Neutral Citation Number: [2020] EWHC 796 (TCC)Case No: HT-2020-000049IN THE HIGH COURT OF JUSTICEBUSINESS AND PROPERTY COURTS OF ENGLAND AND WALESTECHNOLOGY AND CONSTRUCTION COURT (QBD)The Rolls Building7 Rolls BuildingsFetter LaneLondonEC4A 1NL

Date: Thursday, 27th February 2020

Before:

MR JUSTICE WAKSMAN

Between:

(1) BALFOUR BEATTY CIVIL ENGINEERING LIMITED
(2) BALFOUR BEATTY GROUP LIMITED — Claimants

- and –

ASTEC PROJECTS LIMITED — Defendant

(IN LIQUIDATION)

MR. THOMAS CRANGLE (instructed by Pinsent Masons LLP) for the Claimants MR. RIAZ HUSSAIN, QC and MS. CHANTELLE STAYNINGS

(instructed by Gateley Plc) for the Defendant

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APPROVED JUDGMENT

MR JUSTICE WAKSMAN:

Introduction

1.
This is an application for an injunction, on Twintec or Twintec-analogous principles, to restrain three adjudications which the Defendant sub-contractor ("Astec") seeks to bring, in respect of the three sub-contracts it had with the Claimant main contractor ("Balfour Beatty"). Balfour Beatty is the party seeking the injunction. There is no issue between the parties that the entirety of their dealings for all these purposes are constituted by these three separate subcontracts. They all deal with various aspects of work to and around Blackfriars Station. The first contract is called "the North Contract" and in that regard a notice of adjudication has already been issued. The second is in respect of "the South Station" and the third is in respect of the "the Lighting Boom".

2.
Although the first adjudication notice has only been recently served, these works began as long ago as 2010. In April 2014, Astec went into administration and then liquidation in October 2014. By that point or shortly afterwards, both sides had claims or counterclaims against each other. Astec said that it was owed £4m in respect of work done and not paid for, loss and expense, and matters of that kind. Balfour Beatty, for its part, denied those claims and said that it was entitled to recoup some ex gratia payments or payments on account, further, that there were delays and defective work which sounded in damages, all of which would result in a net sum due to it of £1m. Both sides accept, for present purposes, that these are genuine claims and counterclaims; indeed they are the sort of matters that come before adjudicators very regularly.

3.
Nothing happened after the liquidation, apart from one notice of funding from Astec's then-solicitors in 2016, until 24th December 2019. That is when Gateley, now the solicitors for Astec, sent a claim letter. It was followed by a first notice of adjudication sent on 24th January 2020. Astec by then and though in liquidation, had obtained funding from a legal funder called Pythagoras, which will be entitled to a significant (but not beyond 50%) fee from any recoveries that Astec may ultimately make. Astec also has in place legal expenses and after the event insurance and, indeed, its insurer is in court today.

4.
Because this matter has come up so late, there have been a number of shifts of position as what Astec is prepared to offer by way of security to Balfour Beatty.

Balfour Beatty's Application

5.
The whole question of the offer of security arises in the context of Balfour Beatty's application. As Astec is an insolvent company, Balfour Beatty says no adjudications should proceed. This is because, in essence, they fall outside what is now said to be the very limited number of cases where the court will contemplate allowing adjudications at all where the company seeking the money is in liquidation. All of that, of course, was covered in considerable detail by the Court of Appeal in Bresco v Lonsdale [2019] EWCA Civ. 27. (At the time of delivering this judgment the Supreme Court was due to hear an appeal in April.) The Law

6.
Summarising Bresco as much as I need to for present purposes, the Court of Appeal, by the lead judgment of Coulson LJ, concluded that there is no absolute jurisdictional bar to the holding of an adjudication at the instance of an insolvent adjudication claimant. To that extent Coulson LJ accepted that he was wrong to have so concluded in Enterprise v McFadden [2010] BLR 89. In Bresco itself he concluded that the judge below had been wrong to hold that there was no jurisdiction at all. The reason why it had been thought that there might not be any jurisdiction was because of what Coulson LJ said still existed as a "fundamental incompatibility" between the adjudication regime on the one hand, and the insolvency set-off regime on the other. The relevant part of the latter, for present purposes, is constituted by rule 14.25 of the Insolvency Rules 2016 (formerly rule 4.90 of the Insolvency Rules 19860. It states:

"1. This rule applies in a winding up where before the company goes into liquidation there have been mutual dealings between the company and a creditor who is claiming in the liquidation.

2. An account must be taken of what is due from the company and the creditor to each in respect of their mutual dealings and the sums due from one must be set off against the sums due from another."

7.
That incompatibility was reflected in the ultimate outcome in Bresco case because, while it was not said that the adjudicator would have no jurisdiction at all because of the insolvency, it was thought that in very many cases an adjudication would be futile or pointless. This is because it could never reach a position where the ultimate mutual account could be reached as a result of the adjudication. Additionally, there could be difficulties arising in so far as security would be required by the party

resisting the adjudication in the event of underlying litigation taking place. So it would never be enforced.

8.
All of this was in turn considered in great detail by Adam Constable QC, sitting as a judge of the High Court in Meadowside v 12-18 Hill Street Management [2019] EWHC 2651. He took the view, with Bresco, that for an adjudication to be able to proceed in these circumstances was going to be the exception rather than the rule. But then at paragraph 87 he said:

"…. A case is likely to be an exception to the ordinary position in circumstances where:

(1)
the adjudication brought or to be brought determines the final net position between the parties under the relevant Contract. An adjudication, by definition, will not be able to determine the net position between parties with dealings on more than one contract. The extent to which the adjudication is not capable of dealing with the entirety of the mutual dealings between the parties (and as such will not mirror the Rule 14.25 process between the parties) is to be taken account of in all the circumstances when looking at the utility of the adjudication and the discretion to injunct, or, following adjudication to enforce.

(2)
Satisfactory security is provided both:

(a)
In respect of any sum awarded in the adjudication and successfully enforced, so that it is repayable should the responding party successfully overturn the decision in litigation or arbitration brought within a reasonable time of the date of enforcement;

(b)
In respect of any adverse order for costs made against (or agreed by) the company in liquidation in favour of the responding party in respect of:

(i)
Any unsuccessful application to enforce the adjudication decision;

(ii)
The subsequent litigation/arbitration, in which the responding party is seeking to overturn the adjudication decision;

The extent to which any such costs order is ordered to be met from the security would be a matter for the Court, insofar as it was not agreed.

(3) What is satisfactory as security in form, duration and amount is a question on the facts in the ordinary way and may be provided incrementally (as it would be, for example, in any security for costs application). A combination of the following solutions might be appropriate:

(a)
the liquidator undertaking to the court to ring-fence the sum enforced so t hat it is not available for distribution for the relevant duration;

(b)
a third party providing a guarantee or a bond;

(c)
ATE insurance…

(4) As discussed further below in Section E, any agreement to provide funding or security which permits the company in liquidation to avoid the ordinary consequences of Bresco cannot amount to an abuse of process.

I refer to the conditions set out in paragraph 87 (1) to (3) as “the Meadowside Conditions”.

Analysis

The “Three Adjudications” Point

9.
One has then to attempt to apply what can properly be drawn from those statements of principle to the case before me, which was not the case before the Courts in Meadowside or Bresco indeed any case that I have been referred to, and which results purely from the position that an adjudicator must undertake a separate adjudication for each contract in question.

10.
In the case of most insolvent companies, of course, it will be impossible for the requirements of paragraphs 87(1) and (2) of the judgment in Meadowside to be satisfied. That is why in normal circumstances, adjudications will be seen as pointless. Either they will not be enforced by the court or the court will injunct them from taking place at the outset.

11.
Had this been a case where an adjudicator did have the statutory power to consider the disputes arising from all three contracts in one adjudication and produce a net result, then on the basis of Meadowside, that would satisfy paragraph 87 (1) of the judgment therein. This is because, as is common ground here, there are no other claims or counterclaims lurking elsewhere which would not fall into the calculation. The adjudicator would in fact be settling the entirety of the dealings between the parties.

12.
The only reason why the adjudicator cannot is because there are three separate contracts. But on that basis if there were three adjudications and each one produced a net result in favour of one or other of the parties, then by netting those results off against each other one would arrive at a complete and comprehensive account of the parties’ mutual dealings. Indeed, it is also common ground that the parties could agree to confer jurisdiction on the adjudicator to have one adjudication for all three contracts, but that would be a matter of agreement. What is not being suggested is that even if there was an agreement, the adjudicator for some reason would have no jurisdiction to decide the three contractual disputes under the umbrella of one adjudication.

13.
I do not consider that there is anything in Bresco itself to the effect that the mere fact that there would be three adjudications dealing with 3 contracts means that they should not take place at all.

14.
It is, however, true that in Enterprise Coulson J (as he then was) stated as follows:

“61…. It seems to me that, on these facts, this claim could not be pursued in adjudication, but would have tobe pursued in court. There are three main reasons for this.

62.
First, in the present case, there were four Sub-Contracts between TML and Enterprise. Under the Act. an adjudicator can only deal with one dispute under one contract…Thus, absent agreement, anadjudicator could never undertake the necessary task under rule 4.90 if there was more than one contract between the parties. He could not in those circumstances become what the authorities describe as "the decisionmaker". Furthermore, on the facts here, at least one of those contracts…was not a construction contract at all, which would mean that an adjudicator would have no jurisdiction even to consider it.

63.
Secondly, as noted in Stein v Blake, if (as here) the responding party has a crossclaim and considers that it would be entitled to the net balance from the claiming party (the assignees), then it would be necessary for them to join the assignors, in this case the liquidators of TML. As I have said, the Deed of Assignment in the present case envisages just that course. But again, that could not happen in adjudication because it is not possible to have a tripartite adjudication.

64.
Thirdly, I consider that, on its face, rule 4.90 envisages that the account will be taken and the balance decided in one set of proceedings where the result would be final and binding. It seems to me that that is the inescapable effect of the words used, particularly in sub-rules 4.90(3) and (4). It is also, I think, what Lord Hoffmann had in mind in Stein v Blake when he referred to the taking of the "single account". Again, therefore, that would rule out adjudication, because the results could only be obtained piecemeal, contract by contract, and could only ever be temporarily binding. Those points are developed further below.

15.
However, in this case, I cannot see why the adjudicator could not be the decision-maker as outlined above. Nor do I accept that on the facts of this case, it would be correct to say that the decisions would be taken in a “piecemeal” fashion. And as for the point about adjudications only being temporarily binding, that cannot, in my view, survive Bresco because if it were correct, then as a matter of principle or jurisdiction, one could never have an adjudication in an insolvency situation. In truth, the points made by Coulson J here fade into the “no jurisdiction” analysis which is now established to be wrong. See how they resurface at paragraphs 78 and 79 of the judgment on the question of jurisdiction.

16.
So far as the reference to Stein v Blake [1996] AC 243 is concerned, I do not think that this is relevant here when it was essentially dealing with the question of assignability of debts and putative tripartite adjudications.

17.
As for Meadowside, for Balfour Beatty placed particular reliance on the part of paragraph 87 (1) of the judgment which stated that “An adjudication, by definition, will not be able to determine the net position between the parties with dealings on more than one contract.”. From this, it argued that wherever there is more than one contract, that is an end of the matter so far as the adjudication is concerned. I do not think that this is a fair reading of this passage. The judge in Meadowside was not dealing with a case like this where there was more than one contract but all the contracts could be adjudicated upon even if in separate but parallel adjudications. Taken together, such adjudications

would deal with entirety of the mutual dealings and would mirror rule 14.25, which is the factor also mentioned in paragraph 87 (1).

18.
Even on the basis of three separate adjudications, if Astec was successful and sought to enforce, there would then be three separate applications for summary judgment. It is inconceivable that a judge on that occasion would do anything else other than order what the net result should be. That is not a matter of this court “taking an account”. It is this court simply doing a fairly straightforward mathematical calculation.

19.
For all of the above reasons, I do not take the view that the existing case-law debars the taking place of adjudications in the circumstances pertaining here simply because there will be more than one adjudication because there is more than one contract.

Conditions for the Adjudications taking place

20.
On that basis, one can turn to the next question which is whether the Meadowside Conditions can be made out, and whether there are any other directions which would be necessary in order to take account of the fact of three adjudications if I were to permit them to proceed. The rationale for the adjudications here, in the first instance, is to get a relatively cheap and admittedly rough-and-ready decision on these very familiar types of dispute without the immediate and heavy costs of entering into litigation. If, for example, Astec ends up as the net loser in the adjudications then it is unlikely to proceed with substantive litigation given its financial circumstances - but at least the risks would then be apparent. Whether in those circumstances, Balfour Beatty as the net winner, chose to enforce would very much depend on whether it considered that Astec had the wherewithal to pay.

21.
Thus, the purpose of the adjudications here are not initially for cashflow. There is no business now for which cashflow is required on the part of Astec because it is in insolvent liquidation. The cash might arise if Astec wins the adjudications on a net basis and, for example, Balfour Beatty decides not to challenge them in any subsequent litigation. However, that is some way down the road. There is no interim cashflow advantage to Astec because it has already proffered an undertaking that if it was to enforce any adjudication awards in its favour, the monies recovered would be paid into court and it would not be able to do anything with them until the end of any litigation.

22.
On that footing the immediate rationale for permitting the adjudications here would be best served if, once the adjudication decisions had been given, there was an immediate stay on enforcement against Astec, provided that Balfour Beatty started litigation within six months thereafter. There is a slight nuance on that to which I shall refer later on. This is much simpler and easier than (a) getting the monies in but (b) not being able to do anything with them until the end of the trial. There is no disadvantage to Astec if I were to permit it to proceed only on that basis because there is clearly no credit risk as far as Balfour Beatty is concerned which might otherwise call for a payment-in now.

23.
It was also suggested by Balfour Beatty that the right course is litigation now rather than adjudication(s) because the latter will be too complicated (due to the three subcontracts). However, I do not accept that it is for me broadly to compare he advantages of litigation as against adjudication

in circumstances where prima facie a party in the position of the defendant has the right to seek an adjudication. The court does not prevent adjudications because one party considers that they would be unduly complex.

24.
On that basis, Astec should be allowed to bring those adjudications on the conditions that I will set out hereafter, provided then that there is sufficient security in the way contemplated by paragraph 87(2) of the judgment in Meadowside. A number of practical and legal objections have been made to certain aspects of that security and I will deal with those now.

25.
First of all, the security for the costs of any substantive litigation was originally offered by Astec at £250,000, but that was in relation only to one notice of adjudication and hence one contractual dispute. If there are three contractual disputes, logic suggests that the amount of security should be £750,000. Astec's response is that this does not or should not follow because it is not known at this stage as to how much costs will actually be incurred and that can only be properly established once the adjudications have taken place.

26.
I do not agree with that. If there is any underlying litigation then, subject to some points which both sides might accept have been completely knocked out by the adjudicator, the dispute is going to be re-run at significant cost. In my judgment, the security to be provided initially must be £750,000. This is subject to the right of Balfour Beatty to seek further security if that sum has been or is likely to be expended, just as if this was a case of security for costs granted by the court in the usual way. There is an insurer in court and I have seen today a letter from it already giving an indication that insurers even at this stage would be prepared to increase the amount. However, I am not prepared to leave that to chance and so security of £750,000 will be a condition of the order that I make. That disposes of Balfour Beatty's first objection.

27.
The second objection is taken to clause 3(c) of the insurance policy. That says that if there is any material deterioration in the prospects of a successful outcome at trial for the insured (ie Astec) then insurers may terminate the policy, and the costs protection in favour of Balfour Beatty would stop at that point. The argument made by Balfour Beatty here is that if it was undertaking litigation where it had effectively to overturn an award in favour of Astec by the adjudicator, it is all very well that Astec's claim in the litigation might be struck out since security was no longer available. But Balfour Beatty would still have to continue to trial so as at least to establish a judgment which would overtop the award by the adjudicator against it. And it would have no costs protection in that regards going forwards.

28.
The answer proffered by Astec was that if that happened on the assumption that Astec had already got the money in, that money was ring-fenced and it would return it. That in my view deals with the point, save that such an offer such an offer be reworded to be consistent with the fact that there will now be an initial stay of enforcement. That is that the stay on enforcement of the adjudicator's decisions in Astec's favour would become permanent if Astec's own claim in the litigation came to a premature end. Balfour Beatty would not therefore be out of pocket. In that event there would then be no commercial interest in Balfour Beatty continuing with the litigation unless it decided speculatively

that it wanted to be the net winner and take its chances whether it could recover something from Astec. That is a different matter and does not affect this point.

29.
One then comes to clause 2 of the exclusions in the policy. This excludes the following from the indemnity:

“Disbursements or Opponent’s Costs (a) if the Legal Action is struck out or dismissed for want of prosecution or is otherwise lost as a direct result of the negligent conduct of the action by the Appointed Legal Representative and/or the appointed counsel.”

30.
The more that Counsel and I looked at it, the less clear it became. In my judgment, the only thing that ought to be there would be something to the effect that if Astec’s claim was either struck out or dismissed for want of prosecution, or is otherwise lost as a direct result of the negligent conduct of the claim by its legal representatives, cover was excluded. I suspect that this eventuality is not likely to happen but it seems to me to be unexceptionable in a policy of insurance. As amended to reflect what I have just said, it can stay.

31.
Finally, it was suggested by Balfour Beatty that there was a problem about the operation of the indemnity because the “Legal Action” which was the subject matter was defined to be “Any proceedings issued by the Opponent against the insured to overturn the Adjudicator’s Final Decision”. The latter was defined as:

“The written determination of the Adjudicator after the three separate adjudications in respect of the three

Sub- Contracts having been concluded…”

The point made was that a single determination might be impossible to show. I do not think there is anything in that. It seems to me that what this must cover is a single determination of the adjudicator after the three separate adjudications, if that is what happens, or 3 separate determinations or, if the parties agree, a determination after one consolidated adjudication.

Conclusion

32.
Accordingly, I do not find there to be any fatal jurisdictional objection to the adjudications proceeding or that any exercise of discretion must inevitably prevent them from occurring. Therefore, I am not prepared to grant the injunction sought. However, and subject to further discussion with counsel, this is on the basis that:

(1)
notices for the two remaining adjudications are issued within 21 days;

(2)
the parties must ensure that the same adjudicator is appointed to deal with all three adjudications;

(3)
the three adjudications will be dealt with together but the time limits that apply are such that each adjudication is entitled to have 28 days as the minimum, which means that there would be at least 84

days for the entirety of the three adjudications, subject to any further extensions which may be sought and granted.

(4)
the parties may, if they wish, agree to confer jurisdiction on an adjudicator to deal with all three contractual disputes in one adjudication;

(5)
Then, following the issue of all three decisions, or one as the case may be, the claimant has six months in which to bring legal proceedings to seek a different result or not. It seems to me that if all that the claimant is going to do immediately because of limitation is to issue a claim form so that time stops running but otherwise takes no further action, that should not be regarded as the commencement of proceedings. In any event, as I understand it from Mr. Hussain, Astec would be willing to enter into appropriate standstill agreements which might remove the need to issue the proceedings altogether.

(6)
If Balfour Beatty does issue the proceedings within six months after the adjudication decisions, then Astec cannot seek to enforce any adjudication decision and that will remain the position throughout the litigation until it terminates. If, on the other hand, Balfour Beatty does not bring the substantive proceedings within the six months, Astec may bring enforcement proceedings.

(7)
So far as security for costs are concerned, it has already been agreed that the adjudication fees will be the subject of security and in respect of any legal action which is brought by Balfour Beatty they are covered for the purpose of any adverse costs order against Astec up to £750,000. If it should appear that £750,000 is insufficient, then the defendant may seek further security in the usual way.

(8)
If Balfour Beatty is the net winner at the adjudication stage, it may seek to enforce, subject to any argument Balfour Beatty may have at that point. That, of course, is on the basis that there is no underlying litigation to follow. If, on the other hand, for example, Astec is the net loser but decides nonetheless to go for legal action to overturn that result (which I suspect is unlikely) then of course it will be open to Balfour Beatty as the defendant to be able to seek security for costs in the usual way.

(9)
Clause 2(c) will be reworded in the way that I have already pointed out and at 3(c) will be dealt with in the way that I have also pointed out.

33.
That is my decision. I am grateful to Counsel for all their helpful submissions.