FENWICK ELLIOTT

The construction & energy law specialists

Legal Briefing

Ted Lowery considers a decision that applies the Bresco v Lonsdale principles on waiver

Ove Arup and Partners International Limited v Coleman

Bennett International Consultancy plc

Before Mrs Justice O'Farrell

In the Technology and Construction Court

Judgement delivered 29 January 2019

The facts

During April 2016 Coleman Bennett International Consultancy (CBI) engaged Arup to provide engineering services in support of a feasibility study for a hyperloop transport link between Manchester and Leeds. The hyperloop project was being promoted by Direct Cities Network (DCN). The contract sum was £350,000 plus VAT and in May 2016 CBI paid the first instalment of £75,000.

On 11 October 2016 DCN acknowledged a debt of £350k for work undertaken by Arup but asked for time to pay. DCN offered £75,000 in 30 days, another £75,000 within 3 months and the balance to follow according to cash availability. In the event no further payments were made and during September 2018 Arup commenced adjudication.

On 11 October 2018 CBI e-mailed the adjudicator contending that there was more than one dispute and more than one contract and that the wrong parties had been identified. CBI disputed jurisdiction on these grounds and in relation to further jurisdiction issues it said it had not yet had an opportunity to investigate. In its response in the adjudication CBI relied upon this e-mail but did not elaborate further on its jurisdictional case.

In a letter dated 12 October 2018, having noted CBI's failure to explain its arguments, Arup set out is case that the April 2016 agreement related to construction operations, that Part 2 of the HGCRA thereby applied and that the 11 October 2016 arrangement was made with DCN. CBI did not respond.

In a decision dated 19 October 2018 the adjudicator ordered CBI to pay £275,000 plus VAT, interest, statutory compensation and his fees.

In November 2018 Arup commenced enforcement proceedings. CBI disputed enforcement on three grounds:

- That the April 2016 agreement was neither a construction contract nor related to the carrying out of construction operations, alternatively, it included matters that were not construction operations and which were not severable from the dispute referred to adjudication.
- That the referral was concerned with more than one contract, namely the April 2016 agreement and 11 October 2016 arrangement.
- That the disputed jurisdiction issues turned upon questions of fact that could not be properly determined in adjudication or decided in court on a summary basis.

The issue

Was Arup entitled to enforcement of the adjudicator's decision?

The decision

The judge agreed with Arup that CBI was precluded from raising any jurisdictional points. Applying the Court of Appeal's recent decision in *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale Electrical Limited and Primus Build* [2019] EWCA Civ 27, the judge decided: (i) that where the 11 October e-mail and response had failed to provide substantiation of CBI's arguments, the result was that the adjudicator had not been able to understand or address CBI's jurisdictional objections; (ii) albeit raised without sufficient elaboration, the adjudicator had still disposed of CBI's objections and CBI could not now raise any new form of jurisdictional challenge in order to resist enforcement; (iii) with its general reservation in the 11 October e-mail CBI had tried to keep its jurisdictional options open, contrary to the Court of Appeal's ruling; and, (iv) where in its response, CBI had denied jurisdiction but admitted paragraph 15 of the referral which asserted that Arup's appointment was a construction contract and the services to be performed by Arup were construction operations, this amounted to a positive admission of jurisdiction.

The judge went on to consider the alternative position had CBI been entitled to challenge jurisdiction but concluded that none of the three arguments advanced were sustainable.

Commentary

In *Bresco* the responding party made a general reservation as to jurisdiction that was then repeated, supplemented by two specific objections that were subsequently rejected by the adjudicator. The Court of Appeal decided that the responding party could not be permitted to rely upon its vaguely worded original general reservation of position in order to be able to raise new objections. Coulson LJ went on to set out some principles applicable to waiver and general reservations in the context of adjudication.

Each case will be judged on its own facts. Here, CBI had made a general reservation of position, given some brief indication of the principles upon which it opposed jurisdiction by means of "headline" points but failed to provide any substantive explanation by reference to the particular facts that it would have been aware of. Applying *Bresco*, the judge found that the 11 October e-mail did not substantiate CBI's jurisdictional challenges appropriately and clearly. Having participated in the adjudication without an effective reservation, CBI had therefore waived its jurisdictional objections.

Ted Lowery
March 2019