Neutral Citation Number: [2017] EWHC 348 (TCC)

Case No: HT-2016-000211

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2017

Before :

MRS JUSTICE JEFFORD

- -

Between :

SYMBION POWER LLC	**Claimant**
- and -	
VENCO IMTIAZ CONSTRUCTION COMPANY	**Defendant**

- -
- -

Mrs Jane Davies Evans (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Mr Benjamin Pilling QC (instructed by **Cooke, Young & Keidan LLP**) for the **Defendant**

Hearing dates: 30th January 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE JEFFORD

1. This is an application under s. 68(2)(d) of the Arbitration Act 1996 in which the Claimant alleges serious irregularity in the Award of an arbitral tribunal ("the Award") because the tribunal ("the Tribunal") failed to deal with all the issues that were put it. The Claimant asks the Court to set aside or vary the Award rather than remit it to the Tribunal in the particular circumstances of this case.

2. The arbitration arose out of a project to construct a power station in Kabul, Afghanistan. Under a contract dated 14 June 2008, the Prime Contractor (whom I shall refer to as "the JV") engaged Symbion Power LLC ("Symbion") for a scope of works called the Balance of Plant. This contract is referred to as "the BOP Contract".

3. Symbion in turn engaged Venco Imtiaz Construction Company ("Venco") as sub-contractors for civil and structural works. The Sub-Contract was dated 14 August 2008 and was based on the FIDIC Red Book. In addition to the standard terms of the Red Book, the Sub-Contract contained at Schedule 9.6 detailed provisions in respect of "Payment Management". Clause 9.1 provided:

   "This section covers the method of managing the payment amount determination, invoicing, and required support information to provide payment to the Subcontractor for the Subcontract Work."

4. The Sub-Contract provided that the works and the project were subject to "the Laws" (of which there was a lengthy definition which is not relevant) but that "interpretation of this contract is to be construed under the law of the State of Nevada". In respect of dispute resolution, the Sub-Contract provided for arbitration; I am told that the parties agreed that the seat of the arbitration should be England and certainly no issue has arisen about this.

5. Disputes arose under the BOP Contract which was terminated on 19 May 2009 and termination of the Sub-Contract followed.

6. In due course an arbitration took place between the JV and Symbion and an award was published on 24 October 2012. I shall refer to this arbitration, as it was referred to at the hearing, as "the prior arbitration" and to the resultant award as "the Prior Award".

7. In March 2013, Venco commenced an arbitration against Symbion. Venco's primary claim was for payment for work done prior to termination in a sum in excess of US$ 4 million. In the course of the arbitration, there were various Statements of Case, Memorials and Briefs served by the parties. A hearing took place in September 2015 and the parties served Post-Hearing Briefs. Not all of this material was, understandably, before the Court on this application but extensive extracts were exhibited to the various statements served in support of and in response to the application. The Award was published on 11 July 2016. Venco was largely successful in the arbitration.

8. Symbion, however, now make this application on the basis that they raised 7 discrete defences. Symbion accepts that the Tribunal dealt with 3 of these defences but contends that the Tribunal failed to address 2 of these defences at all and failed to address the essential parts of the 2 remaining defences.

The Award

9. It is helpful if I set out at this stage some parts of the Award which I will refer to further below.

10. In relation to the Prior Award, the Tribunal said:

"It has, however, been suggested by both parties ... that some findings in that Award could be of guidance to the Tribunal, although not binding on it. In this regard we do note later in this Award (in paragraph 166) certain consistencies between this Award and [the Prior Award] but otherwise do not refer to [the Prior Award]." [paragraph 23]

The relevance of the reference to paragraph 166 is not immediately apparent but it is obvious from this paragraph that the Tribunal was aware of the Prior Award and it is implicit that they had had regard to it and whether it might be relevant.

11. At paragraph 52, the Tribunal referred to Symbion's case that there was an oral modification to the Sub-Contract to provide that it was only required to make payment to Venco if it had itself been paid by the JV. The Tribunal continued:

"Further, it [Symbion] argues that even if there was no pay-if-paid modification, the onus is on the Claimant [Venco] to prove the value of the work it carried out. It says that the Claimant has failed to discharge this burden and therefore no damages should be awarded. By contrast, the Claimant denies that it agreed any pay-if-paid modification. ..... Further the Claimant contends that it had sufficiently proved the value of the works in respect of which it is claiming payment."

12. Having concluded that the pay-if-paid modification was never agreed, the Tribunal turned, under the section heading "PROOF OF CLAIMANT'S DAMAGES" to Venco's claim for damages: US$3,148,457 in respect of invoices 6 to 13 and US$937,724 in respect of 21 Purchase Orders (POs). The Tribunal recited that it had received written and oral testimony from both witnesses of fact and expert witnesses on the issue of proof of damage.

13. It is neither necessary nor appropriate for me to set out in this judgment the detail of that testimony. Some of the invoices had been approved by Symbion but evidence had been given that any review of the invoices was fairly broad brush. One of the reasons given for that was that Symbion's witnesses were aware that interim payment certificates could be "corrected" particularly when the final payment was made. Some of Venco's invoices had not been approved but had not been returned to Venco for correction or additional information. Quality Control Daily Reports (QCDRs) had been provided to the Tribunal for the relevant periods. Most of the Purchase Orders had been approved by Symbion. There was evidence about work done or materials supplied under other orders.

14. The Tribunal recited both Venco and Symbion's submissions. Symbion's submissions, in summary, disputed the evidence on which Venco relied and contended that the QCDRs and invoices were inaccurate and could not be relied on for proof of percentage of work complete. The Tribunal set out the evidence on each invoice or group of invoices and on each PO or group of POs and their conclusions on each. As I have said, they largely found in Venco's favour.

Symbion's application: the law

15. Before I turn to the detail of Symbion's case, it is also helpful to set out the relevant law.

16. On this application, Symbion relies specifically on s. 68(2)(d) which provides as follows:

> *"Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –*
> *...*
> *(d) failure by the Tribunal to deal with all the issues that were put to it.*
> *..."*

17. There are disputes between the parties both as to whether the matters relied on by Symbion are issues within the meaning of that sub-clause and as to whether, even if there are issues that the Tribunal has failed to deal with, there is any substantial injustice.

18. The parties were agreed that a clear summary of the law, which I gratefully adopt, is set out in the decision of Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) both as to the meaning of "issue" [33(g)] and substantial injustice [33(h) and (i)], namely:

> *"(g)(i) There must be a "failure by the tribunal to deal" with all of the "issues" that were "put" to it.*
>
> *(ii) There is a distinction to be drawn between "issues" on the one hand and "arguments", "points", "lines of reasoning" or "steps" in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a "high threshold" that has been said to be required for establishing a serious irregularity […].*
>
> *(iii) While there is no expressed statutory requirement that the Section 68(2)(d) issue must be "essential", "key" or "crucial", a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with […].*
>
> *(iv) However, there will be a failure to deal with an "issue" where the determination of that "issue" is essential to the decision reached in the award […]. An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes […].*
>
> *(v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the Section 68(2) application […].*
>
> *(vi) If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry […]; it does not*

matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.

(vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length […].

(viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue […]. A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it […].

(ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences […]. The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) […].

(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise […]. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues […].

(xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the Tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will be engaged.

(xii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and common sense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) […]. The Court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard."

"(h) In relation to the requirement for substantial injustice to have arisen, this is to eliminate technical and unmeritorious challenges […]. It is inherently likely that substantial injustice would have occurred if the tribunal has failed to deal with essential issues […].

(i) For the purposes of meeting the "substantial injustice" test, an applicant need not show that it would have succeeded on the issue with

> *which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it [is] necessary only for him to show that (i) his position was "reasonably arguable", and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award […].*
>
> *(h) The substantial injustice requirement will not be met in the event that, even if the applicant had succeeded on the issue with which the tribunal failed to deal, the Court is satisfied that the result of the arbitration would have been the same by reason of other of the tribunal's findings not the subject of the challenge."*

The defences

19. Symbion's first defence was that the contract incorporated a paid when or if paid provision which was the subject of an oral variation to the terms of the written contract. Symbion accepts that the Tribunal, as set out above, expressly addressed and rejected that argument. A further defence was that Venco was seeking damages from the wrong party. Again Symbion accepts that that defence was dealt with by the Tribunal.

20. Symbion's next line of defence was that Venco bore the burden of proof on its claims. I do not regard that as properly characterised as a defence. The overarching issue in the arbitration was whether Venco was entitled to be paid the sums that it claimed. Leaving aside any question of whether the burden of proof was, in any case, a point in dispute, it was plainly for Venco to prove its case. The Tribunal recited Symbion's argument to this effect and clearly proceeded on the basis that the burden fell on Venco. That being the case, the substance of Symbion's defence was that Venco had failed to discharge that burden. Unsurprisingly, Symbion no longer contends that the Tribunal failed to address the issue of its "defence" on burden of proof but contends, as I set out below, that the Tribunal failed to address the issue as to the discharge of that burden.

21. The four matters that Symbion says were not dealt with were the following (which I describe in more detail below):
    (i) The collateral estoppel defence
    (ii) The conclusive evidence defence
    (iii) The failure to meet the burden of proof defence
    (iv) The overstatement defence

    I have set these out in the order that they were argued but I intend to deal with the conclusive evidence and burden of proof defences first.

Conclusive evidence

22. Here Symbion's position is that it was Venco's case that the invoices and POs were conclusive evidence of the sums due to Venco; Symbion disputed that they were conclusive; but, says Symbion, the Tribunal failed to deal with this defence.

23. If this were how the case had been put, I would have had little hesitation in finding that whether or not the invoices and POs were conclusive evidence of the sums due was an issue which the Tribunal ought to have dealt with. But it was not, in fact, an issue that arose. Nor did the Tribunal proceed on the basis that the invoices and POs were conclusive evidence, so it cannot be said that they failed to deal with the defence to this point.

24. Firstly, Venco say that it was simply not their case that the invoices and POs were conclusive. As I have said, limited – but still extensive - documentation from the arbitration was before the Court on this application. There was no document in which Venco said in terms that the invoices and POs were conclusive as to the value of work done.

25. Mrs Davies Evans, who appeared on behalf of Symbion, drew my attention to a number of passages in which she argued that that was the effect of what Venco was saying, albeit those passages were primarily in Symbion's responses to Venco's case.
    (i) Venco's Statement of Claim did not form part of the documents before the Court but Symbion's Statement of Defense, under the heading *"[Venco] has not proven the value of the works invoiced"* said this:

    > *"[Venco's] Statement of Claim assumes that the value of its work is conclusively established by its invoices. .... the value of the work performed by [Venco] was subject to continuing re-evaluation by Symbion until the end of the project. As such, it is [Venco's] burden to prove the value of its works and its invoices are not conclusive evidence."*

    (ii) Whatever Venco had said, therefore, does not appear to have been an assertion of conclusivity. This was at best what Symbion assumed Venco was saying and Symbion's response was focussed on the point that Venco still had the burden of proving the value of its works.
    (iii) In its pre-hearing Responsive Memorial, Venco argued that *"even if Symbion had grounds to challenge [Venco's] invoices at the time, which [Venco] denies, Symbion's chance to challenge [Venco's] invoices is long past under the terms of the Subcontract."*. Venco said that Symbion was required to make bi-monthly payments based on Venco's achievement of payment milestones but retained the right to dispute the achievement of milestones through written notification. Venco argued that if Symbion did not do so, payment was due. But Venco also averred that *"[It] has amply demonstrated that the work was performed and the materials were tendered."* This was the closest Venco appear to have come to asserting that its (unchallenged) invoices were contractually conclusive but it was still advancing its case on the basis that it had offered sufficient proof of its claim.
    (iv) Symbion's Responsive Memorial disputed that Symbion had "waived its right to question" the invoices and repeated that Venco had the burden of proof.
    (v) In its Post-Hearing Brief, Venco emphasised the extent to which its invoices and POs were approved and accused Symbion of engaging in revisionist history by attempting to discredit its own approvals. Venco asked the Tribunal to disregard this tactic. That argument and the submissions on the evidence that followed were entirely inconsistent with any claim that the invoices were conclusive evidence. Symbion responded in its own Post-Hearing Brief describing Venco's argument as being that invoice approval was somehow "sacrosanct" and emphasising that approval of an invoice was not determinative of the value claimed. Nothing more seems to have been said by either party about Symbion having waived any right to challenge an invoice (even if unapproved) if it had not done so at the time.

26. It seems to me that Venco was not arguing that there was some contractual basis on which these invoices (whether approved or unapproved) were binding but was

repeatedly making a point going to the weight of the evidence, namely that if Symbion had not challenged its invoices at the time of submission or for a considerable time afterwards, and indeed not until a dispute arose, it was too late to do so, in the sense that such a challenge was not credible. Even if Venco may at some point have gone further or Symbion may have thought that it had done, by the time of the Post-Hearing Briefs it was clearly not Venco's case that its invoices (whether approved or unapproved) or POs were conclusive evidence of the value of work done.

27. In any case, the Tribunal does not appear to have thought that that was Venco's case. There is no mention at all in the Award of such a case and the Tribunal made no finding that the invoices and POs were conclusive. On the contrary, they addressed Venco's claim on the basis of considering the entire body of evidence that was before them as to the value of work done.

28. In this context, Mrs Davies Evans argued that, although the Tribunal had not said in terms that the invoices were conclusive, they had in effect treated them as such. In particular, she argued that the Tribunal failed to take account of the fact that the interim invoices were always capable of adjustment and that at the end of the day in the Final Account there would be a "proper" account taken. It followed, Symbion argued (and indeed argued in the arbitration) that the fact that it had not challenged invoices at the time was of little evidential value since it knew that it could all be put right in due course.

29. I do not accept the argument that the Tribunal treated the invoices as conclusive: on a fair reading of the Award, the Tribunal had in mind Symbion's arguments as to weight and addressed the entire body of evidence. Symbion's arguments as to the relevance of the final account process were just that – arguments – and ones that were considered by the Tribunal and given such weight as the Tribunal thought fit.
30. In my judgment, Symbion's case on this argument fails because (i) there was no issue that the invoices or POs were conclusive and (ii) even if there had been such an issue, the Tribunal must have rejected that case (and accepted Symbion's case) because they did not proceed on the basis that the invoices and POs were conclusive.

Burden of proof

31. Symbion's case on this defence was that it had a discrete defence that Venco had failed "to meet its burden of proof". I take that to mean that Venco had failed to discharge the burden on it by proving its case on the balance of probabilities. If the "issue" in the arbitration is expressed in that way, then it is clear from the summary of the Award that I have given above that the Tribunal addressed that issue and decided it largely in Venco's favour. That would be an end to this challenge.

32. Symbion, however, put its case in a more nuanced way and argued that the Tribunal had failed to deal with essential parts of this defence.

33. In Mrs Davies-Evans' written submissions, it was expressed as this (with my numbering):

"(1) The Tribunal failed to deal with Symbion's argument regarding the express provisions of the Subcontract as to the evidential value of the documents relied on by Venco.

(2) The Tribunal failed to deal with Symbion's submission regarding Venco's obligation to submit "supporting documents showing in detail in a form approved by [Symbion] the value of all work done in accordance with the [Subcontract]" when seeking final payment."

34. As expanded upon in oral argument, (1) was concerned with the fact that, under the Sub-Contract, interim payment certificates (and Venco's invoices forming its applications for payment) were not binding and (2) was concerned with the argument that little weight was to be attached to Symbion's approval or lack of challenge to Venco's invoices because interim payments were subject to review at the stage of final payment.

35. Mr Pilling QC, for Venco, submitted that these arguments did not identify issues (whether or not ones which the Tribunal had failed to deal with) but rather amounted to saying that the Tribunal had wrongly concluded that Venco had proved its case. I agree with that submission and, in my view, the "issues" identified by Symbion were simply part and parcel of the matters relied upon by Symbion to argue that Venco had failed to prove its case.

36. Even if these were "issues", they were considered and dealt with by the Tribunal as part of its consideration of whether Venco had proved its case. That is evident from its recitation of Symbion's arguments and its conclusions in Venco's favour. To the extent that the Tribunal has not articulated each element of Symbion's argument and its conclusions, Symbion's complaint is in reality one of the fullness of the Tribunal's explanation not its substance. It is, in any case, not a proper complaint.

Collateral estoppel

37. Symbion argues that an issue in the arbitration was its defence that the Tribunal was bound by findings in the Prior Award by virtue of the principle of collateral estoppel. For this principle and its application it relied on the law of the State of Nevada as the law of the contract. No argument was advanced before me that I should have regard to any other system of law such as the law of the seat of the prior arbitration or this arbitration. For my part, I find it difficult to see why the law that was expressly to be applied to the construction of the contract is the relevant law on this issue but I proceed on the basis of what was apparently common ground between the parties in the arbitration.

38. Symbion argues that the Tribunal failed to deal with this defence. I deal below with the question of whether this was an issue in the arbitration falling within s.68(2)(d) and whether the Tribunal failed to deal with it but I first consider Symbion's alternative argument.

39. That alternative argument was that the findings of the prior tribunal were "highly persuasive". Although at one point in argument, Mrs Davies Evans put this as the second limb of the collateral estoppel argument, it was clearly put as an alternative, that is a case that Symbion advanced if its collateral estoppel argument failed. As such, I have no hesitation in finding that the alternative argument was not an "issue" that the tribunal ought to have addressed but it was rather an element of the argument between the parties as to the evidence to support or defeat Venco's claim and the weight to be given to such evidence. I will refer to this argument below as the evidentiary argument.

The background

40. In the prior arbitration, the tribunal had to consider the claims made by Symbion for payment up to the date of termination. The Prior Award recites that Symbion argued that the value of the works done could be determined up to 6 February 2009 by the value of invoices which had been approved by the JV. The tribunal rejected that argument and found that Symbion had to prove the value of the work done. In that respect, on the evidence, it then found that Symbion had carried out 50.02% of the works (for which it had already invoiced in February 2009). Even though Symbion continued to carry out work up to termination, the tribunal found that Symbion had not sufficiently proved any greater value. The tribunal found that Symbion had not proved the value of the goods and materials which it claimed to have procured and had already invoiced for.

41. The starting point for Symbion's argument in this arbitration and on this application, therefore, had to be that there was some aspect of these findings which, if binding, would determine an issue in dispute between Symbion and Venco. Symbion put that broadly on the basis that there were issues as to the construction of the contract and the value of works on which the Prior Award was conclusive but Symbion was unable to point to any particular allegedly binding finding. It follows, in my view, therefore, that it is difficult to identify with any precision what the issue is that the present Tribunal is said to have failed to address. I return to this point below.

Symbion's case

42. On this application, I was taken to how Symbion had put this case in its pre-hearing Responsive Memorial. Referring to the doctrine of collateral estoppel as "issue preclusion", Symbion said this:

> *"There can be no reasonable argument that the issues sought be precluded are (sic) the same issues as in the prior arbitration. Specifically …. these issues include:*
>
> - *the payment procedures and the right to ongoing reassessment of the value of work until the end of the project….*
> - *the oral modification of the BOP Subcontract to provide that Symbion was not required to pay its subcontractors until after receiving payment from [the JV] ….*
> - *Symbion's payment of invoices that [Venco] claims were unpaid as of January and April 2009;*
> - *Symbion's performance of its duties under the BOP Subcontract"*
>
> This is the fullest articulation I have seen of the aspects of the Prior Award that Symbion said gave rise to a collateral estoppel. Symbion said that these issues were "essential" to the Prior Award.

43. At the hearing, there were a number of exchanges with the Tribunal about this issue.

44. In opening argument, Symbion's arbitration counsel (not being counsel who appeared on this application) identified the circumstances which he said "provided a pretty sound basis for applying collateral estoppel to findings in litigation and arbitration against a sub-contractor". He said that that was obviously an issue the Tribunal would have to consider and on which Symbion was prepared to submit further argument. He went on to say that the prior tribunal's interpretation of the BOP contract was "relevant" to the interpretation of the Sub-Contract. He also said that the approach of the prior tribunal to the claims of non-payment was "instructive". The Chairman of the Tribunal

intervened to ask "This is by way of guidance, isn't it?" to which counsel responded "Yes".

45. During closing argument, Venco's arbitration counsel made a submission in respect of the differences in the way in which the dispute under the BOP Contract and the Sub-Contract had unfolded. That prompted a number of comments from one member of the Tribunal concluding:

"So we, the arbitration panel, agree that there are not perfect parallels between what was being litigated in the prior arbitration and this one. Different contract, different facts, different agreements, different scopes of work. All that is going to have to be taken into account."

46. Venco now rely on the first of these exchanges to argue that Symbion had in fact abandoned the collateral estoppel argument and the latter to argue that the point is immaterial anyway.

47. I do not read the first of those exchanges as sufficiently clear to be an abandonment of Symbion's case on collateral estoppel. Although counsel acceded to the suggestion that the approach of the tribunal in the prior arbitration provided guidance, he did so expressly against the background of having said that they were prepared to make further submissions on collateral estoppel. It seems to me more likely that he was moving on to an alternative argument. Nor does it seem, when it came to Post-Hearing Briefs, that Venco had formed the view that Symbion had abandoned the point. Venco addressed the collateral estoppel point, albeit briefly. Having said that, Symbion did not address the point at all in its Post-Hearing Brief – despite what had been said at the hearing.

48. It was only in Symbion's Reply to Venco's Post-Hearing Brief that the matter was mentioned. This was in a footnote to a paragraph responding to the accusation of revisionist history which I referred to above. Symbion repeated its case that *"Approval of an interim payment certificate is not proof or an admission of the accuracy of any of the information shown in the invoice."* The footnote said that Venco's argument was "very similar" to that advanced by Symbion in the prior arbitration and that *"Even if the Tribunal determines that the prior tribunal's interpretation of the contract language here is not binding on [Venco], it should nonetheless consider this prior interpretation as extremely persuasive authority*".

49. To the extent, therefore, that Symbion appeared to persist in its case about collateral estoppel, it appeared to be to the limited extent that the Tribunal should not regard interim payment certificates as proof or an admission.

Conclusions

50. To the extent that the status of the Prior Award was dealt with expressly in the Award, the relevant passage is set out at paragraph 10 above.

51. I say first, for completeness, that if I had reached the view that the evidentiary argument was an issue that the Tribunal ought to have dealt with, I would have found, on the basis of this passage, that they had done so. The Tribunal dealt with and decided the evidentiary value of the findings in the Prior Award by taking account of the arguments of both parties that the Prior Award could provide guidance. They did not have to deal

with the argument in the precise terms of Symbion's case in order to satisfy this Court that they had dealt with the issue.

52. So far as the primary case is concerned, taking the sequence of events and submissions as a whole, it seems to me that the collateral estoppel point, even if not expressly abandoned by Symbion, fell away, as arguments often do, perhaps in the light of the Tribunal's adverse comments. The Tribunal could not therefore be criticised for failing to deal expressly with it in the Award.

53. If I am wrong about that, it seems to me that it was only persisted with in relation to the limited issue of the status of and weight to be attached to interim payment certificates. For all the reasons I have already set out, the Tribunal did not treat interim payment certificates (or invoices or POs) as conclusive proof or an admission, so the complaint goes nowhere. Even if the Tribunal did not do so on the basis of a collateral estoppel, they took the approach which Symbion submitted they should.

54. In any event, I accept Mr Pilling QC's argument that the Tribunal did impliedly deal with and reject the point. They did so in expressly treating what had been said in the prior arbitration as guidance, thereby implicitly rejecting the argument that it was binding.

55. In answer to that submission, Symbion argued that that could not be right because it was tantamount to saying that if the point had been put to the Tribunal and was not referred to in the award, then it was impliedly rejected. If that were right, it was argued, no s.68(2)(d) application could ever succeed.

56. Mrs Davies Evans drew my attention to the decision of Gloster J (as she then was) in *Soeximex SA v Agrocrop International Pte Ltd.* [2011] EWHC 2743 (Comm). In that case, an issue arose as to the legality of the buyers obtaining a Letter of Credit in the context of the purchase of Burmese rice. The argument as to illegality arose under both US and EU regulations. The tribunal found that, in both instances, to establish illegality the buyers would have to establish that monies would be payable to Burmese persons and the tribunal was not satisfied that that was the case. The buyers argued that the tribunal had failed to deal with an alternative argument, under the US regulations, that there would be an infringement merely because of the export of financial services to Burma and with a completely separate argument under the EU regulations. Neither of these arguments involved establishing that Burmese people would receive funds. Gloster J. held that these further matters were issues that the tribunal ought to have dealt with but had failed to deal with and the matter was remitted. In reaching that decision, she observed that the tribunal had referred to relevant evidence but that there was no indication that it had addressed an important and discrete issue.

57. This case seems to me quite different from the present case. The court was concerned with two free-standing arguments as to why the transaction was illegal either of which could have led to the conclusion that the transaction was illegal irrespective of the tribunal's finding on the matters it had, in fact, addressed.

58. In the present case there was a primary case (that findings in the prior arbitration were binding) and a fall back position – the evidentiary argument – which only came into play if the Tribunal rejected the primary case. In the context of what had happened in

the arbitration and the Tribunal's finding that the prior arbitration had evidentiary value, it seems to me clear that they had rejected the primary case. This is quite different from a situation where the tribunal recites an argument and evidence but then fails to deal expressly with the point that arises and a party asks the Court to infer that it has been rejected. My view in this case most certainly does not mean that in any case where a tribunal has not mentioned an issue that was before it must be taken to have rejected the argument. As so often it is a matter of fact and degree.

59. If I am wrong about all of that, I would nonetheless have found that there was no substantial injustice to Symbion in this case.

60. Firstly, I repeat what I said in paragraph 53 above. That in itself means that there is can be no substantial injustice in the Tribunal failing to deal with the issue because the Tribunal did not treat invoices or POs as conclusive.

61. I have already referred to the BOP contract and the provisions in relation to interim payments. The tribunal in the prior arbitration held that the approval of invoices under the contractual scheme did not conclusively establish the value of the work done by Symbion for the purposes of its claim for damages. In this arbitration the Tribunal reached no different decision. The tribunal in the prior arbitration also took the approach that the approval of invoices submitted by Symbion could be evidence of the state of completion and the value of the works. The present Tribunal took the same approach. It is, therefore, impossible to see what substantial injustice, Symbion could have suffered through the Tribunal not dealing, on Symbion's case, with the collateral estoppel defence.

62. Secondly, there is no dispute between the parties that the relevant principles are as set out above in *Raytheon*. The first question therefore is whether the collateral estoppel argument was reasonably arguable and, for these purposes, I assume that the whole of the collateral estoppel argument remained live. For Symbion, it was submitted that it was clearly a reasonably arguable point because a wealth of authority from the Courts of Nevada was set out in Symbion's submissions.

63. For present purposes, I take Symbion's submissions of law at their highest. Having done that I do not consider the point to be reasonably arguable. That is because, as I have already said, Symbion is simply unable to identify precisely what findings are binding on this tribunal.

64. Mr Pilling QC argued, in any event, that there were significant differences between the terms of the JV/Symbion Contract and this Sub-Contract. For example, Schedule 9.6 of the BOP contract contained, in the first paragraph of clause 9.6.5.1, provisions relating to the submission of monthly invoices and the making of monthly progress payments. The second paragraph provided *"Bidder shall furnish with each invoice evidence, satisfactory to Employer, that all labour and materials furnished and equipment used during the period covered by any progress invoice ... have been paid in full..."*. The Prior Award recites the JV's reliance on this second paragraph as part of its argument that it was entitled to withhold payments and seek further information about invoices. That paragraph does not appear in the corresponding clause 9.6.5.1 in the Sub-Contract.

65. No evidence has been adduced as to the impact under the principle of collateral estoppel in the law of the State of Nevada of the fact that there was not a complete

match in contractual provisions. It is difficult to discern what impact the particular paragraph had on the conclusions of Prior Award and whether its absence from the Sub-Contract would have made any difference to Symbion's collateral estoppel argument. That reflects the vagueness of the argument. These points together reinforce my view that the collateral estoppel defence is not reasonably arguable.

66. On this application Symbion also relied on the collateral estoppel argument in the context of the valuation of the works. I note that that was not expressly one of the issues relied on in the Responsive Memorial so, even if there were anything in the point, it cannot be said that it is one the Tribunal ought to have dealt with.

67. In any case, there is no "write across", as it was put in the hearing, from the Prior Award on the issue of valuation.

68. In the prior arbitration, the last invoice on which Symbion had received payment was invoice no. 1613 which was submitted some time in December 2008 and approved on 30 December 2008. After that Symbion submitted invoice no. 1614 covering a period from 28 December 2008 to 9 January 2009; invoice no. 1615 covering a period to 23 January 2009; and invoice no. 1616 covering the period to 6 February 2009 in which, as referred to above, Symbion claimed that the construction was 50.02% complete. It was not disputed that Symbion and its sub-contractors remained on site and performed work through to 19 May 2009. The tribunal found that, as at that date, Symbion had achieved at least 50.02% completion. The tribunal was not, however, satisfied that Symbion had proved that it had procured items of the value in its invoices and recalculated the sums due on the invoices accordingly. Putting it in simple terms, it is argued by Symbion that the tribunal, therefore, made findings that no work for which there should be further payment was done after December 2008 (or the date of the last invoice) up to the date of termination. This argument is also relied upon by Symbion for the "overstatement" argument which I deal with below.

69. So far as Venco is concerned, the argument simply does not work. The tribunal in the prior arbitration made no findings about the extent of or value of Venco's works. They may have concluded that, as at the date of invoice no. 1616, Symbion had overstated its progress and overvalued its works. Without more, that does not tell you that Venco had overstated its progress or overvalued its works; nor does it tell you what the value was of work done by Venco up until termination.

70. Drawing these various threads together:
    (i) The collateral estoppel issue was not one that the Tribunal ought to have dealt with because it had fallen away.
    (ii) The Tribunal did deal with it, in any event, as demonstrated by the fact that Tribunal dealt with the alternative argument which only arose if the primary case had been rejected.
    (iii) In the alternative, if any part of the collateral estoppel issue was still in play in the arbitration it was that alleged to arise from what was said in the Prior Award about the construction of the payment provisions in so far as they were relevant to the status and evidential value of invoices/ interim payment certificates.
        (a) There were differences between the two contracts, so the collateral estoppel argument taken at its highest was not reasonably arguable and there can have been no substantial injustice in the Tribunal not dealing with it.

(b) The Tribunal, in any event, took the same approach as the tribunal in the prior arbitration. So, even if the issue ought to have been but was not dealt with, there can be no substantial injustice.

(iv) There was no issue before the Tribunal in any event as to a collateral estoppel in respect of the valuation of the works. Even if there had been, the point was not reasonably arguable and there can be no substantial injustice.

The overstatement defence

71. I come last to the so-called "overstatement defence". In Symbion's submissions on this application, the overstatement defence was summarised as follows:

"Symbion's final defence was that there was binding, or in the alternative, highly persuasive evidence before the Tribunal that the work (including procurement) for which Venco sought payment in this Arbitration had not been performed or was of a value far less than claimed by Venco in the Arbitration."

The footnote reference given for this defence was paragraph 22(5) of the statement of Mr Segal, of Symbion's solicitors, in support of this application. That paragraph says this:

"In particular, there was binding, or in the alternative, highly persuasive authority before the Tribunal within the Prior Award that Venco's evidence pertaining to the value of the work performed was, under the terms of the Venco Subcontract, insufficient."

72. These are two different points: one is that the Prior Award was binding or persuasive as to value and the other that is that it was binding or persuasive as to proof and evidence. Highlighting this distinction is not an arid point. As framed in Symbion's submissions, it is no more than a repetition of the collateral estoppel point relating to valuation which I have dealt with above. The way it is framed in Mr Segal's statement gives the lie to the contention that the overstatement defence is a free-standing defence and an issue that the Tribunal ought to have dealt with as such. In my judgment, it is not. It is, as Mr Segal's statement expresses it to be, another element of Symbion's defence that Venco had not proved its claim.

73. That is made clear by the references in Symbion's statements of case, Memorials and Briefs that Mr Segal relies upon. I do not set them out in detail here. The paragraphs referred to in the Statement of Defense, Post-Hearing Memorial and Post-Hearing Reply are all concerned with the, by this time well-worn, point that invoices are not conclusive as to the value of work done. The last of these references is to the footnote I referred to at paragraph 48 above. The paragraphs relied on in the Responsive Memorial address the fact that Symbion had not proved its case in the prior arbitration.

74. There is, therefore, neither an issue on the overstatement defence that the Tribunal ought to have dealt with nor, in any event, an issue that it failed to deal with. The Tribunal did not treat Venco's invoices as conclusive and it weighed the whole of the evidence as to the value of work done as it was entitled to and ought to have done.

Remit or set aside?

75. For all these reasons, I reject Symbion's application.

76. Had I reached a different conclusion, Symbion urged me to set aside this Award rather than remit it as might be expected. The basis for this argument was a matter relating

the conduct of the arbitration which is of real concern and which I consider I should say something about in this judgment.

77. The arbitration was conducted under the auspices of the International Chamber of Commerce by a three person tribunal. Two of the arbitrators were nominated by the parties and, as I understand it, the chairman was nominated by the two party-appointed arbitrators. The constitution of the tribunal was complete in 2013. In 2015, Venco's party-appointed arbitrator resigned and was later replaced.

78. In mid-2014, Symbion's party-appointed arbitrator (whom I shall call Arbitrator A) sent an e-mail to Symbion's arbitration counsel. It was not copied to any other member of the Tribunal or to any representative of Venco. He put in the subject line: "HIGHLY CONFIDENTIAL: NOT TO BE USED IN THE ARBITRATION". He expressed the view that he could send such an e-mail to arbitration counsel because it was about the "selection" of the chairman but said that it was sent on the explicit condition that it could not be referred to in the arbitration or afterwards. The e-mail then went on to say that both party-appointed arbitrators were upset by the conduct of the chairman; it expressed highly negative views about him; and Arbitrator A said that he was meeting the chairman and would encourage him to resign.

79. Counsel replied saying simply that he did not feel the need to discuss the matter but would keep the confidence.

80. The arbitration then, of course, proceeded for about 2 years without the resignation of the chairman, with a replacement arbitrator, and with no suggestion that there were any other internal difficulties on the Tribunal.

81. However, on this application, Symbion disclosed Arbitrator A's email (but not counsel's response) in support of its contention that the internal conflict on the Tribunal meant that the remission of the matter to it would be inappropriate.

82. Arbitrator A became aware of this when he was served with a copy of the application and the evidence in support. He e-mailed counsel and others complaining that the e-mail promising to keep his confidence had not been provided to Symbion's now solicitors and that his confidence had not been kept.

83. On Symbion's argument that the Award should not be remitted, I will say no more than that I would have been very reluctant to set it aside rather than remit. Whatever may have happened in 2014, the Tribunal (including the new co-arbitrator) appeared to have worked effectively together for 2 years. Whilst disclosure of the 2014 e-mail to the chairman might have created a somewhat awkward working environment, it is not something that experienced, professional people could not deal with.

84. More to the point, I am astonished that such an e-mail was sent in the first place. Where arbitrators are nominated and/or appointed by the parties, it is inevitable that there will be some correspondence or discussion between them prior to appointment to which the other party will not be privy. That will be necessary to ascertain suitability for appointment, availability and so forth. That discussion may extend to the selection of the chairman for similar reasons. But once the tribunal is appointed, it seems to me

wholly inappropriate for one arbitrator to communicate with the party that appointed him without notice to the other members of the tribunal and the other party.

85. Where there is a three person tribunal, with each party appointing an arbitrator and the chairman being selected by the co-arbitrators or an arbitral body, the ability of each party to appoint an arbitrator is intended to bring balance to the tribunal and give the parties confidence in the balance and fairness of the tribunal. The party-appointed arbitrators patently do not represent the party that appointed them and they are under a duty, as individual arbitrators and as a tribunal, to act fairly and impartially. Any communication by one arbitrator with one party which concerns the arbitration may give rise to concerns that that arbitrator is not acting fairly or impartially for the simple reason that it creates the impression of a close relationship between the arbitrator and the party and raises the spectre of other such communications. Requiring the communication to be kept confidential does not remedy the problem: if anything, it highlights the arbitrator's awareness that this is communication he should not be having. Whether in any individual case there is the appearance of bias will, of course, turn on its particular facts but I have no doubt that such communications between one arbitrator and one party should be avoided.

Confidentiality

86. I provided a copy of this judgment in draft to the parties on 23 February 2017. When I did so I asked the parties to address me on the issue of whether the judgment should be anonymised because, as I said, I was concerned about the extent to which this judgment revealed the content of the Prior Award in circumstances where it was not the subject of any challenge and the JV was not party to these proceedings. The parties having asked for further time, I received submissions from Venco on 3 March 2017, from Symbion on 8 March 2017 and from Venco in response on 9 March 2017. Venco argues that the judgment should not be anonymised and Symbion argues that it should.

87. In summary, Venco makes two points: (i) the tribunal in the prior arbitration heard argument and decided that the Prior Award was not confidential; and (ii) the present Award is already in the public domain. It is in the public domain because of the public enforcement proceedings that Venco has brought in the US and that have been reported by a legal website.

88. Symbion relies on the decision of the Court of Appeal in *Economic Department of City of Moscow v Bankers Trust Co.* [2004] EWCA Civ 314. That case is concerned with whether a judgment on a s.68 application should be published at all rather than with whether it should be anonymised (which was recognised as one means to preserve the expected confidentiality of the arbitration). In that case the parties were identified in the judgment. However, it seems to me that the same principles are broadly applicable to the issue of anonymisation.

89. There is, firstly, a distinction to be drawn between the hearing and the publication of the judgment. Under CPR Rule 62.10, the default position is that an application under s.68 will be heard in private. The judgment is another matter. It is, therefore, unfair for Symbion to suggest that Venco has waited until it knows it has won before raising the issue of the form of the judgment.

90. There is a strong public interest in the publication of judgments, including those concerned with arbitrations, because of the public interest in ensuring appropriate standards in the conduct of arbitrations. That has to be weighed against the parties' legitimate expectation that arbitral proceedings and awards will be confidential to the parties. Mance LJ, as he then was, described it as a spectrum:

> *"40 ... At the one end is the arbitration itself and at the other an order following a reasoned judgment under section 68. In between is the hearing under section 68. An order will normally give very limited information ... even a section 68 hearing is likely to cover only limited aspects of the subject matter of the original arbitration ... A reasoned judgment under section 68 will in likelihood disclose very much less about the subject matter of the arbitration than will have been covered during the section 68 hearing itself. Moreover, judges framing judgments are accustomed to concentrate on essentials, to avoid where possible unnecessary disclosure of sensitive material and in some cases to anonymise. ...*
> *41. When weighing the factors, a judge has to consider primarily the interest of the parties in the litigation before him or in other pending or imminent proceedings. ... The concerns or fears of other parties cannot be a dominant consideration. Nor can there be any serious risk of their being deterred from arbitrating in England, if the court weighs the relevant factors appropriately. If, in the absence of other good reason for publication the court withholds publication where a party before it would suffer some real prejudice from publication or where the publication would disclose matters by the confidentiality of which one or both parties have set significant store, but publishes its judgments in other cases, businessmen can be confident that their privacy and confidentiality in arbitration will, where appropriate, be preserved. The limited but necessary interface between arbitration and the public court system means that more cannot be expected. There can be no question of withholding publication of reasoned judgments on a blanket basis of a generalised, and in my view, unfounded, concern that their publication would upset the confidence of the business community in English arbitration."*

91. In the present case, my concern about the confidentiality of the Prior Award (with its seat in France) was misplaced.

92. As I have said, the present Award is also already in the public domain because of the proceedings in the US. Symbion says that it is Venco who have put the Award in the public domain by bringing proceedings in the US so they say that Venco should not be permitted to rely on this factor. Symbion have not identified what steps Venco could or should have taken to preserve the confidentiality of Award in public proceedings. In any case, the reality is that Venco has been compelled to commence these proceedings because of Symbion's failure to pay the Award, whilst Symbion has pursued these proceedings to challenge the Award on grounds which, in my judgment, had no merit. Further, when the US proceedings were picked up by a legal website, a Symbion representative is reported as having provided comment making reference to these proceedings. That is not consistent with Symbion seeking to preserve the confidentiality of the Award.

93. It is, therefore, unrealistic to argue that Symbion continues to have any expectation of confidentiality in the Award.

94. Symbion seeks to argue that it will nonetheless suffer positive detriment if the judgment is published without anonymisation. It is suggested firstly that if this issue had been raised earlier, Symbion would have submitted evidence as to positive detriment. I noted above the date on which this judgment was provided in draft and submissions requested. Symbion, having asked for further time to make its submissions, has had nearly 2 weeks to submit such evidence but has not even indicated what that evidence might be. There is no merit in this complaint. Symbion only goes so far as to suggest that its negotiating position with others might be prejudiced in some general way. I can see nothing in this judgment which would have the effect of disclosing to others with whom Symbion might be in negotiations anything of a confidential nature.

95. This is, therefore, a case in which there is no reason to anonymise the judgment and I do not do so.

Costs

96. The parties have also agreed that I should deal with the summary assessment of costs on paper and have made submissions to me. I will deal with that in a short separate judgment.