

JUDGMENT : MR. JUSTICE COOKE : High Court Commercial : 24<sup>th</sup> June 2005.

### Introduction

1. The Claimant (Lafarge) applies to this Court under Section 67(1)(a) of the Arbitration Act 1996 seeking a determination that an Award dated 10<sup>th</sup> March 2005 was made without jurisdiction. In that Award, the Arbitrator determined, as a preliminary issue, that he did have jurisdiction in the arbitration which had purportedly been commenced by the Defendant, the London Borough of Newham (Newham) in relation to a dispute under a contract dated 8<sup>th</sup> June 2001 between Lafarge and Newham. The matter had been referred to an Adjudication and following that Adjudication, Newham had sought to arbitrate the matters in dispute between the parties.
2. It was common ground between the parties that the Arbitrator had jurisdiction to determine his own jurisdiction but, in accordance with Section 67, it was open to Lafarge to challenge the arbitrator's decision on that point.

### The Contract Provisions

3. The relevant terms of the Contract are as follows:

*"Clause G43 – Avoidance and settlement of Disputes*

*(1) In order to overcome where possible the causes of disputes and in those cases where disputes are likely still to arise to facilitate their clear definition and early resolution (whether by agreement or otherwise) the following procedure shall apply for the avoidance and settlement of disputes.*

...

*(4) The Employer and the Contractor agree that no matter shall constitute nor be said to give rise to a dispute unless and until in respect of that matter*

*(a) the time for the giving of a decision by the Engineer on a matter of dissatisfaction under the sub-clause (2) has expired or the decision given is unacceptable or has not been implemented and in consequence the Employer or the Contractor has served on the other and on the Engineer a notice in writing (hereinafter called the Notice of Dispute)*

*(b) an adjudicator has given a decision on a dispute under sub-clause (6) and the Employer or the Contractor is not giving effect to the decision, and in consequence the other has served on him and the Engineer a Notice of Dispute and the dispute shall be that stated in the Notice of Dispute. For the purpose of all matters arising under or in connection with the Contract or the carrying out of any Works the word "dispute" shall be construed accordingly and shall include any difference.*

*(5) (a) Notwithstanding the existence of a dispute following the service of a Notice under sub-clause (3) and unless the Contract has already been determined or abandoned the Employer and the Contractor shall continue to perform their obligations.*

*(b) The employer and the Contractor shall give effect forthwith to each decision of*

*(i) the Engineer on a matter of dissatisfaction given under sub-clause (2) and*

*(ii) the adjudicator on a dispute given under sub-clause (6)*

*unless and until that decision is revised by agreement of the Employer and Contractor or pursuant to this Clause.*

*(6) (a) The Employer or the Contractor may at any time before service of a Notice to Refer to arbitration under Clause G43 (10) by notice in writing seek the agreement of the other for the dispute to be considered under 'The institution of Civil Engineers' conciliation Procedure 1999 or any amendment or modification thereof being in force at the date of such notice.*

*(b) If the other party agrees to this procedure any recommendation of the conciliator shall be deemed to have been accepted as finally determining the dispute by agreement so that the matter is no longer in dispute unless a Notice of Adjudication under sub-clause (6) or a Notice to Refer to arbitration under sub-clause (9) has been served in respect of that dispute not later than one month after receipt of the recommendation by the dissenting party.*

*(7) (a) The Employer and the Contractor each has the right to refer a dispute as to a matter under the Contract for adjudication and either party may give notice in writing (hereinafter called the Notice of Adjudication) to the other at any time of his intentions so to do. The Adjudication shall be conducted under "The institution*

*of Civil Engineers' Adjudication Procedure 1997 or any amendment or modification thereof being in force at the time of the said Notice.*

(8) *The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings or by arbitration or by agreement.*

...

(10) (a) *All disputes arising under or in connection with the Contract other than failure to give effect to a decision of an adjudicator shall be finally determined by reference to arbitration. The party seeking arbitration shall serve on the other party a notice in writing (called the Notice to Refer) to refer the dispute to arbitration.*

(b) *Where an adjudicator has given a decision under sub-clause (6) in respect of the particular dispute the Notice to Refer must be served within three months of the giving of the decision otherwise it shall be final as well as binding.*

(11) (a) *The Arbitrator shall be a person appointed by agreement of the parties*

(b) *If the parties fail to appoint an Arbitrator within one month of either party serving on the other party a notice in writing (hereinafter called the Notice to Concur) to concur in the appointment of an Arbitrator the dispute shall be referred to a person to be appointed on the application of either party by the President for the time being of the Institution of Civil Engineers...*

#### **4. Clause G44 – Notices**

(1) *Any notice to be given to the Contractor under the terms of the Contract shall be served by sending the same by post to or leaving the same at the Contractor's principal place of business (or in the event of the Contractor being a Company to or at his registered office).*

(2) *Any notice to be given to the Employer under the terms of the Contract shall be served by sending the same by post to or leaving the same at 25 Nelson Street London E6 6EH marked for the attention of Head of Environment Engineering London Borough of Newham or such other address or person as the Employer may from time to time advise the Contractor in writing.*

(3) *Any notice shall be deemed to be served two working days following service in accordance with this clause."*

#### **The background facts**

5. As recited in the Award, Lafarge, under the terms of the contract of 8<sup>th</sup> June 2001 was to provide certain construction services over a three-year period. This Contract provided a framework for effecting minor Civil Engineering works for Newham, primarily comprising footpath or carriageway construction or reconstruction work and environmental work, as instructed from time to time by Newham during the term of the contract.

6. During the course of the contract a dispute arose between Lafarge and Newham as to the proper method of valuation of Lafarge's work and the "*Rates in Bands*" applicable thereto. By Clause G43 (7)(a) of the Contract, Lafarge had the right to refer any dispute of this kind to adjudication and did so by a Notice dated 7<sup>th</sup> July 2004.

7. On 12<sup>th</sup> August 2004, the adjudicator sent by fax to the parties the draft wording of his decision in the adjudication. After what is described by Newham as "*some to-ing and fro-ing*", at 11:02 on 13<sup>th</sup> August 2004 the adjudicator transmitted an e-mail communication attaching a letter and a document entitled "*Adjudicator's Decision*", both of which were dated but unsigned.

8. Paragraph one of that document ran as follows:

*"This document contains the Decision of Anthony Canham appointed adjudicator in the matter of a dispute between the parties to a Contract dated 8<sup>th</sup> June 2001..."*

The document extended to twenty-five pages with a further page recording the decision in seven paragraphs. As sent by e-mail, this document was not signed or dated.

9. The letter which was sent with it was also not signed. It read as follows:

*"As intimated earlier I am publishing the Decision today.*

*I attach this letter and the Decision to this e-mail.*

*The posted hard copy additionally includes invoices, with a reconciliation on the face of the invoice in respect of the deposits paid.*

*I am now functus officio, other than I am able to correct any clerical mistake or error arising from an accidental slip or omission. I am not able otherwise, nor am I willing to enter into any correspondence, concerning the decision.*

*I take this opportunity of thanking the parties for the opportunity to have worked for them.*

*Yours faithfully”*

10. The letter and Decision, both signed and dated 13<sup>th</sup> August were sent in hard copy to the parties on 13<sup>th</sup> August 2004. It is said by Newham that it was not received by it until 17<sup>th</sup> August.
11. On 11<sup>th</sup> November 2004 Knowles sent a letter, by recorded delivery, to the registered office of Lafarge in the following terms:  
*”Dear Sirs,  
In the matter of the Arbitration Act 1996 and  
In the matter of an intended Arbitration between:  
The Mayor and Burgesses of the London Borough of Newham  
And  
Lafarge Aggregates Limited  
Please be advised that we have been instructed by the London Borough of Newham to act on their behalf in the arbitration as detailed in the attached Notice to Refer.  
We have proposed three arbitrators for your agreement and enclose brief details attached to the Notice to Concur of their qualifications and experience.  
Could you please arrange to forward all future correspondence in respect of this arbitration to our London offices marked for my attention.  
Yours faithfully  
for Knowles Limited”*
12. It has not been contended that Knowles had no authority to send this letter on behalf of Newham. The letter enclosed a Notice to Refer which expressly stated that the adjudicator's decision on the matters referred to him was dated 13<sup>th</sup> August 2004 and that there was a need, pursuant to Clause G43 (10)(b) of the Contract for the Notice to Refer to be served within three months of the adjudicator's decision of 13<sup>th</sup> August 2004. Additionally a Notice to Concur was attached seeking agreement to one of three persons nominated as proposed arbitrator.
13. The letter of 11<sup>th</sup> November 2004 from Knowles was sent by recorded delivery and, in accordance with a date stamp on that letter, was received at the registered office of Lafarge on 12<sup>th</sup> November 2004.
14. The 11<sup>th</sup> November 2004 was a Thursday so 12<sup>th</sup> November was a Friday and 13<sup>th</sup> November a Saturday. There is no evidence as to the time of day when the letter of 11<sup>th</sup> November was sent.

#### **The issues**

15. Four issues have been raised by the parties on this application. Three of those issues were decided in favour of Lafarge by the Arbitrator and one in favour of Newham. He found that the adjudicator had given his decision on 13<sup>th</sup> August 2004, the date when it was sent and received by e-mail and not on 17<sup>th</sup> August, the date when the written and signed copy was received by Newham. He found that the reference in G43 (10)(b) to a decision by an adjudicator under sub-clause (6) had to be construed as referring to an adjudication under sub-clause (7) of the Contract. It followed that the Notice to Refer in Clause G43 (10)(b) had to be served within three months of 13<sup>th</sup> August 2004 if it was not to be final as well as binding. In deciding upon the date of service of the Notice to Refer sent by Newham on 11<sup>th</sup> November 2004, he concluded that Clause G44 (3) applied to all notices served under the Contract and that service was therefore not effected until the expiry of two working days after the letter had been sent. Thus far the Arbitrator had accepted Lafarge's submissions but he decided the final question, namely whether Saturday was a working day for the purpose of Clause G44 (3) in favour of Newham. He found that Saturday was a working day for the purpose of the Clause so that the Notice to Refer was to be treated as served on Saturday 13<sup>th</sup> November 2004 which was within three months of the giving of the decision on 13<sup>th</sup> August 2004.
16. Each of those findings was the subject of argument before me and I deal with them in turn.

**The date when the Adjudicator gave his decision.**

17. The terms of Clause G43 (10)(b) require the Notice to Refer to be served "within three months of the giving of the decision" by the Adjudicator. The decision was sent by e-mail at 11:02 hours on 13<sup>th</sup> August 2004 following a draft of the decision being sent the previous day and "some to-ing and fro-ing" in correspondence concerning it. Newham submit that, for a decision to be given, it has not only to be transmitted by the Adjudicator but received by the parties. I do not see how this assists Newham since the e-mail was transmitted and received virtually instantaneously on 13<sup>th</sup> August 2004. It was plain from the terms of the letter, decision and the e-mail all dated 13<sup>th</sup> August that the Adjudicator was publishing his decision that day and that he considered himself "*functus officio*" from that point onwards. After despatching the e-mail, he signed a printed copy of the electronic version of the Decision and dated it 13<sup>th</sup> August 2004. It is clear, in my judgment that the decision was given on 13<sup>th</sup> August, by e-mail, although not signed when sent by that method.
18. In reality Newham's case depends here upon the Adjudicator's statement in a letter of initial directions of 16<sup>th</sup> July 2004. In that letter he gave directions that all written submissions should be served electronically with the contract and documents relied upon sent "same day delivery" by courier, including a hard copy of what had been served electronically. Following the paragraphs dealing with directions, he said:  
*"It is my usual practice to correspond by facsimile without the use of post other than for publication of my decisions. I will on occasion copy documents by e-mail. I hope that that is acceptable to both parties. Please advise me if not"*.  
Neither party raised any objection and the Arbitrator rightly found at paragraph 31 of his Award that the parties had been corresponding by e-mail during the adjudication without objection. He concluded that e-mail was an acceptable means of communication between the parties and noted that the adjudicator's draft decision had been sent by e-mail, as were the parties comments thereon.
19. I agree with the Arbitrator that the adjudicator's statement following his initial directions did not amount to a contractually agreed procedure whereby the adjudication decision had to be given in any particular way. All that the adjudicator was doing in his letter of 16<sup>th</sup> July was to give advance notice of his usual method of communication to ensure that the parties did not object to facsimile communication in the normal way with copy documents by e-mail. He was not however committing himself to sending the Decision by post in circumstances where the parties were content to communicate by email. There was no agreed procedure for communicating his Decision and he was not fettered by that letter from sending his decision out in any way he chose.
20. In such circumstances it is clear that the decision was sent and received on 13<sup>th</sup> August and it would make no sense to say that the decision was given on 17<sup>th</sup> August when it had already been fully communicated four days earlier and the Arbitrator considered himself *functus* at that point. All that happened on the 17<sup>th</sup> August was that Newham received a hard copy of a decision which had already been both given and received on 13<sup>th</sup>, albeit that on this latter occasion the decision was both signed and dated.
21. Newham sought to argue, in the alternative, that Clause G44 (3), which refers to notices, should also be construed to refer to the giving of a decision by the adjudicator under Clause G43 (10). It is said that the word "notice" is sufficiently wide to encompass an adjudicator's decision and that there are policy reasons for treating a Notice under Clause 44 (1) or (2) in the same way as an adjudicator's decision.
22. This argument founders on the wording used. Time and again in Clause G43, there is reference to a notice, to which Clause G44 must be taken to refer. Thus the Contract provides for a Notice of Dispute, a "*notice in writing*" seeking agreement to conciliation, a "*Notice of Adjudication*", a "*Notice to Refer*" and a "*Notice to Concur*". These are notices to be given by one party to the other. The language of Clause G43 (10)(b) which also elsewhere makes passing reference to a "*Notice to Refer*", does not refer to any "notice" to be given by the adjudicator of his decision but simply uses the words "*where an adjudicator has given a decision*". Whatever the policy reasons, to which I shall return in the context of

Clause G44, the "giving" of a decision by the adjudicator cannot be equated with a notice to be sent by one party to the other of the kind to which Clause G43 elsewhere refers.

23. I conclude therefore that the three-month time limit under Clause G43 (10)(b) ran from the giving of the decision at 11:02 on 13<sup>th</sup> August 2004.

**Does the three month time limit in Clause G43 (10)(b) refer to the adjudicator's decision under sub-clauses (7), (8) and (9)?**

24. Lafarge drew attention to the evolution of this form of Contract from Clause 66 of the Institution of Civil Engineers' Conditions of Contract. The Arbitrator found that Clause G43 here had its origin in Clause 66 as anyone involved in major road works contracts would know. Neither party contends otherwise. The Arbitrator accepted Lafarge's contentions that the addition of a new sub-clause (2) in Clause G43 (where there was no equivalent provision in Clause 66 of the earlier form of Contract) had not been followed by consequential amendments in the following sub-clauses, with the result that, save for one exception, they all cross-referred to the wrong sub-clause (being one sub-clause earlier than the sub-clause to which they should have referred).
25. It does not seem to me to be necessary to draw upon the preceding ICE Conditions of Contract to reach the conclusion that the reference in Clause G43 (10)(b) to sub-clause 6 is plainly a mistake for sub-clause (7). Clause G43 (10) deals with the question of a Notice to Refer to arbitration and specifically refers, both in sub-clause (a) and sub-clause (b) to a decision of an adjudicator. That decision can only be a decision of an adjudicator appointed in accordance with the terms of Clause G 43 of the contract and the relevant Subclauses in that Clause which provide for adjudication.
26. There is no need for any extended legal argument about this. Although Newham relied on the principle of *contra proferentem*, and suggested that the cross reference was not sufficiently clear for the Court to conclude that the adjudication was that referred to in Sub-clause 7, this cannot avail them. Whether or not other amendments had been made to the earlier ICE form of contract, which show that someone had applied his/her mind to alterations, there is only one form of adjudication decision to which the sub-clause could be taken to have reference. This is not a matter of rewriting the contract but one of sensible commercial construction.
27. As a matter of construction it is plain that the reference to sub-clause (6) in Clause 43 (10)(b) must be interpreted as a reference to sub-clause (7) and in particular to sub-clause (7) (c). If it is asked what adjudication decision is being referred to in Clause G43 (10)(b), there is only one answer, namely a decision by an adjudicator appointed in accordance with the terms of the Contract and Clause G43 in particular. The many references to adjudication under sub-clause (6) which appear in the contract, including one in sub-clause (6) itself, only make sense if the adjudication referred to is that which is provided for in the clause.
28. If reference is made to Lewison: "the Interpretation of Contracts" 3<sup>rd</sup> edition, as the Arbitrator did at paragraph 23 of his Award, it is clear that the Court can, as a matter of construction, correct obvious mistakes in the written expression of the intention of the parties.
29. Equally, if regard is had to Lord Hoffman's speech in **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1WLR 896, it is clear that regard can be had to the background to the Contract, namely anything which would have affected the way in which the language of the document would have been understood by a reasonable man with the knowledge of the parties. The standard form ICE contract falls into that category and any reference to it reinforces the conclusions I have already reached.
30. There is therefore no need for rectification and it is clear that the three-month time limit in Clause G43 (10)(b) is directly applicable to a Notice to Refer following the decision given by the adjudicator in the present instance.

**The date of service of the Notice to Refer.**

31. I was referred to a number of authorities in relation to the use of the word "deemed" in contracts, statutes or orders. Amongst them were **R v Westminster Unions Assessment Committee** [1917] 1KB 832, **International Bottling Co Ltd v Collector of Customs** [1995] 2 NZLR 579, **Godwin v Swindon**

**Borough Council** [2002]1 WLR 997 and **Anderton v Clwydd County Council (No 2)** [2002] 1 WLR 3174. What these authorities show is the need to have regard to the purpose of the relevant "deeming" provision in the document in question. The word "*deemed*" can mean "*presumed until the contrary is proved*", but it can also be used as a word of definition, stating how matters are to be regarded definitively for the purposes of the contract or document in question.

32. Here it is agreed that the intention of including Sub- clause 3 was to achieve certainty as to time of service but the parties differed as to whether this was of universal application or whether it only applied where the time of receipt could not otherwise be established. Newham maintains that it is a fall-back provision, where receipt cannot be shown – a rebuttable presumption of service which prevails only where it cannot be rebutted by evidence of actual receipt. Lafarge contends that it is of universal application and defines the point at which service is to be treated as effective.
33. Newham points to the difficulty created by the use of the word "served" in Clause G44 (1) and (2), as compared with its use in Clause G44 (3). Sub-clauses (1) and (2) refer to service by carrying out certain actions whereas sub-clause (3) refers to a Notice being "*deemed to be served two working days following service*" in accordance with those earlier sub-clauses. The solution however is self-evident. Clause G44 (1) and (2) set out the methods by which service is to be effected whereas sub-clause (3) specifies the time at which such service is to be taken as having occurred.
34. Once the structure of the clause is seen, it is in my judgment plain that the Clause as a whole is intended to represent a complete code for service of notices under the Contract so that the parties know exactly where they stand. The terms of the sub-clause refer to "*any notice*" which must mean all contractual notices served by the parties without limitation. The idea that Clause G44 (3) should be ignored leaving Clauses G44 (1) and G44 (2) to operate entirely independently, as Newham suggested, in some circumstances, because of its draconian effect, makes no sense. The terms of Clause G44 (3) must be given meaning in the context of the Clause as a whole. Clause G44 (3) applies to both sub-clauses (1) and (2) and to both the methods of service prescribed in those clauses.
35. Sub-clause (1) and (2) provide for different methods of service. In the case of any notice to be given to Lafarge, such notice can be served by two distinct methods. The first is by sending the Notice by post (not specified as first as opposed to second-class post). The second is by leaving the Notice at its registered office since it is a limited company. What is plain, as a matter of construction, is that, whichever method of service is adopted, "*notice shall be deemed to be served two working days following service*". Whether or not the Notice is sent by post or left at the registered office, the terms of Clause G44 (3) apply, even though the effect may be to *deem* service to be effected after actual receipt in the course of post or delivery by hand, either of which could easily occur.
36. The reason for this provision for a lapse of time before service is treated as effective is reasonably apparent.
  - i) If a letter is sent by post, there will inevitably be some delay before the Notice comes to the attention of those dealing with the matter at the contractor's office, whether as a consequence of delay in the post or circulation of post at the office. The Notice may not arrive at all because of the vagaries of the postal system. Equally, if the Notice is left at the contractor's principal place of business or registered office, it is highly likely that there will be some delay in the matter coming to the notice of the persons concerned in the business in question. Delay is particularly to be expected with delivery by post or by hand to the registered office if that office is, as is commonly the case, the offices of solicitors or accountants of the address of the Company secretary.
  - ii) The counting of time is nonetheless from the point when the server of the notice takes action, either by posting the notice or leaving at the relevant office.
  - iii) The Clause is thus intended to bring clarity to the time at which service is effective, benefiting the server because he can calculate when he needs to take the relevant action and benefiting the recipient by allowing time for the matter to which the notice relates to come to the notice of those concerned with it.

37. I therefore agree with the Arbitrator that the deeming provision in Clause G44 is of universal application and applies to all Notices served under the Contract. The allowance of two working days is to give some scope for the matter to come to the actual attention of those dealing with it on behalf of the recipient but the provision is of benefit to the person serving the Notice inasmuch as there is clarity as to the point at which service is effective.
38. For these reasons, a Notice sent or delivered in accordance with the prescribed methods is treated as being served two working days following the sending or the leaving of the Notice in accordance with the Clause, as the case may be. The sub-clause does not exist in order to resolve disputes where the parties do not agree on the date of actual receipt. The words "*deemed to be served*" are not included in the Clause in order to provide a fallback position if it cannot be shown when the Notice was received: nor do they give rise to the possibility of rebuttal by evidence as to the time of actual receipt.
39. There are a number of possible situations which could arise.
- i) First, the Notice might actually be received outside the time allowed in sub-clause (3). If the vagaries of the postal service result in delay of four days before delivery, it would not avail Lafarge to say that actual receipt occurred then, when sub-clause (3) stated in terms that the Notice is deemed to be served two working days following sending the Notice by post.
  - ii) Equally, the Notice might not arrive at all when sent by post and a repeat Notice might have to be sent. The deeming provision would nonetheless apply so that the sender was not prejudiced by adopting the procedure sent out in the Clause. Nor in practice would the putative recipient be prejudiced since the arbitration could not move forward without the Notice to Concur and the response to it and the appointment by the president for the time being of the ICE, in default of agreement on the identity of the Arbitrator.
  - iii) The third possibility is that the Notice might be received earlier than the two working days allowed after sending the post. By parity of reasoning, the actual receipt cannot matter when sub-clause (3) provides in terms for the time when a Notice is to be treated as being served. Since this code covers service by sending the document by post or leaving the document at the contractor's principal place of business/registered office and the underlying rationale must be the same, it matters not a whit whether or not the document arrives earlier than the two working day period through the course of the post or by being left at the office.
  - iv) In each case time is allowed from the point at which one or other method is adopted by the server.
40. As already indicated, I am not much assisted by the authorities upon which the parties relied since the issue here is one of construction of Clause G44 in the context of the Contract as a whole. It may be that some analogy can be drawn with the position under the CPR and the judgment of Lord Justice May in **Godwin v Swindon Borough Council** [2001] EWCA Civ 1478 in seeing the need for certainty as the rationale for prescribing a deemed time of service, but I doubt if matters go further than that since the Court was there called upon to construe the rules of Court rather than the Contract which is the subject of dispute here.
41. In this context therefore with a three-month limit, the server of such a Notice knows that he must adopt one of the prescribed forms of service at a time which allows two working days to follow before the expiry of the relevant time limit. The date of effective service can be known in advance and is demonstrable by reference to the sending of the Notice by post or the deposit of it at the registered office, as the case may be.

**When is the Notice deemed to be served? Is Saturday to be treated as a working day?**

42. The Notice to Refer was sent on Thursday 11<sup>th</sup> November 2004 by recorded delivery at a time which is not revealed in the evidence. Although it actually arrived on 12<sup>th</sup> November 2004, the Friday, the effect of Clause G44 (3) is that service would only be treated as effective two working days following the sending by post. The one thing which is clear from the terms of the sub-clause and the word "*following*" in it, is that two working days must ensue after the action taken by the server to serve, before service is effective- the notice *shall be deemed to be served two working days following service in accordance with this clause* (emphasis added).

43. If two working days have to ensue after service, then anything less than 2 working days thereafter will not suffice and although neither party was enamoured with the idea of fractions of a day, in my judgment, the sub-clause requires the passage of two full working days, whatever that means, before service is to be taken as effective. Parts of a working day do not amount to or equate to a working day. Whenever the relevant step is taken by the server, two working days must pass before service is deemed to have taken place. Thus if a notice was delivered at 4.00pm on a Tuesday, service could not take effect until two working days had expired, namely at 4.00pm on the Thursday.
44. The main question to which the parties addressed their arguments and upon which the Arbitrator focused was whether or not Saturday 13<sup>th</sup> November 2004 was to be treated as a working day. If it was not, then the two working days following the sending of the Notice by recorded delivery on Thursday 11<sup>th</sup> November could not expire until some time on Monday 15<sup>th</sup> November, assuming that Sunday was also to be treated as a non-working day, as the parties accepted it was.
45. The Arbitrator accepted Newham's argument in the following terms:
- "48. The final question is whether Saturday is a working day for the purposes of Clause G44 (3)?*
- 48. The term 'working day' is not defined in the contract. It is not a term of universal use. Chitty 21 – 019 states 'the phrase "working days" excludes days when work is not ordinarily done'. This definition does not help very much because often contractor's work weekends on a regular basis whether as client's offices are, as Newham's, closed Saturday and Sunday.,*
- 50. Newham argued that the Specification gave permitted working hours as including Saturday 07:00 – 14:00. The Specification also gave an uplift for working on Saturdays of 28% to the Scheduled rates. The Contract was for the provision of Construction Services over a period of three years. The extent and the amount of the work involved was not defined in the Contract. It was to be undertaken on an order by order basis. Roadworks by their nature are often required to be undertaken on major routes out of peak hours.*
- 51. It was, in my opinion clear from the Specification that certain types of work might have to be undertaken on a Saturday, and hence it will have been necessary for Newham to be able to instruction work to be carried out on Saturdays. It will also have been in the interests of Lafarge that Newham have that power to enable them able (sic) to recover the 28% uplift in their rates.*
- 52. I therefore find that it was the intention of the parties that Saturday would be a working day for the purposes of the Contract. "*
46. The parties accepted that "working days" meant days when work was ordinarily done but the issue arose as to whose work and what work was encompassed by this expression.
47. Newham argued that reference should be made to the Contract to determine the ordinary working days for the contract and reference was then made to a provision tucked away in the Appendices to the large contract document which dealt with permitted hours for work and uplifts on rates for work done.
48. The Arbitrator proceeded on a false assumption into which he was led, it seems, by an argument of Newham. He understood that the Contract provided for "permitted working hours" which included Saturday 0700-1400 but that an uplift on rates was payable for Saturday work of 28%. In fact, under the Contract, an additional uplift on the rates for work done was payable to Lafarge in respect of work on Saturday afternoons, Sundays and at night, but not for Saturday mornings. For Saturday afternoons it was a 19% uplift. No additional rate was payable for Saturday mornings however from 0700- 1400. Before this Court, Newham's argument was that this showed that Saturday morning was ordinary working time under the Contract, as compared with other times which attracted premium rates, and that because Saturday morning was ordinary working time, Saturday was therefore a "working day" for the purposes of Clause G44 (3) of the Contract. A working half-day or part working day thus was said to amount to a working day.
49. Lafarge argued that what mattered was the working hours of the offices of both of the parties and that neither Saturday nor Sunday counted as working days since neither Lafarge's nor Newham's offices were open then. The working hours permitted by the Contract or the working hours or days of the



labourers and the rates paid were irrelevant to the question of "*working day*" for the purposes of receipt of notices under Clauses G43 and 44. Since the purpose of the allowance of working days must have been to give time for the matter to be brought to the attention of those who would deal with a dispute of this kind at the offices of the recipient party, it was the ordinary working days of the parties' offices to which this sub-clause referred.

50. The parties' arguments thus presented a sharp choice to be made between the working days of the offices and the potential working hours of the labourers employed by Lafarge.
51. The Arbitrator found that road works by their nature often required to be undertaken on major routes out of peak hours. He concluded that certain types of work might have to be undertaken on a Saturday and that therefore Newham would have to be able to give instructions to Lafarge for such work to be done on Saturdays. Therefore, having referred to the permitted working hours as including Saturday morning and an uplift rate of 28% for Saturdays, he concluded that Saturday was a working day for the purposes of the Contract.
52. The problem with the argument on extra uplift is however that the appendices to the Contract show that an uplift to the Scheduled rates was provided for working at night (with varying uplifts for shifts of different hours and lengths), for work done on Saturdays between 14:00 and 19:00 hours and work on Sundays between 07:00 and 19:00 hours. All such uplifts indicate that the periods to which they relate are not ordinary working time at all. The premium rates attracted are justifiable on this basis. In consequence Newham eschewed such an argument at this hearing. The same difficulty arises in relation to the Arbitrator's reliance on emergency work done on Saturdays, which attracted premium rates. It matters not whether there was someone on call at Newham and/or Lafarge, ready to deal with matters of an emergency nature in relation to traffic accidents, flooding, repairs to signing and guarding where necessary, outside what are referred to as "*permitted hours*" in appendix 1-7. That was not ordinary working time or part of an ordinary working day.
53. Furthermore if Saturdays were to be included on this basis, why not Sundays? If Sundays were included, the result would be that the phrase "working day" covered every day of the week, which makes the reference to "working" redundant, save in the context of bank holidays. This seems an unlikely construction.
54. Appendix 1/7 set out restrictions as to when the contractor was permitted to carry out works in residential areas, non-residential areas and traffic sensitive streets and junctions in particular. In residential areas, "*permitted hours*" of work were Monday – Friday 0830- 1800 and no Saturday or Sunday working was allowed, whereas in non residential areas the "*permitted hours*" of work were 0700-1900 Monday to Friday and 0700-1400 on Saturdays (thereby excluding Saturday afternoons and Sundays). Particular issues arose with traffic sensitive streets, junctions and roundabouts where additional restrictions on hours applied depending on the particular location. Emergency work was however permissible outside "permitted hours" regardless and this was part of Lafarge's responsibility under the Contract, if called upon.
55. The Arbitrator pointed out that the Contract had no definition of "working days" but then looked to the concept of "permitted working hours" which vary according to the nature and location of work to be done. I am unable to see that there is any assistance to be gained from this. The parties cannot, in my judgment, be taken to have had these detailed provisions relating to "*permitted hours*" in mind, when using the term "*working days*" for notice purposes, particularly as the "permitted hours" are so variable, depending on location and work to be done. What is the relevance of permitted hours for work on the ground to time for receipt of notices relating to conciliation or arbitration? To that extent, at least, the focus of Lafarge on office hours seems more to the point. A notice sent on a Friday night would not receive any attention until Monday morning, whether or not Saturday work was being done on the roads, and whether or not it was planned or took place because of an emergency.
56. In my judgment there is no need to turn to obscure parts of the Contract appendices to seek to ascertain the meaning of "*working days*". The concept was intended to be a simple one since it was intended to bring clarity to the Notice provisions in the Contract and certainty to the question of the

time of service of such notices. If "*working days*" means days when work is ordinarily done, as all are agreed it does, those days must be readily identifiable, independent of any issues about "*permitted hours*" in which Lafarge could do particular types of work in particular places. I consider that the expression "*working day*" has a general meaning which is not dependent on the particular work which Newham might or might not require Lafarge to do under the terms of the Appendices, whether in emergency or otherwise and whether at ordinary rates or uplifted rates.

57. In ordinary parlance in the UK, "*working days*" are Mondays to Fridays, excluding Christmas, Easter and Bank Holidays. The point is illustrated by the parties' own office hours. These are the days when the parties' offices were and would ordinarily be open and it is this concept that the parties must have had in mind. The Arbitrator said that "*working day*" was not a term of universal use, but its general meaning outside use in contracts is sufficiently clear for it to be used in contracts, whether construction contracts or other contracts, and to be given that meaning where the contract itself does not provide a definition. There is no suggestion here that there is any customary meaning in the construction industry or any usage which would change the position, whether or not contractors often work at weekends.
58. If regard is had to the object of the sub-clause, bearing in mind the commercial context of the notice provisions and their rationale, Lafarge is right to point to the reasons for the deeming provision which allow time for actual receipt of the notice by those concerned with it in offices, after the serving party has done its part at a time which is identifiable. It is therefore much more likely to be the ordinary office working day which the Contract has in mind, as opposed to the ordinary builders' site day and the expression is clear in its effect if it is taken to refer to this. I conclude that the expression "*working day*" means an ordinary office working day.
59. In practice, for the period in November 2004 with which this dispute is concerned, this means Monday to Friday so that no issue arises on the facts here as to the exact hours which might be involved in a "*working day*" (whether 0900- 1700 or 0930-1730 or the specific times when the recipient offices were ordinarily open) nor as to the exact time when the recorded delivery notice was sent on November 11<sup>th</sup> nor the exact time when the two working days expired following service. As Saturday 13<sup>th</sup> November 2004 was not a working day, two working days could not expire on that day, following the sending of the Notice by recorded delivery on 11<sup>th</sup> November 2004 (at whatever time), and the earliest time at which service could be treated as effective would be sometime on Monday 15<sup>th</sup> November 2004, which was more than three months from the date when the adjudicator gave his decision.

**Conclusion.**

60. The consequence is that the Arbitrator has no jurisdiction in this dispute since the reference to him was not made in time in accordance with the provisions of the Contract.

Bernard Livesey Q.C. (instructed by Winward Fearon) for the Claimant

Paul Darling Q.C. (instructed by Trowers & Hamblins) for the Defendant