JUDGMENT : JUDGE DAVID WILCOX: TCC. 20th August 2004

1. The claimant seeks a number of declarations in respect of the jurisdiction of Mr Bingham, an arbitrator appointed on the application of the claimant by the President of the Chartered Institute of Arbitrators in respect of disputes arising many years ago and in relation to which there are two notices requiring the arbitral resolution of disputes arising out of a construction contract. These notices are dated 16th April 1992 and May 2000 respectively.

2. It is necessary to refer to the history of the events giving rise to this disputed application. It can be briefly done, since although the span of years is considerable, the relevant activity relating to the prosecution and defence of the intimated claims is minimal. The respondent contends that the inactivity and delay by the applicant is fatal to the continuation of the applicant's claims. The claimant in the arbitration, Indescon, the applicant before the court, is a limited company in administration. It was in the late 1980s and early 1990s an active building contracting company. The respondent both in the arbitration and to this application is a private individual who is engaged in property development and investment.

3. In 1989 the parties executed a contract on a JCT standard form, with Contractor's Design (1981 Edition), together with the Employer's Requirements and Contractor's proposals. Article 5.1 and additional clause 39 of the conditions related to the settlement of disputes by arbitration. 5.1: *"In case of any dispute, whether it arises during the progress or after the completion or abandonment of the works as to:*
(1) the construction of this contract; or
(2) any matter or thing of whatsoever nature arising hereunder or in connection herewith;
(3) excluding any dispute or difference under clause 19 under clause 31 to the extent provided in clause 31.9 and under clause 3 of the VAT agreement,
then such dispute or difference shall be and is hereinafter referred to the 'Arbitration' and final decision of a person to be agreed between the parties to act as Arbitrator or failing agreement within 14 days after either party has given the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the person named in Appendix 1: Conditions."

   That deals with the right to apply and then there is a provision giving the right to apply to the High Court to determine any question of law arising during the course of a reference.

4. Indescon agreed to construct a new office block at Block 1, City Reach, Isle of Dogs, London for the respondent. The contract sum was in excess of £17 million. The development comprised a nine-storey office building of approximately 150,000 square feet with car parking at basement and sub-basement levels. It was a steel-framed construction within curtained walling of polished granite and glazing panels and had the normal attributes of a modern office building with raised floors, suspended ceilings, air conditioning and high speed lifts.

5. Practical completion took place in September 1990. Indescon submitted a final account on 25th February 1991 in the sum of £25,028,972.68. A revised final account was submitted on 22nd October 1991 in the sum of £24,565,723.67.

6. Following failure to agree the amount in the final account, Indescon wrote to the respondent, a letter dated 16th April 1992 (I refer to this as the "1992 notice"). This referred various disputes to arbitration. The letter has the following provisions: *"The Official Referee sitting at Newcastle District Registry of the High Court has already held in the proceedings, which we were forced to bring against you in order to secure payment by you of valuation 32, that you interfered with and prevented the proper valuation and certification of monies. The current situation is that we see no sign that Beard Dove Limited and R Siefert & Partners will take any steps to progress the final account and your attitude to date indicates to us that agreement over the final account cannot be achieved. Accordingly, we hereby give notice under clause 39 of the contract that we require our dispute with you to be referred to arbitration forthwith. For the avoidance of doubt, we would advise you that the following areas of dispute exist between us which we require to be resolved by arbitration:*
(1) The failure of your agents to deal with the final account properly or impartially, or at all, including claims for loss and expense.
(2) The failure of your agents to properly assess the date by which the works should have been completed.

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(3) Breaches by you both express and implied terms to the contract.
(4) Damages flowing from item 3 above.
(5) All or any other disputes arising from the contract which are not already the subject of the High Court proceedings against you referred to above."

This was followed by a letter dated 15th July 1992 from Dickinson Dees acting on behalf of Indescon to Messrs Cobbetts acting on behalf of the respondent, requiring the respondent to concur with the appointment of an arbitrator, failing which Indescon would apply to the Royal Institute of Chartered Surveyors for the appointment of an arbitrator.

7. In October 1992 the respondent made proposals for discussion between the parties of the sub-contract packages, but none took place before Indescon became the subject of an administration order on 13th January 1993. In December 1993 Dickinson Dees acting on behalf of the administrators of Indescon served on the respondent a claim document with the stated intention of using it as a basis for an impending arbitration and proposing the confirmation of the appointment of Mr John Sims as arbitrator.

8. On 14th February 1994 Cobbetts for the respondent wrote to Dickinson Dees to confirm that they had the claim documents sent and reminding them that the respondent had not previously agreed to the appointment of Mr Sims, and that the available terms of his appointment were in any event out of date.

9. On 14th March 1994 Cobbetts on behalf of the respondent wrote a letter containing the following provisions: *"We have since received a copy of Mr Simm's letter of 3rd March to you upon which we are taking instructions. We note your comments about the 'slight' delay in forwarding the E&M element of the claim. The delivery of your client's submissions must, however, be put in context. As we see it, your clients have taken a year to put them together. When they are delivered, a period of only eight weeks is allowed of which 25 per cent is lost immediately because of the day on which the first part arrives and the major part of the claim, the E&M, is only received at the beginning of February. There [sic] are not claims to which detailed responses are possible in the sort of time which you appear prepared to allow."*

In that letter they went on to detail the missing documentation, and then stated: *"We should be obliged if you will either clarify the omissions or send us copies of the missing documents. Having said that, we can say that it is our client's intention that his representatives should embark on discussions with your clients about the Submissions. There is no purpose in incurring the very substantial costs of arbitration unless there is no alternative and, as it is clear that there is a considerable number of points, quite apart from those regarding the paperwork identified above, which need clarification, we suggest that Mr Marshal in the company of Mr Garnett should meet perhaps Mr Ayers and Mr Fielder to discuss the most practical way forward. Our client did, of course, make proposals in October 1992 for detailed discussions of the sub-contract packages making up the final account, and we have in mind some similar approach now, your clients, the Administrators, having reviewed the position with their advisors. If, therefore, you would care to telephone the writer we can discuss arrangements."*

10. This was clearly a sensible commercial approach by the respondents and was without prejudice to their position in the arbitral process. The appointment of Mr Sims was not pursued by the applicants.

11. In May 1994 the parties entered into what became a series of eleven without prejudice meetings. The last of these meetings took place in February 1995, but correspondence between the surveyors acting for the parties continued until April that year when Cobbetts acting on behalf of the respondents proposed that the parties should meet without their surveyors. Two such meetings took place between May and September 1995. A further four meetings took place between the parties in the period from February to July 1996, during which period in June 1996 the respondent provided Indescon with a document described as a "Counterclaim". This document has now been formally served in the current arbitration proceedings.

12. In October 1996 the respondent supplied further information with regard to this counterclaim. There was no substantial or relevant contact between the parties between September 1996 and December 1998. The reason for this is explained in the witness statement of Mr Owen Claxton-Ingham, manager

for the joint administrators. He states: *"The administrators did not want to jeopardise the potential sale of a property to the respondent by proceeding with the arbitration. Between September 1995 and February 1998 the administrators were attempting to sell an Indescon Group property, West Tower, a building sharing the atrium with Block 1, the subject property of the arbitration. The respondent was one of those who expressed an interest in purchasing West Tower."*

13. By January 1999 almost seven years had elapsed during which the claimant had done nothing to secure the appointment of an arbitrator. In January 1999 Indescon contacted the respondent and a meeting took place in February when it was confirmed to the respondent that, if no negotiated settlement could be agreed, arbitration proceedings would be the only alternative.

14. On 3rd May 2000 Dickinson Dees wrote to the respondents serving a second notice. They wrote in these terms: *"We are instructed by the administrative receivers of Indescon Ltd."*

Clearly the description of them being *"**receivers**"* is an error: *"Disputes have arisen between our client and yourself in relation to the building known as Block 1, City Reach, Isle of Dogs, London, in relation to a number of matters, including the following:*

(1) True construction of the contract between the parties.
(2) The carrying out and completion of the works pursuant to the terms of contract between the parties dated 9th May 1998 and executed in February 1989.
(3) The imposition of liquidated damages by yourself.
(4) The date of practical completion of the works under the terms of the contract.
(5) The release of retention under the terms of the contract.
(6) Extensions of time due to our client.
(7) Entitlement to additional preliminaries.
(8) Costs due to additional works.
(9) Betterment costs.
(10) External works.
(11) Fees.

In relation to the above matters in dispute we hereby require you to submit these matters to the arbitration of a person to be agreed between us. Please notice that this notice of arbitration is served without prejudice to the validity of the existing notice of arbitration dated 16th April 1992. Irrespective of which of these notices is ultimately found to be effective, we invite you to agree to adopt the Arbitration Act 1996 as the relevant provision governing the conduct of this arbitration. We shall shortly provide a list of our proposed arbitrators for your consideration."

15. No satisfactory explanation has been offered as to why a second notice was served. There are two matters of significance: firstly, the scope of the disputes described differs from those of the first notice, and; secondly, there is a reservation as to the first notice, indicating that by reliance upon the second notice the first is not abandoned.

16. On 15th May 2000 Dickinson Dees proposed a choice of arbitrators and invited the respondent to concur in the appointment of one of those named. There was some correspondence in relation to requests by the respondent for security of costs, and by the claimant for agreement as to the structure of any proposed arbitration.

17. In their letter of 5th September 2000 a second list of names was proposed by Dickinson Dees. That letter contained the following passage, which was again to be repeated in January 2001: *"We would be obliged if you would confirm that there is an effective arbitration agreement between the parties referable to this dispute and that this dispute has been referred to arbitration either under the first or alternatively the second arbitration notice served by ourselves on 16th May 1992 or 3rd May 2000. We suggest that this matter be subject to the provision of the Arbitration Act 1996, although, as you know, the first notice was served in 1992 when the previous arbitration regime was in force. It seems to us it would be more appropriate, indeed sensible, for the parties to adopt the 1996 process."*

18. On 23rd January 2002 the claimant provided the respondent with draft particulars of claim, the intent to enable the respondent to further consider the feasibility of the proposed structure of the arbitration. By the accompanying letter, Dickinson Dees withdrew the name of one of the potential arbitrators, since he had already acted for one of the parties, but asked again that the respondent should consider those remaining proposed. The respondent was also informed that should the identity of an arbitrator not be agreed within 14 days of the date of the letter, an appointment would be requested from the President of the Royal Institute of Chartered Surveyors. There being no agreement, Dickinson Dees wrote to the RICS on 15th February 2002 requesting an appointment.

19. The notification of the dispute was in these terms: *"**Nature of dispute, including approximate sum of money in dispute, location of works and/or address of premises if relevant.**"*

Under that the following was entered: *"A notice of arbitration was sent under cover of a letter dated 16th April 1992. A further notice was sent on 3rd May 2002, a copy of which is enclosed for your attention, which confirms that a dispute exists for a building known as Block 1, City Reach, Isle of Dogs, London."*

20. Mr KC Scott was appointed as the arbitrator. On 15th March the respondent put the applicant on notice that it questioned both the validity of his appointment and jurisdiction, and reserved the right to take issue as to the delay in seeking an arbitration. On 22nd May the respondent produced an argument that under the contract the RICS was not the correct appointing body and said in their letter: *"In May 2000 you served a further notice of arbitration which you stated was without prejudice to the earlier notice in April 1992, although we do not understand why you considered this to be necessary, or on what basis it was given, bearing in mind the wide terms of the notice in April 1992. Since then you have also suggested various names as potential arbitrators but ignored Mr Sims who in 1992 you effectively considered had been appointed."*

They went on in that letter to propose that: *"If therefore you wish to pursue your client's claims which, as you know, our client rejects (not least because of his substantial counterclaims for defects of which you are aware, which will gain him nothing apart from a set-off of your client's insolvency), we take the view that you should do so on the basis of your April 1992 notice before Mr Sims, whom you proposed at the outset and whom our client is prepared to agree should act as arbitrator. This is, of course, without prejudice to all other rights and arguments our client may have against your clients."*

21. On 24th July Dickinson Dees confirmed that Mr Scott was being asked to stand down and wrote: *"Without prejudice to this issue of which arbitration regime applies and the standing of the arbitration notices served to date, and also to our contention that Mr Scott was properly appointed initially, we shall apply to the Chartered Institute of Arbitrators with the appointment of an arbitrator as we are entitled to do under the terms of the original contract between our respective clients in the purported absence of any identification of a nominating body in this regard."*

This elicited the reply of 26th July agreeing to the revocation of Mr Scott's appointment and saying: *"We will leave it to the Institute [that is of Arbitrators] to decide if we cannot agree who should be the arbitrator."*

22. On 22nd August 2002 the applicants made a unilateral application for the appointment of an arbitrator as they were clearly entitled to do in the absence of agreement. A copy of the second notice was sent. The application under the rubric "***Details of dispute**. Please state briefly the nature, circumstances and location of dispute"*, contained the following: *"Disputes have arisen between the claimant and respondent in relation to the building known as Block 1, City Reach, Isle of Dogs, London."*

Under the rubric "**Issues Concerned**", there was the following: *"Issues in dispute include the true construction of the contract between the parties, the carrying out and completion of the works pursuant to the terms of the contract, the imposition of liquidated damages, the date of practical completion, the release of retention, extensions of time, entitlement to additional preliminaries, costs due to additional works and fees."*

That part of the application form entitled *"**Issues Concerned***" mirrors the matters contained in the second notice. In the application no specific reference is made to the first notice, but it is clear that the second notice does make express reference to the first notice in terms that I will deal with shortly.

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23. On 23rd September 2002 Mr Anthony Bingham was appointed as arbitrator pursuant to that application by the Institute of Arbitrators. The respondent from the outset made it clear that it was not submitting to the arbitrator's jurisdiction or participating, save without prejudice, to its rights to argue the issue of jurisdiction. On 10th February he made his position quite clear. They wrote: *"The claimant sought your appointment in 2002 in respect of a referral notice given 10 years earlier in 1992. We cannot accept that the 1992 notice remains effective to confer jurisdiction upon an arbitrator appointed in 2002. It is this central point that gives rise to the dispute as to jurisdiction. The proposition that a referral notice can remain effective for 10 years is, we suggest, a proposition that is entirely alien to the ethos of the arbitral process and contrary to the principles of any rational legal system that, in order for there to be a fair resolution of disputes, requires actions to be conducted with some degree of efficiency. The grounds upon which the challenges to jurisdiction are made are as follows:*

(1) Any right to appoint an arbitrator pursuant to the 1992 notice has lapsed through the effluxion of time.

(2) By delay or by the issuing of the 2000 referral notice and/or appointment of Mr Scott, the claimant abandoned the 1992 notice.

(3) For the reasons given at 2 above the claimant is in repudiatory breach of the arbitration agreement.

(4) The claimant was under an implied obligation to appoint or to apply for the appointment of an arbitrator within a reasonable time of issuing the 1992 notice. Upon expiry of a reasonable time the right to appoint an arbitrator under that notice elapsed."

Then under the heading "**Validity of Appointment":** *"We do not believe that upon the proper construction of the documents seeking your appointment as arbitrator you have been validly appointed to determine the dispute that was the subject of the 1992 referral notice. As is reasonably clear from the terms of the notification of the dispute made to the Chartered Institute, you were appointed to determine the disputes as set out in the referral notice of May 2000. The May 2000 referral notice has now been expressly abandoned. Accordingly, we do not accept that you have jurisdiction to proceed with the reference."*

24. The reference to the abandonment of the May 2000 referral notice relates to a three-way telephone conference meeting with the arbitrator of 13th January 2003, arranged by the arbitrator to discuss the jurisdiction issues raised by the respondent's defence. The accuracy of that record, namely the arbitrator's notice number 3, has not been put in question by either party. At 3.1 he records thus: *"The arbitrator asked Mr Lewis if it is his position that the arbitration was commenced by way of the Indescon letter of April 1992. The answer was yes."*

It was clear, in my judgment, that Mr Lewis was factually setting out his argument. There is no question, in my judgment, of there being an election as to which of the notices is to be proceeded with, let alone there being any abandonment, because (for reasons I give later) in my judgment there is no basis upon which it can be concluded that either notice was abandoned.

25. The contract which was under seal thus giving rise to a 12-year limitation period, gave the right to refer any disputes during the progress of or after the completion or abandonment of the works as to the construction of the contract, or anything of whatsoever nature arising hereunder or in connection herewith but excluding disputes as to withholding income tax, fair wages and VAT. Article 5.1, which I have made reference to, provides that: *"The dispute shall be and is hereby referred to arbitration and final decision of a person to be agreed between the parties to act as arbitrator or failing agreement within 14 days after the party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed at the request of either party by the person named in the Appendix 1 to the Conditions."*

The amendment by way of new clause 39 nominates the Chartered Institute of Arbitrators as the appointing body and, arguably, the President of the Royal Institute of Chartered Surveyors. The position is ambiguous and in fact did give rise to dispute; that is in relation to the appointment of Mr Scott to which I have earlier made reference.

26. The 1992 notice served by the applicant was the exercise of its right to have the disputes therein described arbitrated. The respondent, by reason of Article 5 and condition 39, was contractually obliged thereafter to submit to the decision of the arbitrator agreed or nominated by the appointing body. The service of such a notice has two consequences: it may stop time running under Limitation

Acts, and it is the commencement of the procedure leading to the arbitral adjudication of the disputes therein described.

27. Until an arbitrator was appointed there was no one empowered to adjudicate. Mr John Sims was proposed but never appointed. Mr KC Scott was appointed by the President of the Royal Institute of Chartered Surveyors, arguably a proper appointment, but because of the differences between the parties his appointment was by the consent of both revoked. His appointment clearly would have been on the basis of the 1992 notice.

28. In May 2000 the applicant served the further notice. Earlier I questioned the reason for doing so. It could not have been for the purposes of limitation, because the 1992 notice was so wide in its ambit as embracing all disputes that had arisen under the contract, including it administration and the final account. It could relate to matters arising since April 1992, or identifiably discrete from the disputes described in the 1992 notice, such as the discovery of hitherto latent defects.

29. This court was not invited to consider the precise scope of the two notices by the parties. It may be that on a close examination of the evidence as to the scope that the second notice relates to that no disputes other than those encompassed within the 1992 notice. It is evident that Mr Anthony Bingham was regularly appointed by the Chartered Institute of Arbitrators. They were an agreed nominating body under the contract, although it is arguable that there was a second. Both parties signified their agreement in correspondence that the Chartered Institute of Arbitrators was the appropriate body to appoint.

30. From the details of the dispute given in the application, it is clear that he was appointed to deal with the disputes contained in the second notice accompanying the application. The second notice is expressed to be without prejudice to the first. It is clearly intended to stand separate and independent from the first. It is common ground that, unless the parties otherwise agree, any arbitration commenced by the 1992 notice is governed by the 1950 and 1975 Arbitration Acts. As to the 2000 notice, the 1996 Act applies.

31. The respondent's submissions as to jurisdiction do not coincide exactly with the grounds that were indicated to the arbitrator in the letter I made reference to earlier. I will deal with them in their revised form.

32. The applicant's primary case is that the 1992 notice commenced the arbitration. At the meeting in January 2003 Mr Lewis (the applicant's solicitor) said just that. In his third statement of 10th May 2004 he reiterated his belief that Mr Bingham's appointment was made in relation to both bodies. This, as I have already indicated, was not in fact an election between to the two notices, it was recorded by the arbitrator as a contention by Indescon. The 2000 notice was served without prejudice to the 1992 notice and nothing was done or said to warrant the respondent concluding that the 2000 notice was abandoned.

33. Mr Dennison QC submits that nowhere, either in the claim form or in the documentation attached from Indescon, is it apparent that Mr Bingham was appointed in respect of the 1992 notice. Further he contends that any right to appoint an arbitrator under the 1992 had lapsed by September 2002, and because no application to appoint had been within a reasonable time of the notice to arbitrate, this was a breach of an implied term. He based his submission as to lapse by effluxion of time upon the dicta of Robert Goff LJ in **Leonida D [**1985] 1 WLR 925 in a passage at page 928: *"The suggestion that a party to an arbitration might be taken by his long delay to have repudiated the reference to arbitration though favoured by the lower courts was rejected by the majority of the House in* ***Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd.*** *Perhaps, sadly, the argument in that case does not appear to have been presented to the House on the basis that each parties' right to invite the arbitration tribunal to proceed to an award and to make directions to that purpose should be regarded as a contractual right in the nature of a power which will lapse if not exercised within reasonable time, though such an approach is not easy to reconcile with the passage in the speech of Lord Diplock at page 986."*

That passage is not support for the proposition that there is a class of contractual rights described as "powers" and as such must be exercised reasonably. The meaning of the passage is that some contractual rights must by implication be exercised reasonably (see **The Golden Bear** [1987] Lloyd's Rep 343. I reject the submission that the right to apply lapsed through effluxion of time.

34. As to the submission that the contractual right to apply is subject to an implied term, and then it should be exercised reasonably and as such within a reasonable period of time from the issuing of notice, there are a number of obstacles facing such an argument. Firstly, the respondent would have to show that such a term has to be implied either to give business efficacy to the contract, or in order to give effect to the obvious intention of the parties. Secondly, it would have to be shown that any such term was a condition, the breach of which would entitle the respondent to treat the agreement as being at an end. Thirdly, the respondent would have to demonstrate that he did not acquiesce in the breach.

35. In my judgment, it is not obvious the parties intended any such term, or that they would have agreed the inclusion of such term, not least because they had agreed that the contract should be made under seal and was, therefore, subject to a 12-year limitation period. Mr Sears QC further submits that no such term is necessary in order to give business efficacy to the contract. I hold that he is right. Even if such a term were to be applied, any breach would give rise to entitlement to damages unless the breach entitled the respondent to treat the arbitration agreement as having been repudiated.

36. Mr Dennison submits that if the court were now to approve Indescon's conduct in issuing a notice to concur and appointing some 10 years later, it would in effect be allowing the parties to issue protective arbitration notices up against the expiration of the limitation period, but not require them to act expeditiously in relation to the notice thereafter. I do not accept this would be the effect of the court granting the relief which Indescon seeks, because a respondent in that position will clearly be protected by section 13(a) of the 1950 Act or section 41(3) of the 1996 Act.

37. In his written submission at paragraph 35, Mr Dennison submits that arguably the latest time for the expiry of the limitation period was 2002. If that is right, it serves to show that any application to strike out prior to then would have been likely to fail. No application was made either then or subsequently. Had it been, it would have been unlikely that a court would have concluded that the delay between the expiry of the limitation period and the date of the application to the Chartered Institute of Arbitrators was either inordinate or inexcusable, or that it had resulted in any prejudice.

38. As to the argument that there was an abandonment of the 1992 notice, the respondent contends that by issuing the 2000 notice, and/or by seeking the appointment of Mr Scott, Indescon is taken to have abandoned the 1992 notice. Indescon submits that it is not to be taken as having abandoned the 1992 notice by the taking of either step, and it relies upon the absence of any evidence that the respondent believed that it had so abandoned. It relies on the terms of the letter under which the 2000 notice was served, which made it clear that the 2000 notice was served without prejudice to the validity of the existing notice of arbitration dated 16th April 1992. Secondly, in the application that was made to the Royal Institute of Chartered Surveyors, express reference was made to both notices. Thus, there can be no question that by making that application Indescon can be said to have abandoned the 1992 notice.

39. It is common ground between the parties that the appointment of Mr Scott was invalid. The respondent cannot rely upon an appointment which Indescon has acknowledged to be invalid as demonstrating Indescon's agreement to abandon the 1992 notice.

40. The respondent did not in fact regard Indescon as having abandoned the 1992 notice by the taking of either of those steps, since by their letter of 22nd May 2002, some time after the 2000 notice and the appointment of Mr Scott, the respondent's solicitors stated that they took the view that Indescon should not pursue the arbitration on the basis of the 1992 notice. Secondly, by its defence and counterclaim the respondent complained that the existence of the two extant notices was embarrassing. Indescon, in my judgment, cannot be said to have expressly abandoned the 1992 notice, nor by its actions can it be said that it had done so by implication.

41. The respondent submits that there was a repudiatory breach of the arbitration agreement, relying on the grounds set out in their letter to the arbitrator in their letter of 10th February 2003. Firstly, as to the question of delay mentioned in that letter, there is no express provision in the arbitration agreement that the parties should proceed without delay. Therefore, if there is to be some time obligation upon the parties it has to be the result of some implied term. In order to provide any prospect of a remedy to the respondent, any such term would have to be to the effect that the parties would commence and then conduct any arbitral proceedings with reasonable dispatch, or some such term. As I have found earlier, there is no basis for implying such a term in this contract.

42. In that letter there was the reliance upon the issuing of the 2000 notice. It is difficult to see how by issuing the 2000 notice Indescon can be said to be in breach of any term of the arbitration agreement. Similarly, it is not possible to conclude that by seeking the appointment of Mr Scott Indescon can be said to be in repudiatory breach of any term of the arbitration agreement. Indescon may arguably have applied to the wrong appointing body, but that cannot be characterised as a repudiatory breach. Neither was it regarded as such by the respondent who agreed that the appropriate appointing body was the Chartered Institute of Arbitrators and joined in the revocation of Mr Scott's appointment.

However, delay may well have the effect of rendering the trial of any disputes after many years more difficult or unfair. Mr Sears faces up to this but contends the applicant cannot rely upon any delay in seeking an appointment of an arbitrator in relation to the 1992 notice, because the appointment of Mr Bingham, he contends, is in relation to the 1992 disputes, and secondly, because any delays between the 1992 notice and the appointment of Mr Bingham were equally the responsibility of the respondent. He relies upon the authority of **Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd** [1981] Appeal Cases 909, and in particular passages in the speech of Lord Diplock at page 986, paragraph B-C: *"No doubt in some arbitrations of a kind with which those who act on behalf of the parties in the conduct of the arbitration are familiar, both the claimant and respondent may carry out voluntarily some or all of the preliminary steps needed to prepare the matter for the hearing by the arbitrator, and to do so without seeking and obtaining any prior direction from him; but if what is done voluntarily by way of appropriation is done so tardily that it threatens to delay the hearing to a date when there will be a substantial risk that justice cannot be done, it is, in my view, a necessary implication from their having agreed that the arbitrator shall resolve their dispute that both parties, respondent as well as claimant, are under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay. Even if an application to the arbitrator for directions in such circumstances were a matter of right only, and not, as I think it is, a mutual obligation, it provides a remedy to the party which thinks that the proceedings are not progressing fast enough voluntarily which renders unnecessary the implication in the arbitration agreement of any such term as there was suggested by Donaldson J or Robert Goff LJ."*

At page 987, G-H, he says: *"In the instant case, however, as in **Crawford v AE Prowting**, the respondents were content to allow the claimant to carry out voluntarily the preparation of detailed points of claim. They never made an application for directions to the arbitrator and none were made by him. For failure to apply such directions before so much time has elapsed there was a risk that a fair trial of the dispute would not be possible. Both claimant and respondent were, in my view, in breach of their contractual obligations to one another. Neither can rely on the other's breach as giving him a right to treat the primary obligation of each to continue with the reference as brought to an end. Respondents in private arbitrations are not entitled to let sleeping dogs lie and then complain that they did not bark."*

43. As to Mr Sears' first submission that Mr Bingham was appointed in relation to the 1992 notice, I reject that. By the terms of the application to the Chartered Institute of Arbitrators, it is clear that it was pursued on the basis of the 2000 notice. I accept the submission of Mr Dennison that nowhere is there any warrant for concluding that it was on the basis of the 1992 notice.

44. As to his second submission, I find it difficult to accept that in the absence of an arbitrator, and thus a body vested by the parties under the contract with any powers, that there was any responsibility for the delay in prosecuting the claims under the 1992 notice that can be visited upon the respondent. The position clearly would have been different had there been an arbitrator appointed. There is no basis,

in my judgment, on the authority of the **Bremer Vulkan** or the **Hannah Blumenthal** [1983] 1 All Eng 34 (House of Lords) for concluding that there was an obligation upon the respondent to take steps to appoint an arbitrator. More so, since 1994 when the respondent has been dealing with a company in administration who had prosecuted its claims in fits and starts over a period of 10 years.

45. Should the applicant still intend to prosecute its claims under the 1992 notice, it is open to it to seek the respondent's agreement to an arbitrator, or failing such agreement to apply unilaterally for the appointment of an arbitrator to the Chartered Institute of Arbitrators. It would be open to the respondent to agree the appointment of Mr Bingham and for the two arbitrations to be heard together.

46. For the reasons given, I propose to make the following order. Upon the application of Indescon Ltd and upon hearing counsel for the applicant and respondent, and upon reading the evidence, it is ordered that:

(1) The right to appoint an arbitrator pursuant to an arbitration notice of 16th April 1992 (that is the 1992 notice) continues to subsist.

(2) That in the absence of agreement the President of The Institute of Chartered Arbitrators is the proper person to appoint, pursuant to the 1992 notice.

(3) That such arbitration would proceed under the Arbitration Acts of 1950 and 1979.

(4) The arbitration notice dated 3rd May (that is the 2000 notice) issued by the respondent is valid, and those proceedings pursuant to the 2000 notice continue to subsist.

(5) The appointment of Mr Anthony Bingham as arbitrator pursuant to the 2000 notice is valid.

(6) That it is for the court to make an order about the costs of the applications before the court.

(7) It is for the arbitrator to make an order about the costs of the arbitration, both as to those prior and those subsequent to the hearing.

(8) The power of the arbitrator in relation to (7) above includes the power to make a series of orders, each related to an interim award.

(9) The arbitration pursuant to the 2000 notice is to proceed under the Arbitration Act 1996.

It is implicit from the order that I have made that I have found in relation to the 2000 notice that there is no delay, that there is no abandonment and that the submissions of Mr Dennison in relation to that notice as to appointment are rejected.

47. I now go on to make by consent the following further order. The time for making of any applications for permission to appeal to this court be extended to the date of the hearing before this court, such hearing to deal with costs now the matters arising out of the judgment, such date to be fixed. The time for filing any appellant's notice to the Appeal Court to be within a period to be fixed at the hearing in the absence of any period to be fixed within a period of 14 days after the date of such hearing. All applications in relation to costs to be heard at the hearing. I direct that a transcript of this oral judgment be made, and that after it has been considered by me as to typographical errors and the like, that copies of it be made available free to each of the parties.

DAVID SEARS QC and RAYMOND WICKS (instructed by Dickinson Dees) appeared on behalf of the CLAIMANT
MR G WOODS appeared on behalf of the CLAIMANT for judgment
STEPHEN DENNISON QC and CHANTAL-AIMEE DOERRIES (instructed by Cobbetts) appeared on behalf of the DEFENDANT
MR M CHENNELLS appeared on behalf of the DEFENDANT for judgment