OPINION OF LORD CLARKE : Outer House, Court of Session. 23 March 2005

[1] These two Commercial Actions relate to the same dispute between the parties, the background to which is as follows.

The Contractual Context

[2] The pursuers, in the action which I shall refer to as Action No.1, Scrabster Harbour Trust (to whom I shall refer in this opinion as "Scrabster") aver, in that action, that on or about 12 September 2001, they entered into a contract with Mowlem plc whereby Mowlem plc agreed to construct for Scrabster, as employer, a new breakwater quay and associated works as part of new ferry terminal development at Scrabster. The averments in Action No.1 go on to say that *"the Contract"* was constituted by a letter from Scrabster dated 12 September 2001, together with the documents referred to therein. It is a matter of agreement that the Contract was subject to the ICE Conditions of Contract, Fifth Edition (June 1973) revised in January 1979 and reprinted with amendments in January 1986, published jointly by the Institution of Civil Engineers, the Association of Consulting Engineers and the Federation of Civil Engineering Contractors along with Guidance Note 8, Guidance Note reference CCSJ/C/GN/March 1995, Amendment reference ICE/Fifth Edition/Tax/February 1998; ICE/Fifth Edition/HGGR/March 1998; ICE/CPF/February 1999; ICE/Third Parties/December 1999; ICE/Scot Arb/April 2001 and Addenda, Alterations and Special Conditions. The foregoing conditions are referred to, cumulatively, in the pleadings as *"the Conditions of Contract"*. It is a matter of agreement also that Clause 66 of the Conditions of Contract made provision for the settlement of disputes. In particular, Clause 66(2), (3) and (6) enabled the contractor to challenge, *inter alia*, a decision or certificate of the Engineer appointed under the contract. Clause 66(6) gave each party the right to refer any dispute as to a matter under the Contract for adjudication. Clause 66(7) of the Conditions of Contract provided that the decision of the adjudicator *"shall be binding until the dispute is finally determined by legal proceedings or by arbitration... or by agreement"*. Clause 66(9)(a), however, provided that if the employer or contractor did not give effect to the adjudicator's decision and served a notice of dispute, the dispute might, subject to the provisions of the Contract, be referred to arbitration - see Clause 66(3)(b) and Clause 66(9)(a). The Conditions of Contract made specific provision about the arbitration procedure to be followed. Clause 67(2) (as amended), provided, *inter alia*, that any reference to arbitration under the Conditions of Contract *"shall be conducted in accordance with... 'the Scottish Arbitration Code'"*. As will be seen, that Code makes provision for, *inter alia*, the commencement of an arbitration by the giving of a Notice of Arbitration, the content of any such notice and the appointment of an arbiter or arbiters. By Clause 66(9)(b) of the Conditions of Contract themselves, as amended by the said ICE/Scot Arb/April 2001, it was provided:

"Where an adjudicator has given a decision under Clause 66(6) in respect of the particular dispute, the Notice of Arbitration must be served within three months of the giving of the decision otherwise it shall be final as well as binding."

As far as the provisions of the Scottish Arbitration Code 1999 are concerned, certain of these were the subject of discussion in the debate which took place before me in relation to the relevancy of the parties' pleadings in both actions. The Code has been lodged as No.6/4 of process and the provisions, in question, are set out in full in Article 5 of Condescendence in Action No.1.

The Dispute

[3] On or about 28 November 2003 Mowlem plc referred to adjudication, certain decisions of the Engineer, appointed under the Contract, and the question whether Scrabster, as employer, were entitled to deduct liquidate damages under the Contract. The adjudication process was complex and lengthy. It resulted in a decision being issued by the Adjudicator on 25 June 2004. It appears that in that decision the claims of Mowlem plc were largely rejected by the Adjudicator. He did award Mowlem the sum of £85,509.20 plus VAT, which has been paid by Scrabster to Mowlem plc.

[4] Mowlem plc were dissatisfied with the Adjudicator's decision. By letter to Scrabster dated 15 September 2004, 6/9 of process, Mowlem plc, through their solicitors, served a notice described as a Notice of Arbitration, referring "the dispute" to arbitration. The Notice was received by Scrabster on or about 16 September 2004. The present litigations are concerned with its validity or otherwise.

[5] In Action No.1, Scrabster seek a declarator that the Notice was invalid and of no effect. They also seek a declarator that the Adjudicator's final decision is final and binding as between the parties. They, furthermore, seek interdict of Mowlem plc or anybody acting on their behalf from taking steps which are inconsistent with the Adjudicator's decision being final and binding. Action No.2, in which Mowlem plc are the pursuers and Scrabster are the defenders, is the counterpart of the first action. In it Mowlem plc seek a declarator that the Notice of Arbitration was valid.

[6] The basis of Scrabster's attack on the validity of the Notice of Arbitration is that it failed to comply with the provisions of Article 1 of the Scottish Arbitration Code. Scrabster's averments in Action No.1, in Article 9 of Condescendence, are, in that respect, to the following effect:
"The said notice is invalid and of no effect. It fails to comply with the provisions of Article 1.3(a), (c), (d), (e) and (g). In particular, there is no statement of the defenders' claim; the nature of the claim, the sums claimed, and the pursuers' defence, of which the defenders must be aware having regard to the exhaustive nature of the adjudication; the relief or remedy sought is not included; the Notice does not include any demand that any matter be referred to arbitration; the Notice does not include a proposal by the defenders of the name and address of an Arbitrator. By failing to propose an Arbitrator, the pursuers have been deprived of their opportunity under Article 1.4(d) to propose candidates. The Code provides no mechanism for the appointment of an Arbitrator where a claimant, such as the defenders, fails to include a proposal of the name of an Arbitrator. In these circumstances, the Notice of Arbitration is invalid and of no effect."

As I have already noted, both of these actions came before me for debate. They did so on the parties' respective pleas as to relevancy.

Scrabster's Submissions

[7] In opening his submissions for Scrabster, Mr Reid, Q.C., referred me to the full terms of the Notice in question, 6/9 of process. It is in the form of a letter from MacRoberts, solicitors acting for Mowlem plc. It is headed, above the particulars of the addressee, "Notice of Arbitration". The text of the letter itself then has a heading, which is in the following terms:

"**Notice of Arbitration**
Mowlem plc (trading as Mowlem Marine)
Scrabster Harbour Trust
Scrabster Harbour - New Ferry Berth"

The text of the letter then bears to set out, among other things, the terms of the parties' contract and a summary of the dispute between the parties. At p.2, it continues as follows:

"By Notice of Dispute dated 14 September 2004 we gave notice for and on behalf of our clients that a dispute had arisen in respect of:

1. *The matters which were the subject of the Notice of Dissatisfaction dated 6 August 2004 and*
2. *The matters which were included within the Adjudicator's Final Decision dated 25 June 2004.*

For and on behalf of our clients, Mowlem plc, we hereby give this Notice of Arbitration in accordance with clause 66(9) in respect of the following disputes:

1. *(a) Sums of money and extensions of time due to our clients following their Payment Application No.20 (renumbered by the Engineer as No.21) submitted by letter dated 16 July 2003 including the list of addendum items and the Engineers draft Payment Certificate No.21 and revised version of the application against which the draft Certificate was prepared, issued by the Engineer's letter of 24 July 2003, confirmed by the Engineer's Payment Certificate No.21 issued by faxed letter dated 31 July 2003*
   (b) The Engineer's notification in terms of clause 44(3) that our clients were not entitled to an extension of time for completion as notified in the Engineer's letter dated 28 August 2002;
   (c) the Engineer's decision in terms of clause 44(2) namely the Engineer's interim assessment of Extension of Time of 15 days issued by letter dated 11 September 2003 and;
   (d) the deduction of liquidated damages.
2. *The Adjudicator's Final Decision related to the following matters arising out of Interim Payment Certificate 21:-*

(a) our client's entitlement to an Interim Extension of Time in respect of events up to and including 22 March 2003
(b) our client's entitlement to repayment of Liquidated Damages deducted
(c) our client's claim related to their Interim Extension of Time request - Addendum Item 1
(d) our client's claim for interest on Liquidated Damages - Addendum Item 3
(e) our client's claim related to Additional Painting and Clutching Variation - Addendum Item 4.02"

[8] Senior counsel for Scrabster said that the present dispute was not concerned with construing the terms of that letter. It was concerned with whether its contents complied with the Conditions of Contract so that it was a valid Notice of Arbitration under that Contract. Senior counsel then proceeded to take the court through the relevant contractual conditions. It has been seen that the basic contractual conditions are the ICE Conditions, Fifth Edition as revised and amended. Clauses 66 and 67 deals with contractual disputes in relation to works which are situated in Scotland. The standard conditions were amended in 1998 to take into account of the availability of the new form of dispute resolution, namely adjudication. New provisions, Clause 66(1) - (12) were inserted to provide for settlement of disputes by adjudication. New Clause 66(9) and (10) were in their original form in the following terms:

"(9) (a) All disputes arising under or in connection with the Contract or the carrying out of the Works 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 Clause 66(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.

(10) (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 of being of the Institution of Civil Engineers.

(c) If an arbitrator declines the appointment or after appointment is removed by order of a competent court or is incapable of acting or dies and the parties do not within one month of the vacancy arising fill the vacancy then either party may apply to the President for the time being of the Institution of Civil Engineers to appoint another arbitrator to fill the vacancy.

(d) In any case where the President for the time being of the Institution of Civil Engineers is not able to exercise the functions conferred on him by this Clause, the said functions shall be exercised on his behalf by a Vice-President for the time being of the said Institution."

The Scottish Arbitration Code, for use in domestic and international arbitration, was promulgated in 1999 (6/4 of process). In the light of it having been promulgated, certain amendments were made to the ICE Conditions of Contract, Fifth Edition. These amendments are lodged as 6/3 of process. In the Explanatory Note to the amendments, it is stated as follows:

"The ICE's Arbitration Procedure (1983) was revised in the light of the Arbitration Act 1996. As that Act does not apply in Scotland, the companion ICE's Arbitration Procedure (Scotland) (1983) continued in force for arbitrations in Scotland. The Scottish Arbitration Code 1999" was prepared by the Scottish Council for International Arbitration, the Chartered Institute of Arbitrators (Scottish Branch) and the Scottish Building Contract Committee pending future legislation in Scotland by the devolved Assembly. The Code has been accepted generally in Scotland as the authoritative document for the conduct of Scottish arbitrations.

Following publication of the Code, the Sponsoring Bodies of the ICE Conditions of Contract had agreed that the Code should be used for ICE arbitrations in Scotland. Accordingly, the ICE "Arbitration Procedure (Scotland) (1983)" has now been withdrawn and, in its place, the 1999 Code will apply as modified by the ICE's new "Appendix (2001) to the Scottish Arbitration Code 1999" that is published separately".

[9] A copy of the Appendix (2001) referred to, is lodged as 6/5 of process. The amendments to the Code, *inter alia*, deleted the existing Clause 66(10) and substituted it for the following:

"66(10)(a) The arbitral tribunal shall be appointed by agreement of the parties.

(b) Failing agreement of the parties as aforesaid at sub-clause (a) above the following shall apply.

(i) Reference at Articles 3.5, 3.6, 3.7, 3.8 and 6.2 of the Code to the Chairman of the Institute of Arbitrators (Scottish Branch) and to the Chairman of the Scottish Council for International Arbitration shall be deemed to be a reference to the President of the Institution of Civil Engineers as defined at (ii) below;

(ii) 'President' means the President for the time being of the Institution of Civil Engineers or any Vice-President acting on his behalf or such other person as may have been nominated in the arbitration agreement to appoint the arbitrator in default of agreement between the parties."

The existing Clauses 67(1) and (2) were replaced with the following:

"Application to Scotland

67(1) If the Works are situated in Scotland (and unless the Contract otherwise provides) the Contract shall in all respects be construed and operate as a Scottish contract and shall be interpreted in accordance with Scots Law and the provisions of sub-clause (2) of this Clause shall apply.

67(2) In the application of these Conditions and in particular Clause 66 thereof

(a) any reference to arbitration under these Conditions shall be conducted in accordance with the law of Scotland 'The Scottish Arbitration Code 1999' prepared by the Scottish Council for International Arbitration the Chartered Institute of Arbitrators (Scottish Branch) and the Scottish Building Contract Committee together with the ICE Appendix (2001) thereto or any amendment to or modification of the Appendix being in force at the time of appointment of the arbitrator. Such an Arbitrator shall have full power to open up review and revise any decision opinion in instruction direction certificate or valuation of the Employer's Representative or an adjudicator

(b) for any reference to the 'Notice to Refer' there shall be substituted reference to the 'Notice of Arbitration'."

[10] The basic submission of senior counsel for Scrabster was that, in the foregoing way, the parties had agreed to structure their contractual arrangements in such a way that compliance with the contractual provisions regarding arbitration were mandatory. While it was accepted that 6/9 was a Notice in writing and had been delivered properly, it had missing from it reference to matters which, by virtue of the parties' agreement that the Scottish Arbitration Code should apply, were mandatory if it was to be a valid Notice. In particular, the requirements of Articles 1.3(a), (c), (d), (e) and (g) had simply been ignored or overlooked. When it was pointed out to senior counsel for Scrabster that the Appendix 2001, 6/5 of process, contained a sample Notice of Arbitration designed to be used in relation to the Code which did not specify the matters referred to in Article 1, his reply was that it was not intended as a guidance to the validity of any Notice and had no relevance for the present dispute. It was a feature of senior counsel's submissions that, at first, at least, he repeatedly referred to the need for Mowlem plc to have "adequately" complied with the provisions of the Code in respect of their Notice, rather than that they should have strictly complied with it. It may have been that the expression "adequately" was employed, at first, because senior counsel for Scrabster did find it difficult to suggest what materiality some of the missing items had, or to put the matter another way, what possible prejudice Scrabster could have suffered because the strict letter of those provisions had not been complied with. In due course, however, senior counsel, as I understood him, periled his position on the proposition that there had to be absolute and strict compliance with the provisions of the Code if the Notice was to be valid.

[11] Senior counsel then referred me to certain authorities. In the first place I was referred to the case of ***Muir Construction Ltd* v *Hamley Ltd*** 1990 S.L.T. 830. In that case contractors were employed to carry out certain works under the JCT Standard Form of Building Contract (1980 Edition). The contract provided for service of any notice of termination of the contract to be by registered post or by recorded delivery. The contractor served a warning notice on the employers seeking payment under an *interim* certificate and thereafter, no payment having been made, purported to terminate the contract by hand delivery of a notice of determination. The employer argued that the service of the notice by hand delivery, was invalid and of no effect. That argument found favour with the Lord Ordinary, Lord Prosser. At p.833J-K his Lordship said:

"With some hesitation, I have come to the view that in the present case the notice was rendered invalid by the failure to send it by registered post or recorded delivery.... I have no doubt that the contract must be construed in a

commonsense business way. I am not however satisfied that there is anything contrary to commonsense, or anything inconsistent with a business approach, in concluding that precise words in a carefully structured provision are intended by the parties to have a precise effect in a carefully structured procedure."

At a later passage in his Opinion, at p.834G-H, his Lordship continued:
"Having regard to the origin, grammar and terms of the present provision, I would find it wholly unnatural to regard it as merely some sort of aide memoire for the person exercising the power, included only in his interests, and intended to leave him free to adopt other methods if he wanted to take the risk of a subsequent argument about receipt. In operating these important and somewhat complex provisions, I see nothing unduly demanding in expecting that the contractor or those acting for him will have the terms of cl.28 in front of them, and will assume that cutting corners is dangerous. On the whole matter, I see the required formality as intentional, binding, and useful to both parties. If written notice is all that was required, that could easily have been said, and any unilateral interest in recorded postage left of the party choosing to determine, and how to determine, his employment."

Senior counsel then referred me to the case of ***Fernandez* v *McDonald*** [2004] 1 W.L.R. 1027. That case was concerned with whether or not, a notice given by a landlord to a tenant that he required possession of the leased subjects, complied with certain requirements of section 21(4)(a) of the Housing Act 1988. The Court of Appeal held that it did not and were not persuaded that the notice in question being substantially to the same effect as was provided for by the Statutory Provision, was effective. In the context of the law of England, in respect of the serving of notices provided for under Statute, Hale L.J., as she then was, at p.1032-1033 approved what Chadwick L.J. had said in the case of ***Burman* v *Mount Cook Land*** *Ltd* [2002] Ch.256. In that last mentioned case, Chadwick L.J. had said that the correct approach, in relation to statutory notices, was to ask the question, is the notice a valid one for the purposes of satisfying the relevant statutory provisions? His Lordship also said that that was the correct approach not only for notices served under statutes but also notices served under contractual provisions such as those commonly found in leases. Senior counsel for Scrabster then referred me to some further passages from the judgment of Chadwick L.J. in the case of ***Burman*** and to the reference in that case (at p.267) to a *dictum* of Lord Hoffmann in the case of ***Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd*** [1997] A.C. 749 at 776. The *dictum*, in question, was pronounced in the context of a case involving the giving of a notice under a lease. The *dictum* was to the following effect:
"If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."

That *dictum*, it was submitted, supported Scrabster's argument that when the parties had provided for precise requirements to be met in terms of their agreement before any particular act was to be effective, then those requirements had to met. If they were not met, the act in question was ineffective. Senior counsel submitted that the absence in the Notice of Arbitration in the instant case, of the particulars referred to in paras.(a), (c), (d), (e) and (g) and of Article 1 of the Arbitration Code, meant that the proceedings in relation to arbitration could not be followed through as had been envisaged. There was some particular and practical importance, at least, about the absence of the provision in relation to the appointment of the Arbiter. Clause 66 was designed to cover every matter once arbitration was sought. The importance of the obligation to refer under the ICE Conditions was highlighted by the case of ***Douglas Milne Ltd* v *Borders Regional Council*** 1990 S.L.T. 558. One of the questions in that case was whether the right to go to arbitration had prescribed. The Second Division held that the obligation to refer a dispute or difference to the contract engineer had prescribed and, accordingly, that if the obligation to refer to the engineer had prescribed, the right to go to arbitration was no longer available, see Lord Justice Clerk Ross at p.561B-C. By analogy of reasoning, in the present case, not only had the Notice of Arbitration to be served timeously but it had to be served in accordance with the terms of the Contract.

Mowlem plc's Submissions

[12] In reply, senior counsel for Mowlem sought dismissal of Action No.1 and decree in Action No.2.

[13] In the first place, it was contended that Clause 67(2), of the parties' Contract, properly construed, did not apply to the style or format of a Notice of Arbitration. It referred only to the conduct of an arbitration, once initiated. That submission relied heavily, as will be seen, on the decision in the case of ***Christiani***

and Nielsen Ltd* v *Birmingham City Council 52 Con. L.R. 56. In the second place the submission, on behalf of Mowlem, was that, if the provisions of the Arbitration Code fell to be applied to the content of a Notice of Arbitration, then, while 6/9 of process, did not comply precisely with what was specified in the Code, it did to a sufficient extent to render it valid.

[14] Senior counsel then proceeded to refer me to the immediate background to the serving of the Notice of Arbitration. In particular it was pointed out that the Notice of Arbitration came after Mowlem had sent a Notice of Dispute, after the Adjudicator's decision was issued. That Notice is 6/8 of process. It, in turn, was preceded by Mowlem plc sending a Notice of Dissatisfaction to the Engineer acting under the Contract. It had been considered that it was necessary, under the contractual provisions, to issue both of these notices as a pre-condition to requiring arbitration, having regard to the provisions of Clause 66(1), (2) and (3). Under reference to Clauses 66(5), (6) and (9)(a), senior counsel submitted that what was stipulated in the Contract with regard to notices, when there was a dispute, was that the notice should be in writing.

[15] Senior counsel then returned to his primary submission. In Article 1.1 of the Arbitration Code it is stated as follows: "The party commencing arbitration (the claimant) shall give to the other party (the Respondent) a Notice of Arbitration." Article 15 of the Code deals with what is described "conduct of proceedings generally". Clause 67(2) was concerned, it was submitted, only with the way in which an arbitration, once commenced, should be conducted not with how it might be initiated. That was what the wording of the provision said, *"any reference... shall be conducted"* (emphasis added). A similar distinction had been recognised in the ***Christiani*** case which dealt with a contract under the ICE Conditions. In that case the contractor wished to refer a dispute to Arbitration. Clause 66(3)(a) of the relevant ICE Conditions provided as follows:

"Where a Certificate of Completion for the whole of the Works has not been issued and (i) either the Employer or the Contractor be dissatisfied with any such decision of the Engineer, or.... then either the Employer or the Contractor may within 3 calendar months after receiving notice of such decision... refer the dispute or difference to the arbitration of a person to be agreed upon by the parties by giving notice to the other party."

Clause 66(5)(a) of the ICE Conditions provided as follows:

"Any reference to arbitration shall be conducted in accordance with the Institute of Civil Engineers' Arbitration Procedure (1983) or any amendment or modification thereof being in force at the time of the appointment of the arbitrator." (emphasis added)

The ICE Arbitration Procedure, in question, stated that

"The notice to refer shall the list the matters which the issuing party wishes to be referred to arbitration where Clause 66 of the ICE Conditions of Contract applies... The notice to refer shall also state the date when the matters listed therein were referred to the engineer for his decision under Clause 66(1) and the date on which the engineer gave his decision thereon or that he has failed to do so."

The contractor gave a notice designed to refer the dispute to arbitration, which did not fully comply with what was set out in the above quoted provision in the Arbitration Procedure. The contractor did give a later notice which fully complied with the requirements of the procedure, but that was more than three months after the relevant engineer's decision. The employer argued that there had been no effective reference of the dispute to the arbitrator. His Honour Judge John Hicks, Q.C., sitting in the Queen's Bench Division (official referee's business) held that failure to comply with the specific requirements of the Arbitration Procedure was not fatal to the effect of commencement of an arbitration. The judge's reasoning is set out at pps.60-62. In the first place, he said, at p.60:

"The first issue is whether there was a good notice to refer. It did not comply with r.1.2 of the procedure in one admitted respect and some other disputed respects. The admitted respect is that it did not give the date of decision - as it is expressed in r.1.2: 'The date on which the engineer gave his decision thereon'. That is simply omitted. The respects in which it is further alleged to be deficient - apart from some matters which are so trivial that I do not propose even to mention them, because they are clearly not such as would invalidate the notice - are first that the reference to the engineer's representative (who is a separately identified officer) was a mistake, in that the reference should have been to the engineer, although it is conceded that the date given for the submission to him is correct, that is to say that on that date it was submitted to the engineer".

It is to be noted that the judge appeared to accept that the omission of certain matters might be so unimportant as to give no basis, at all, for attacking the notice as being invalid. He did, however, then turn to what he identified as the "first and main question" which was "whether r.1.2 has to be complied with, and that turns on the terms of cl 66 of the contract, which I have read insofar as they are material." The judge continued:

"The point can be put in this way: does the incorporation of the arbitration procedure by cl 66(5) relate back to the notice to refer or does it apply only to the conduct of the reference once the arbitration has been commenced? One starts from the position that on its face cl 66(3) specifies what must be done to refer the matter to arbitration. It does not contain the detailed requirements of r.1.2 of the procedural rule and it is not, as I understand it, submitted that the notice failed to comply with cl 66(3)(b)."

The court then continued:

"The next point to be noted is what cl 66(5)(a) requires is that the reference shall be conducted in accordance with that procedure (my emphasis) and (counsel for the plaintiff) says that on the ordinary meaning of the word 'conducted' that relates to what happens during the arbitration, not what has to be done in order to commence it. In my view, that is a valid point. The weight to be given to it, as with all matters of construction, has to be considered in the whole context, but I would certainly accept that in the ordinary use of English 'conducted' has a meaning which approximates to the expression 'carried on' rather than including commencement."

Judge Hicks then turned to consider the arguments put forward by counsel for the employer. At p.61 he noted that counsel for the employer said:

"that one should pay attention to the word 'reference' because he says that in cl 66(3) the verb "refer" clearly relates not to the conduct of the matter once referred but to the act of referring, and that 'reference' in sub-cl (5)(a) prima facie bears the same meaning".

The judge explained that he was not impressed by that submission. He did so in the following way:

"*The verb 'refer' is clearly hardly capable of any meaning other than the specific act of referring, not to what happens afterwards. The noun 'reference' in this context of arbitration, however, is commonly used in one of two senses: either that act of referring, or the whole arbitration procedure which then ensues. If it is the former sense of the noun 'reference' that is intended then the corresponding verb seems to me naturally to be some such expression as 'made' - 'any reference to arbitration shall be made' - or 'notified'. The verb 'conducted' seems to me to be plainly referable to the second sense of the word 'reference'. If both were meant, as I think (counsel for the employer) was constrained to argue (because he can hardly submit that sub-cl (5)(a) relates only to the act of referring) then one would expect to see 'any reference to arbitration shall be made and conducted' or some such expression. So far, therefore, on the ordinary meaning of the words, I think that (counsel for the plaintiff's) submissions have force."*

The judge then continued:

"There is the further consideration that if the procedure were to apply to the act of referring as well as to the subsequent conduct of the arbitration, then if that were not dealt with by some phrase as I have suggested in sub-cl (5)(a) ('made and conducted') the matter could even more simply and plainly have been dealt with in sub-cl (3) itself by adding sufficient words after 'giving notice to the other party' in such terms as 'being a notice complying with the Civil Engineers' arbitration procedure'".

At p.62 the judge added:

"There is a further and final consideration in support of the plaintiff's construction in my view, and that is that this is a practical document to be put into effect by practical people, not by lawyers searching through the documentation afterwards. In my view there is certainly a trap if the person administering this contract looks to cl 66 - and naturally and in my view correctly to cl 66(3) - to find out what he has to do to initiate an arbitration, and is given no indication at that point that the subsequent reference in sub-cl (5) to the conduct of the arbitration is going to put him at risk of serving an invalid notice by failing to refer to that procedure. It would be a natural and it seems to me entirely sensible expectation that one starts to look at the procedure once the arbitration is on foot."

[16] It has to be noted that in the ***Christiani*** case, the judge went on to decide that lest he be wrong in all of the reasoning to which I have just referred, he would exercise his power under section 27 of the English Arbitration Act 1950 to give an extension of time for the giving of notice. Such a power is not available in Scotland.

[17] Senior counsel for Mowlem plc invited me to follow the reasoning of the court in the *Christiani* case and apply it to the circumstances of the present case.

[18] Senior counsel for Mowlem plc then proceeded to make certain submissions in relation to his "*esto*" case. The Notice, 6/9 of process, contained, it was submitted, all that was necessary to let the other side know that arbitration was being sought and in relation to what it was being sought. Strict compliance with the requirement of Article 1.3(a), namely, that "the full names and addresses of the parties (including telephone, facsimile, telex numbers and email addresses if known) should be given, was immaterial in the present case when the pursuers had been in regular correspondence in relation to the dispute over a long period of time and had been engaged in a lengthy adjudication process in relation thereto. The same observation could be made in relation to literal compliance with the requirements of Article 1.1:3(c), i.e. the provision of "a short statement of the Claimant's claim, including the nature of the claim, the sum or sums claimed, and the Respondent's defence if known to the Claimant". Once again the history of the matter rendered strict compliance with the wording of that provision *otiose*. The claim was that the adjudicator's decision was wrong and what his client sought from the arbiter was what they sought from the adjudicator. Senior counsel for Mowlem plc contended that the content of 6/9 of process, properly read, referred only to the matters which were before the adjudicator for his determination. As far as the provisions of Article 1.2(d) were concerned, the relief or remedy sought was what was sought before the adjudicator. The express words in terms of Article 1.3(e) i.e. "a demand that the matter be referred to Arbitration" were *otiose* in the context. In respect of the provisions of Article 1.3(g) namely that the Notice should include the name and other particulars of a proposed arbiter, senior counsel made the following submission. While in some cases that provision might have a practical purpose, in the present case the position was dealt with in effect by other provisions of the Contract. Clause 66(1)(a) provided that "the arbitral tribunal shall be appointed by agreement of the parties". That provision really rendered the provisions of Article 1(3)(g) of the Arbitration Code empty of content since ultimately there had to be agreement between the parties regarding who the arbiter was to be. Under reference to certain *dicta* in the case of *Mannai*, senior counsel submitted that, in any event, strict compliance with the matters specified in Article 1.3 of the Arbitration Code was not indispensable for a Notice of Arbitration to be valid. The contractual scheme was that for an adjudicator's decision to become final and binding there had to be inaction by the disappointed party. A commercially sensible approach to the contractual scheme should be adopted. A notice, in writing, from the disappointed party that he wished the dispute, which was before the adjudicator, should now be the subject of arbitration, should be sufficient to prevent the adjudicator's decision becoming final and binding.

Scrabster's Response

[19] In reply, senior counsel for Scrabster contended that the matters or issues set out in 6/9 of process, did not entirely overlap with the issues and matters before the adjudicator. While the engineer's certificate No.21 was referred to in 6/9 of process, not all of the matters covered by that certificate were before the adjudicator. It was not accepted that the recipient of 6/9 of process would have considered that what was to be referred to arbitration was simply the adjudicator's decision.

[20] The decision in the case of ***Christiani,*** it was submitted, was either distinguishable from the present case, or was wrong. The judge in ***Christiani*** had overlooked a cardinal principle of contract law, namely that in construing the provisions of a contract, one had to look at the contract as a whole. The judge had focused simply on one part of the provisions in the relevant contract concerning arbitration where, at p.62, he referred to a trap where a person administering the contract looked only at Clause 66. Clause 66 in the present contract had to be read along with Clauses 67 and 68. Moreover, the court's analysis, in ***Christiani,*** of the phrase "the reference shall be conducted" was unsound. The judge had indulged in an over-technical exercise in semantics. The commercially sensible construction of the phrase was that it referred to the whole of the arbitration procedure *"from beginning to end"*. The preliminary procedure involving the service of a notice was an important part of the arbitration process. The ***Christiani*** case was, in any event, distinguishable in that the judge ultimately decided to grant an extension of time under the relevant English legislation. That meant that his reasoning was not necessary for the disposal of the case.

Decision

[21] I am satisfied that 6/9 of process, having regard to its background, as I have set out above, made it clear to Scrabster that Mowlem plc were dissatisfied with the adjudicator's decision and that they wished the matters which were the subject of his decision, and possibly other matters, referred to arbitration. *Prima facie* it was a notice in writing to refer the dispute to arbitration in terms of Clause 66(9) of the Contract. It was served within three months of the adjudicator giving his decision which otherwise would have been final as well as binding.

[22] The sole question is whether the absence from that notice of particulars set out in Article 1 of the Arbitration Code, in the section which is headed "Commencement of Arbitration", prevents it from being a Notice of Arbitration in terms of the parties' contract, which had the effect of preventing the adjudicator's decision becoming final and binding. Senior counsel for Scrabster had considerable difficulty in suggesting what prejudice would be suffered by his clients because of the absence of express reference to most of the matters in question. He, as noted, vacillated between submitting that there had to be "adequate" compliance with the provisions of Article 1 of the Code, on the one hand, and on, the other hand, that there had to be "strict" compliance therewith. I am bound to say that, in the context of these commercial actions, relating to a commercial contract, and having regard to the history of matters between the parties, to find that the absence of the particulars in question from the very detailed Note, 6/9 of process, rendered it ineffective as preventing the adjudicator's decision becoming final and binding in terms of Clause 66 would not, at first sight at least, be an attractive result. Whether or not it is the correct result, of course, depends on what the parties' contractual intentions were, as evidenced by the contractual terms they employed. Scrabster's argument turns on the wording inserted as new Clause 67(2) by the amendment *"reference ICE/Scot Arb/April 2001"*, 6/3 of process. Prior to that amendment, there appears to be no question but that a notice in terms of 6/9 of process would have been effective for the purpose of preventing the adjudicator's decision becoming final and binding. To succeed, Scrabster must at least persuade the court that the words *"any reference to Arbitration under these Conditions shall be conducted in accordance with... 'the Scottish Arbitration Code' etc."* in Clause 67(2) meant that the Notice of Arbitration required to be strictly in compliance with Article 1.1 of the Arbitration Code. In particular, Scrabster's argument depends on the court being satisfied that the words "conducted in accordance with the Scottish Arbitration Code" had that effect. As has been seen, that wording, save for the reference to the Scottish Arbitration Code 1999, was otherwise identical to the wording in Condition 66(5)(a) of the contractual conditions considered by the court in ***Christiani,*** with the substitution of the words *"Civil Engineer's Arbitration Procedure 1983"*. I have reached the conclusion that the reasoning of the learned judge, in that last mentioned case, to the effect that the wording should be construed as referring to the carrying on of the arbitration, rather than any prescribed procedure as to how it should be commenced, is sound. To "conduct" is defined in the Shorter Oxford English Dictionary as, *inter alia*, *"to carry on a process"*. I agree with the judge's reasoning, on this point, in its entirety but, for myself, I am particularly persuaded by the distinction drawn by him, at p.61 of his judgment between the expression "a reference conducted" and "a reference made and conducted". If those who compiled the relevant conditions of contract had intended that a Notice of Arbitration, designed to prevent the Adjudicator's decision becoming final and binding, would not have such effect because of some failure in expression of the sort argued for in the present case, it seems to me that they could, and should, have made this clear by, for example, inserting in Clause 66(9)(a) after the words *"Notice of Arbitration"*, the words *"being a Notice complying with the provisions of the Scottish Arbitration Code"*. They chose not to do so, which I considered to be particularly significant since the decision in ***Christiani,*** which dealt with essentially the same point, arising in the same basic set of standard conditions, formulated by the same professional body, had been decided and reported as recently as 1994. Had the compilers of the standard conditions not wished the wording in the Scottish version of the conditions, as amended, to have the restricted effect placed on the equivalent phrase by the court in ***Christiani*** then, it seems to me, they should have made that clear and that they did not do so persuades me that they were content with the judge's reasoning in ***Christiani.***

[23] There is further support, it seems to me, for the argument that the compilers of the 2001 amendment did not intend that its effect would be that a Notice of Arbitration to be valid should comply strictly with the provisions of Article 1 of the Arbitration Code. Clause 67(2) provides that any reference to Arbitration shall be conducted, not only in accordance with the Scottish Arbitration Code, but also with *"the ICE Appendix (2001) thereto or any amendment or modification of the Appendix being in force at the time of the appointment of the arbitrator"*. The relevant Appendix in relation to the contract with which I am concerned is lodged as 6/5 of process. Clause 1.1 of the Appendix states under the heading "Commencement and Procedural":
"If a contract does not define when a dispute or difference shall arise, then a dispute or difference shall be deemed to arise when a claim or assertion made by one Party is rejected by the other Party and that rejection is not accepted or no response to the claim is received within a period of 28 days. Subject only to the due observance of any condition precedent in the Contract or the Arbitration agreement, either party may then invoke arbitration by serving a Notice of Arbitration on the other party."

There is included in the Appendix a sample of a Notice of Arbitration. It is in the following terms:

"The Institution of Civil Engineers Appendix (2001) to the Scottish Arbitration Code 1999
Notice of Arbitration
To: (Name of Respondent)
(Address of Respondent)
Date:

NOTICE OF ARBITRATION
(Contact Name)
We consider the following dispute(s) or difference(s) have arisen between us:
We now give notice that we require the(se) dispute(s) or difference(s) to be referred to arbitration.
Yours faithfully
For and on behalf of
(Claimant's Name)."

The Appendix and the sample Notice of Arbitration were produced by the body who were responsible for producing the standard conditions and relevant amendments applicable in this case. It is perfectly clear from the style of Notice of Arbitration just referred to that they did not consider, or, in my judgment, intend, that the Notice of Arbitration to be valid in terms of the relevant ICE contractual conditions, should comply slavishly, if at all, with the provisions of Article 1 of the Scottish Arbitration Code. Persons administering the contract who saw that style being put forward as part of the Appendix could certainly have been lured into a trap if, notwithstanding that the style does not require as part of its content the provisions of Article 1.3 of the Arbitration Code, subsequently discovered that they were in fact obligatory, if the Notice Arbitration was to be valid. For these reasons I am satisfied that the Notice 6/9 of process was a valid Notice of Arbitration in terms of the contract and, in particular, in terms of Clause 66(9).

[24] In the circumstances I do not require to reach any conclusion with regard to the "*esto*" position adopted on behalf of Mowlem plc and the various authorities relied upon by Scrabster regarding the situations where strict compliance in relation to statutory or contractual notices is demanded. Having said that, it seems to me that there may be a real question as to whether or not the provisions of Article 1.3 of the Scottish Arbitration Code should be regarded as mandatory, in every case, as opposed to being directory in their effect.

[25] In the whole circumstances I shall dismiss Action No.1 at the instance of Scrabster as being irrelevant and grant decree of declarator in terms of the first conclusion in Action No.2 at the instance of Mowlem plc.

Pursuers (Scrabster): Reid, Q.C.; Burness
Defenders (Mowlem): Davidson, Q.C.; MacRoberts