Neutral Citation Number: [2021] EWHC 1284 (TCC)

Case No: HT-2021-000051

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

Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: Wednesday 31st March 2021

Before:

THE HONOURABLE MR. JUSTICE WAKSMAN

- -

Between:

C. SPENCER LIMITED

Claimant

- and -

MW HIGH TECH PROJECTS UK LIMITED

Defendant

- -
- -

MR. J. BOWLING & MR. M. THORNE for the **Claimant**
MR. J. ACTON DAVIS, QC for the **Defendant**

- -

APPROVED JUDGMENT

- -

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MR. JUSTICE WAKSMAN :

INTRODUCTION

1. I have before me an application which constitutes the latest chapter in a series of disputes between C. Spencer Limited, CSL, the claimant sub-contractor and MW High Tech Projects UK Limited, the defendant main contractor and CSL'S employer.

2. It is CSL's application for summary judgment to enforce the decision of the adjudicator, Mr. Leigh Belasco, dated 14 January 2021 in respect of adjudication no. 4. By that decision he decided among other things that MW should pay CSL £3,397,029.03 within seven days.

3. In opposition to this application, MW takes essentially three points, all of which are said to go to the jurisdiction of the adjudicator and all or any of which it is said have the effect of rendering it void or unenforceable.

4. They are as follows:

   i) The adjudicator was invalidly appointed because of a failure by CSL to adhere to the contractual provisions governing notification and appointment.

   ii) The adjudicator impermissibly valued at zero, four separate counterclaims raised by MW, all of which in fact concerned or arguably concerned excluded operations within the meaning of section 105(2)(c) of the Housing Grants Construction and Regeneration Act 1996 as amended, "The Act".

   iii) The adjudicator equally impermissibly dealt with the release to CSL of retention monies which themselves covered work which consisted of both included and excluded operations.

5. As this is an application for summary judgment, if there is a real prospect of success in relation to any of the points, then I should not grant it, save to the extent that the decision can be severed if appropriate.

6. The evidence before me consisted of two witness statements from Stephen Carey, CSL's solicitor, dated 8th February and 8 March, a witness statement from Mr. James Greggan, MW's contract manager and contract manager on this job, and Andrew Beach, the operations director for CSL and the project delivery director on this contract dated 8 March.

CONTRACTUAL BACKGROUND

7. Much of the contractual background to the present dispute has been helpfully set out by Mr. Justice O'Farrell in her judgment in *CSL v MW* [2019] EWHC 2547 ("the first decision"), which was upheld by the Court of Appeal in *CSL v MW* [2020] EWCA 331 ("the Court of Appeal decision"). I therefore draw upon that summary where appropriate below.

8. By a contract dated 20 November 2015, MW was engaged as main contractor by Energy Works (Hull) Limited, EWH, to design and construct a power plant capable of processing refuse-derived fuel produced by commercial and industrial waste and municipal solid waste. By a sub-contract dated 20 November 2015 (the sub-contract), CSL was engaged by MW to design and construct the civil structural and architectural work for completion of the facility. The sub-contract price was £35,650,398.

9. The sub-contract work included construction operation for the purpose of part 2 of the Act but also included the assembly of plant and direction of steel work to provide support or access to the plant and machinery work which falls outside the ambit of the Act in which I refer to as "Excluded work". It therefore meant that this contract was a hybrid contract.

10. The sub-contract included the general conditions of the ICHEME, the Institute of Chemical Engineers, form of contract known as the Brown Book. The material provisions of the sub-contract are as follows:

> Clause 38.1: "The contractor will pay the sub-contractor the sub-contract price against completed milestone events".
>
> Clause 38.3: "The sub-contractor shall submit a request for payment at intervals of not less than one calendar month showing the sub-contractor's assessment of the amount to be paid and the total amount previously certified. The sub-contractor's requests for payment shall each state the sum the sub-contractor considers is to be paid".
>
> 38.4: "16 days after date of sub-contractor's request for payment in accordance with 38.3 the contract manager shall issue a certificate to the sub-contractor and the contractor for the instalment to which the request for payment relates. The certificate shall show the sum which the contract manager considers to be due at the payment due date, determined in accordance with sub-clause 38.5 and the basis on which it has been calculated. The total certified shall comprise all sums listed in the sub-contractor's statement which in the opinion of the contract manager are properly payable under the sub-contract and shall show separately any elements within the sum certified in respect of nominated sub sub-contractors".
>
> "The contract manager may in any certificate delete, correct or modify any sum previously certified by him as it shall consider proper. If in respect of any sub-contractor's request for payment the contractor or the contract manager on his behalf considers that nothing is due to the sub-contractor, he shall issue a certificate for zero".
>
> Clause 38.5: "In respect of each instalment the contractor shall pay the sub-contractor the amount specified in clause 38.6 or, if applicable, the amount specified in a notice under 38.7".
>
> 38.6: "Subject to 38.7 and 41.1(a), the amount to be paid by the contractor is (a) the amount certified for payment in the relevant contract manager's certificate under 38.4 or, (b), if the contractor or contract manager on his behalf omits to issue such a certificate, the amount applied for in the relevant sub-contractor's application under 38.3".
>
> 38.7: "If the contractor intends to pay less than the sum due in accordance with 38.4 or 38.6 for any reason, including any sum that may be due from the sub-contractor to the contractor under the sub-contract or any sum not payable in accordance with 41.5, the contractor shall notify the sub-contractor not later than one day before the final date for payment of the amount he considers to be due and the basis on which that sum is calculated".

11. So the contractual regime for the payments is that CSL was entitled to make application for an interim or instalment payment on a monthly basis on completion of each milestone. Each application submitted must set out CSL's assessment of the amount

due in respect of completed milestones and any other amount it considers itself to be entitled to. Each instalment becomes due after 16 days. The contract manager issues a certificate 16 days after the application setting out his response to the application, including the basis on which the certified sum has been calculated. MW is obliged to pay the sum due 19 days after the payment due date. If MW intends to pay less than the sum due it must issue a "Pay less" notice no later than one day before the final date for payment.

12. It is here important to emphasise the difference between a certificate issued by the contract manager under clause 38.4 and a notice issued by the contractor under 38.7. The 38.4 certificate deals with the agreement or otherwise by a professional, the contract manager, in respect of the sums claimed in the interim payment application, hereby CSL. It is about the sums claimed against MW, not about counterclaim or other separate claims raised by it as against CSL. This provision of course, mirrors section 110(a)(ii) of the Act. I should add that the sub-contract here was compliant with the Act's relevant requirements and it is not suggested otherwise.

13. Clause 38.7 then provides for what should be referred to in this context as a "Pay less" notice. This is a provision enabling MW to state any sums it intends to pay which is less than the notified sum, which would be the sum stated in the 38.4 certificate if one had been produced. As with the Act, if MW did not serve a certificate or a pay less notice then the amount due is as set out in CSL's application made pursuant to 38.3. All of this reflects relevant provisions of the Act (see the last part of paragraph 40 of the first instance decision).

14. As for the sub-contract's adjudication provisions, Clause 44.2 says that: "Either party has the right to refer any dispute or difference, including any matter not referred to the contract manager as a matter under or in connection with the sub-contractor to adjudication. Either party may at any time issue a notice of adjudication stating its intention to do so".

15. However, Clause 44.1 states that: "This clause 44 applies only to the extent, if any, required by the Act. Therefore, although the dispute resolution provisions of the sub-contract include an entitlement for either party to refer any dispute to adjudication, such right is limited to disputes in respect of those parts of the sub-contract work that constitute construction operations within the meaning of the Act".

BACKGROUND TO THE PRESENT DISPUTE

16. Initially, the parties operated the payment machinery provisions without any regard to the division between milestones or works that fell within or out of the definition of construction operations. In 2018 a dispute arose between them in respect of interim payment application no. 31. Neither that application nor the payment notice issued by MW separated out sums in respect of construction operations from the sums due in respect of non-construction operations.

17. In July 2018, CSL gave notice of an intention to refer the dispute to adjudication. MW raised a jurisdictional challenge in respect of that. The ground was that the contractual adjudication provision was limited to disputes in respect of construction operations within the Act. The adjudicator did not have jurisdiction to determine the dispute as framed, and because it failed to distinguish between the works and associated sums

claimed falling within and outside of the Act. In the face of such a challenge, CSL withdrew its adjudication claim.

18. On 4th February 2019, CSL issued its application for interim payment no. 32 for the sum of £3.353 million plus VAT, of which £2.68 million was claimed in respect of construction operations and the balance was claimed in respect of other works.

19. The enclosed application for payment included a breakdown of the amount claimed as due under the sub-contract, each item allocated to or divided between construction operations and/or non-construction operations.

20. By letter dated 19 February 2010, MW served payment notice no. 35 stating: "We refer to the civil structure and architectural sub-contract and your application for payment. We hereby give you notice of the sum that we consider to be or have been due at the payment due date in respect of the above application being a certificate that the sub-contractor owes the contract £6.8 million, roughly. The basis on which that sum was calculated is set out in the attached spreadsheet".

21. For ease of reference, as with the adjudicator, I shall refer to this document and its enclosures as "Notice no. 35". Its precise contractual status I shall explain below. The key elements in notice no. 35 were these. First of all, payment in respect of completed milestones 1 to 76, £33.103 million. Section B related to the changes register, that is to say, variations. A negative figure of £3.05 million. Section C, assessment of four counterclaims minus £4.317 million. Section D, the net amount due less previously-certified fees in retention, minus £6.8 million.

22. So far as the four counterclaims are concerned, which amounted to the £4.317 million I have just referred to, they were broken down into four items. BOP inertia slab, which was £3.7 million; unforeseen ground conditions, £1.106 million. RGF delays to fire-stopping, £768,000-odd and costs of aborted adjudication £141,000-odd. I will say more about those claims later. I would only add here that no proceedings have been brought by MW against CSL in connection with these very substantial purported claims to date.

23. To return to the chronology, by a letter dated 14th March 2019, CSL's solicitors claimed the sum of £2.683-odd million plus VAT as the notified sum due in the absence of any valid payment or pay less notice. That is as claimed in interim application for payment no. 32.

24. By a letter dated 19 March 2019, MW's solicitors disputed the alleged debt, arguing that the failure of MW to specify the sums due in respect of construction and non-construction operations did not invalidate its payment notice which was CSL's contention.

25. On 5 April 2019, CSL commenced the claim which was later decided in the first instance decision and the Court of Appeal decision. As already presaged, its point was that as the notice did not distinguish between sums due in respect of excluded and included operations, notice 39 did not amount to a valid 38.4 notice at all. That being so, CSL was entitled to the sum claimed in payment application 32.

26. By her judgment in the first instance decision, Mrs. Justice O'Farrell disagreed and held that the failure to distinguish between those operations did not render notice 35 invalid and accordingly, CSL's application for summary judgment for the sums claimed failed. The Court of Appeal agreed neither the sub-contract's own regime nor the Act required there to be such a differentiation in that payment certificate or notice no. 35.

27. Then, on 24 April 2020, MW served a notice of adjudication on CSL. This commenced the third adjudication. MW sought from the adjudicator valuation of the included operations element of the variations account as set out in its notice 35 of £3.418 million and repayment accordingly. It also asked the adjudicator to calculate repayment on the basis that CSL had completed 100 per cent of the works, that is, all milestones, and did ask that the whole of the retention which covered included and excluded operations, should be released to MW as a credit against CSL's payment obligation, so that after recouping the retention the net amount was £2.969 million.

28. I should add that the essence of this exercise in adjudication 3 was to decide the true value of the variations claimed for by CSL but which MW said ended up in a negative figure and a positive figure in its favour. It should also be noted that although there had been an earlier issue as to whether CSL had actually completed the final milestones 75 and 76, that was ultimately conceded for the purpose of adjudication 3. There was therefore no need for the adjudicator to decide any dispute about that.

29. As CSL put it, this exercise backfired on MW because the adjudicator held that there was indeed a sum due to CSL from MW so far as valuation of the variations was concerned. He found that the amount due to CSL for the variations, in his decision of 22 July 2020, was £3.197 million.

30. Adjudication no. 4. CSL commenced this on 4 November 2020. I will recite all the relevant facts pertaining to it at this stage. CSL sought payment to it of £3.197 million, being the valuation of the variations which had been adjudicated upon in adjudication 3.

31. How the adjudication commenced is important for MW's first alleged defence to the present claim. On 17 November 2020, Sarah Cunningham of CSL's solicitors sent the following email. The subject heading was: "Application for the nomination of an adjudicator and notice of adjudication. C. Spencer Limited (referring party) v MW High Tech Projects (responding party)".

32. There were a number of attachments, application form for adjudicator nomination, annexure 2 to the application, excerpt of sub-contract, annexure 1, excerpt from form of contract Brown Book. Letter to the President of the Institute of Chemical Engineers and notice of adjudication.

33. This email was sent to the Institute as the addressee, which of course was the adjudicator's appointment authority, but it was copied to, among other people, Neil Robinson, Roy Meakin of MW along with Mr. Greggan of MW, the contract manager and the author of notice no. 35. The body of the email read as follows:

> "Application for nomination of adjudicator and notice of adjudication. C. Spencer, referring party, MW, responding party. We act on behalf of C. Spencer Limited. Please find attached the following documents which we are submitting. An application form for nomination of adjudicator with covering

> letter, the notice of adjudication and relevant excerpts from the contract relating to adjudication. C. Spencer are arranging for electronic payment of the fee today. We confirm the responding party are copied in to this email. Please let us know if you have any questions".

34. There was then indeed attached, apart from the notice of adjudication, the letter requesting the appointment addressed to the President of the Institute. That was to seek the appointment again of Mr. Belasco. Mr. Greggan says in his witness statement prepared for this application that he opened up the attachments on receipt of the email, having been involved in the earlier litigation which I have described above.

35. He said at paragraph 37 that at that point he was more concerned with the details of the claim than the question of service. He said that Mr. Belasco was appointed on the evening of 18 November. He said that on the following evening Ms. Cunningham sent out a detailed email with an attached link to an electronic repository containing a referral and a number of other documents. The referral appeared to have been served and so the MW team and their solicitors started to compose an early draft of the response in view of the very tight timetable.

36. On receipt of the referral, Mr. Belasco wrote to the parties the same day and directed the response to be due by 29 November, which seemed a tight timescale to him. However, he goes on to say that he had expected a hard copy of the notice of adjudication to be served at MW's address as well. This is what had happened on previous occasions. Subsequently, MW took the point, one which included others such as apparent bias, which has not been pursued beyond the adjudication, about valid notification or otherwise before the adjudicator, who determined it as a preliminary matter against MW.

37. He summarised it in his award at paragraph 2.11 as follows: "Having considered both parties' submissions on the matter, I issued my non-binding decision. I do not reproduce the entire contents of my letter but I was not convinced by MW's argument. It was my intention to continue with the adjudication finding that unlike the scheme for construction contract where the referring party is obliged to serve their notice prior to requesting appointing of adjudicator, I did not consider there to be any such requirement of the Grey Book rules and that just because CSL had served their notice at the same time this should not deprive them of a valid service of that notice", and the adjudication proceeded without prejudice to MW's right to take that point further, as indeed they now have.

38. As to the substance, the adjudicator decided that MW should pay CSL the principal sum of £3.397 million and interest of £179,000 and the retention monies should be released to CSL. This in effect was what he had valued the variations at in adjudication 3 with an adjustment.

39. As for retention, the adjudicator had to deal with the fact that the employer, EWH, had terminated the main contract on 4 March 2019 and confirmed in its letter to CSL of 6 March 2019, saying that MW had effectively been dismissed from site and therefore CSL could no longer work there either. This happened before any final certificate in respect of the sub-contract works had been issued.

40. The issue of retention would be relevant if the adjudicator was to find that there was a sum substantively owed to CSL, as he ultimately did. He had not needed to deal with

it in adjudication 3 in the context of MW's claim because he found in favour of CSL anyway.

41. The adjudicator considered that he was entitled now to deal with the question of retention across the board, as it were. The retention sums, which was 5 per cent of the sub-contract price, were not allocated to included and excluded works separately. He considered that he had the power to determine the question of whether the retentions should be released as part of his power to deal with notice 35. Of the retention, 50 per cent thereof was payable on TOC, Certificate of Takeover, and a further 50 per cent on the issue of the final certificate.

42. MW had asserted that the adjudicator had no jurisdiction to deal with the retention since it dealt with both included and excluded operations. He noted that in adjudication 3 where MW had sought payment of the retention to it as part of the sums it claimed from CSL, MW made no distinction between included and excluded operations and did not suggest that dealing with the retention was outside his jurisdiction. Now that they did, he said, he considered this was not open to MW to approbate and reprobate in this manner. He also considered that he could deal with it as it applied across the board, as it were, across the whole sub-contract.

43. I deal in more detail with this part of his decision below. However, he went on to decide that there had been a valid construction completion certificate or request therefore within the meaning of the contract by 16 January 2018, not least because in adjudication 3, MW had accepted that all the relevant milestones had been completed.

44. He then found that takeover occurred on or around 25 January 2018. This meant that as at the time of application 32 and notice 35, the first half of the retention had fallen due for payment. That left the second half of the retention and the question of the final certificate. This was never issued because of the termination of the main contract. The adjudicator considered that because of this, the sub-contract had broken down in that respect.

45. He went on to hold, as CSL has submitted, that the second half of the retention should be released on 25 May 2020, which was 850 days after TOC. The origin of this seems to be the fact that under the sub-contract the final request for payment which would trigger the release of the second half of the retention, could not be made until the end of the defects liability period which commenced on TOC and expired 850 days later. So the adjudicator had then determined that although there was a breakdown of the contractual machinery and there never would be a final request for payment, the second half of the retention should be taken to be due as soon as a final request could have been made, and this was a point that had been argued in CSL's reply.

46. So far as the counterclaims were concerned, it is necessary to quote at some length from various parts of the decision and they come from issue 1D and issue 5. At paragraph 2.25 he said that: "In principle, in respect of a defence to a monetary order, MW did have the right of set off. However —" he says "— MW said that if he did not find for MW in respect of their secondary jurisdictional challenge because of the hybrid contract because he is not aware of other significant matters over which he does not have jurisdiction, he cannot award a payment to CSL without investigating those other matters, which MW says then he cannot", and that he is referring to the counterclaim.

47. At 2.28 he says this:

> "MW says that as a result of MW's claims against CSL, even when the sum that CSL claimed in the notice is accounted for, that would then produce a negative total figure of £1.498 million, that is putting in the values of the counterclaim. MW's position was somewhat unclear. MW says that I am not empowered to open up many of the figures making up these totals, but while MW appeared to be raising the right of set off as a defence, it (a) appeared to tell me I cannot consider such a defence, and (b) made no submissions in respect of the quantum of that defence, save for the inertia slab counterclaim. This rather unsatisfactorily left MW's position as being where I should have taken MW's position at face value with little or no substantiation provided at all".

48. At 2.29 he says he was directed by CSL to where it says, in 44.12, that: "The adjudicator may determine more than one dispute and if required to do so by the respondent to a claim or counterclaim, determine any matter in the nature of set off, abatement or counterclaim at the same time he refers to other matters". CSL submitted that the word "Any" would allow the adjudicator to include both included and excluded operations as part of any set off, abatement or counterclaim.

49. As to whether MW could simply raise claims by way of set of without putting them to proof, CSL had contended that it was up to MW whether or not it wishes to rely on any set off, but given that it has, it cannot then inform the adjudicator that he can only look but not touch. In paragraph 2.30 the adjudicator agreed about that.

50. He then referred to the fact that these counterclaims have been referred to in notice 35. He said at 2.36:

> "MW's position appeared to be they had substantial set offs as a defence against any payment —" if he was to order that "— as a result of the four heads of the counterclaim but with that point raised, MW says I am not empowered to open up many of the figures. I am not sure how MW believes it can raise such a defence, then tell me I cannot consider this defence".

51. At paragraph 2.39, he referred to CSL's submission that: "MW could not simply bring £4.6 million-worth of claims into an adjudication as a defence and then rely on the adjudicator's purported lack of jurisdiction to prevent the adjudicator assessing those claims". Case law showed the adjudicator would have decision (cause?) to consider this in the context of whether a defence is valid. It went on to submit that MW had not even attempted to discharge the burden of showing the counterclaims.

52. At paragraph 2.40, the adjudicator agreed with that position. He noted that on 29 December, that is before his decision, MW wrote, in relation to the set off and abatement point and objected to CSL's interpretation". It said as follows:

> MW wishes to make it absolutely clear it has not introduced the four claims as a set off or abatement or a counterclaim; indeed, it was very careful not to do this".

53. At paragraph 2.42, he said having considered the submissions, he wrote to the parties saying that he was uncertain as to the precise relevance of the set off point, both in the body of the response and in the witness statement:

> "MW's position was on the one hand that they were extant counterclaims that would eclipse the sums sought by CSL, but on the other I did not have jurisdiction to consider those claims. Without substantiation, as CSL has said, I would be left only with MW's say-so. This is not a valid basis on which to counter a monetary award".

> "However, it has now been expressly confirmed that MW is not seeking any reliance on the defence of set off to the four claims. That is entirely MW's prerogative and I assume Mr. Anderson of MW's solicitors has received instruction from MW on that point".

54. At 2.44:

> "While it is open to MW to defend itself by way of set off and counterclaim and despite the interpretation of the response that that was what MW were saying, I acknowledge MW's clarification it is not pursuing any set off. In that case, therefore, it is not sufficient for MW to raise these points so that I may know they exist in the background but not to properly or at all substantiate them and expect me to somehow account for these matters in my decision. That is not an acceptable approach".

55. In 2.45:

> "Given that no set off has been put forward, I do not consider that any jurisdictional points arise and any sum I may decide for CSL is therefore without set off or abatement in respect of the counterclaims".

56. At 6.2 he returned to the topic but said that:

> "Given my findings in respect of issue 1(d) in that these counterclaims are not advanced by MW in this adjudication, I have not considered valuing these counterclaims further".

57. And at 6.3:

> "However, in correcting notice 35 it was open to MW to address these sums but in the absence of this, all I have are four unsubstantiated figures. So for the purpose of this adjudication, and I quote: 'I have no choice but to value these at nil pounds for the purpose of correcting notice 35 which is the position taken by CSL in the surrejoinder'. If MW was prepared to stand by these counterclaim figures then they have more than a sufficient opportunity to make their case, but MW has expressly elected not to. That is, of course, entirely their prerogative".

58. Then finally in paragraph 9.9 in declaration 7:

> "CSL has sought a declaration that the four counterclaims are valued at nil. In the surrejoinder this position has been updated. The value of the four claims as identified is zero pounds for the purpose of ordering any payment to CSL. Given that MW clarified its position it was not advancing these claims in set off, it was not necessary for me to value these claims and so I do not. I have valued these at nil only for the purpose of correcting notice 35".

ANALYSIS

Defence 1.

59. Notification here is governed by clauses 3 and 4 of the Grey Book. They provide as follows. By clause 3.1:

> "The party wishing to refer to arbitration any dispute arising or in connection with a contract may give a notice at any time to that effect to the other party"

and the notice should include various points of detail which are not in issue here.

60. By Clause 4.1 :

> "When an adjudicator has either been named in the contract or agreed prior to the issue of a notice the party issuing the notice shall at the same time send to the adjudicator a copy of the notice with a request for confirmation that the adjudicator is able and willing to act".

61. By Clause 4.2:

> "When an adjudicator has not been so named or agreed, the party issuing the notice may include with the notice the name of one or more persons with their addresses who are willing to act and acceptable to the referring party for selection by the other party. Providing that one of these is acceptable to the other party, the other party shall select and notify the referring party and the selected adjudicator".

62. Clause 4.3, which is what governs this case says that:

> "Where an adjudicator is not appointed under 4.1 or 4.2, the party issuing the notice may request ICHEME to nominate an adjudicator. Such request shall be in writing...".

63. MW's first point is that CSL should have issued the notice of application to MW at some point prior to the request to appoint an adjudicator. This was not done here, as is common ground, because both were sent at the same time to the Institute and also to MW. I shall call this "The timing point".

64. There is nothing in the words of clause 3.1 or 4.3 that says that there should be sequential issuing of the two types of document. MW relies on the fact that clause 3.1 comes before clause 4.1. That is a very weak argument and I reject it. It is true that for obvious reasons clause 4.1 mandates simultaneous provision of the notice and request for the appointment but that hardly makes it impermissible under clause 4.3. Clause 4.2 is sequential but it has to be because of the role of the other party. Again, that is irrelevant to the construction of 4.3 or 3.1, for that matter.

65. It is then said that on previous adjudications the notice of adjudication had been sent earlier. However, in the absence of some form of estoppel argument, which has not been deployed here, it is irrelevant as to what the parties did in previous adjudication. There is no case dealing with these provisions which mandates such an approach. Mr. Acton Davis, QC referred me to *Lee v Chartered Properties* [2010] BLR 500, but as he made clear, that was not to support his timing point as such but rather the separate point that if the appointment was invalid, then there is no jurisdiction. Subject to one qualification, that is a proposition which Mr. Bowling accepts.

66. Mr. Acton Davis, QC then referred me to *IDE Contracting v RG Carter* [2004] BLR 172. This dealt with the notice provisions under the then scheme, which were different. In particular the provisions dealing with a request for an adjudicator begin: "Following the giving of notice of an adjudication". Obviously, there, as the judge said, notice comes first, but that is not this case, otherwise that case is cited again for the principle that an invalid appointment means the adjudicator has no jurisdiction.

67. I was then referred to the well-known case of *Twintec v Volker* [2014] BLR 417, but again it does not assist on the timing point here. Indeed there it is concerned with the issue of appointment under the wrong appointing authority and how that affects jurisdiction. Nor is there any logical or practical reason why there should be the timing point and none has been suggested. The proof of the pudding is in the eating. On receipt

of the email, MW acted immediately. Indeed, in the 4th edition of Coulson on Adjudication, 18.16 it is recommended that both notices are sent at the same time. That militates against any idea of unfairness or impracticality where notices are sent simultaneously. There is in truth nothing in the timing point and I reject it.

68. Secondly, MW says that copying MW in on an email where the addressee was ICHEME, albeit with all the correct documents, cannot amount to the "Giving of notice" as required by clause 3.1 of the Grey Book. I will refer to this as "The mode of notice point". However, as a matter of principle I cannot see why not. Clause 3.1 is not providing for formal "Service", rather the simple giving of notice, nor does clause 3.1 make any stipulation about the mode of giving notice.

69. MW does not suggest that the giving of notice by email as opposed to, for example, sending by post, on an email addressed to MW, which includes the notice of adjudication, itself would be insufficient, nor could it. It is impossible to see why it then becomes insufficient if MW is not the direct addressee but is copied in instead. That is especially so where the subject line refers to the notice of adjudication and specifically identifies MW as the responding party. Moreover, the covering email also states expressly that the responding party is copied in.

70. In my judgment, all of the above is sufficient to show that notice was given here for the purpose of clause 3.1. Mr. Greggan may, as he has said, enquired if a hard copy had arrived at MW's office in Chippenham, but that is irrelevant if notice has already been given by email. Again and in truth, whatever else it did the fact remains that MW acted upon it at once. Accordingly, there is nothing in the mode of notice point, either.

71. As a fallback, CSL had submitted that any failures here were minor procedural anomalies and accordingly should not in these circumstances and under this sub-contract deprive the adjudicator of his jurisdiction. I have my doubts about that point, but it does not matter. It is academic in the light of the findings above and I say no more about it.

72. I now turn to defences 2 and 3.

<u>Introduction to defences 2 and 3 - hybrid contracts</u>

73. It is necessary to say at the outset that it is now common ground between the parties that section 1045 of the Act does not mean that an adjudicator cannot refer to or "Handle" hybrid contracts or "Pots" as part of the adjudication of a dispute. The key point is that the adjudicator cannot resolve a dispute which itself relates to excluded operations.

74. So, to take a simple example, in resolving a final account dispute the adjudicator can take into account for the purpose of calculation a figure in respect of excluded works which is agreed. Because of this common ground, both defences 2 and 3 are premised on the basis that the adjudicator has sought to determine a dispute about or including excluded operations, i.e. he was doing more than merely referring to them or handling them.

75. I turn then to defence 2. MW's stance here, as with its stance before the adjudicator, was very odd. It was that a) the adjudicator had to take account of the value of the

counterclaim in dealing with the matters in issue in adjudication 4 and crucially, the amounts due to CSL, yet b), he could not actually value them or do anything with them save to put them in at face value because they all dealt with allegedly excluded operations.

76. I have some sympathy with CSL's observation that this appeared to be a tactical manoeuvre designed to stop the adjudicator from awarding to CSL the sum that he had found due in respect of the variations in adjudication 3, but without seeing if there was anything in the counterclaim to begin with, in other words, as it actually submitted, it was a look but don't touch.

77. The first question is to see what the adjudicator was doing with the counterclaim. MW seizes on the fact that he had indeed sought to value it at nil, even though a), he had no power to do so, and b) MW had expressly told him, as it were, not to do so. Read properly, it is plain that the adjudicator was not seeking to value the counterclaims. He could not value them on their merits, as it were, because apart from them and their value being asserted, MW had adduced no evidence or detailed submissions to support them. Rather, he was doing what MW asked him to do, that is to take them out of the adjudication altogether and for that purpose removing them from notice 35. There was therefore no putative illegitimate valuation at all.

78. Faced with that, MW's alternative argument was that the adjudicator still had somehow to give credit for them. When asked how and why, Mr. Acton Davis, QC said that notice 35 was a value payment notice under the contract so that the sums counterclaimed had to be deducted from the sums claimed in any event.

79. However, this argument does not work. First and notwithstanding with its headed payment notice, having regard to the body of notice 35 and the words used, it is plainly purporting to be a payment certificate under 38.4. If there was to be a set off or counterclaim asserted that would require a pay less notice under 38.7, which was not made. Quite obviously, the contract manager responding to the works in question and their valuation, is in no position to certify counterclaims or other claims that may be invoked. That is why the contract manager is the relevant party for 38.4, whereas the contractor is the party who serves the 38.7 pay less notice.

80. This is particularly clear here when one considers the nature of the four alleged counterclaims. The BOP inertia slab claim was a claim for losses and damages arising from the critical delay on the part of CSL of 114 days in relation to the delay caused in the installation of the slab. The second unforeseen ground conditions was a claim that CSL failed to pursue and provide timely notification of a claim which CSL could have brought against a third party for water ingress which MW claims prejudiced its ability to claim time and cost of flooding events from EWH.

81. Thirdly, RDF delays due to the fire-stopping claim, the claim was it failed to carry out fire-stopping works. As a result, MW's works were delayed by 17 days. Finally, the cost of the abortive adjudication, these were the costs that MW claimed to have incurred as a result of CSL aborting adjudication 2.

82. Indeed, the point was put beyond doubt by Mrs. Justice O'Farrell in paragraphs 80 to 86 of her judgment. I will simply summarise these, but they should be taken as read in to this judgment. She recited MW's case that the negative valuations could still be

relied upon as a pay less notice. She says that on an objective construction of notice 35 it was served as a payment notice pursuant to clause 38.4 and was stated to be a sum considered to be due and was stated to be a certificate. It was not identified as a pay less notice. It was not intended to be read as a pay less notice. There was no contractual intention to serve it as such.

83. A payer is entitled to raise any legitimate set off as part of its payment notice or pay less notice. She said that the difficulties of a hybrid contract merited further consideration but it does not assist MW here, because the sub-contract produces the same result as under the Act. The premise is that MW failed to serve a payment notice. The sub-contract has replicated the effect of section 111 through clauses 38.5 and 38.7. If MW wished to pay less than the sum due for any reason, including a set off and counterclaim, it was obliged to serve a pay less notice.

84. In the absence of the pay less notice and in the absence of a valid certificate under clause 38.4, the amount applied for under 38.3 would be payable. Therefore, had the court found that the payment notice was invalid, MW would not be entitled to rely on its negative valuation as a set off under section 111.

85. So, those paragraphs make clear that any set off and counterclaim to be relied upon to avoid paying more at that stage had to be the subject of a pay less notice, which was not done. It must follow that the adjudicator was not obliged to take any account of the counterclaims at all. That being so, he never dealt with any excluded operations in an illegitimate sense at all. Of course, the corollary which MW wished to avoid, no doubt, was that if the counterclaims were made the subject of a set off to be applied in respect of the sums claimed for intended works, the adjudicator would then have the power to adjudicate upon them, regardless of their nature. (See the new clause 44.12 of the sub-contract, quoted by the adjudicator at paragraph 2.29)

86. For the above reasons, the second defence can be disposed of relatively shortly in this way against MW and in favour of CSL. It is therefore not strictly necessary to consider CSL's alternative argument which is that on the facts, the counterclaims do not involve excluded operations anyway. The one counterclaim on which oral argument focused here was the first and largest, the BOP slab.

87. The relevant slab is shown graphically at paragraph 8 of the witness statement of Mr. Beach in answer to that of Mr. Greggan and to which there is no further responsive evidence. BOP is the Balance of Plant building. The inertia slab was situated there and that building contained the steam turbine generator. The foundations and slab to the building, which were undertaken by CSL, incorporated design and construction of precast driven piles, installation of ground beams, a reinforced concrete slab and the inertia slab, although the design was by MW. One can see the foundational slab, as it were, in the diagram at paragraph 8.

88. The inertia slab was independent of the main concrete reinforced slab and supported by bearing springs designed, supplied and installed by MW and its sub-contractor, Siemens. The inertia slab was then cast in place by CSL on top of the bearing springs.

89. The relevant part of section 105.2 that we are concerned with here, which is (c), dealing with exclusive operations, reads thus: "Assembly, installation or demolition of plant or machinery or erection or demolition of steelwork for the purposes of supporting or

providing access to plant or machinery on a site where the primary activity is power generation". It is not doubted that this was a site involving power generation, it is the preceding words which are at issue.

> "On the face of it, it is very hard to see why a concrete slab lying beneath plant and machinery or steelwork is plant or machinery itself or itself is steelwork to support or provide access to such plant and machinery. The essential object of section 1052(c) is surely plant and machinery. Steelwork is included as an adjunct to that plant and machinery. Other steelwork, for example the steel included incorporated in reinforced concrete structure of a building obviously would not be excluded operations".

90. It is true there are springs beneath the inertia slabs, but they formed no part of CSL's work because they were installed by MW and I think supplied by Siemens. I do not accept that just because the inertia slab sits upon them, the slab itself is now to be regarded as steelwork in the required sense. Mr. Acton Davis QC suggested that there might be steelwork in the inertia slab such as screws or bolts to affix the structures above the inertia slab to it. Perhaps, but applying these provisions in a realistic and common sense way, I fail to see how that again transforms the slab into the relevant steelwork.

91. I add that it is well-established that the courts should generally take a narrow approach to the construction of section 1052 (see the decision of Mr. Justice Ramsey in *North Midland v Lentjes* [2009] BLR 574, in which he held that concrete silos forming part of works for power stations were not excluded). It is also noteworthy that he said that the resolution of whether the works fell within section 105.2(c) or not was to be achieved by looking at the matter broadly, not involving minute analysis. That goes against Mr. Acton Davis QC's further submission that the true characterisation of the inertia slabs would require expert evidence and a trial. I disagree with that approach.

92. Mr. Justice Ramsey confirmed this approach in the later case of *Cleveland Bridge v Whessoe* [2010] BLR 415, although on the facts he found that there were some items of excluded operations.

93. On that basis, I can and do conclude at this summary stage, had it been necessary, that the counterclaim in respect of the BOP inertia slab was not concerned with excluded operations anyway. The second claim, if maintainable at all, dealing with the failure by CSL to pursue a water ingress claim cannot be said to deal with excluded operations, the same is true of the third and even more so of the fourth, which is all about costs incurred by MW in adjudication 2. None of these matters cover steelwork in the narrow sense described in section 105.2(c). In the event, defence 2 fails as a matter of principle anyway for the reasons set out above.

94. I should add that the underlying nature of the four counterclaims are addressed and rejected on this point comprehensively in Mr. Beach's witness statement.

<u>Defence 3 - retention</u>

95. The adjudicator's reasoning here is spread across several different sections of his decision, so I have synthesised what I believe he was saying and not saying below. While the adjudicator accepted, in my view, that the contractual machinery had broken down because of the rejection of MW and thus CSL from the site, his emphasis was then on the fact that a final certificate, which is the trigger for the release of the second

half of the retention, could never now be sought or provided. In fact of course, there had never been a formal takeover certificate either, although CSL had issued a draft.

96. Even though for the purpose of dealing with the variations issue in adjudication 3 the adjudicator had made a working assumption that the sub-contract works were substantially complete by January 2018, in adjudication 4 he expressly held that this did not mean that he had therefore found, when the retention failed to be released to CSL, because it did not then arise.

97. What he did, however, given that there was no TOC issued, was to decide in adjudication 4 when takeover actually occurred (see paragraph 4.3 of his decision). As against that, MW's position in adjudication 4 was that the works were not complete in January 2018 and were never complete, and that he could not now decide that question because he would be straying outside his jurisdiction, in other words, akin to the point now being made.

98. His answer to this is instructive, in my view. He said this:

> "I did not make a binding decision in respect of completion. My analysis at issue 15 of adjudication 3 was all based on submissions by the parties with no jurisdictional challenge made. However, that I had jurisdiction to consider this point in the initial jurisdiction was conferred by MW by virtue of the fact that it had asked me to find it was entitled to retain the retention for non-completion which in turn would require me to investigate whether CSL had completed the sub-contract works. MW's position as to jurisdiction is directly contrary in this adjudication".

99. That last sentence is a reference to the principle about disallowing approbation and reprobation, which he had referred to earlier on, a principle which has been applied in adjudication cases where there have been a number of successive adjudications. In other words, a party cannot blow hot and cold.

100. He made this same point in paragraphs 3.5, 3.18 and 4.27. It is, in my view, just as relevant here as it was there. Equally important is the fact that while not purporting to be binding in the limited adjudication sense, the adjudicator did say at paragraph 4.21 that:

> "In adjudication 3, when I referred to substantial completion as my term, I was referring to completion in the sense that the conditions for the CCC TOC were generally met as opposed to a contractual definition of substantial completion".

101. He also noted the very important fact that for the purpose of adjudication 3, MW conceded that all the milestones had been met. That really was the basis for payment application 32 and CSL's request for all that it said it was entitled to. In adjudication 4, he noted that in notice 35, MW had resiled from that position so far as milestones 75 and 76 were concerned. As to that, he said that:

> "To the extent that they may now argue these milestones were not complete, MW accepted they were completed in adjudication 3 and that decision included the above values for those milestones and I am therefore bound by that. In any event, any residual argument as to the non-completion of 75 and 76 was not pursued before me".

102. That led the adjudicator to conclude that:

> "The overall contractual construction certificate which had been sought by CSL on 16th of 2018 should be regarded as valid".

103. He then had to deal with the date of takeover. At paragraph 5.16 he said there was no discernible difference between the contractual completion certificate and the takeover certificate and that was a matter of contractual analysis. In paragraph 5.17 he dealt with MW's submissions that there were still significant items of work outstanding, but as he pointed out, all of this had already been covered in adjudication 3 and broadly in favour of CSL.

104. Then in 5.18 he said that for all of those reasons he was of the view it was reasonable to conclude that takeover occurred on or around the date notified by CSL, i.e. 25 January 2018, and he so decided. As the application 32 came after this date, then at least the first half of the retention was due for release to CSL.

105. Although MW had sought to raise a number of disputes on this issue before the adjudicator, the truth is that it was effectively determined already by his findings in adjudication 3, that all the milestones had been completed. Then a matter of common ground in a context where MW made a specific claim to recover retention monies without taking any jurisdictional point at all. No doubt advisedly, because it mistakenly thought it would be to its benefit not to do so.

106. A subsidiary point noted by the adjudicator and made to me was that when notice 35 did not allocate claims between included and excluded works, and where the retention never did either but went across the sub-contract as a whole, the adjudicator had jurisdiction anyway. I agree with this last point, but it is not necessary for my decision. The matters referred to above clearly establish, in my view, that there was no real determination of disputed matters in relation to excluded operations arising anew in adjudication 4. In truth, they had all been decided in adjudication 3 in a context where MW had accepted jurisdiction on the question of retention.

107. Any pure contractual analysis that was undertaken by the adjudicator in adjudication 4 is irrelevant on this issue. In those circumstances, it is impossible to say that the adjudicator had no jurisdiction to decide formally the release of the first half of the retention.

108. The second half of the retention can be dealt with much more briefly. In view of the fact that there had been no final certificate nor any prospect of one, the adjudicator put the date for release of the second half as at the end of the defects liability period. That was the earliest date when the final certificate could have been sought. That was a logical and fair way to decide when the second retention would fall due, and even if it was not, it does not go to jurisdiction. However, it is a simple and direct consequence, in my view, of his decision on the first half of the retention.

109. Accordingly, the matter of the release of the second half of the retention is not arguable either as being an illegitimate dealing with a dispute in relation to excluded operations. I only add that had these been dealings with excluded operations, as the adjudicator himself said, that part of the decision could have been severed from the rest of his decision, which would still leave a substantial balance in favour of CSL. In the event, this does not arise.

Footnote to defence 3 - interest

110. It might have been the case that the assessment of interest could have strayed into a consideration of both included and excluded matters. However, that was not so here. The adjudicator simply applied the contractual provisions such that he determined the date for final payment was as set out in notice 35, which was 11 March 2019. Accordingly, interest ran from that date. (See his paragraph 7.16)

111. Then at paragraph 19 he said:

> "CSL has claimed interest. MW has resisted the same. I am satisfied there is jurisdiction to decide interest. However, in order to decide it was necessary to determine the sum due at notice 35 and whether retention was to be applied, and if so, what sum, which in turn required a determination as to whether takeover had occurred, I am satisfied that these matters enjoy internal jurisdiction. I therefore decide —"

and then he gives the figures. In other words, again one inevitably flowed from the other.

112. I agree with that analysis, in other words, the date and the amount of interest flowed irresistibly from the earlier findings, in respect of which, as I have found, he had jurisdiction.

CONCLUSION

113. Accordingly, none of the points raised by MW in opposition to CSL's application for summary judgment have a real prospect of success. Indeed, I have to say they have no prospect of success at all and were wholly unmeritorious. Accordingly, the application for summary judgment therefore succeeds, and CSL is entitled to the sum claimed.

This judgment has been approved by Waksman J.