Bresco Electrical Services Limited (in liquidation) v Michael J. Lonsdale (Electrical) Limited and Primus Build Ltd* [2019] EWCA Civ 27, the Court of Appeal considered challenges to jurisdiction and the relevant reservations taken in relation to the two matters that were before it. The judgment in that case was given by Coulson LJ, who considered the relevant authorities in relation to reservations and waiver, and then stated as follows at paragraph 91 and 92:

> "91. In my view, the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour…
>
> 92. In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:
>
> (i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (*Allied P&L*).
>
> (ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit (*GPS Marine*).
>
> (iii) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it (*GPS Marine*).
>
> (iv) A general reservation of position on jurisdiction is undesirable but may be effective (*GPS Marine; Aedifice*). Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:
>
> i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (*Aedifice, CN Associates*);
> ii) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open (*Equitix*)."

Those guidelines provide a useful test, which I will apply in this case.

19 The defendant's submission, put very ably by Mr Darton, is that the defendant made a general reservation, sufficient to identify the objection to jurisdiction now taken, in a letter/email dated 11 October 2018 sent by its Direct Access barrister, Mr Bacon, to the adjudicator, and that challenge was subsequently maintained in the response that was filed in the adjudication. The letter of 11 October 2018 states as follows:

> "CBI does not accept that Part 2 of the Housing Grants, Construction and Regeneration Act 1996, or the Scheme for Construction Contracts Regulations 1998, apply to the matter or matters referred to in the notice and fully reserves CBI's position in relation to jurisdiction. CBI does not accept that this adjudication has been validly commenced or that the appointment adjudicator has jurisdiction in respect of the referring party's claim for the brief reasons set out below."

20 There was then a heading, "More than one dispute/More than one contract", and the substance of that dispute was set out. Then there was a second heading, "The wrong parties", following which a case was set out in relation to that ground. There was then a further heading, "Further response," which stated:

> "Whilst CBI will participate in the adjudication, it will do so under protest and without prejudice to its contention that any adjudicator or adjudicators that are appointed lack jurisdiction. CBI therefore disputes jurisdiction on the grounds summarised above and on further jurisdictional issues that we have not yet had the opportunity to investigate in the limited time we have had since the service of the notice."

21 The challenge made in the response was set out at paragraph 1 as follows:

> "The responding party, CBI, does not accept that this adjudication has been validly commenced or that the appointed adjudicator has jurisdiction in respect of the referring party's claim, for the reasons set out herein. By an email dated 11 October 2018, CBI gave notice that it challenged jurisdiction, which it will continue to maintain throughout the course of this adjudication. The rest of the submissions made within this document are made without prejudice to CBI's challenge to jurisdiction."

That was then repeated by the witness statement relied upon by Mr Coleman on behalf of CBI.

22 In response to the letter/email sent by CBI on 12 October 2018, Arup sent a response to the adjudicator, copied to CBI, in which it addressed the submissions made by CBI as to jurisdiction. In particular, it stated:

> "CBI says, without explanation, the matters referred to the adjudicator do not fall within the scope of Part 2 of the 1996 Act. Arup disagrees."

23 It set out its arguments on construction operations and the reasons that it contended that the appointment between the parties fell within the scope of the 1996 Act. It also set out its response to the suggestion that the purported agreement in October 2016 was a separate agreement with DCN, rather than CBI.

24 In my judgment, the defendant is precluded from relying on its jurisdictional challenge, based on the submission that the contract (or contracts) between the parties fell outside the ambit of Part 2 of the 1996 Act, for the following reasons. First of all, the matter identified in the second paragraph of the letter/email of 11 October 2018 raised on its face a challenge

to the application of the 1996 Act, but did not give any details as to the basis on which that assertion was made. Therefore, it fell foul of the requirement laid down by Coulson LJ in the *Bresco* case for any challenge to be appropriate and clear.

25 From the decision, it is apparent that, although the adjudicator considered that a challenge was being made, it was not clear to the adjudicator what the detail of any such challenge might be. At paragraph 54 of his decision, the adjudicator stated that:

> "The issue has not been developed in detail by CBI in the response and there has been no issue taken with Arup's letter of 12 October in this regard."

26 Both points were well made by the adjudicator. In its response, CBI again raised a jurisdictional challenge based on the fact that it asserted that the contract did not fall within the 1996 Act, but produced no submissions explaining the basis on which that assertion was made. There was no response to the detailed submissions set out by Arup in its letter of 12 October and, therefore, the adjudicator had nothing other than a bare assertion on which to base his decision. Hardly surprisingly, therefore, the adjudicator simply stated in paragraph 55:

> "I accept the case for Arup, as set out in paragraphs 4-7 in its letter of 12 October."

27 This was precisely one of the mischiefs with which Coulson LJ was concerned, namely that a mere general reservation was not sufficient to enable the adjudicator to understand and deal with the nature of the objection.

28 Secondly, in this particular case, CBI did raise two very specific jurisdictional points, both in its letter/email dated 11 October and in its response. Having decided to pin its colours to the mast and take those very specific objections to jurisdiction, both of which were dealt with by the adjudicator in specific terms and both of which had been addressed by Arup, and having lost those points in front of the adjudicator, it would be inappropriate now to permit the defendant to raise a new form of jurisdictional challenge in order to resist enforcement.

29 Thirdly, the general reservation that was made at the end of the letter/email dated 11 October 2018 was in such vague terms as to fall foul of the test set out by Coulson LJ at paragraph 92(iv), where he said that a general reservation may be effective, but not if:

> "(i) At the time it was provided, the objector knew or should have known of specific grounds …
> ii) [Or that it] was worded in that way simply to try and ensure that all options … could be kept open …"

30 Having identified a potential challenge based on the application of Part 2 of the Act, CBI must be taken to have recognised that it had that potential objection and yet it failed to put forward a detailed and specific objection in that regard. Further, the wording of the general response is intended to effectively cover everything. I specifically refer to the fact that it identifies "further jurisdictional issues that we have not yet had the opportunity to investigate". Clearly, this was an inappropriate attempt to keep open to the defendant all lines of jurisdictional challenge, regardless of whether they were specifically raised or not.

31 Fourthly, and finally, I consider that the defendant has lost its right to challenge jurisdiction. In the referral document at paragraph 15 Arup stated:

> "The appointment was a construction contract and the services to be performed and each of them was in relation to construction operations within the meaning of section 104 of the Housing Grants, Construction and Regeneration Act 1996."

32 In its response, CBI stated:

> "Save that CBI expressly denies the jurisdiction of the adjudicator to adjudicate upon this dispute for the reasons set out herein, paragraph 15 is admitted."

33 The jurisdictional disputes that were then set out were identified at paragraph 44 of the response, namely that:

> "The referred claim is brought under more than one contract and/or raises more than one dispute and, secondly, the adjudication is being brought against the wrong party."

34 In those circumstances, perhaps not surprisingly, Arup did not feel the need to deal further with any jurisdictional dispute based on the application of the Act in its reply.

35 On that basis, I am satisfied that not only did CBI fail to raise, by way of general or specific reservation, the right to raise the jurisdictional challenge now raised, it positively admitted that there was jurisdiction by reference to the application of section 104 of the 1996 Act. For those reasons, therefore, the defendant has lost its right to raise new jurisdictional challenges.

36 In any event, even if it had retained the right to challenge, I am satisfied that the scope of the work encompassed by the appointment in April 2016 was one that fell within the ambit of Part 2 of the Act. Section 104(1) of the 1996 Act states:

> '(1) In this Part a "construction contract" means an agreement with a person for any of the following -
> (a) the carrying out of construction operations; …
>
> (2) References in this Part to a construction contract include an agreement -
> (a) to do architectural, design, or surveying work, or
> (b) to provide advice on building, engineering …
>
> in relation to construction operations.'

37 "Construction operations" are defined in section 105 of the Act as "operations of any of the following descriptions" and, at (b):

> "(b) construction … forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways [and so forth]."

38 I accept the submission made by Mr Churcher on the part of the claimant that it is not necessary, in order to fall within the scope of section 104, for the services to be provided (in this case the engineering design and advisory services) to be by reference to a contract for imminent or ongoing construction work. It is sufficient for the design work to be under a contract and for that contract to be in relation to construction operations. It is clear that those construction operations may be operations in the future, from the wording of section 105(1)(b), which refers to works that are going to form part of the land. There is no

condition in section 105 that the construction operations themselves need to be carried out under a specific contract for that purpose.

39 In considering the nature of the operations that were covered by Arup's scope of work, they include design work that is in connection with construction operations as so defined. It is clear from the letter that Arup would be required to make a number of assumptions because of the absence of detailed information from HTI at the time that it was asked to carry out its work. But those initial assumptions and/or assessment of capacity were simply to enable Arup to carry out its design work, namely to define the system for the tunnel and the stations that would be built, assuming that the proposal went ahead. The detailed work that Arup was being asked to do and which it was undertaking to do, as evidenced by its letter of 14 April 2016, was the detailed engineering work that falls fairly and squarely within the definition in section 105.

40 I accept the submission by Mr Darton that one needs to have a cut-off point. I accept that there needs to be a sufficient nexus between the advisory, calculation or initial design work and the subsequent construction operations. However, that does not mean that the construction operations contract needs to be ready or that the parties need to be ready to strike the ground. It is sufficient that, as here, there was a specific operational scheme of works that was anticipated. It was in the very early stages of its formation, but nonetheless the work that Arup was being asked to do was to assist with the definition and detailed design of construction operations that would subsequently be carried out. Thus, I would have rejected the jurisdictional challenge in any event.

41 If I had accepted the jurisdictional challenge as valid, I would however have had difficulty in carrying out any severance of the matters that fell within or without Part 2 of the Act. I note that both parties have relied upon the decision in *Cleveland Bridge UK Ltd v Whessoe* [2010] EWHC 1076, paragraphs 110, 116 and 120.

42 In that case Ramsey J stated that the court would carry out a severance exercise if the adjudicator had made a decision not only on the whole dispute, but also a decision which dealt only with the part of the dispute that was within the adjudicator's jurisdiction. If, contrary to what I have already said, parts of the contract between the parties fell within Part 2 of the Act, but parts fell outside, it would not be sufficient, in my judgment, for the adjudicator to have set out, as he did at paragraph 55, the relevant proportions of the work that related to different aspects of the work. What would be required would be for the adjudicator to have made a decision as to precisely what figure would have been allowed and what decision would have been made in that event.

43 Therefore, subject to the matters that I have already decided against the defendant, this would not have been a case where it would have been possible for the court to point to an alternative decision made by the adjudicator that would have allowed the court to sever those parts that were within jurisdiction.

44 I turn to the second jurisdictional challenge, which is whether there was more than one contract or dispute. It is trite law that paragraph 8 of the adjudication statutory scheme only allows an adjudicator to deal with one dispute and one contract, unless the parties consent to a wider jurisdiction.

45 In this case, the starting point is that it is common ground that Arup and CBI were parties to a contract that was entered into on or around 14 April 2016. The notice of adjudication was made on that basis. The dispute raised, both in the letter/email dated 11 October and in the

submissions before the adjudicator, was that the 11 October exchanges between the parties gave rise to a variation or separate contract with a separate party.

46 What is beyond dispute is that there was a dispute under the contract of April 2016 between Arup and CBI that was properly referred to adjudication. That being the case, the adjudicator had jurisdiction to determine any dispute between the parties arising under that contract, including issues as to whether or not that contract was varied in any respect and/or whether there were subsequent separate contracts that might have affected the original contract.

47 In any event, the adjudicator decided this matter on the construction of the original letter of 14 April 2016. He decided that the fee terms put forward by Arup and accepted by CBI were for the full fee of £350,000 plus VAT, with the possibility of a discounted fee in exchange for a 20 percent stake in the proposed joint venture. It was a matter for the adjudicator to determine that and, whether it is right or wrong, it is not a matter that goes to jurisdiction. Therefore, it is not a matter that the court would take into account when deciding whether or not to enforce the adjudication decision.

48 The third and final ground on which the defendant challenges jurisdiction is that there are findings of fact made by the adjudicator that are challenged on this application and the defendant has a real prospect of overturning those findings of fact at a trial. I am not satisfied that the defendant has any real prospect of showing either that there was a separate contract formed in October 2016, or that any such contract was formed with a separate entity, DCN. My decision is based on the words used in the email from Sir Peter Michael, which confirmed a debt owed to Arup by DCN / CBI. It did not refer to a fresh agreement.

49 I also accept the submissions made on behalf of the claimant by Mr Churcher, that when one looks at the witness statements submitted by the defendant to the adjudicator, both from Sir Peter Michael and from Mr Coleman, although they challenge the variation alleged by the claimant and the authority of Sir Peter Michael to enter into any form of commitment on behalf of CBI, what they do not do is give any positive evidence of a fresh contract made between Arup and DCN.

50 In any event, the desire on the part of a defendant to challenge findings of fact by an adjudicator will not be good grounds for resisting enforcement.

51 For all of those reasons, the claimant is entitled to succeed in its application for summary judgment and I will enter judgment for the claimant as requested.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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