Before Lord President; Lady Cosgrove; Sir David Edward, Q.C. First Division, Inner House, Court of Session. 22nd February 2006.

OPINION OF THE COURT : delivered by Temporary Judge Sir David Edward, Q.C.

Introduction

[1] These are Reclaiming Motions at the instance of Scrabster Harbour Trust ("Scrabster") against interlocutors dated 23 March 2005 pronounced by the Lord Ordinary in two commercial actions, one by Scrabster against Mowlem Plc (trading as Mowlem Marine) ("Mowlem"), and the other by Mowlem against Scrabster.

[2] The actions arise out a contract between the parties which was subject to the ICE Conditions of Contract (5th Edition) as amended by ICE/5th Edition/HGCR/March 1998 and ICE/ScotArb/April 2001.

[3] The issue in both cases is the same - namely, whether a letter dated 15 September 2004 from Mowlem to Scrabster was a valid notice requiring arbitration in relation to certain disputes which had been the subject of a decision by an adjudicator. In one action Scrabster seek declarator that the purported notice was invalid and of no effect and that the decision of the adjudicator was final and binding. In the other Mowlem seek declarator that the notice was valid.

[4] Scrabster contend that the letter of 15 September 2004 was invalid as a notice requiring arbitration because it did not comply in a number of respects with the requirements of Article 1:3 of the Scottish Arbitration Code ("the Code"). In particular, it did not comply with the requirements of Article 1:3(g) of the Code in that it did not propose the name of an arbiter. (The Code uses the term 'arbitrator' rather than 'arbiter', presumably because it is intended for use outside as well as within Scotland.) Other aspects of non-compliance are raised in the pleadings but these were not pressed before us as going to invalidity.

[5] Scrabster contend that compliance with the Code, including Article 1:3, was made a condition of the contract by Clause 67(2)(a) of the ICE Conditions as amended, and that the consequence of non-compliance was to deprive them of the opportunity to put into motion the subsequent provisions of the Code in relation to the appointment of an arbiter.

[6] Mowlem contend, first, that Clause 67(2)(a) did not have the effect of incorporating Article 1:3 into the contract, but second, *esto* it was so incorporated, compliance with all the requirements of Article 1:3 was not mandatory, so that non-compliance was not such as to render the letter of 15 September 2004 invalid as a notice requiring arbitration.

[7] The Lord Ordinary dismissed the action at the instance of Scrabster and granted decree of declarator as sought in the action at the instance of Mowlem. The Lord Ordinary's Opinion is reported at 2005 SLT 499.

[8] Scrabster moved us to recall the Lord Ordinary's interlocutor, to grant them the declarator they seek and to dismiss the action at the instance of Mowlem.

[9] The terms of Mowlem's letter of 15 September 2004 are set out in paragraph 7 of the Lord Ordinary's Opinion and need not be repeated here.

The Contract between the Parties

[10] The contract between the parties provided, so far as material, as follows:- *"The Conditions of Contract referred to in the Tender shall be the Conditions of Contract (Fifth Edition) prepared by the Institution of Civil Engineers ... dated June 1973 (Revised January 1979) ... including ... ICE/5th Edition/HGCR/March 1998; ... ICE/ScotArb/April 2001, ... with addendum's(sic), alterations and special conditions as shown in Part 2 below and these conditions shall be deemed to form and shall be read and construed as part of this Contract".*

[11] The only relevant "***addendum, alteration or special condition***" provided as follows:-
*"**Clause 67 APPLICATION TO SCOTLAND***
Sub-Clause (1) is deleted and substituted by the following:-
If the Works are situated in Scotland the Contract shall in all respects be construed and operate as a Scottish contract and shall be interpreted in accordance with Scots law and where any dispute in connection with the

Contract is to be determined by a Court that Court shall be either the Court of Sessions (sic), Edinburgh or a Sheriff Court in Scotland".

[12] The relevant conditions of contract so incorporated can be set out in consolidated fashion as follows:-

*"**Clause 66(9)***

Arbitration

(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 a Notice of Arbitration) 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 of Arbitration must be served within three months of the giving of the decision otherwise it shall be final as well as binding.

Clause 66(10)

Appointment of arbitrator

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

President or Vice- President to act

(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.

Clause 66(11)

Arbitration - procedure and powers

(a) Neither party shall be limited in the arbitration to the evidence or arguments put to the Engineer or to any adjudicator pursuant to Clause 66 (2) or 66(6) respectively.

(b) Unless the parties otherwise agree in writing any reference to arbitration may proceed notwithstanding that the Works are not then complete or alleged to be complete.

Clause 67

(1) If the Works are situated in Scotland the Contract shall in all respects be construed and operate as a Scottish contract and shall be interpreted in accordance with Scots law and where any dispute in connection with the Contract is to be determined by a Court that Court shall be either the Court of Sessions (sic), Edinburgh or a Sheriff Court in Scotland.

(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 arbitrator shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer or an adjudicator.

(b)-(d) [Effect has been given to these sub-clauses above]

(e) notwithstanding any of the other provisions of these Conditions or of the Code (including in particular Articles 22.7 and 22.8) nothing therein shall exclude or be construed as excluding recourse to the Court of Session under Section 3 of the Administration of Justice of (Scotland) Act 1972

(f) [not relevant here]

(g) [not relevant here]

(h) The application of Articles 1.6 1.8 1.9 and 1.10 of the Scottish Arbitration Code 1999 shall be subject to the provisions of Clause 66(2) of the Contract unless the Arbitrator otherwise directs. [Note: the effect of this provision is that disputes giving rise to counterclaims must first have been submitted for decision by the Engineer.]".

The Scottish Arbitration Code

[13] Article 1 of the Code provides, so far as material, as follows:-

*"**Commencement of Arbitration***

1:1 The party commencing arbitration (the Claimant) shall give to the other party (the Respondent) a Notice of Arbitration.

1:2 Arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Respondent.

1:3 The Notice of Arbitration shall include the following:

(a) The full names and addresses of the parties (including telephone, facsimile, telex numbers and e-mail addresses if known).

(b) A reference to the arbitration clause or the separate arbitration agreement that is involved.

(c) 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.

(d) The relief or remedy sought.

(e) A demand that the matter be referred to arbitration.

(f) If the arbitration agreement calls for each party to appoint an Arbitrator, the name and address (and telephone, facsimile, telex number and e-mail address if known) of the Arbitrator nominated by the Claimant.

(g) If the arbitration agreement does not call for each party to appoint an Arbitrator, a proposal by the Claimant of the name of an Arbitrator with his full name and address (and his telephone, facsimile, telex number and e-mail address if known).

(h) Within thirty days after receipt of the Notice of Arbitration the Respondent shall deliver to the Claimant a Notice of Defence. Failure to deliver a Notice of Defence shall not delay the arbitration. If there is such a failure all claims set forth in the Notice of Arbitration shall be deemed to be denied.

1:4 The Notice of Defence shall include:-

(a) Any comment on article 1:3(a) (b) or (e) that the Respondent considers appropriate.

(b) A short statement of the Respondent's defence.

(c) If the arbitration agreement calls for each party to appoint an Arbitrator the name and address (and telephone, facsimile, telex and e-mail address if known) of the Arbitrator nominated by the Respondent.

(d) If the arbitration agreement does not call for each party to appoint an Arbitrator, then the Respondent shall intimate whether he accepts the Arbitrator nominated by the Claimant and, if he does not accept him, the names and addresses of the candidates whom the Respondent proposes.

[NOTE: There is no Article 1:5]

1:6 The Respondent may include in the Notice of Defence any counterclaim within the scope of the arbitration clause. If so, the counterclaim in the Notice of Defence shall include those matters in Article 1:3 (b)(c)(d) and (e).

1:7 If a counterclaim is asserted in the Notice of Defence, within 30 days after its receipt, the Claimant shall deliver to the Respondent a reply to the counterclaim which shall include the same matters as provided for in the Notice of Defence in Article 1:5.

1:8 Failure by the Respondent to include a counterclaim in the Notice of Defence shall not preclude the Respondent from making a counterclaim at a later stage of the proceedings, if the arbitral tribunal in its absolute discretion is prepared to permit it. Any such counterclaim shall include those matters in Article 1:3. (b)(c)(d) and (e).

1:9 If any party has been served with a Notice of Arbitration he may, at any time before the arbitral tribunal has been appointed, give Notice of Arbitration in respect of any other disputes which fall under the same

arbitration agreement. All disputes identified in such Notice of Arbitration shall be consolidated within the same arbitral proceedings.

1:10 After an arbitral tribunal has been appointed, either party may give a further Notice of Arbitration to the other, and to the arbitral tribunal, referring any additional dispute which falls under the same arbitration agreement to the arbitral tribunal proceedings and, whether or not the other party consents to that other dispute being referred to the proceedings, the arbitral tribunal may in its absolute discretion order that the additional dispute should be referred to and consolidated within those same proceedings or that it should not be so referred and consolidated."

[14] Article 3 of the Code provides, so far as material, as follows:-

*"**Constitution of the Arbitral Tribunal, Number of Arbitrators and Procedure for Appointment***

3:1 The expression "the Arbitral Tribunal" in this Code includes a sole Arbitrator or all Arbitrators where more than one. All references to an Arbitrator shall include the masculine and the feminine, and Arbitrator shall include Arbiter.

3:2 The parties are free to agree on the number of Arbitrators. If they have not agreed, a single Arbitrator shall be appointed.

3:3 If the parties have agreed that there shall be more than one Arbitrator and the Claimant has nominated an Arbitrator in accordance with Article 1:3(f) but the Respondent fails within thirty days of receipt of the Notice of Arbitration either to deliver a Notice of Defence at all, or to include in the Notice of Defence the name and address of another Arbitrator, the parties shall be deemed to have agreed on a single Arbitrator and the Arbitrator nominated by the Claimant shall be appointed as the sole Arbitrator.

3:4 If the parties have agreed that there shall be a single Arbitrator and the Claimant has proposed an Arbitrator under Article 1:3(g), and the Respondent does not intimate non-acceptance of that Arbitrator within thirty days of the Notice of Arbitration, then the Arbitrator proposed by the Claimant shall be appointed as the sole Arbitrator.

3:5 Where the parties have agreed a single Arbitrator be appointed and each has nominated an Arbitrator, they shall endeavour to agree on the single Arbitrator within thirty days of delivery of the Notice of Defence. If they cannot agree within that period either party may apply, in the case of a domestic dispute to the Chairman of the Chartered Institute of Arbitrators (Scottish Branch), and in the case of an international dispute to the Chairman of the Scottish Council for International Arbitration, to appoint the Arbitrator.

3:6 Where parties have agreed on an arbitral tribunal of three and each has appointed an Arbitrator then unless the parties have agreed on another method of appointment the party-appointed Arbitrators shall endeavour within thirty days of the delivery of the Notice of Defence to agree upon a third Arbitrator who shall be the chairman of the arbitral tribunal, or if the parties have so agreed shall act as oversman. If the party-appointed Arbitrators do not reach agreement within that time either party may apply in the case of a domestic dispute to the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) and in the case of an international dispute to the Chairman of the Scottish Council for International Arbitration, to appoint that third Arbitrator or oversman.

3:7 Where application has been made to the Chairman of the appropriate body to appoint an Arbitrator and that Chairman refuses or fails to make an appointment within thirty days of the application, either party may apply to the Court of Session, Scotland to appoint the Arbitrator.

3:8 Where the Chairman of the appropriate body is unavailable or unable to act, a Vice-Chairman may act in his place.

3:9 For the purposes of this Article the parties prorogate the exclusive jurisdiction of the Court of Session, Scotland.

[15] Other provisions of the Code are referred to in ICE/ScotArb/April 2001 - namely Article 6:2, relating to the replacement of an Arbitrator, and Articles 22:7 and 22:8, relating to recourse to the Courts.

The ICE Appendix (2001) to the Scottish Arbitration Code

[16] The ICE Appendix (2001) to the Code, Section 1.1 provides:

*"**Commencement of Arbitration***

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."

Annexed to the Appendix is a 'Sample' Notice of Arbitration in the following form:
"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 Lord Ordinary's Decision

[17] The Lord Ordinary's decision turns on an interpretation of Clause 67(2)(a) and, in particular, of the words *"any reference to arbitration under these Conditions shall be conducted in accordance with ...[the Code]".*

[18] Following Judge John Hicks, QC, sitting as an Official Referee in ***Christiani & Nielsen Ltd v Birmingham City Council*** (1994) 52 ConLR 56, the Lord Ordinary held that this wording should be construed as referring to the carrying on of the arbitration, rather than to any prescribed procedure as to ***how*** it should be commenced (2005 SLT at page 507 F-G). He reached this conclusion on the basis that the wording is, save for the reference to the Code, *"identical to the wording in condition 66(5)(a) of the contractual conditions considered by the court in* ***Christiani****"* (page 507F), and consequently that *"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 ... they should have made that clear"* (page 507J).

[19] The Lord Ordinary felt supported in this conclusion by the fact that the '***sample***' Notice of Arbitration in ICE Appendix (2001) (see paragraph 15 above) does not itself comply with Article 1:3 of the Code.

[20] In view of this conclusion, the Lord Ordinary did not consider it necessary to reach a conclusion on Mowlem's *esto* case, but said that there might be a real question as to whether or not the provisions of art 1:3 of the Code should be regarded as mandatory in every case, as opposed to being directory in their effect (page 508E).

Submissions of the Parties in the Inner House

[21] The submissions of the parties in the Inner House were very substantially the same as those advanced before the Lord Ordinary and fully summarised in his Opinion (paragraphs 7 to 20, 2005 SLT at pages 501H to 506L).

[22] Scrabster argued that the Lord Ordinary was wrong to base his judgment on the decision in ***Christiani.*** That case was wrongly decided and was in any event distinguishable. It had made only a fleeting appearance in the textbooks on building contracts.

[23] ***Christiani*** should be distinguished since, in the present case, the contract refers expressly to Articles of the Code that deal with matters anterior to the '***conduct***' of the arbitration (notably Clauses 66(10)(b)(i) and 67(2)(h)). The Code had been incorporated in the Conditions of Contract in its entirety, including the provisions of Article 1:3 prescribing the form of any Notice of Arbitration.

[24] Counsel for Scrabster again founded on *dicta* in the English cases cited to the Lord Ordinary (***Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd*** [1997] AC 749, ***Burman* v *Mount Cook Land Ltd*** [2002] Ch 256, and ***Fernandez* v *McDonald*** [2004] 1 WLR 1027) and the judgment of Lord Prosser in ***Muir***

Construction* v *Hambly 1990 SLT 830. These cases supported the proposition that, where the contract required a notice to comply with certain conditions or criteria, a notice that did not so comply was invalid. Counsel founded, in particular, on the *dictum* of Lord Hoffmann in ***Mannai*: *"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."*** ([1997] AC at page 776 A-B)

[25] In the present case, a Notice of Arbitration, to be valid, had to comply with the requirements of Article 1:3 of the Code, especially the requirement to propose the name of an arbiter. Without such a proposal the procedure for appointing an arbiter could not be set in motion, and Scrabster were consequently deprived of the opportunity to make a counter-proposal. The words *"The Notice of Arbitration shall include the following: ..."* were clear and unambiguous.

[26] Counsel for Scrabster submitted that it did not matter whether one viewed the issue as one of "strict" compliance, or of "adequate" compliance, since in at least one respect (Article 1:3(g)) it was indisputable that Mowlem had failed to comply with the provisions of the Code.

[27] Mowlem, for their part, argued that ***Christiani*** was correctly decided and the Lord Ordinary was right to follow it.

[28] But even if that were not so, and Article 1:3 of the Code had been fully incorporated in the Conditions of Contract, strict compliance with the provisions of Article 1:3 was not essential to a valid Notice of Arbitration. It would be absurd, for example, to hold that a Notice of Arbitration was invalid because it failed to mention a telephone, fax or telex number or email address that could be shown to have been known to the Claimant (see Articles 1:3 (a) and (f)). Moreover, Article 1:3(h), although falling under the general prescription *"The Notice of Arbitration shall include..."*, related to matters subsequent to service of the Notice of Arbitration and could not therefore be included in it.

[29] The sample notice annexed to ICE Appendix (2201), which did not comply with the provisions of Article 1:3, showed that it was not intended that strict compliance with those provisions was mandatory.

[30] In the present case, the notice served by Mowlem complied with the requirements of Clause 66(9)(a) and was valid.

[31] Counsel for Mowlem did not seek to analyse the English decisions cited by counsel for Scrabster (see paragraph 24 above).

Decision

Was Article 1:3 of the Code incorporated in the Conditions of Contract?

[32] The contractual conditions at issue here are not a masterpiece of the draughtsman's art, and textual support can be found in them for the positions of both parties. In our opinion, however, the approach of the Lord Ordinary was unsound in that he proceeded on the view that the wording of Clause 67(2)(a) is, save for the reference to the Code, identical to the wording in the contractual condition considered by the court in ***Christiani*** and, consequently, that Clause 67(2)(a) must be given the same restricted effect.

[33] It is true that some of the words in Clause 67(2)(a) of the present contract are identical to those considered by Judge John Hicks in ***Christiani*,** but the interpretation of particular contractual terms depends on their context.

[34] In the context in which the words in question appear here, we find it impossible to hold, as the Lord Ordinary did, that they relate only to the *"carrying on of the arbitration, rather than any prescribed procedure as to how it should be commenced"*. In our opinion, Scrabster were well-founded in submitting that, since Clauses 66(10)(b)(i) and 67(2)(h) refer to Articles of the Code which relate to the appointment of the arbitrator, Clause 67(2)(a) cannot be given such a limited meaning. That being so, it is unnecessary to consider whether ***Christiani*** was correctly decided and we express no opinion on that question.

[35] In our opinion, the intention of the parties here was to incorporate the Code in its entirety, except as expressly provided otherwise, as a component of the Conditions of Contract. It does not follow, however, that the contract must be read as providing that a Notice of Arbitration must, in order to be valid, comply with all the provisions of Article 1:3 of the Code. The Code is only one component of the Conditions of Contract and must itself be interpreted in the context of the Conditions as a whole.

The cases relied on by Scrabster

[36] In interpreting the Code, counsel for Scrabster relied strongly on three English cases (***Mannai, Burman*** and ***Fernandez*** - cited at paragraph 24 above) and it is convenient to consider them at this stage. All three cases concerned the English law of landlord and tenant. Given the wide differences between English and Scots law in this field, we approach the task of interpreting these cases with diffidence.

[37] The issue ultimately before the House of Lords in ***Mannai*** was whether long-standing precedents relating to the service of notices between landlord and tenant (***Cadby* v *Martinez*** (1840) 11 A&E 720 and ***Hankey* v *Clavering*** [1942] 2 KB 326) should be overruled. The effect of those precedents was that an error as to date, however obvious, in a notice under a break clause in a lease was fatal to the validity of the notice. In ***Mannai,*** the tenant had served a notice specifying 12 January rather than 13 January.

[38] Lord Goff of Chieveley, with whom Lord Jauncey of Tulliechettle agreed, said that the question was whether "*a more relaxed approached [should] be adopted to the construction of notices of this kind"* ([1997] AC at page 760H). His conclusion was that *"At present, the applicable law is clear and well settled, and [counsel for the landlord] informed your Lordships that disputes were rare. In these circumstances, the change in the law now proposed would not, in my opinion, be justified."* (page 761G).

[39] The majority, however, held that ***Cadby*** and ***Hankey*** should be overruled and that (as summarised in the headnote) the construction of the notices had to be approached objectively, and the question was how a reasonable recipient would have understood them, bearing in mind their context. Each of their Lordships gave his own reasons for overruling ***Cadby*** and ***Hankey.***

[40] Lord Steyn said that *"There is no justification for placing notices under a break clause in leases in a unique category. Making due allowance for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licences and notices to complete ... To these examples may be added notices under charter parties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are 'sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate'."* (page 768 E-G).

(We were not referred to any Scottish authority, and we have found none, in which special significance or treatment has been accorded to notices served under "***contractual rights reserved***".)

[41] Dealing with ***Hankey,*** Lord Steyn said: "***Hankey* v *Clavering*** *was decided more than half a century ago. Since then there has been a shift from strict construction of commercial instruments to what is sometimes called purposive construction of such documents. Lord Diplock deprecated the use of that phrase in regard to the construction of private contracts as opposed to the construction of statutes. ... That is understandable. There are obvious differences between the processes of interpretation in regard to private contracts and public statutes. ... It is better to speak of a shift towards commercial interpretation. ...*

In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach Lord Greene MR's judgment in Hankey ... is rigid and formalistic. Nowadays one expects a notice to determine under a commercial lease to be interpreted not as a 'technical document' but in accordance with business common sense ... After all, there is no reason whatever why such a document must be drafted by a lawyer. Qualitatively, the notices are of the same type as notices under charter parties and contracts of affreightment. Such notices, even if they entail the exercise of important options, are habitually drafted by commercial men rather than lawyers. It would be a disservice to commercial practice to classify such notices as technical documents and to require them to be interpreted as such. Nowadays one must substitute for the rigid rule in Hankey ... the standard of a commercial construction." (pages 770E to 771 D)

[42] Lord Hoffmann took the decision in *Hankey* as his starting point, saying that *"Common sense cannot produce such a result: it must be the result of some rule of law. If so, what is that rule and is it correct?"* (page 774C)

Having analysed the reasons for the decision, he concluded that the rule of law in question was "*an old rule about the admissibility of extrinsic evidence to construe legal documents*". He went on to characterise this rule as "***extraordinary***" and "***not merely capricious but also, for reasons which I need not develop at length, incoherent***" (pages 776G, 777E and 778C).

[43] Lord Hoffmann's grounds for overruling ***Cadby*** and ***Hankey*** were that: *"In the case of commercial contracts, the restriction on the use of background has been quietly dropped. There are certain special kinds of evidence, such as previous negotiations and express declarations of intent, which for practical reasons which it is unnecessary to analyse, are inadmissible in aid of construction. ... But apart from these exceptions, commercial contracts are construed in the light of all the background which could reasonably have been expected to have been available to the parties in order to ascertain what would objectively have been understood to be their intention. ... Why, therefore should the rule for construction of notices be different from those for construction of contracts? There seems to me no answer to this question."* (page 779 F-H)

[44] It was in the context of his preliminary analysis of ***Hankey*** that Lord Hoffmann made the observation about notices on blue paper and pink paper on which counsel for Scrabster relied (see paragraph 24 above). That observation must be read in its context. Seeking to find an explanation for the decision in ***Hankey***, Lord Hoffmann said: *"I pass on to a second explanation which also seems to me inadequate. Lord Greene MR said ... that because such notices have unilateral operation, the conditions under which they may be served must be strictly complied with. I have already said that this principle is accepted on both sides. But, as an explanation of the method of construction used in Hankey ..., it begs the question. 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. But the condition in clause 7(13) related solely to the meaning which the notice had to communicate to the landlord. If compliance had to be judged by applying the ordinary techniques for interpreting communications, there was strict compliance. The notice clearly and unambiguously communicated the required message. To say that compliance must be strict does not explain why some other technique of interpretation is being used or what that is."* (page 776 A-C)

[45] Lord Hoffmann thus drew a distinction between

(i) a condition that is clear and unambiguous as it stands, requires no ***'interpretation'*** and, because it involves the unilateral exercise of a right to bring the contract to an end, calls for strict compliance according to its terms, and

(ii) a condition that leaves scope for interpretation and application *"in the light of all the background which could reasonably have been expected to have been available to the parties in order to ascertain what would objectively have been understood to be their intention"*.

We take leave to doubt whether a Scottish court would feel bound to declare a notice invalid on the ground that it was written on pink paper rather than blue paper, but the point being made is clear enough and is confirmed by the way in which Lord Clyde dealt with the matter.

[46] Lord Clyde focussed the question at issue in this way: *"[T]he question in this appeal is whether the two letters dated 24 June 1994 and sent by the appellant tenant to the respondent landlord qualify as effective notices to determine the leases to which each letter respectively referred. Their validity as notices has to be tested against* ***the terms of the power under which they were served.*** (page 780H, emphasis added)

He answered that question thus: *"The standard of reference is that of the reasonable man exercising his common sense in the context and in the circumstances of the particular case. It is not an absolute clarity or an absolute absence of any possible ambiguity which is desiderated. To demand a perfect precision* ***in matters which are not within the formal requirements of the relevant power*** *would in my view impose an unduly high standard in the framing of notices such as those in issue here. While careless drafting is certainly to be discouraged the evident intention of a notice should not in matters of this kind be rejected in preference for a technical precision."* (page 782 C-D, emphasis added)

[47] Our conclusion from an analysis of the speeches in ***Mannai,*** so far as relevant for present purposes, is that the courts should interpret and apply commercial instruments in a common sense 'commercial' or 'business' way, eschewing linguistic and legalistic niceties. Where a contract gives one party the right unilaterally to bring the contractual relationship to an end, or to alter it in some other way, then that

party must, if he chooses to exercise that right, comply with the agreed conditions for its exercise. If strict compliance with a particular condition is called for, then strict compliance will be enforced.

[48] These propositions do not appear to us to be at variance with the law of Scotland. But the speeches in ***Mannai*** are essentially concerned with the approach to construction of notices of the particular class under discussion. They do not address the question at issue here. Adopting Lord Clyde's formulation, the legal issue here is whether the formal requirements for exercise of a power (*in casu* the power to require arbitration) include compliance, according to their terms, with conditions set out in one of several documents which together form the Conditions of Contract (*in casu* compliance with Article 1:3 of the Code). On that question, the most that can be drawn from ***Mannai*** is that the answer will depend on the terms of the Conditions of Contract as a whole, giving them a common sense business interpretation.

[49] The other two English cases cited, ***Burman*** and ***Fernandez*****,** can readily be distinguished both from ***Mannai*** and from the present case. The conditions in question in those cases were not contractual but statutory.

[50] Lord Prosser's decision in ***Muir Construction Ltd* v *Hambly Ltd*** (*supra*) appears to us to be precisely in line with the conclusions we have drawn from ***Mannai*****.** In that case, the contractors 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 service of a notice of determination. It was averred that service of the notice had been by hand delivery to an employee of the employers. The contract provided that the contractor may "**by registered post or recorded delivery** *to the Employer or Architect forthwith determine the employment of the Contractor under this Contract ..."* (emphasis added). The employers argued that the notice alleged to have been served by hand was invalid.

[51] Having analysed the contract and the purpose of the requirement for service by registered post or recorded delivery, Lord Prosser concluded that *"the required formality [was] intentional, binding and useful to both parties"* (1990 SLT at page 834H). *"Precise words in a carefully structured provision are intended by the parties to have a precise effect in a carefully structured procedure"* (page 833J). Consequently, the notice averred to have been served by hand was invalid.

[52] We observe in passing that the clause under consideration in ***Muir Construction***, requiring service by registered post or recorded delivery, seems to be a better illustration of the point Lord Hoffmann was making in ***Mannai*** than his example of a clause requiring a notice on blue paper.

[53] In the light of the foregoing analysis of the cases, the question that remains to be resolved in the present case can be formulated as being whether, looking at the Conditions of Contract as a whole (including the Code and in particular Article 1:3) the parties intended that compliance with Article 1:3 of the Code should be a formal requirement for exercise of the power under Clause 69(9)(a) to require that a dispute between them be referred to arbitration.

[54] For present purposes any distinction between "***strict***" and "***adequate***" compliance is unimportant since it is not in dispute that Mowlem's notice of 15 September 2004 omitted altogether a number of the constituents of Article 1:3 of the Code and, in particular, Article 1:3(g).

Was compliance with Article 1:3 of the Code a formal requirement for exercise of the power under Clause 69(9)(a) to require that a dispute between the parties be referred to arbitration?

[55] The power under the Conditions of Contract to require that a dispute be referred to arbitration, although unilateral in one sense, was a power reserved to both parties. It was, indeed, a power that might be exercised by both parties in respect of the same decision of the adjudicator if both were dissatisfied with it. Moreover, it was not a power to bring the contractual relationship to an end or otherwise to alter or modify it. The power was therefore quite different in character from a unilateral power to determine a lease (as in ***Mannai***) or to terminate a contract for non-payment (as in ***Muir Construction***).

[56] It is true, as Scrabster submitted, that the scheme of procedure envisaged by the Code assumes that the Notice of Arbitration will contain a proposal of the name of an arbiter, followed by acceptance of that

proposal or a counter-proposal in the Notice of Defence. It is also true that Article 1:3 of the Code provides that the Notice of Arbitration "*shall* include" the matters listed.

[57] The Code is not, however, designed specially for use as a component of more extensive Conditions of Contract, such as the ICE Conditions. It is designed to be used in any circumstance and in any place where one party to a dispute desires that a dispute be referred to arbitration. It is, in our opinion, open to question whether it was ever intended that each and every provision of the Code which includes the word 'shall' must be regarded as mandatory in every case where the Code is adopted.

[58] In the specific context of the ICE Conditions, the 'sample' Notice of Arbitration in ICE Appendix (2001) - which is an *Appendix to the Code* (not to the ICE Conditions) - does not comply with the requirements of Article 1:3 of the Code. This, to put it no higher, is an indication that, *for the purposes of applying the ICE Conditions*, the provisions of Article 1:3 are not to be regarded as mandatory.

[59] Clause 66(9)(a) of the Conditions of Contract applicable to this contract requires only that "The party seeking arbitration shall serve on the other party a notice in writing (*called* a Notice of Arbitration) to refer the dispute to arbitration". Had it been the intention that the notice, to be valid, must be a Notice of Arbitration complying with the provisions of Article 1:3 of the Code, it would have been easy to say so.

[60] Clause 66(10)(a) says simply that "*The arbitral tribunal shall be appointed by agreement of the parties".*

[61] It can hardly be said, therefore, that we are in presence of "*precise words in a carefully structured provision".*

[62] Further considerations emerge from consideration of Article 1:3 of the Code itself.

[63] In the first place, as Mowlem argued, it would seem absurd to contend that a Notice of Arbitration must automatically be invalid if it does not expressly mention all the telephone, facsimile, telex numbers and e-mail addresses of the parties [Article 1:3(a)], where these can be shown already to be known to the Claimant.

[64] In the second place, and more cogently, a Notice of Arbitration could not possibly 'include' the matters mentioned in Article 1:3(h). It appears probable that something has gone wrong with the word-processing of this part of the Code since the numbering passes from 1:4 to 1:6 without 1:5. What appears as Article 1:3(h) should probably be Article 1:4, and Article 1:4 should be Article 1:5.

[65] Whatever be the explanation, it cannot be asserted that Article 1:3(g) is mandatory while Article 1:3(h) is not, since both come under the general heading *"The Notice of Arbitration **shall include** the following ...".*

[66] Scrabster contended that the scheme of the Code requires that Article 1:3(g) be mandatory in order that the Notice of Defence can include the Respondent's reaction to the Claimant's proposal of an arbitrator. This might be persuasive but for the second sentence of Article 1:3(h) which provides that "*Failure to deliver a Notice of Defence shall not delay the arbitration*." The Code is silent as to how the '***scheme***' for appointment of the arbitrator is, in that event, to operate.

[67] Looking at Article 1:3 of the Code both by itself and in the context of the Conditions of Contract as a whole, we conclude that the parties cannot be held to have intended that compliance with Article 1:3, in particular Article 1:3(g), should be a formal requirement for the exercise by either party of the power to require that a dispute between them be referred to arbitration, rendering invalid any notice that did not so comply.

[68] Mowlem's letter of 15 September 2004 complied with Clause 66(9)(a) of the Conditions of Contract and was, in our opinion, a valid Notice of Arbitration.

[69] We reach this conclusion with some relief since it would be unfortunate if a Code designed to promote recourse to alternative dispute resolution were to become a quarry for litigation over legal niceties. We also hope that the Sponsoring Bodies of the ICE Conditions of Contract will look again at the terms of ICE/ScotArb/2001 in order to remove the uncertainties canvassed in argument before us.

Act**:** Davidson, Q.C.; MacRoberts (for Mowlem)
Alt: Reid, Q.C.; Burness (for Scrabster)