Case No: HT-2021-000343
Neutral Citation Number: [2021] EWHC 3445 (TCC)

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 4 November 2021

BEFORE:

MR SIMON LOFTHOUSE QC
(Sitting as a Deputy Judge of the High Court)

BETWEEN:

CUBEX (UK) LIMITED

Claimant

- and -

BALFOUR BEATTY GROUP LIMITED

Defendant

MR JESSOP appeared on behalf of the Claimant
MR WILLIAMSON QC appeared on behalf of the Defendant

JUDGMENT
(APPROVED)

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1. **THE DEPUTY JUDGE**: This is the Claimant's claim for summary judgment application to enforce the Decision of Mr Anthony Bingham as Adjudicator dated 2 May 2018. I shall refer to the Claimant as Cubex and the Defendant as Balfour Beatty. The total sum the adjudicator found was due from Balfour Beatty to Cubex was £408,216.04

2. Mr Jessup appears for Cubex, Mr Williamson QC for Balfour Beatty. I am grateful to both for the clarity of their written and oral submissions.

3. Balfour Beatty was contracted by Crossrail to design and fit-out Woolwich Station. The design and manufacture of the doors to be installed at the Station was alleged to be sub-contracted by Balfour Beatty to Cubex.

4. What is not in issue is that Balfour Beatty contracted with a third party for the doors. Cubex contended that was a repudiatory breach of the contract it said have been concluded between Balfour Beatty and Cubex Both in the adjudication and before me, Balfour Beatty denies there was any concluded contract in February 2017, the date contended for by Cubex.

5. By proceedings issued in 9 September 2021 Cubex seeks an order that Balfour Beatty pays to Cubex the following sums:

   (i) A total of £408,216.04 in accordance with the adjudicator's decision; accordingly, it seeks judgment for damages in the same sum;

   (ii) Interest pursuant to the Late Payment of Commercial Debts (Interest) Act 1998, alternatively section 35A of the Senior Courts Act 1981 at 8% from 09 May 2018 to the date of judgment, alternatively at such rate and for such period or such amount as the court thinks fit.

6. Summary judgment is resisted by Balfour Beatty on four grounds :

   (i) Balfour Beatty have real prospects of showing that the contract(s) between the parties' related:

either wholly to "excluded operations" (the manufacture or delivery to site of building components and/or materials) such that the Adjudicator had no jurisdiction over the dispute(s);

or

at least in part to such excluded operations, such that the contract(s) were "hybrid" contract(s), with the result that the Adjudicator did not have jurisdiction over the dispute(s);

(ii) Balfour Beatty have real prospects of showing that Cubex purported to refer, and the Adjudicator purported to decide, more than one dispute, and/or that the single contract contended for by Cubex never came into existence : either of which yields the result that the Adjudicator lacked jurisdiction over the dispute;

(iii) Balfour Beatty have real prospects of showing that the Adjudicator acted in breach of the principles of natural justice in his conduct of the Adjudication in that he decided the critically important issue of contract formation on the basis which neither party had put forward, and upon which neither party had the opportunity to make submissions or put forward evidence;

(iv) There is another compelling reason why summary judgment should be refused in this case, namely the inordinate delay on the part of Cubex between the Adjudication Decision being issued on 1st May 2018 and the commencement of the present proceedings in September 2021. The Court should, therefore, exercise its discretion not to give judgment.

The Decision

7. In his Decision the Adjudicator, Mr Tony Bingham, concluded that on 23 February 2017 an agreement was concluded between the parties under which Cubex was to provide 296 doors to Balfour Beatty. In summary he concluded that a price had been agreed on 22nd February 2016

between Mr Devenish of Cubex and Mr Davenport of Balfour Beatty (page 17 of his Decision refers). However, there remained essential terms yet to be agreed and on Mr Bingham's analysis no contract arose on 22 February 2017.

8. On the Adjudicator's analysis the Contract was concluded at a meeting attended by the parties on 23 February 2017 which, in his words "finalised the essential elements of the Contract between Balfour Beatty and Cubex. There was nothing more essential to be bottomed out. They were ad idem." (page 17 of his Decision also refers). The doors were to be designed for the fit out of the new Woolwich Station and the Contract as found by the Adjudicator was for the design and supply of those doors.

9. Before addressing the grounds on which Balfour Beatty rely in defence to the claim for summary judgment I remind myself that the policy underlying the Housing Grants Construction and Regeneration Act 1996 ("the Act") is one which has been colloquially as "pay now argue later". This approach finds reflection in the authorities which illustrate a robust approach when considering matters said to be exceptions to enforcement. The first three matters relied on by Balfour Beatty, if established, fall within recognised exceptions to which I now turn.

1. <u>The Contract related either wholly to excluded operations or at least in part to excluded operations</u>

10. It is not in issue before me that if the Contract related in part to excluded operations then, as a hybrid contract, the Court does not have jurisdiction (see *Cleveland Bridge UK Limited v. Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC) paragraphs 116 to 118 refer in the judgment of Ramsey J).

11. It is similarly not in issue that what was required of Cubex was both the design and supply of the doors in issue. The question for me is, as for the Adjudicator, is whether any contract for such design and supply is a construction contract within the meaning of the Housing rants Construction and Regeneration Act 1996 Act ("the Act").

12. Balfour Beatty rely on Section 105(2)(d)(i) and (ii) contending that any contract would be one for the manufacture or delivery to Site of building or engineering components or equipment, materials, plant or machinery. Section 105(2)(d)(i) and (ii) provide:

> **"(2) The following operations are not construction operations within the meaning of this Part –**
>
> **(d) manufacture or delivery to site of –**
>
> **(i) building or engineering components or equipment,**
>
> **(ii) materials, plant or machinery, or**
>
> **(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communication systems, except under a contract which also provides for their installation;"**

On this, Mr Jessop referred me to the Decision of Coulson J (as he then was) in *Equitix FSI CHP (Wrexham) Limited v. Bester Generacion UK Limite*d [2018] EWHC 177 (TCC) as authority for the proposition that exceptions are to be defined narrowly (paragraph 33 refers). I respectfully accept that observation, however, the authority does not bear directly on the proper construction of Section 105(2)(d).

13. In that regard, Mr Jessop sought to rely on *Cleveland Bridge v. Whessoe* the authority to which I have already referred where, at paragraph 61, Mr Justice Ramsey concluded that erection of steelwork to pipe racks and pipe bridges was excluded from being a construction operation by Section 105(2)(c)(ii) but not the prior activities of fabrication drawings, off-site fabrication or delivery to Site of fabricated steelwork. In that case I note the relevant contract was to provide all labour, materials, contractor's equipment, temporary works and everything required for carrying out the services. The services were widely defined, however, for present purposes I need only note that Cubex is not assisted by the decision which concluded at paragraph that:

> **"I have therefore come to the conclusion that in relation to the Services under the Subcontract in this case, the only operation which is excluded from being a construction operation by section 105(2)(c)(ii) is the erection of the steelwork for**

the pipe racks and pipe bridges and not the prior activities of fabrication drawings, off-site fabrication or delivery to site of the fabricated steelwork. It follows that I consider that Cleveland Bridge is correct in its approach to the division between construction operations and excluded operations in relation to the Services under the Subcontract."

14. The *Cleveland Bridge* case concerned the dividing line between those activities which fell within the Act's definition and those which fell without in relation to the terms of the particular contract under consideration. It did not address directly the point before me.

15. This threshold jurisdictional objection was made before the Adjudicator. Mr Bingham concluded that as an agreement to undertake design was within the scope of the Act that meant that the contract found by the Adjudicator was not a supply only contract. With respect, the difficulty with that analysis is the wording of section 104(2)

16. Section 104(1) provides:

> **"In this Part a "construction contract" means an agreement with the 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, interior or exterior decoration or on the laying-out of landscape**
>
> **in relation to construction operations**
>
> **…**
>
> **(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations."**

On the basis that the design is said to be in relation to the supply of doors, this brings us back to Section 105(2)(d). Further, as set out above, it does not assist Cubex to treat this as a hybrid contract.

17. It follows that I conclude the contract contended for by Cubex and found by the Arbitrator (albeit as I discuss below, different contracts), both had same nature and were not construction contracts within the meaning of the Act.

18. In the event this analysis is wrong and out of deference to the submissions made before me on the other points I shall address these briefly.

2. <u>Cubex purported to refer and the Adjudicator purported to decide more than one dispute and/or the single contract contended for by Cubex never came into existence</u>

19. Cubex in their Referral Notice alleged a single contract, however, it was unclear from the Referral Notice the date on which it was contended the Contract was concluded and, in particular, whether an agreement had been reached on 22nd February 2017 or in a discounted figure on 24th February 2017. However, this lack of precision is not the same as saying more than one dispute has been referred to the Adjudicator and more than one contract. This conclusion is consistent with the decision of Akenhead J in *Air Design (Kent) Ltd v. Deerglen (Jersey) Ltd* [2008] EWHC 3047 (TCC) and, in particular, paragraph 22. Mr Williamson does not suggest that the decision on which he relies of *Viridis UK Ltd v. Mulalley & Co Ltd* [2014] EWHC 268 (TCC) casts doubt on *Air Kent* and I read paragraphs 80 and 81 of that Decision as consistent with the same in stating that:

> **"80. It appears to me therefore that by reference to the subsequent observations of Akenhead J himself Ms Chambers is right to say that the decision in <u>Air Design</u> is authority only for the proposition that where an adjudicator is properly appointed under a contract about which there is or can be no dispute, then he may also have jurisdiction to resolve jurisdictional issues if they are coincidentally part of the substantive dispute referred to him.**
>
> **81. In my judgment it is clear that this proposition cannot on any view be said to apply to the present case where, on the findings I have made, the defendant was correct in its contention, which it maintained clearly before the adjudicator, but which was always disputed by the claimant, that there was never any initial concluded contract about which there was no dispute and that the claims made in the adjudication were all advanced under three separate contracts. It follows that the adjudicator could not properly have been appointed under any version of the initial concluded contract as contended for by the claimant, because no such contract was ever formed, in circumstances where there was a substantial dispute between the parties as to**

> **whether or not there was such a contract, or a series of separate contracts covering the same matter, and in circumstances where there were differences of substance in the adjudication procedures applicable to the differing contracts as well as in the other terms of those contracts. It is difficult to construe this as a case where the adjudicator was required, as part of the substantive dispute referred to him, to decide whether or not the subsequent orders were variations of the original order. The claim as advanced was a simple final account claim under a sub-contract, whereas the question was to whether or not the claim advanced arose under one or more than one contract was raised fairly and squarely as a question of jurisdiction, and the adjudicator decided it accordingly. In such circumstances there can, in my judgment, be no question of the court concluding that his answer on that question should, even if wrong, nonetheless be temporarily binding on the defendant, who never agreed to jurisdiction upon him to decide that question."**

20. The difficulty in this case is that the Adjudicator is said *not* to have been appointed under a contract about which there is or can be no dispute.

21. The Adjudicator addresses this objection which was also advanced before him by Balfour Beatty. He concluded that on the basis that there is a construction contract "the gate is open to adjudicate the ambit of the contract". That would be correct if, as noted by HHJ Davis, the Adjudicator was properly appointed under a contract about which there is or can be no dispute. It is to that issue to which I now turn.

22. For the purposes of this judgment I do not propose to go through the history of exchanges between the parties prior to the alleged contract beyond noting the following:

    (i) On 8 and 12 September 2016 there were standard purchase orders issued by Balfour Beatty for doors. These were supply only purchase orders but, as I have noted, the supply included and is accepted to include elements of design;

    (ii) On 13 February 2017, Cubex provided an order confirmation in relation to 50 doors in the sum of £238,081.07;

    (iii) On 22 February 2017, Cubex provided a commercial proposal for the design, manufacture and delivery of doors under which Cubex offered to supply 246 doors at a total price of £2,235,128.94.

(iv) On 24 February 2017, Cubex provided an adjusted price. This adjusted price was found by the Adjudicator to be a commercial bonus but one which post-dated the conclusion of a contract on 23rd February 2017.

23. As already noted, it is clear the Adjudicator found that the essential terms of the contract had only been agreed by 23rd February 2017. There is nothing in the evidence which tells me what those outstanding essential terms were said to be. I asked Mr Jessop if he could assist me on what those terms were or where I found them in the evidence. He was unable to assist on either point on the papers before me. This is perhaps unsurprising given that 23 February 2017 was not a date for which either party contended as the date of a concluded contract. As such it cannot be said that the Adjudicator was properly appointed under a contractor about which there is or can be no dispute.

24. To the contrary, the Adjudicator found a contract which was not contended for by either of the parties relying on the agreement of essential terms on that date, which terms Cubex itself cannot identify.

25. It follows that I consider the Defendant has a real prospect of successfully defending the claim on the basis that the contract found by the Adjudicator never came into existence and that he was not properly appointed under a contract about which there is or can be no dispute. For understandable reasons, I should note that no argument was addressed to me contending that there can be no dispute that there was a contract concluded on a different day which would have given the adjudicator jurisdiction.

26. This leads into the third ground of objection, that of natural justice. On that, the relevant test is that set out by Akenhead J in *Cantillon v. Urvasco Ltd* [2018] EWHC 282 (TCC) paragraph 57, the relevant parts of which were also helpfully summarised at paragraph 36 of Mr Williamson's skeleton argument. In particular:

> **"Breaches of the rules will be material in cases where the Adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive of or of considerable potential importance to the outcome or the resolution of the dispute and is not peripheral or irrelevant and whether the issue is decisive etc. is a question of degree."**

27. This is a ground reserved for where the Arbitrator "goes off on a frolic of his own". In that regard I note that the exchanges between the parties and particularly between 22 and 24 February 2017, were clearly in play and it could be questioned what additional arguments Balfour Beatty might wish to employ beyond their analysis of the documentation and whether they revealed a concluded contract in February 2017. Mr Williamson drew my attention to the evidence in defence of the application in the First Witness Statement of Mr Craig Morrison and, in particular, paragraph 6.16 which states:

> **"If BBGL had known that this was the Adjudicator's line of thinking, BBGL could have (a) attempted to secure witness statements from those present at the Design Interface Meeting on 23 February 2017; and (b) pointed out the above inconsistency out [sic] (namely that even Cubex did not suggest a contract was concluded at the Design Interface Meeting on 23 February 2017)."**

28. That highlighted no more than attempting to secure Witness Statements from those present at the meeting on 23rd February 2017 and pointing out that Cubex did not suggest a contract was concluded at the design interface meeting. As to the second point, the substance of Balfour Beatty's submissions was already to that effect in that it had analysed the case advanced by Cubex which did not contend for such a concluded contract. As to the possibility of further evidence, I note that no evidence was given by Balfour Beatty in response to the Witness evidence provided by Cubex and, in particular, that of Mr Devenish. I recognise that that the burden is on Balfour Beatty in establishing a breach of a rule of natural justice and that the breach must be material. However, and subject to a point I make below on the authority of *AMEC Capital Projects Ltd v. Whitefriars City Estates Ltd* [2004] EWCA Civ 1418 I consider that the failure to draw to the parties' attention an analysis which concludes with the contract on 23rd February 2017 would have been sufficient breach to be material. Had the outstanding

terms been identified and the meeting clearly stated as the time at which the contract was concluded, the importance of calling evidence as to what happened increased significantly. Further, concentration on that issue may have illustrated the position, accepted before me, that the nature of those outstanding terms was unknown.

29. For completeness I refer to *Amec v. Whitefriars* a case not cited before me, to note the judgment of Jackson LJ at paragraph 41 where a distinction is drawn between considerations of natural justice in relation to the adjudication of a dispute and considerations of natural justice when addressing questions of jurisdiction. This distinction arises in relation to decisions, such as on jurisdiction, which do not affect the parties rights and so do not strictly engage the same principles of natural justice, however prudent it may be for the adjudicator nonetheless to observe them. I have not overlooked this distinction. However given my decision on the other issues and my conclusion at paragraph 25 above that the Defendant has a real prospect of successfully defending the claim on the basis that the contract found by the Adjudicator never came into existence and that he was not properly appointed under a contract about which there is or can be no dispute, such a distinction would not have assisted Cubex.

30. Given argument was addressed to the point, I should also record that during the course of exchanges before him the Adjudicator raised a question as to which email is said to record the agreement of Balfour Beatty with Cubex referred to between paragraphs 8 and 9 of the First Witness Statement of Mr Devonish. He noted the answer that there isn't one other than a CTC (cost to complete) e-mail dated 24 February 2017. That email refers to Cubex revising their prices down as I have already noted. The Adjudicator considered this took place after a contract had been concluded.

31. The final ground of defence to these proceedings was that the claim for enforcement has been brought late. Reasons have been given for this which relate to the solicitor involved changing firms and financial constraints on Cubex. Balfour Beatty does not accept these are good reasons for the delay, however, I do not consider there is any specific obligation to bring enforcement

proceedings by any particular date within the relevant limitation period. Mr Williamson made clear that he was not contending that the lateness gave rise to any abuse of process and did not identify any other legal or procedural basis on which a valid decision should not be enforced. It follows that if I had concluded this was an enforceable decision I would not have declined to give summary judgment on the grounds of alleged delay.

32. For these reasons I refuse the application for summary judgment. I will now deal separately with costs and any other applications.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge