

**JUDGMENT** : HHJ David Wilcox. TCC. 7<sup>th</sup> October 1999

1. On 4 July 1996 Northumbrian Water Ltd employed the Dredging & Construction Co Ltd ('Dredging') as the main contractor in respect of works in connection with the Tees Estuary Environmental Scheme. The main contract was based upon the ICE conditions of contract 6th edn and the North Bank Transfer contract works were known as TSS 50Q/1 Portrack to Bran Sands Pipeline Phase 1.
2. On 30 September 1996 Dredging entered into a subcontract with Delta Civil Engineering Co Ltd ('Delta') whereby Delta were employed to carry out, amongst other matters, various pipe jack crossings. The contract was based upon the FCEC form of subcontract, 1991 edition.
3. On 20 March 1998 Delta gave notice of dispute to Dredging pursuant to cl. 18(2) of the subcontract. This notice was accompanied by notices to refer and to concur in the appointment of an arbitrator pursuant to cl. 18(5).
4. The notice of dispute stated that the dispute had arisen between the parties as a consequence of the failure of dredging:
  - (a) to provide thrust and reception pits in accordance with the contract and its failure to pay for the resulting loss, damage and expenses under the subcontract or as damages for breach of the subcontract;
  - (b) to pay for all items properly executed under the subcontract; and
  - (c) to pay sums in respect of financing charges and interest on (a) and (b) above, pursuant to the subcontract or as special damages and/or pursuant to the Arbitration Act 1996.
5. Clause 18 of the subcontract so far as it is relevant to these appeals provides:
  - (1) *If any dispute or difference of any kind whatsoever shall arise between the Contractor and the Sub-Contractor in connection with or arising out of the Sub-Contract, or the carrying out of the Sub-Contract works (excluding a dispute concerning VAT but including a dispute as to any act or omission of the Engineer) whether arising during the progress of the Works or after their completion shall be settled in accordance with the following provisions ...*
  - (2) *For the purposes of sub-clauses 18(3) to 18(5) inclusive, a dispute is deemed to arise when the party serves on the other a notice in writing (herein called the Notice of Dispute) stating the nature of the dispute. Provided that no Notice of Dispute may be served unless the party wishing to do so has first taken any step or invoked any procedure available elsewhere in the sub-contract in connection with the subject matter of the dispute, and the other party has:
    - (a) taken such steps as may be required, or,
    - (b) did allow a reasonable time to take any such action.*
  - (3) *In relation to any dispute notified under sub-clauses 18(2), and in respect of which no Notice to Refer under sub-clause 18(5) has been served, either party may, within 28 days of the service of the Notice of Dispute, give a notice in writing under the Institution of Civil Engineers Conciliation Procedure (1988) ...*
  - (4) *Where a dispute has been referred to a conciliator under the provisions of sub-clause 18(3) ...*
  - (5) *Where a dispute has not been referred to a conciliator under the provisions of sub-clause 18(4) then either party may within 28 days of service of the Notice of Dispute under sub-clause 18(2) refer the dispute to the arbitration of a person to be agreed upon by the parties by serving on the other party a written Notice to Refer. Where a Notice to Refer is not served, within the said period of 28 days, the Notice of Dispute shall be deemed to have been withdrawn.*
  - (6) *If the parties fail to appoint an arbitrator within 28 days of either party serving on the other party, a written Notice to Concur in the appointment of an arbitrator, the dispute shall be referred to a person to be appointed on the application of either party by the President (or if he is unable to act, by any Vice-President) for the time being of the Institute of Civil Engineers.*
  - (7) *Any such reference to arbitration shall be conducted in accordance with the Institution of Civil Engineers, Arbitration Procedure (1983) or any amendment or modification thereof being in force at the time of the appointment of the arbitrator.*
  - (8) *If any dispute arises in connection with the Main Contract and the contractor is of the opinion that such dispute touches or concerns the Sub-Contract Works and the dispute is referred to a conciliator or an arbitrator under the Main Contract the Contractor may by notice in writing require that the Sub-Contractor provides such information and attend such meetings in connection therewith as the Sub-Contractor may request. The contractor may also by notice in writing require that any such dispute under this Sub-Contract be dealt with jointly with the dispute under the Main Contract and in like manner. In connection with any such joint dispute, the Sub-Contractor shall be bound in like manner as the Contractor by any recommendation of the conciliator or any award by an arbitrator.'*
6. On 24 March 1998 Dredging gave a notice of dispute to the employer's engineer pursuant to cl. 66 of the main contract in respect of amounts certified by the engineer and requested an engineer's decision under cl. 66(3) which provides:
  - (3) *Every dispute notified under Sub-Clause (2) of this Clause shall be settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor within the time limit set out in Sub-Clause (6) of this Clause.'*
7. Clause 66(6) provides:
  - (A) *Where a Certificate of Substantial Completion the whole of the works has not been issued and either:*

- (i) *The Employer or Contractor is dissatisfied with any decision of the Engineer given under Sub-Clause (3) of this Clause, or*
- (ii) *The Engineer fails to give such decision for a period of one calendar month after the service of the notice of dispute, or*
- (iii) *The Employer or Contractor is satisfied that any recommendation of a conciliator appointed under Sub-Clause (5) of this Clause.*

*Then either the Employer or Contractor may within three calendar months after receiving such decision, or within three calendar months after the expiry of the said period of one month, or within one calendar month of receipt of the conciliator's recommendation (as the case may be) refer the dispute to the arbitration of a person to be agreed upon by the parties serving on the other party a written Notice to Refer.*

*(B) Where a Certificate of Substantial Completion of the whole of the works has been issued, the foregoing provision shall apply save that the said period of one calendar month referred to in (A) shall be read as three calendar months.'*

8. Also on 24 March 1998 Dredging gave notice to Delta under the provisions of cl. 18(8) of the subcontract requiring the subcontract dispute to be dealt with jointly with the main contract dispute.
9. On 1 April 1998 Delta applied to the president of the Institution of Civil Engineers for the appointment of an arbitrator in respect of the subcontract dispute. This was rejected because the period of 28 days since the service of the notice to concur had not expired.
10. On 20 April 1998 Delta reapplied to the president of the ICE for the appointment of an arbitrator in respect of the subcontract dispute.
11. Dredging, in letters, between 3 and 24 April variously submitted that the president could not and should not appoint an arbitrator in respect of the subcontract dispute since by their letter of 24 June to the subcontractor, Delta, Dredging had validly elected their entitlement under cl. 18(8) of the subcontract to have the matters dealt with under the dispute resolution provisions of the main contract and that in any event it was undesirable to have a multiplicity of proceedings in relation to substantially the same subject matter.
12. On 18 May 1998, Mr Derek Simmonds confirmed his appointment by the president as arbitrator in respect of the subcontract dispute.
13. On 8 June 1998 the engineer named in the main contract gave his decision under the provision of cl. 66 of the main contract.
14. On 30 June 1998 Dredging wrote and informed the engineer that: *'We hereby give Notice under Clause 66(B) that we are dissatisfied with your decision and will refer the dispute to arbitration unless we are otherwise able to resolve it by further reference to you as Engineer and to the Employer.'*
15. Between 1 July 1998 and 18 August 1998 Dredging and Delta exchanged submissions to enable the sub-contract arbitrator to determine the jurisdiction question.
16. On 1 September 1998 in his award the arbitrator declared: *'Having considered all the arguments, I FIND that the Contractors (the Respondents) Notice under Clause 18(8) of the FCEC form of Sub-Contract (dated 24th March 1998) was invalid. The necessary step of referral of the Main Contract dispute either to conciliation or arbitration not having taken place. I therefore HOLD that I have jurisdiction in respect of the Sub-Contract dispute.'*
17. On 4 September 1998 Dredging notified the claimant under cl. 18(8) of the sub-contract that: *'We require the dispute you allege to have arisen between us to be dealt with jointly with disputes which have arisen under the Main Contract and in like manner.'*
18. The respondent also enclosed a copy of its notice to refer issued under the main contract to Northumbrian Water. That notice to refer, also dated 4 September 1998, served upon the employer, stated: *'We confirm our dissatisfaction with the Engineer's decision, in response to our Notice of Dispute dated 24th March 1998, given on the 8th June 1998 under Clause 66(3) the Conditions of Contract as the amounts properly due to us in accordance with Clause 66(6) of the Conditions of Contract, we hereby refer the dispute to the arbitration of a person to be agreed between us.'*
19. On 4 September, Dredging also informed the arbitrator that they had referred the main contract dispute to arbitration.
20. On 8 September 1998, the arbitrator wrote to the parties. He made reference to Dredging's letter of 4 September informing him of the reference by Dredging to arbitration under the main contract and to Delta's letter of 7 September.  
*'Certain matters need to be decided:*  
*(A) Will the Respondent be challenging my decision?*  
*(B) Now that it has referred the Main Contract dispute to arbitration, does the Respondent intend to raise a second challenge to my jurisdiction?*  
*(C) If the answer to (B) is "Yes", are the parties content to rely on the submissions already made, or does each wish to make an additional submission?*  
*(D) If the answer to (A) is "Yes", does the Claimant nevertheless wish to continue with the Sub-Contract arbitration?*

*If the answer to (A) is "No", but the answer to (B) is "Yes", it may be preferable to defer the Sub-Contract dispute pending a second decision.*

*If the answer to (B) is "Yes", then it is likely that the unsuccessful party will challenge the decision. Instead of my making a decision, it may therefore be more beneficial to submit the matter for determination by the Court under the provisions of Section 32(2) of the Arbitration Act 1991.*

*Will the Claimant as a matter of urgency respond to (A) and to (B). Depending on the answers, will both parties comment on my suggestion above.'*

21. The reference to claimant in the last sentence was clearly an error and was corrected by later fax. It should have been respondent (Dredging).
22. By letters of 10 September 1998, and 11 September 1998, Dredging reiterated their arguments raised in submissions on the question of jurisdiction to the arbitrator and asked him to 'correct his decision in accordance with rule 21.3 of the ICE Arbitration Procedure and/or Section 57 of the Arbitration Act 1996' to the effect that the contractor's notice dated 24 March 1998 under cl. 18(8) of the subcontract was valid and to find that he did not have jurisdiction. Dredging confirmed that they would raise a second challenge to jurisdiction should it be necessary.
23. On 12 September 1998 the arbitrator wrote confirming that he interpreted Dredging's letter of the 11 September as being an actual challenge to his jurisdiction and gave directions for the hearing of it.
24. On 4 October 1998 the arbitrator made a second declaration as to his jurisdiction:  
*'In consideration of the foregoing and without having necessarily referred to all the arguments put before me, I AWARD AND DECLARE as follows:*
  1. *The Contractor is not prevented from making a Second Challenge to my jurisdiction.*
  2. *As a result of the Contractor having on the 4th September 1998 referred the (related) Main Contract dispute to arbitration and having issued a further Notice of "joint dealing" under the provisions of Clause 18(8) of the Sub-Contract, my previously established authority to decide those Sub-Contract issues where there are "related" Main Contract issues has been thereby revoked and I no longer have jurisdiction to deal with these issues.*
  3. *For the avoidance of doubt, I still do have jurisdiction to deal with issues between Dredging and Construction and Delta which fall outside those to which Clause 18(8) of the Sub-Contract applies. That is, any issues in respect of which there can be no Main Contract dispute because the Contractor has no remedy against the Employer."*
25. On 13 November 1998 there was in fact a third declaration and directions as to the adjudication of disputes that he considered fell outside cl. 18(8) of the subcontract.
26. Delta by way of appeal contend that the arbitrator was right as to his first declaration, and that he was wrong as to the second. Dredging by way of appeal contend that the arbitrator was wrong as to the first declaration.
27. The following issues arise out of the two appeals and the two declarations of the arbitrator.
  - (1) Is it a condition precedent for the effective operation of cl. 18(8) of the subcontract, namely the contractor's requirement that any dispute under the subcontract be dealt with jointly with any dispute under the main contract which touches and concerns the subcontract works and that the subcontractor be bound of like manner as the main contractor by any award of the arbitrator, that the main contract dispute must have been referred to arbitration prior to any attempt by the subcontractor to refer the subcontract dispute to a separate subcontract arbitration.
  - (2) If a reference to arbitration of the main contract dispute is a pre-condition to the operation of cl. 18(8), if that condition is subsequently fulfilled by the main contractor at any time thereafter and if notice of joinder is also issued, is the arbitrator's jurisdiction thereby revoked?
28. Clause 18 deals with the dispute resolution machinery in a subcontract, which is based upon the 1991 edition of the FCEC blue form subcontract. The approach I must take as to questions of construction is the same as to be followed in any commercial contract.
29. Subclause 8 in the first sentence gives the main contractor the right to require the assistance of a subcontractor in relation to a particular type of dispute, namely, one arising in connection with the main contract, and where the contractor is of the opinion that the dispute touches or concerns the subcontract works. Pausing there it is of note that the draftsman does not use the term any dispute that arises out of the main contract, it may not. The sentence goes on to set out the time when such a request may be made, namely, after the dispute is referred for conciliation or arbitration under the main contract. The obligation then is for the subcontractor to assist by providing information and attending meetings in connection with the request.
30. The second sentence confers upon the contractor a further right, that is to require: *'That any such dispute under this Sub-Contract be dealt with jointly with the dispute under the Main Contract, and in like manner.'* (emphasis added)
31. Such dispute clearly refers to the dispute characterised in the first sentence. But there is a second requirement governing the exercise of the contractor's right for joint resolution in the second sentence. Such a dispute (a) arising in connection with the main contract, and (b) where the contractor is of the opinion that such dispute touches or concerns the subcontract work, (c) must also arise under the subcontract.
32. There is no point for either the contractor or subcontractor to take part in the joint adjudication of disputes unless they do arise out of the subcontract and in connection with the main contract. There is merit in such a joint

adjudication for both parties since, if it can be achieved, and the employer consents, there is avoided a multiplicity of proceedings and the risk of inconsistent findings by tribunals of fact.

33. Delta contends that the arbitrator's declaration was correct. Delta submits that the expression '*Such dispute*' in the second sentence refers not only to the dispute as described in the main sentence but also as to the manner in which the contractor may have proposed to deal with it. They contend that a necessary prerequisite for the service of a joinder notice is a pre-existing reference to arbitration or conciliation.
34. Such a construction could confer advantage to a subcontractor, but were he able to win '*a reference race*' it would lead to a multiplicity of proceedings arising out of the same subject matter. Mr Hickey contends that to follow the construction urged by Dredging could lead to unconscionable delay. The contractor could drag his feet and delay in making a reference for conciliation or arbitration under cl. 66 of the main contract. There are of course time limits in cl. 66, which would limit any tactical delay on the part of the contractor in dispute. And these are all matters that an informed subcontractor looking at the risks of the contract would take on board when he entered into the subcontract.
35. In relation to the first declaration, I hold that the arbitrator erred in finding that he had jurisdiction in respect of the subcontract. He ought to have held that Dredging's notice was valid and did not require a pre-existing reference to conciliation or arbitration of the main contract. The right to require assistance in arbitration or conciliation is distinct from the further right provided to Dredging under the second sentence of cl. 18(8) which is additional and separate. At the time when the arbitrator sought to deal with Dredging's challenge to his original declaration he clearly was not entitled to do so. In fact he arrived at the correct decision namely to decline further jurisdiction. He was not entitled under s. 57 of the Arbitration Act 1996 to sit in appeal against his own earlier decision as to jurisdiction. The contract did not give him this power. As to jurisdiction after his first declaration, he was *functus officio*. The arbitrator on the first occasion had exhaustive submissions as to jurisdiction and made a declaration and award after mature consideration. (In the absence of an accepted determination as to jurisdiction) the aggrieved party should have referred the matter to the court. Had both parties wished to give the adjudicator a '*second bite at the cherry*' they could have done so by agreement.

#### **Conclusions**

36. The first application in point of time is that of Dredging & Construction Co Ltd in relation to the second award. That of Delta Civil Engineering Ltd relates to the first award.
  - (1) As to the first award I hold that the arbitrator erred in law by holding that he had had jurisdiction in relation to matters arising in the main contract and in relation to which the contractor was of the opinion that the existing dispute touched and concerned the subcontract. He was wrong to hold that it was a condition precedent to the contractor requiring joinder that there should be an existing conciliation or reference.
  - (2) In relation to the second declaration, I hold that the arbitrator was not entitled to reconsider jurisdiction as to matters arising in connection with the main contract and touching and concerning the subcontract in the opinion of the contractor and which were under the subcontract,
    - (a) because he had determined his jurisdiction already after a full consideration of all the relevant arguments and by hearing full submissions from the parties;
    - (b) he was *functus officio* on the question of jurisdiction; and
    - (c) because he erred in law in holding that it was a condition precedent that there should be an existing reference to conciliation or arbitration before a valid notice of joinder could be served.

Martin Bowdery (instructed by Russell & Creswick) for the applicant.  
Alexander Hickey (instructed by Howe & Co) for the respondent.