JUDGMENT : MR JUSTICE JACKSON: TCC : 29th September 2005.

1. This judgment is in seven parts, namely:
   Part 1: Introduction
   Part 2: The Facts
   Part 3: The Present Proceedings
   Part 4: Are Items 3, 4 and 7 within the arbitration clause (clause 17.1) of the two deeds of appointment?
   Part 5: Is there such a convergence of issues in the two arbitrations as to trigger clause 17.2 of the two deeds of appointment?
   Part 6: In the exercise of its discretion, should the court appoint Mr Planterose as arbitrator pursuant to section 18 of the 1996 Act?
   Part 7: Conclusion.

Part 1: Introduction

2. This is the hearing of an arbitration claim in which the claimant seeks the appointment of an arbitrator pursuant to section 18 of the Arbitration Act 1996. The claimant is City & General (Holborn) Limited ("*CG*"). The defendant is AYH plc ("*AYH*"). The present dispute arises out of a building project in which Kier Regional Limited ("Kier") was the main contractor.

3. In the course of this judgment I shall refer to the Arbitration Act 1996 as *"the 1996 Act"*.

4. Section 18 of the 1996 Act provides:

   "(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

   There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.

   (2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

   (3) Those powers are:-

   (a) to give directions as to the making of any necessary appointments.

   (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made

   (c) to resolve any appointments already made

   (d) to make any necessary appointments itself.

   (4) An appointment made by the court under this section has effect as if made with the agreement of the parties."

5. There is no other statutory provision to which I shall refer for present purposes. The next task, therefore, is to outline the facts.

Part 2: The facts

6. By a contract dated 6th November 2001 made between CG and Kier, Kier agreed to carry out works of refurbishment and rebuilding at the site of the former Patent Office Library in London. This contract was made using the JCT Standard Form of Building Contract 1998 Edition with amendments. Under this contract some of the design obligations were undertaken by Kier. The contract sum was £11,650,000.

7. By a deed of appointment dated 23rd November 2001, CG appointed AYH to act as project manager for the development. By clause 2.2 of the deed AYH warranted that it would exercise reasonable skill and care in the performance of its functions as project manager. Clause 2.6 of the deed provided: *"The Consultant agrees to indemnify the Client against each and every liability the Client may incur to any person whatsoever including any claims, demands, proceedings, damages, costs and/or expenses sustained, incurred or payable by the Client to the extent that the same arise by reason of any negligence, omission or default by the Consultant in the performance of his obligations under and in connection with this Deed."*

   Clause 2.9 of the deed provided: *"The Consultant shall co-operate closely with the Client and with the Several Consultants in the co-ordination and integration of the Services with the services to be performed by the several Consultants to the intent that the Project shall be completed with all reasonable speed and economy within the Construction Period."*

Clause 17 of the deed provided:

"17.1. Subject to Clause 16 and 17.2, any dispute arising out of this Deed shall be referred to arbitration in accordance with the Arbitration Act 1996 by a single Arbitrator to be agreed between the parties or, failing agreement within 14 days from the time when either party has given to the other a written request to concur in the appointment of an Arbitrator, nominated at the request of either party by the President of the Chartered Institute of Arbitrators.

17.2. If the dispute to be referred to arbitration under this Deed raises issues which are substantially the same as or are connected with issues raised in related disputes between either party to this Deed and any other person, and if the related dispute has already been referred to determination to an Arbitrator, the parties to this Deed agree that:

17.2.1 The dispute under this Deed shall be referred to the Arbitrator appointed to determine the related dispute, except that either party to this Deed may require the dispute under this Deed to be referred to a different Arbitrator (to be appointed under this Deed) if the party reasonably considers that the Arbitrator appointed to determine the related dispute is not appropriately qualified to determine the dispute under this Deed; and

17.2.2 The Arbitrator shall have power to make such directions and all necessary Awards in the same way as if the procedure of the High Court as to joining 1 or more Defendants or co-joining Defendants or 3rd parties was available to the parties and to him."

8. Appendix 2 to the deed set out the services which AYH would provide as project manager.

9. By a second deed of appointment, also dated 23rd November 2001, CG appointed AYH to act as quantity surveyor for the project. The terms of this deed were substantially the same as those of the first deed. The services which AYH would provide as quantity surveyor were set out in Appendix 2 to the second deed.

10. Following commencement of the works, AYH assumed some but not all of the architect's obligations as contract administrator. In particular, AYH undertook the task of ascertaining and certifying extensions of time pursuant to clause 25 of the building contract. AYH also undertook the task of certifying loss and expense pursuant to clause 26 of the building contract. There was no written agreement in respect of these additional duties undertaken by AYH. There was no agreement that any disputes arising out of the performance of these additional services should be referred to arbitration.

11. Unfortunately, the project did not proceed smoothly. Completion was not achieved until 80 weeks after the due date. Kier was granted substantial extensions of time. The cost of the works escalated. Kier has already been paid some £18.5 million and is claiming a further £11 million. Thus, the total cost of the works may be in the region of £29 million. There are substantial disputes between the parties as to (a) who is responsible for the various delays and cost increases and (b) who should bear the costs and losses and in what proportions.

12. As between Kier and CG there have been three adjudications. In the first adjudication the adjudicator held that extension of time No 5 should have been granted under provisions which entitled Kier to recover loss and expense. In the second adjudication, the adjudicator, by a decision dated 24th and 26th May 2004, awarded to Kier a 28-week extension of time in respect of the period between week 96 and week 126. In paragraph 2 of his decision the adjudicator stated: *"I declare that if Kier has incurred and can prove loss and expense as a result of compliance with CA's instructions or the late issue of information then he is entitled to recover such loss and expense under clause 26.2.7 of the contract."*

13. In the third adjudication, by a decision dated 28th October 2004, the adjudicator awarded to Kier loss and expense in the sum of £1,246,487 on the basis of findings made in previous adjudications.

14. The adjudication proceedings only represent part of the picture as between CG and Kier. There has been extensive correspondence concerning Kier's claims. This includes a number of letters between March 2002 and March 2004 in which Kier claimed substantial extensions of time and loss and expense on the grounds of late information, late instructions and late variations. Kier also claimed substantial extensions of time and loss and expense on a variety of other grounds.

15. It was clear that Kier's claims needed to be brought to a final resolution. In order to move towards that final resolution, CG's solicitors served two notices of arbitration. The first notice of arbitration dated 8th October 2003 related to disputes or differences arising out of a flood which occurred on 18th January 2003. The second notice of arbitration is a more general notice. It is dated 15th December 2004 and the material parts read as follows:
"In accordance with Rule 3.3 of CIMAR, we hereby give notice that we require these disputes or differences to be referred to Rowan Planterose QC (hereafter referred to as 'the Arbitrator').

Disputes or differences have arisen in connection with the work carried out by the Respondent pursuant to the contract between the Claimant and the Respondent 8 November 2001 (hereafter referred to as 'the Contract'). The parties are in dispute as to:

1. Whether and to what extent the Respondent is entitled to extensions of time under clause 25 of the Contract in respect of each Section of the Works;

2. Whether the Sectional Completion provisions of the Contract remain in full force and effect and, if they do not, what are the Respondent's obligations in relation to the Date for Completion of the Works (or any Section thereof);

3. The Claimant's entitlement to Liquidated and Ascertained Damages or alternatively general damages for delay in completion of the respective Sections of the Works;

4. What the Respondent is entitled to be paid in respect of loss and/or expense arising out of or in connection with delay and/or disruption in performing the Works (or any section thereof) pursuant to:
4.1 Clause 26; and/or
4.2 Clause 13; and/or
4.3 any other provision of the Contract; and./or
4.4 alternatively, for breach of Contract.

5. What the Respondent is entitled to be paid, in respect of the work executed by the Respondent, pursuant to:
5.1 Clause 14; and/or
5.2 Clause 30.2; and/or
5.3 any other provision of the Contract."

16. Mr Rowan Planterose was appointed as arbitrator in relation to both the arbitrations between CG and Kier.

17. Let me now turn to the position as between CG and AYH. CG took the view that AYH had failed in the performance of its contractual duties in a number of respects and that these breaches of contract had caused much of the delay and increased costs that had arisen. CG was also critical of AYH's pre-contract advice. In a letter to AYH dated 30th September 2004, CG's solicitors set out CG's position as follows:
"In reliance upon the advice of AYH as project manager and quantity surveyor, our client entered into an amended JCT 1998 'lump sum, fixed price' form of contract with Kier Regional Limited for the refurbishment and extension works at 25 Southampton Buildings and Staple Inn. That contract contemplated a cost of £11.65 million and a development period of 69 weeks.

The contractor is now asserting an entitlement to an amount in excess of £26 million, and you have certified an amount in excess of £19 million, of which we understand an amount of no more than £350,000 relates to variations required by our client. Furthermore, the project has now been running for some 146 weeks. Under the management of AYH, the project has so far caused our client to pay to the contractor over £7 million more than the original estimate (plus client variations) and the project has so far taken an additional year and a half.

Our client contends that your performance, or lack thereof, amounts to a breach of contract and/or duty of care owed by you to our client, which has caused and continues to cause our client to incur very substantial losses on this project. Specifically, the acts or omissions that our client says each amount to a breach of contract and/or breach of duty of care are that you have failed to exercise all the reasonable skill, care and diligence to be expected of a properly and appropriately qualified and competent quantity surveyor in respect of the following:
1. providing to our client a budget estimate for the project;
2. providing to our client advice concerning tendering procedures and contract arrangements;

3. your failure to provide to our client each month a written cost report; and

4. your failure to certify amounts payable for loss and/or expense in accordance with the terms of clause 26.1 of the Contract; and your failure to exercise all the reasonable skill, care and diligence to be expected of a properly and appropriately qualified and competent project manager:

5. to monitor the Programme;

6. to monitor all the other consultants' information production programme, request updates if necessary, and coordinate with other programmes and the programme of works;

7. to see that information is provided to the main contractor in accordance with the building contract or the programme of works or in an appropriate timescale;

8. to establish procedures with the other consultants for checking compliance with designs, specifications, and the monitoring of standards of workmanship in materials;

9. to monitor that confirmations of verbal instructions, variation orders and architect's instructions were issued and correctly circulated in accordance with the building contract and our client's procedures;

10. to report each month to our client on design matters, progress of the Works and matters influencing each stage of the project;

11. to provide to our client each month a written report; and

12. to identify as far as possible potential problems and advise our client of alternative courses of action where alternatives exist.

We hereby notify you of our client's intention to pursue its claims against you for damages resulting from the breaches outlined above."

18. For ease of reference in this judgment I shall refer to the 12 numbered subparagraphs of that letter as "Items". Thus, the assertion that AYH was negligent in providing a budget estimate will be referred to as "Item 1" and so forth.

19. On 11th March 2005 CG's solicitors sent to AYH's solicitors a notice of arbitration in the following terms:
"We refer to our letter to your client dated 30 September 2004 and to your response to us dated 22 October 2004.
Mr Rowan Planterose QC is already appointed in respect of related disputes between our client City & General Limited, and the contractor, Kier Regional Limited.
Accordingly, we hereby notify you that, pursuant to clause 17.2.1 of the Deed of Appointment, our client intends to refer to Mr Planterose the disputes set out in our letter dated 30 September 2004. We note that you have already agreed that a senior construction lawyer is appropriately qualified to hear the disputes between our respective clients."

20. AYH and its solicitors did not agree that clause 17.2 of the two deeds of appointment had been triggered. Furthermore, they did not agree that the same arbitrator should deal with the disputes between (a) CG and Kier and (b) CG and AYH.

21. In order to resolve this deadlock, CG commenced the present proceedings.

Part 3: The present proceedings

22. By a claim form issued on 10th May 2005, CG applied to the Technology and Construction Court pursuant to section 45 of the 1996 Act for an order in the following terms*: "Mr Rowan Planterose QC is appointed Arbitrator in respect of the disputes between the Claimant and the defendant referred to in the Claimant's Notice to Concur dated 11 March 2005."*

23. The evidence in support of this claim comprised a witness statement made by the relevant partner in CG's solicitors together with a bundle of documents.

24. The progress of these proceedings has not been entirely smooth. AYH's evidence in response to the claim revealed three principal lines of defence. These were:
(1) the court had no jurisdiction under section 45 of the 1996 Act to make the order sought;
(2) some of the Items in the letter dated 30th September 2004 did not fall within the arbitration clause of either deed of appointment;
(3) the issues between (a) CG and Kier and (b) CG and AYH are neither substantially the same, nor are they connected and, therefore, clause 17.2 is not triggered.

25. CG conceded the first point at an early stage. It amended the claim form so as to claim the same relief under section 18 rather than section 45 of the 1996 Act.

26. This arbitration claim came on for hearing on 11th August. Mr Gordon Bell appeared for CG and Mr Michael Curtis appeared for AYH. Unfortunately, on 11th August there was insufficient evidence before the court about the nature of the various disputes which were in play. During the course of the day further documents were ferried to court by CG's solicitors. These included CG's Draft Points of Claim against AYH and various documents arising from the three adjudications. It became impossible for the advocates to assimilate the new material and to formulate their respective arguments, since each of them was reading for the first time highly material evidence.

27. In those unfortunate circumstances, I adjourned the hearing in order to enable (a) an agreed bundle of the relevant evidence to be prepared, and (b) fresh skeleton arguments to be served.

28. At the adjourned hearing on 27th September (which I shall refer to as "Day 2"), Mr Antony Edwards-Stuart QC represented CG and Mr Michael Curtis (as before) represented AYH.

29. There was a narrowing of the issues on Day 2 and certain arguments were abandoned. As a result of this process, three questions only arise for the decision of this court.
    (1) Are Items 3, 4 and 7 within the arbitration clause (17.1) of the two deeds of appointment?
    (2) Is there such a convergence of issues in the two arbitrations as to trigger clause 17.2 of the two deeds of appointment?
    (3) In the exercise of its discretion, should the court appoint Mr Planterorse as arbitrator pursuant to section 18 of the 1996 Act?

30. I shall now address those three questions separately.

Part 4: Are Items 3, 4 and 7 within the arbitration clause (clause 17.1) of the two deeds of appointment?

31. There is no dispute that Items 1, 2, 5, 6, 8, 9, 10, 11 and 12, as set out in CG's solicitors' letter dated 30th September 2004, are disputes which fall within the arbitration clause. AYH contend, however, that Items 3, 4 and 7 relate to services which fall outside both deeds of appointment. Accordingly, these Items are not caught by the arbitration clause.

32. There was at one stage a serious issue as to whether I should decide this question or whether I should leave it to the arbitrator. Indeed, I was taken through some interesting authorities on this topic. On Day 2, however, that issue faded away. It is now common ground that I should decide the jurisdictional question.

33. The project management services set out in Appendix 2 to the first deed of appointment include the following:
    "4.6 Co-ordinate the Other Consultants to see that information is provided to the Main Contractor in accordance with the Building Contract or the Programme or in an appropriate timescale."
    "4.17 Attend regular meetings with the Client to report on all design, costs, construction and programming aspects; provide monthly written reports; identify as far as possible potential problems and advise the Client of alternative causes of action where alternatives exist."

34. The quantity surveying services set out in Appendix 2 to the second deed of appointment include the following:
    "22. During the course of the Building Contract provide such reasonable assistance as the Client shall reasonably request relating to financial and contractual matters including monthly projections of the final costs.
    23. Carry out monthly Valuations on site and provide cost management and cost reporting services as necessary."

35. Having read out the material provisions, let me now turn to the individual Items.

36. **Item 3.** In my judgment this item falls within clauses 22 and 23 of the quantity surveying services.

37. **Item 4.** Mr Curtis submits that certification was a function of the contract administrator. AYH voluntarily took on this function. It does not fall into any of the categories of work referred to in the two deeds of appointment. Mr Edwards-Stuart, on the other hand, contends that Item 4 falls within clause 23 of the quantity surveying services. In my judgment, the first task is to construe Item 4 in the context of

the letter dated 30th September 2004. It was known to all parties that AYH, as quantity surveyor, (a) assessed loss and expense under clause 26 of the building contract and (b) certified the loss and expense which they had assessed. When Item 4 is read in context, it is clear that CG were complaining about both functions. This is, in truth, a double-barrelled complaint. AYH, it is said, first erred in the matter of assessment. AHY subsequently erred in the matter of certification. The first limb of Item 4 (failure to assess loss and expense correctly) falls within clause 23 of the quantity surveying services. The second limb of Item 4 does not fall within clause 23 of the quantity surveying services. Nor does it fall within any of the other services as defined in the two deeds. In the result, therefore, I hold that the first limb of Item 4 is caught by the arbitration clause, but the second limb of Item 4 is not.

38. **Item 7.** The issue here is whether or not Item 7 falls within clause 4.6 of the project management services. Mr Curtis submits that Item 7 is much broader than clause 4.6 of the project management services. Item 7 is a general allegation of failure to provide timeous information. It is not focused upon those occasions when the lateness of information results from a failure to coordinate. Mr Curtis' argument is ingenious, but I cannot accept it. Read sensibly and in context, the service described in clause 4.6 consists of causing the other consultants to provide information on time. This is precisely the service the performance of which is criticised at Item 7 of the letter. In the result, therefore, I hold that Item 7 is caught by the arbitration clause.

39. Let me now draw the threads together. My answer to the question posed in Part 4 of this judgment is as follows. Item 3, the first limb only of Item 4, and Item 7 are within the arbitration clause of the two deeds of appointment.

Part 5: Is there such a convergence of issues in the two arbitrations as to trigger clause 17.2 of the two deeds of appointment?

40. In approaching this question I must begin by reminding myself of three principles of construction which are relevant to the present problem.
    (1) The court should give to words used by the parties their ordinary and natural meaning.
    (2) A contractual provision must not be examined in isolation. It must be interpreted in the context of the contract as a whole and in the context of the background facts known to both parties – see **ICS v West Bromwich Building Society** [1998] 1 WLR 896 at 912 to 913.
    (3) If a contractual provision is ambiguous or unclear, the court will favour an interpretation which accords with the obvious commercial purpose of the agreement – see **Antaios Compania Naviera v Salen Rederierna** [1985] AC 191 at 201, **Manai Investments v Eagle Star** [1997] AC 749 at 771, **Siruis International Insurance Company v FAI General Insurance Limited** [2004] UKHL 54 at para 19.

41. Let me now turn from general principles to any authority which sheds light on the specific provision that has to be construed in this case. The one authority which is of assistance is the decision of Judge Humphrey LLoyd QC in **Trafalgar House Construction (Regions) Limited v Railtrack plc** [1995] 75 BLR 55. The main contract in that case contained a provision (namely clause 41.2.1) which is quite similar to clause 17.2 in our case. Likewise, the two sub-contracts in **Trafalgar House** contained a provision (namely clause 38.2.1) which is quite similar to clause 17.2 in our case. The facts of **Trafalgar House** are far removed from the facts of the present case. The disputing parties in **Trafalgar House** were the employer, the main contractor and two nominated subcontractors. Steps were taken to appoint the same person as arbitrator in each of the disputes. There was then a challenge in this court to certain procedural directions which the arbitrator had given. Judge Lloyd made declarations as to the precise ambit of the arbitrator's power in the multiple arbitrations which were on foot. At pages 80 to 81 Judge LLoyd said this: *"Clause 41.2.1 is silent about how or when (or indeed by whom) action is to be taken which may result in the arbitrator in the related dispute being seized of the main dispute. The clause has, for example, been drawn up on the basis that it will be possible to look at the notice of dispute given under clause 41.1 of the main contract and in some mysterious way see that it raises issues which are the same as or connected with the issues in the related dispute with respect to which an arbitrator has already been appointed. Notices of dispute are not normally preceded by careful analyses of the true issues and are usually quite general. The notices given by Trafalgar House and the sub-contractors are typical. A general connection of the subject matter of the dispute is not what the contracts require but rather an identity or convergence of issues: see the decision of Hirst J in* ***Hyundai***

Engineering and Construction Co Ltd v Active Building and Civil Construction Pte Ltd *[1988] 45 BLR 62, especially at pages 69-71."*

42. At page 85 to 86 Judge LLoyd set out his approach to construing clause 41.2.1 of the main contract and clause 38.2.1 of the subcontracts. He said: *"…The background of the scheme of nomination and the common interest of all parties – employers, contractors, and nominated sub-contractors – that related disputes should be dealt with by the same arbitrator require a sensible interpretation to be given to the words 'the Employer and the Contractor hereby agree'. Furthermore, it is now well settled that multiplicity of proceedings is likely to lead to different tribunals reaching different conclusions on the same facts and thus substantial injustice may result:* ***Berkshire Senior Citizens Housing Association Ltd v McCarthy E Fitt Ltd*** *[1979] 15 BLR 27 approving dicta of Kerr J in* ***Bulk Oil (Zug) AC v Trans Asiatic Oil Ltd*** *[1973] 1 Lloyd's Rep 129 at page 137 and applying* ***Taunton Collins v Cromie*** *[1964] 1 WLR 633 (see especially per Pearson LJ at page 637) and that this is a relevant consideration when construing an arbitration agreement: see Balcombe LJ in* ***Ashville Investments Ltd v Elmer Contractors Ltd*** *[1989] QB 488 at page 503E; (1987) 37 BLR 55 at page 75. An interpretation of clause 41.2.1 which did not give effect to those presumed intentions and to such policy would defeat its apparent object. Although both clause 41.2.1 and clause 38.2.1 should have been much clearer, as a matter of construction and if necessary implication they must in my judgment be read together as part of a group of contracts which are on their face commercially directly related to each other and as a matter of law to be read in conjunction with each other so that, whilst recognising that they remain separate agreements, effect is nevertheless to be given to the arrangements that they have in common. Thus the agreement in clause 41.2.1 means, first, that neither the employer nor the contractor can object if, at the instance of the other, a third party is introduced with whom there is a related dispute which by reason of the provisions of NSC/4 (for example) is to be referred for determination by the same arbitrator as appointed under the main contract, and secondly, that each consents to the dispute under the main contract and the related dispute being linked with the other if the arbitrator were to decide to treat a party as a co-defendant or third party in the other arbitration.*

The same interpretation should be given to clause 38.2.1 of NSC/4. In my judgment there is no material distinction between the provisions of clause 41.2.1 of the main contract conditions and clause 38.2.1 of NSC/4, even though there are some differences in the text and in layout. Accordingly, a party to NSC/4 may require the dispute of which notice has been given under clause 38.1 to be referred to the arbitrator appointed under the main contract provided of course that the sub-contract dispute raises issues which are substantially the same as or connected with the main contract dispute and provided that this is done before an arbitrator has been agreed or appointed to determine the sub-contract dispute."

43. In my judgment, the general considerations which Judge Lloyd set out on pages 85 and 86 are relevant to the interpretation of clause 17.2 in the present case.

44. Emboldened by this review of the authorities, I now turn to the task of interpreting clause 17.2 of the two deeds of appointment dated 23rd November 2001.

45. For the purpose of this exercise, I shall initially disregard the facts of the present case and postulate two disputes: namely, dispute A, which has already been referred to arbitration, and dispute B, which is about to be referred to arbitration.

46. What degree of convergence of the issues in dispute A and dispute B is required in order to trigger clause 17.2? It is not necessary in my judgment for every single issue in dispute B to be substantially the same or connected with an issue in dispute A. This is clear from the language of clause 17.2. It is also implicit in the decision of Judge Lloyd in **Trafalgar House.**

47. I now come to the more difficult question: what proportion of the issues in the two arbitrations must converge in order to trigger clause 17.2? The language of the clause leaves this matter unclear. In these circumstances, it seems to me proper to have regard to the commercial purpose of the provision. That commercial purpose is plain and obvious. It is to avoid multiplicity of proceedings, which (as is well known) generate excessive costs and carry the risk of inconsistent findings. Bearing in mind the commercial objective, I do not think that the threshold of clause 17.2 should be set too high. It is not necessary that the majority of issues in dispute B should be the same as or connected with issues in dispute A. In my judgment, it is sufficient if a material portion of the issues in dispute B have that

characteristic. Once a material portion of the issues in dispute B are the same as, or are connected with, issues in dispute A, then it makes obvious commercial sense for both disputes to be dealt with by the same tribunal.

48. There is a separate point which Mr Curtis has argued: namely that clause 17.2 only applies to multiple disputes between the employer and the various professionals. I am afraid that I cannot accept this argument. There is nothing in the deeds of appointment to suggest that clause 17.2 is limited in this way. Furthermore, such an interpretation does not accord with the obvious commercial purpose of the clause.

49. Having set out how I interpret clause 17.2, I must now apply that interpretation to the circumstances of the present case. For this purpose, it is necessary to analyse CG's claim against AYH. In doing this analysis, I am not assisted by the somewhat complex schedule of allegations set out in correspondence between solicitors. Far more helpful is the Draft Points of Claim by CG against AYH.

50. The Draft Points of Claim reveals that CG's case against AYH has five principal limbs, namely:
(1) giving a negligently low estimate at the outset which caused CG to enter into the building agreement and thereby suffer loss;
(2) negligence in relation to the tender process and contract preparation which caused CG to enter into an inappropriate contract;
(3) negligently failing to monitor the various programmes and to ensure that information was given to Kier on time, with the result that Kier became entitled to extensions of time and loss and expense;
(4) negligence in dealing with provisional sum items, which had the consequence that the cost of the works increased;
(5) negligently failing to spot potential problems and to recommend courses of action which would limit the rising costs.

51. I turn now to the arbitration between Kier and CG. Unfortunately, no Particulars of Claim or Draft Particulars of Claim are available in that arbitration. On the other hand, a fairly good picture of the claims which Kier are making can be deemed from the adjudication documents and from the correspondence referred to in Part 2 above. In essence, Kier are claiming:
(1) a substantial increase in the building cost by reason of variations, additional work and so forth;
(2) substantial sums of loss and expense under clause 26 of the building contract;
(3) a full extension of time for the 80-week period of delay, with the consequence that Kier has no liability for liquidated and ascertained damages.

52. On the basis of this analysis, it seems to me that four issues will arise in CG's arbitration against AYH, which are substantially the same as, or connected with, issues arising in the arbitration with Kier. These are:
(1) What was the actual cost of the building works as executed?
(2) Was any, and if so which, information issued late to Kier?
(3) What delay to the progress of the works was caused by that late information?
(4) What loss and expense within clause 26 of the building agreement was Kier caused to incur by reason of the late information?

53. There are, of course, a number of other issues which will arise in the arbitration against AYH but will not arise in the arbitration with Kier. In my judgment, this does not affect the position. A material portion of the issues in the arbitration against AYH are substantially the same as or connected with issues in the arbitration with Kier. Accordingly, clause 17.2 is triggered. In the result, therefore, my answer to the question posed in Part 5 of this judgment is yes.

Part 6: In the exercise of its discretion, should the court appoint Mr Planterose as arbitrator pursuant to section 18 of the 1996 Act?

54. It follows from my conclusions in Parts 4 and 5 above that, under clause 17.2 of the two deeds of appointment, CG is entitled to require that its dispute or disputes with AYH be referred to Mr Planterose as arbitrator. AYH have declined to accept that Mr Planterose should be appointed as arbitrator. It follows that there has been a failure of the procedure for the appointment of the arbitral tribunal within the meaning of section 18 of the 1996 Act. In those circumstances, this court has the

powers set out in subsection (3) of section 18. These include the power to direct that Mr Planterose be appointed as arbitrator.

55. Whether or not this court should exercise that power must be a matter for discretion. Mr Curtis submits that, if Item 4 falls outside the arbitration clause, that is a reason for not exercising my discretion to appoint an arbitrator. This is because Item 4 will have to be litigated in any event.

56. As explained in Part 4 above, my decision on Item 4 is that it embraces two separate claims in respect of (a) assessment and (b) certification. The first claim is caught by the arbitration clause; the second claim is not. It may well be that, if CG really wishes to pursue a separate claim against AYH for negligence in relation to certification, that claim will have to be litigated. But this is not a factor which should deflect the court from appointing an arbitrator. The vast majority of disputes between CG and AYH do fall within the arbitration clause. What remains might be the subject of abandonment or compromise; alternatively, an *ad hoc* reference to arbitration; or, alternatively, litigation. I am bound to say that, to litigate one small point in isolation, would not be a particularly sensible method of dispute resolution from anybody's point of view, but that must be a matter for the commercial judgment of the parties. This consideration is not a reason why the court should decline to exercise its discretion in favour of appointment.

57. Let me now stand back and look at matters more generally. The issues in dispute between CG and Kier overlap to a material extent with the issues in the dispute between CG and AYH. If these disputes are referred to different arbitrators, the court costs will be greatly increased and the management time devoted to dispute resolution will be greatly increased. CG will be a party in both arbitrations; AYH will be a party in one arbitration and, in the other, its staff will be called as witnesses. In addition to these considerations, there is also a substantial chance of inconsistent findings being made in the two arbitrations. All of this is the mischief against which clause 17.2 is directed.

58. The next consideration which I should mention is this. There is no personal criticism of Mr Planterose as an arbitrator. He is a distinguished practitioner in the relevant field, and very properly Mr Curtis has not sought to advance any argument under the latter part of clause 17.2.1 of the two deeds of appointment.

59. In all the circumstances, I conclude that this court should exercise its discretion in favour of making the appointment. My answer to the question posed in Part 6 of this judgment is yes.

Part 7: Conclusion.

60. For the reasons set out in Parts 4, 5 and 6 above, I will make an order, pursuant to section 18 of the 1996 Act, that Mr Planterose be appointed as arbitrator in respect of the arbitration proceedings between CG and AYH commenced by CG's arbitration notice dated 11th March 2005, subject to one qualification: the second limb of item 4 is omitted from the dispute referred to arbitration. I request that counsel discuss and agree the precise formulation of the order which this court should make. Counsel may also wish to attempt to agree an appropriate order in respect of costs, having regard to the history of this litigation. Clearly I will resolve all outstanding issues after counsel have attempted to reach agreement.

61. Finally, I thank all three advocates who have appeared at different stages of this hearing for their assistance.