Brown (L) & Sons Ltd v Crosby Homes (North West) Ltd [2005] Adj.L.R. 12/05

JUDGMENT : MR JUSTICE RAMSEY: TCC. 5th December 2005.

1. These proceedings concern an adjudicator's decision in respect of claims arising from the construction of 114 residential apartments at the Green Quarter development at Redbank, Manchester. On 23 May 2003, L Brown & Sons Limited ("Brown"), entered into a construction contract with Crosby Homes (North West) Limited ("Crosby") in the JCT 1988 standard form of building contract with contractor's design, incorporating amendments ("the Contract").

2. By a referral notice dated 9 September 2005, Brown sought payment of monies due under interim application 27 in respect of a later side agreements in the sum of £228,000 alternatively £208,000, together with reimbursement of wrongfully deducted liquidated damages in the sum of £286,125.87.

3. On 14 September 2005 the Royal Institution of Chartered Surveyors nominated Mr Alan W Wood as adjudicator and he accepted appointment by a letter to the parties on the same date. The adjudicator made his decision on 26 October 2005 in which he found that Crosby was not entitled to deduct liquidated damages in the sum of £286,125.87 or at all; Brown was entitled to payment of an agreed completion bonus of £208,000 pursuant to interim application 27 and Brown was entitled to immediate payment of £387,972.58 plus interest of £9,016.38 up to 26 October 2005 and continuing.

Challenges to the jurisdiction and the adjudication

4. During the course of the adjudication, Crosby challenged the jurisdiction of the adjudicator. By letter dated 19 September 2005 and in the response, it took three points: (1) that there was no jurisdiction under the "*side agreements*" as there was no agreement between the parties; (2) that if there was an agreement it was not an agreement in writing; and (3) if there was an agreement in writing, it was not a construction contract. Brown responded to these matters on 27 September 2005 and the adjudicator held that he had jurisdiction.

5. On 3 October 2005, Crosby challenged the jurisdiction of the arbitrator, writing in response to the submissions served by Brown on 27 September 2005. Brown's case was that the adjudication was brought under the contract, and that by clause 39A.1 the disputes arose "*under, out of or in connection with the contract*". Crosby challenged this on the basis that Article 5 which gave the right to adjudication, was limited to disputes or differences which arose under the contract. It also contended that the dispute could not in any event come within the words "arising out of or in connection with the contract".

6. In the letter of 3 October, Crosby submitted that, on analysis, the dispute could be summarised as follows. First of all, did Crosby and Brown agree that liquidated damages would not be levied? Secondly, did Crosby and Brown agree that a completion bonus would be payable? Crosby submitted that whilst the Contract contains provisions in relation to liquidated damages, it does not contain any provisions which relate to the payment of completion bonuses, and Crosby contend that it is stretching the meaning of the words too far to conclude that the dispute as a whole arises "out of or in connection with the contract".

7. In response, the adjudicator held that he had jurisdiction and on 3 October 2005, he stated:
"I have further considered the submissions of the Parties and would state as follows:
i) I note clause 39A.1 was amended by the Parties to include the words "out of or in connection with," I am of the view that these express words cannot now be separated from Article 5.
ii) I am of the view that the Responding Party's representative's summarised questions relating to the dispute are not exactly correct. The redress sought by the Referring Party in the [adjudication] relates to an entitlement to payment of £407,672.58 (or other sum), ie the Responding Party's entitlement to withhold [liquidated damages] and the Referring Party's entitlement to a completion bonus on the terms alleged.
I am of the view that both of these matters (however paraphrased) arise " … out of or in connection with this Contract…" and I remain of the view that I have jurisdiction to act as Adjudicator in these proceedings..."

These proceedings before the court

8. On 2 November 2005 Crosby commenced Part 8 proceedings. In the Particulars of Claim at paragraphs 15 to 20, Crosby pleaded as follows:

"15. Brown's case was that the adjudicator's jurisdiction to determine the dispute derived from clause 39A of the JCT contract….

17. Brown's contention with regard to clause 39A is wrong. The provision which contained the agreement to adjudicate was Article 5 of the JCT Contract. Clause 39A merely contained the conditions applicable to any dispute which is referred to adjudication pursuant to Article 5…

18. Accordingly, the parties only agreed to refer to adjudication disputes or differences which arise under the JCT contract.

19. The dispute which Brown purported to refer to adjudication did not arise under the JCT Contract. The claims for acceleration payments and for release from liquidated damages derived from separate alleged oral agreements, not the JCT Contract. Those agreements would not themselves be susceptible to adjudication …

20. If, contrary to Crosby's primary case, the contract is to be construed by reference to clause 39A, such that a dispute arising under out of or in connection with the JCT Contract would fall within the scope of a permissible adjudication, then Crosby also maintains that the dispute referred was not one which fell within that ambit either. The claims derived from separate alleged oral agreements reached after the parties signed the JCT Contract and do not give rise to disputes arising out of or in connection with the JCT Contract."

It therefore sought declarations that the adjudicator lacked jurisdiction, and the decision of 26 October 2005 was of no legal force or effect.

9. On 9 November 2005, Brown commenced Part 7 proceedings by which it sought to enforce the decision. At paragraph 30 of its Particulars of Claim, it set out its case as follows:

"Browns case is that article 5 and clause 39A of the Contract (as amended) must be read together and that the amendment to clause 39A of the Conditions must also apply to Article 5."

It further stated at paragraph 37 that:

"It is patently obvious that the dispute referred must have and did arise under out of or in connection with the Contract: the variation to the Contract was an agreement as to how to deal with delays to the Contract, did not relate to any other contract, waived LADs that would otherwise have been levied under the Contract and related to the project that was the subject matter of the contract."

Continuing at paragraph 39:

"In other words even if the words "out of or in connection with the Contract" do not apply, the Dispute arose under the Contract in any event. The variations relied upon, oral or otherwise are variations to specific parts of the Contract and must therefore have arisen under the Contract."

The approach in these proceedings

10. During the course of argument, I raised the issue of the basis on which I was determining the question which arose as to the side agreements. In order to see whether the disputes under the side agreements arise either out of or in connection with the contract, if the wording in clause 39A.1 applied, or under the contract, if the wording in Article 5 applied, I would have to consider these agreements. Whilst Mr Alexander Nissen, who appeared for Crosby, submitted that I might need further evidence to decide that question, he did not contend that I was not entitled to base my decision on the findings of the adjudicator.

11. Mr Simon Hargreaves, who appeared for Browns, submitted that in any event, it was not open to Crosby to contend otherwise. He referred me to correspondence exchanged between the parties leading up to this hearing (file 1, pages 250-254) as showing that the parties had agreed to proceed on the basis of the evidence in those files.

12. I am satisfied that the parties have approached this matter on that basis and I therefore proceed to consider the jurisdictional matters raised in these proceedings on that basis. Although Mr Hargreaves produced some additional documents during the course of the hearing to which Mr Nissen objected, I have not needed to have regard to those documents in order to make my decision.

The jurisdictional challenges

13. There are essentially two main issues. The first is this: under the contract, does the adjudicator only have jurisdiction in respect of disputes or differences "under the contract", or does his jurisdiction extend to disputes or differences "under, out of or in connection with the contract"? Secondly, do the disputes referred to the adjudicator arise "under" and/or "out of or in connection with" the contract?

Jurisdiction under the contract

14. . Under the unamended standard form of building contract used in this case, Article 5 of the Articles of Agreement provides as follows:

"If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 39A."

Clause 39A.1 of the conditions in turn, as unamended, provides:

"Clause 39A applies where pursuant to Article 5 either Party refers any dispute or difference arising under this Contract to adjudication."

The use of the word "under" in these provisions, mirrors section 108(1) of the Housing Grants Construction and Regeneration Act 1996, and paragraph 1(1) of the Scheme for Construction Contracts.

15. In this case there are amendments to the Articles and conditions and in respect of clause 39A.1, the amendments provided as follows:

"Insert after the word "under" the words "out of or in connection with"."

In other words, clause 39A.1 of the condition now reads:

"Clause 39A applies where pursuant to Article 5 either Party refers any dispute or difference arising under out of or in connection with this Contract to adjudication."

However, there was no amendment to Article 5. If there had been the same amendment to Article 5, it is evident that there could be no dispute that this would have permitted adjudication of disputes or differences arising both "under" and "out of or in connection with" the contract.

16. Mr Nissen submits that the amendments to clause 39A.1 alone do not achieve that purpose. He submits that Article 5 is the provision that gives a party the right to adjudicate, and that clause 39A.1 deals with the details of the adjudication thereafter. He points to the fact that Article 5 is expressly mentioned in clause 39A.1 as being the

source of the right and is clearly seen as having that role, even when clause 39A was amended. He relies on clause 39A.4.1 which commences, both in the original and in the amended version, with the words "when pursuant to Article 5 a party requires a dispute or difference to be referred to adjudication".

17. In essence, he says, that if the right is limited to disputes under the contract, the fact that the procedure may apply to a wider group of disputes does not thereby give that right. If the gateway in Article 5 is narrow, it does not, he says, matter that the procedural gateway in clause 39A is wider, because there is no right to refer the wider disputes to adjudication.

18. Mr Hargreaves contends that Crosby's approach is too narrow. Article 5 and clause 39A have to be read together. He submits that this court should apply principles of construction, including those enunciated by Lord Hoffmann in **ICS v West Bromwich** [1998] 1 WLR 896 where he said:

> *"(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax …*
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> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."*

This second part was based on the well-known passage in the speech of Lord Diplock in ***Antaios Compania Naviera SA v Salen Rederierna AB*** [1985] AC 191, 201, where he said:

> *"I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

19. In the context of the amendments, Mr Hargreaves relies on what Lord Bingham said in ***Homburg v Agrosin*** [2004] 1 AC 715 at 737:

> *"… it is common sense that greater weight should attach to terms which the particular contracting parties have chosen to include in the contract than to pre-printed terms probably devised to cover very many situations to which the particular contracting parties have never addressed their minds."*

In essence, Mr Hargreaves submits that it is apparent that the intention was to broaden the scope of the adjudication provisions and that I should construe the provisions of Article 5 and clause 39A.1 so as to give effect to that intention. He also relies on other provisions of the contract in relation to construction and discrepancies.

20. He relies first on clause 1.2 which provides as follows:

> *"The Articles of Agreement, the Conditions and the Appendices are to be read as a whole and the effect or operation of any article or clause in the Conditions or item in or entry in the Appendices must therefore unless otherwise specifically stated be read subject to any relevant qualification or modification in any other article or any of the clauses in the Conditions or item in or entry in the Appendices."*

He also refers to clause 2.4.4 which was added by the amendments and which provides as follows:

> *"Where there is any discrepancy or conflict between or within the Contract Documents the Amendments will prevail over all other Contract Documents and the Articles of Agreement, the Conditions, the Supplementary Provisions and the Appendices will prevail over all Contract Documents other than the Amendments."*

21. He also refers to dictionary definitions of "discrepancy". Mr Nissen's position is that there is no discrepancy between Article 5 and clause 39A.1 as one deals with the right and the other is procedural.

22. In my judgment, the amendment to clause 39A.1 was intended to broaden the scope of the reference to "adjudication". The wording of clause 39A.1 as amended, provides that "clause 39A applies where, pursuant to Article 5, either party refers any dispute or difference arising under, out of or connection with this contract to adjudication". I consider that clause 39A was amended on the basis that those words "pursuant to Article 5" meant that a dispute or difference under, out of or connection with the contract, could be referred to adjudication under Article 5.

23. However, as Mr Nissen states, Article 5 was not amended. That is not, in my judgment, decisive. The plain intention of the parties was to broaden the scope of adjudication, and applying the relevant principles of construction, I consider that the court can give effect to that intention, on the basis that the principles were referred to in ***ICS v West Bromwich***. Otherwise, the words added by the amendment to clause 39A.1 would be given, in effect, no effect. Whereas, as Lord Bingham pointed out in Homburg, such words should be given greater weight.

24. This is not, in my judgment, a case where there is surplusage or redundancy of language and where the court might decide that it can ignore the words added by clause 39A.1. The words added by the amendment were intended to have effect and unless they are construed in the way I have found they should be, they would, as Mr

Nissen accepts, have no purpose. I therefore find that reading Article 5 with clause 39A.1, the intention of the parties was that disputes arising under, out of or in connection with the contract should be referable to adjudication.

25. I do not consider that clause 1.2 of the contract is of much assistance in this case. It could be said that clause 39A.1 had to be read subject to Article 5, or that Article 5 had to be read subject to clause 39A.1, and that on its own does not take the matter much further. This clause does though, generally assume that a contract should be read as a whole and effect be given to each provision, which is the effect of the way I have construed the contract.

26. Clause 2.4.4 is, in my judgment, more directly applicable. On my reading, there is a discrepancy between clause 39A.1 and what it says is the effect of Article 5, and what Article 5 actually provides. I consider that clause 2.4.4 applies in a case such as this where there is a discrepancy. It provides that the amendments will prevail over all other contract documents. That, in effect, in my judgment, puts the amendments to the top of the order of precedence. As a result, this provision on its own (the provision of clause 2.4.4) would, in my judgment, be sufficient to make the wording of clause 39A.1 prevail over the unamended wording of Article 5, even if I had not come to that conclusion as a matter of pure construction.

27. In my judgment, therefore, an adjudicator appointed under the contract has jurisdiction over disputes or differences arising under, out of or in connection with the contract.

28. I now turn to consider whether in this case, and on that basis, the adjudicator had jurisdiction over the particular disputes. Those disputes arose not in relation to the terms of the original contract, but to various side agreements made between the parties. The relevant side agreements were as follows. The July agreement: this was made by the acceptance by Brown by letter of 2 July 2004 of the terms of Crosby's letter of 1 July. The adjudicator states that this agreement was not in dispute. He refers to the terms of that agreement and states that it was not in dispute that Brown did not achieve the dates set out in the July agreement, and the agreement lapsed and was replaced by the October agreement (paragraphs 12 to 15 of his decision).

29. Secondly, the October agreement. This was contained in Crosby's letter dated 7 October 2004, and was concluded and became binding on the parties by Brown's conduct and implied acceptance of Crosby's offer in that letter (paragraphs 16 to 22).

30. Thirdly, the second October agreement. The contentions as to this were set out by the adjudicator in paragraph 24 of his decision in these terms:

"The Second October Agreement … was alleged (by the Referring Party) to have been made on 14 October 2004 in a private meeting between Mr Murphy of the Referring Party and Mr Teage of the Responding Party. The essence of the Second October Agreement was to vary the (first) October Agreement such that the dates by which NHBC certification was required for the Referring Party to qualify for the apartment bonus was changed from 15 October 2004 to 15 November 2004 and the waiver of LADs term/date was similarly changed to the end of November 2004."

31. His findings were set out in paragraph 32 as follows:

"I accepted on a balance of probabilities the Referring Party's submissions that the first October Agreement was amended such that the operative bonus dates for NHBC certification and the Responding Party's ability to legally complete on apartments were amended to 15 November 2004 and the end of November 2004 respectively. I further decide that the operative dates for those apartments on Levels 10 and 11 were removed from the agreement and the time for certification essentially became a matter of best endeavours."

32. He made further findings at paragraph 34. He said:

"I preferred the Referring Party's evidence in this respect and I decided that the Referring Party had met the terms of the agreement to obtain NHBC certificates (on 104 No. apartments) by 15 November 2004 and that the Responding Party was able to legally complete on these apartments by the end of November 2004 and the Referring Party was entitled to receive bonus payments totalling £208,000 in respect of the said 104 No. apartments."

And at paragraphs 39 and 41 he said:

> *"Second, to the extent that I did not have the power to decide such discretionary matter then I decided that I preferred the Referring Party's version of the agreement partially evidenced by the Responding Party's letter dated 7 March 2005, such that there was a continuing agreement to waive LADs and the Responding Party was bound by such agreement.*
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> …
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> *41. I decided that these letters supported the Referring Party's case that there was an on-going (post 14 October 2004) agreement that the Respondent Party would waive LADs and I was of the view that such agreement was linked to the Referring Party's completion of apartments by the November 2004."*

33. The question arises whether the disputes which were decided by the adjudicator in relation to the side agreements were disputes under, out of or in connection with the contract. Mr Nissen submits that the disputes arise from the alleged side agreements and not from the JCT contract and therefore are not disputes linked to the contract.

34. He submits that the disputes: (1) do not arise out of or in connection with the contract, but relate to a claim made pursuant to the side agreements and arise under a completely separately agreement; (2) that the disputes cannot be disputes under the contract as they are disputes about a totally discrete agreement. He relies on ***Shepherd Construction v Mecright*** [2000] 1 BLR 489 at 493 to 494 and ***Fillite (Runcorn) v Aqua-lift*** (1989) 45 BLR 27 at 41 and 44.

35. In addition, he says that the contention that the side agreements constituted variations to the contract so as to give rise to disputes under the contract, is not supportable. There is an absence of reference to the terms of the contract and an agreement waiving liquidated damages assumes that they are due under the contract and so does not vary the contract.

36. Mr Hargreaves submits that the side agreements varied the contract so that the disputes arise under, out of or connection with the contract as varied. Further, even if the side agreements were separate, he submits the disputes are nevertheless disputes arising out of or in connection with the contract.

37. In relation to the words "arising out of", he refers to ***Heyman v Darwin*** [1942] AC 356 at 360 where Viscount Simon L-C, was dealing with a case where the particular clause provided for *"disputes arising in respect of this agreement or any of the provisions herein contained or anything arising hereout to be referred to arbitration"*. He said:

"The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute and (b) what disputes the arbitration clause covers. To take (b) first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties "in respect of" the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it. If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have happened for example, whether the agreement has been broken by either of them, or as to the damage resulting from such breach, or whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance, or whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further - in all such cases it seems to me that the difference is within such an arbitration clause as this."

38. Mr Hargreaves also refers to ***HE Daniel v Carmel Exporters*** [1953] 2 QB 243 in which the relevant clause was "any dispute arising out of the contract" and in the judgment it is stated:

"I propose, however, to decide this case on broader grounds, which I can state shortly. The parties have agreed to submit all their disputes to arbitration. The words "any dispute arising out of the contract ..." cover every dispute except a dispute whether there was ever a contract at all, because if there was no contract, there was no arbitration clause.

He also refers to ***Government of Gibraltar v Kenney*** [1956] 2 QB at 410, in which Sellers J said this:

"In my view, this arbitration clause is very wide. It covers "any dispute or difference" which arises or occurs between the parties "in relation to any thing or matter arising out of or under this agreement." The distinction between matters "arising out of" and "under" the agreement is referred to in most of the speeches in Heyman v. Darwins Ltd in the House of Lords and it is quite clear that "arising out of" is very much wider than "under" the agreement. This clause very widely incorporates a difference or dispute in relation to "any thing or matter arising out of" as well as "under" the agreement, and, in my view, everything which is claimed in this arbitration can be said to be a dispute or difference in relation to any thing "arising out of" the agreement."

39. In relation to the words *"in connection with"*, Mr Hargreaves refers to ***Ashville Investments v Elmer*** [1989] 1 QB 488 at 496A and page 503. At page 496A, May LJ said this:

"With these points made, unless precedent requires me to decide otherwise, I have no doubt that disputes between the parties based upon alleged mistake at the time this contract was entered into, and upon an alleged misrepresentation or negligent mis-statement, are ones "arising in connection" with that contract and thus within the scope of the arbitration clause in this case."

At page 503, Balcombe LJ added his comments, and he said this:

"Disputes as to the construction of the contract, or as to matters arising under the contract, are covered by the opening words of the clause. So disputes as to matters arising in connection with the contract must be taken to refer to disputes other than about questions of construction, or as to matters arising under the contract."

40. If the side agreements were separate agreements, Mr Hargreaves submits that they would still come within the adjudication clause. He referred me to four cases. The first was ***Faghirzadeh v Rudolph Wolff*** [1977] 1 Lloyds Rep 630. That was a case decided by Mocatta J and the relevant clause in an agreement of 10 May 1973, provided that "any dispute arising out of this contract" should be settled by the rules and regulations of the London Metal Exchange. There were negotiations in respect of that contract and at page 634, the judgment sets out the relevant passages from the arbitrator's findings of fact.

"During the said negotiations in Tehran between 7 June 1973 and 13 June 1973, a verbal agreement was reached between Mr Shamoon as agent of the Respondent of the one part, and the Claimant of the other part. The agreement provided:-

(a) That the Claimant should permit the Respondent to sell the said 7,200 metric tons of reinforcing bars to another purchaser on terms corresponding to Special Clause 6.

(b) That the Respondent should be relieved of the obligation to ship the said bars to the Claimant.

(c) That the Claimant should be relieved of the obligation to amend the said defective letters of credit.

(d) That, in accordance with the spirit of Special Clause 6, the Respondent would keep the Claimant informed of market trends and would only sell the said reinforcing bars with the Claimant's consent."

41. When he then came to consider whether the agreement was within the terms of the contract dated 10 May 1973 or was an entirely new contract, Mocatta J said this:

"It was pointed out by Mr Hunter that in order to understand what the agreement was, which had been entered into as the arbitrators had found during the negotiations in Tehran, one has to refer to the contract of May 10. One has to refer to it in the first place to ascertain what special cl.6 provided. Further in order to ascertain the overprice one would again have to refer to the contract and one would similarly have to make such reference in order to ascertain the technical description and sizes of the reinforcing bars originally sold by the respondents…"

42. In giving judgment, Mocatta J said this:

"… the negotiations in Tehran … altered the contract of May 10 much more fundamentally than did the correspondence between the shipowners and the India office in the last mentioned authority."

That was a reference to the case of ***Union & India v EB Aaby's Rederi A/S.***

"Nevertheless, as already indicated, the negotiations in Tehran and the agreement there reached particularly the latter, are unintelligible without referring back to the contract of May 10. In one sense the agreement made in Tehran was a new agreement, but in another sense it varied, though very radically, the contract of May 10. I see no reason for concluding that the agreement made in Tehran jettisoned the arbitration provisions contained in the contract of May 10."

43. Mr Hargreaves secondly referred me to the decision of Mustill J in ***A&B v C&D*** [1982] 1 Lloyds Rep 166, a case where the relevant clause provided for disputes to go to arbitration if they arose in connection with this agreement. In that case, Mustill J said this:

"Even if there were a third agreement, I consider that a claim relating to a breach of it would, in the particular circumstances of this case, be connected with both the previous agreements. The services related to the investigation and repair of work done under the first agreement..."

44. Thirdly, Mr Hargreaves referred me to ***Davies Middleton & Davies Ltd v Toyo Engineering Corporation*** [1997] 85 BLR 59, in which Phillips LJ (as he then was) in the Court of Appeal said in respects of the judgment of Judge Thornton QC below:

"Thus, any dispute which is in connection with the contract is referable to arbitration. This expression is wide enough to cover disputes arising out of a second contract which is related to the contract containing the arbitration clause as can be seen from the decision of Mustill J in ***A and B v C and D…***

It follows that a dispute arising out of a contract entered into to provide a means of resolving disputes that had arisen under an earlier contract are disputes which, in principle, arise in connection with the earlier contract."

45. Finally, Mr Hargreaves referred me to ***El Nasharty v J Sainsbury Plc*** [2004] 1 Lloyds Rep 309 where Mr Julian Flaux QC (sitting as a Deputy High Court Judge) had to make a decision on an arbitration clause where the provision was for disputes arsing "in relation to this agreement" to be referred to arbitration. He said:

"However, although neither the ***Wolff*** *nor the* ***Ashville Investments*** *case are therefore binding because the clauses were in different terms, I do find the reasoning of those courts as to the width of expression such as "in relation to" and "in connection with" of considerable assistance in construing the present clause. Clearly the use of the phrase "in relation to" connotes a wider scope of arbitration clause than one which is limited to disputes arising under a contract such as whether there has been a breach of contract or not. "In relation to" includes disputes which whilst not arising under the contract, are related to or connected with it. In my judgment, a dispute concerning an alleged variation to a contract is a dispute which is "in relation to" that contract."*

46. Mr Nissen points out what was stated in ***Ashville v Elmer*** at page 495. May LJ said this at page 495A-E:

"Similarly, it is a principle of law that the scope of an arbitrator's jurisdiction and powers in a given case depend fundamentally upon the terms of the arbitration agreement, that is to say upon its proper construction in all the circumstances. However, I do not think that there is any principle of law to the effect that the meaning of certain specific words in one arbitration clause in one contract is immutable and that those same specific words in another arbitration clause in other circumstances in another contract must be construed in the same way. This is not to say that the earlier decision on a given form of words will not be persuasive, to a degree dependent on the extent of the similarity between the contracts and surrounding circumstances in the two cases. In the interests of certainty and clarity a court may well think it right to construe words in an arbitration agreement, or indeed in a particular type of contract, in the same way as those same words have earlier been construed in another case involving an arbitration clause by another court. But in my opinion the subsequent court is not bound by the doctrine of stare decisis to do so.

If I were wrong, then in any event it must be necessary to compare the surrounding circumstances in each case to ensure that those in the latter case did not require one to construe albeit the same words differently when used in the different context.

However, before turning to the authorities upon which counsel for Ashville particularly relied, there are in my opinion some further important considerations to bear in mind. First, it is trite law that the answer to the question whether a particular dispute falls within an agreement to arbitrate depends primarily upon the proper construction of that agreement."

47. Mr Nissen therefore submits that the language of the various clauses in the cases cited by Mr Hargreaves, provide little assistance as they are particularly sensitive to the words used and the particular facts of those cases.

48. Whilst Mr Nissen is undoubtedly right and I must approach this case on the basis of the particular words of the clause and the facts of this case, the authorities are helpful in illustrating in a persuasive way, the breadth of particular wording.

49. In this case it is evident that the phrase *"under"* the contract is less broad than *"arising out of or in connection with"* the contract, and this is clear from what Balcombe LJ said in ***Ashville v Elmer***. In the present case, the background to the side agreements was that certain issues arose between the parties as to the performance of the underlying contract. The side agreements therefore introduced a bonus system and a system of relief of liquidated damages with a view to obtaining as early completion as possible.

50. Unlike ***Shepherd Construction v Mecright***, this was not a case of a full and final settlement agreement. Whilst I accept that the terms relied on did not in express language, refer to particular clauses in the Contract as being varied, I consider that the introduction of a bonus system and the waiver of liquidated damages did vary the Contract. Whilst the parties did not expressly add a clause to the contract to provide for bonus, the bonus payment evidently had the effect of adding a provision which led to additional payment and changed or varied the payment required under the Contract. In addition, the waiver of liquidated damages did not expressly refer to the original obligation in clause 24.1 of the contract, nor to the dates nor to the rates of liquidated damages in appendix 1. However, the side agreements were changing or varying the entitlement under the Contract.

51. In addition, I bear in mind that it is quite common in the construction industry for parties to enter into side or supplemental agreements which add to or vary the terms when matters arise during the course of the contract. Those agreements frequently do not have their own provisions for dispute resolution, including adjudication. If the officious bystander had asked such parties what dispute resolution methods applied, I consider that they would invariably assume that those in the underlying contract would apply. The idea that different or no provisions applied to such additional changed obligations would, in my judgment, be an impossible situation and make adjudication unworkable for such projects.

52. In this case, I consider that the side agreements fell into this category of agreement. It was necessary to have regard to the underlying Contract, in particular to see what liquidated damages had been waived. As a result, because, in my judgment, the side agreements were variations to the contract, I consider that the disputes under those side agreements would be properly categorised as disputes under the contract.

53. The phrases "out of or in connection with" are wider than "under" the contract. They cover matters which arise out of the performance of the contract and in connection with that performance. The side agreements and the disputes under them arose out of the performance of the contract or in connection with them. Therefore, even, if contrary to my view, the side agreements were separate obligations without sufficient connection to amount to variations of the contract, then disputes under those side agreements would, in my judgment, arise out of or in connection with the contract.

54. I therefore find that the dispute under the side agreements which gave rise to the sums determined in the decision of the adjudicator, were disputes under the contract, but in any event, would have been disputes arising out of or in connection with the contract.

55. For those reasons, I find that the jurisdictional challenges in the Part 8 proceedings do not succeed. Subject to any further submissions, Brown are therefore entitled to judgment in the sums determined as due to them from Crosby in the adjudicator's decision of 26 October 2005.