JUDGMENT Mr Justice COLMAN, QC: 19th February 1999

Introduction:

1. The applications before the court raise a point of far-reaching importance on the meaning and effect of section 12 of the Arbitration Act 1996, under which the court is given power to extend the time for the commencement of arbitration proceedings as well as further undecided points on the effect of rule 5.2 of the Institute of Civil Engineers' Arbitration Procedure (1997) and of clause 66 of the ICE Conditions of Contract 6th Edition, as amended in 1993.

2. The first application by Harbour and General ("HAGWL") is for an extension of time for the commencement of an arbitration under a contract on the ICE Conditions of Contract under which they were employed by the respondents to carry out and complete works involving the construction of flood defences at Harwich. In dispute are five distinct claims by HAGWL for additional costs in respect of the carrying out of the works. These claims related to additional excavation costs (claim I), additional costs due to delay to site access and to temporary works approval (claim 2), additional costs incurred due to delays resulting from Variation order No 12 (claim 3), additional costs incurred for land-based filling (claim 4) and various additional costs incurred for miscellaneous items (claim 5).

3. The second application is alternative to the first application and is for a declaration that, in effect, even if time is not to be extended, the self-same five claims can still properly be referred to arbitration in proceedings commenced in respect of the Final Certificate issued under the contract because the five claims are issues connected with and necessary for the determination of the correct final valuation of the works and because the arbitrator is given jurisdiction over such issues by the terms of rule 5.2 of the ICE Arbitration Procedure.

The extension of time application

4. It is first necessary to set out in full most of the provisions of clause 66 of the ICE Conditions as amended in 1993: **SETTLEMENT OF DISPUTES**

66(1) Except as otherwise provided in these Conditions if a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion instruction direction certificate or valuation of the Engineer (whether during the progress of the Works or after their completion and whether be-fore or after the determination abandonment or breach of the Contract) it shall be settled in accordance with the following provisions.

Notice of Dispute

(2) For the purpose of sub-clauses (2) to (6) inclusive of this clause a dispute shall be deemed to arise when one party serves on the Engineer a notice in writing (hereinafter called the Notice of Dispute) stating the nature of the dispute. Provided that no Notice of Dispute may be served unless the party wishing to do so has first taken any steps or invoked any procedure available elsewhere in the Contract in connection with the subject matter of such dispute and the other party or the Engineer as the cause may be has

(a) taken such steps as may be required

or

*(b) been allowed a reasonable time to **take any such** action*

Engineer's Decision

(3) Every dispute notified under sub-clause (2) of this clause shall be settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor within the time limits set out in sub-clause (6) of this clause,

Effect on Contractor and Employer

(4) Unless the contract has already been determined or abandoned the Contractor shall in every case continue to proceed with the Works with all due diligence and the Contractor and the Employer shall both give effect forthwith to every such decision of the Engineer. Such decisions shall be final and binding upon the Contractor and the Employer unless and until as hereinafter provided either:

(a) the recommendation of a conciliator has been accepted by both parties or

(b) the decision of the Engineer is revised by an arbitrator and an award made and published.

Conciliation

(5) In relation to any dispute notified under sub-clause (2) of this clause and in respect of which

(a) the Engineer has given his decision or

(b) the time for giving an Engineer's decision as set out in sub-clause (3) of this clause has expired and no Notice to Refer under sub-clause (6) of this clause has been served either party may within one calendar month of receiving notice of such decision or within one calendar month after the expiration of the said period give notice in writing requiring the dispute to be considered under the Institution of Civil Engineers' Conciliation Procedure (1988) or any amendment or modification thereof being in force at the date of such notice and the dispute shall thereafter be referred and considered in accordance with the said Procedure, The recommendation of the conciliator shall be deemed to have been accepted in settlement of the dispute unless a written Notice to Refer under sub-clause (6) of this clause is served within one calendar month of its receipt.

Arbitration

(6) (a) Where a certificate of Substantial Completion of the whole of the Works has not been issued and either

(i) the Employer or the Contractor is dissatisfied with any decision of the Engineer given under sub-clause (3) of this clause or

(ii) the Engineer fails to give such decision for a period of one calendar month after the service of the Notice of Dispute or

(iii) the Employer or the Contractor is dissatisfied with any recommendation of a conciliator appointed under sub-clause (5) of this clause

then either the Employer or the Contractor may within 3 calendar months after receiving notice of such decision or within 3 calendar months after the expiry of the said period of one month or within one calendar month of receipt of the conciliator's recommendation (as the case may be) refer the dispute to the arbitration of a person to be agreed upon by the parties by serving on the other party a written Notice to Refer,

(6)(b) Where a Certificate of Substantial Completion of the whole of the Works has been issued the foregoing provisions shall apply save that the said period of one calendar month referred to in (a) (ii) above shall be read as 3 calendar months,

Arbitration - procedure and powers

(8)(a) Any reference to arbitration under this clause shall be deemed to be a submission of arbitration within the meaning of the Arbitration Acts 1950 to 1979 or any statutory re-enactment or amendment thereof for the time being in force. The reference shall be conducted in accordance with the Institution of Civil Engineers' Arbitration Procedure (1983) or any amendment or modification thereof being in force at the time of the 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.

(8)(b) Neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision under sub-clauses (3) of this clause.

(8)(c) The award of the arbitrator shall be binding on all parties.

(8)(d) Unless the parties otherwise agree in writing any reference to arbitration may proceed notwithstanding that the Works are not then complete.

The events leading up to the reference of the claims to arbitration may be summarised as follows.

5. On 21 January 1997 the Engineer issued a certificate of substantial completion with effect from 22 April 1996.

6. On 3 April 1998 the Engineer issued an interim certificate in the sum of £39,662.08 including VAT in response to the submission of claims I to 5 by HAGWL in the course of 1997.

7. On 6 April 1998 HAGWL gave to the respondents Notice of Dispute seeking the Engineer's decision on each of the five claims.

8. On 18 May 1998 HAGWL sent to the Engineer a statement of final account, indicating a final price of *£5,737,156.86*.

9. The Engineer's decision was issued on 29 June 1998. Some of the claims were accepted outright or in principle and others rejected in principle. Claim 3 and claim 5, section 2.9 were the subject of detailed calculations.

10. On 15 July 1998 HAGWL wrote to the Engineer and stated that the decision was unacceptable. On 8 September 1998 the Engineer's representative wrote to HAGWL raising a question relating to the reconciliation of the figures arising from the Engineer's decision, their final account and their claims.

11. In the meantime, HAGWL had taken no steps under clause 66 either to commence conciliation under 66(5) or arbitration under 66(6). If they were going to proceed by conciliation they were obliged to give notice in writing requiring the dispute to be considered under the Institution of Civil Engineers Conciliation Procedure (1988) as amended and to do so within one calendar month of receiving notice of the Engineer's decision, that is to say within one month of 29 June 1998, namely 28 July. If they were to by-pass the conciliation procedure, which they were entitled to do, and proceed directly to arbitration, they had to give the respondents notice to refer to arbitration within three calendar months of receiving notice of the Engineer's decision, that is to say by 28 September 1998.

12. On Wednesday 23 September 1998 HAGWL sent a fax to the respondents by which they stated that they were dissatisfied with the Engineer's decision in respect of the total amount which they were entitled to be paid under or arising out of or in connection with the contract, that sum being in the order of £2 million. The letter continued: "Accordingly, we hereby give notice that we require the dispute to be considered under the Institution of Civil Engineers' Conciliation Procedure."

13. The letter then set out a list of three appropriate conciliators and continued : *"We invite you to agree to one of the above names and would draw your attention to Rule 4 of the Conciliation Procedure which requires that we agree a Conciliator within 14 days of the Notice of Conciliation."* This Notice of Conciliation was just short of two months out of time.

14. On Friday 25th September 1998 the respondent's solicitors sent by fax the following letter to HAGWL : *"We have been instructed by the Environment Agency who have forwarded to us your letter to them dated 23rd September 1998 which purports to be a Notice of Conciliation, Our clients reserve their rights to dispute whether it is a proper Notice of Conciliation, In the meantime, we hereby acknowledge receipt of your letter, and we will revert back to you on its contents as soon as possible."*

15. The copy of the letter now before me is receipt stamped 28 September, 50 it may be that it was not received during office hours until that date, which was the following Monday.

16. On that Monday, HAGWL sent a letter by fax to the respondents stating that they had that day received the solicitors' 25 September letter, that the solicitors had not provided any detail as to what their concerns were about the Notice of Conciliation, that HAGWL believed that the letter was a correct and proper Notice of Conciliation and setting out the five claims in question, The letter concluded: *"We trust the foregoing will remove any doubts you may have had over the status of the Notice of Conciliation but should, however, you continue to harbour doubts would you please make the details of your concerns known to us by return of fax so any possible delay to the Conciliation process may be avoided."*

17. On the same day the Engineer issued a Final Payment Certificate. This was based on the Engineer's decision of 29 June in respect of the five claims, that is to say it proceeded on the assumption that such decision was correct in principle and it went on to quantify claims 3 and 5 to the extent accepted by the Engineer. A sum of £72,718.96 including VAT was certified to remain payable as the final amount due.

18. On 30 September 1998 HAGWL informed the respondents by fax that their 28 September letter had inaccurately described one of the claims.

19. Then on 5 October 1998 the respondents' solicitors wrote to HAGWL informing them that under clause *66(5)* of the ICE Conditions time for issuing a notice of conciliation had expired on 28 July and that, accordingly, the Notices of Conciliation served on 23 and 25 September were invalid.

20. On the following day, 6 October 1998, eight days after time for the commencement of arbitration had expired under clause 66(a), HAGWL's solicitors sent by fax to the respondents' solicitors two communications,

(i) There was a "***Notice to refer Dispute to Arbitration***" by which they referred to the Notice of Dispute of 6 April 1998 and to the Engineer's decision issued on 29 June 1998. They stated that they understood from HAGWL that "*there (was) some uncertainty whether that decision (had) to be read alongside the final financial evaluation of 28 September"* (no doubt referring to the Final Payment Certificate). The letter went on: *"Our clients are dissatisfied with the Engineer's decision in respect of the total amount which they are entitled to be paid under or arising out of or in connection with the Contract. We are now instructed to give notice that they require the dispute to be referred td arbitration."*

The letter then set out "***the matter in dispute***", namely the five claims.

(ii) The covering letter sent by the solicitors stated in effect that they did not accept the respondents' solicitors' analysis that the Notice of Conciliation was invalid but that in order to protect their client's position, they had served the notice to refer to arbitration. They asked for confirmation that the respondent did not challenge that notice by contending that it was not served within time, failing which, HAGWL would make an application under section 12 of the Arbitration Act for a short extension of time. The letter concluded: "Further, we put you on notice that our clients will be requesting an Engineer's decision on the Final Certificate and, in the event of the decision being unsatisfactory, our clients will be referring to arbitration the whole question of the Final Certificate. Any Arbitrator appointed in that dispute will have jurisdiction to decide on all issues connected with the Final Certificate, including the validity of our client's claims 1-5. Please confirm you accept that the Arbitrator will have such jurisdiction."

Neither confirmation was given and, accordingly, HAGWL issued this application by which it applies for an extension of time to 6 October 1998.

21. *Section 12 of the Arbitration Act 1996* section provides as follows:

12(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished unless the claimant takes within a time fixed by the agreement some step
(a) to begin arbitral proceedings. or
(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun,
the court may by order extend the time for taking that step.

12(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

12(3) The court shall make an order only if satisfied -
(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question. and that it would be just to extend the time, or
(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

12(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.

As appears from sub-section (3) an applicant has to establish that: (a) the circumstances were such as were outside the reasonable contemplation of the parties when they agreed to the time bar provision *and* that it would be "just" to extend the time *or alternatively* (b) the conduct of one party makes it unjust not to extend time.

22. Mr Martin Bowdery has submitted on behalf of IIAGWL that in this case the *"**circumstances**"* were outside the reasonable contemplation of the parties when they entered into the contract. He relies on the following three circumstances:

(i) There was a procedural mistake. Instead of giving notice to refer to arbitration within time on 23 September, HAGWL, gave Notice of Conciliation out of time. It thereby in effect gave notice of a challenge **to the Engineer's decision**, but did **not for** that purpose adopt the correct procedure as required by the relatively complicated regime set up by clause 66.

(ii) The respondent, having received the Notice of Conciliation on 23 September 1998, just within the period of time within which arbitration had to be commenced (28 September 1998), but well outside the time during which Notice of Conciliation had to be given (28 June 1998), did not draw the attention of HAGWL to that particular procedural error until 5 October 1998 after it was too late for HAGWL to serve a notice to refer to arbitration.

(iii) The Engineer's decision which was the subject of challenge under both the Notice of Conciliation and the notice to refer to arbitration did not contain final details and these were only eventually forthcoming in schedules annexed by the Engineer to his Final Payment Certificate issued on 28 September - the last day of the period within which notice to refer to arbitration could be given.

23. In relation to (iii) the form of the Engineer's decision consisted, as I have said, of statements that he rejected or accepted each of HAGWL's claims ***"in principle".*** He attached five appendices explaining his reasoning in arriving at his conclusions in the decision. For example, in relation to claim 3. the Engineer rejected a claim for 45 days delay due to variation order 12 and allowed a maximum of 11 days delay which he slated to be the Final Determination of Extension of Time under clause 44(5) and which he calculated at a round figure of £77,000 but which he stated to be ***"subject to final certification review".*** Mr Toms, appointed as the Engineer's Representative under the contract, explained in his affidavit that at the time when the Engineer's decision was issued it was not possible finally to quantify all the items that the Engineer accepted. This was due to a lack of detailed information at that time. Thus, in addition to claim 3, there was no final quantification of claim 5, items 2.9 and 2.11. The main reason for this was, according to Mr Toms, that there were inconsistencies between the figures in the account submissions made earlier by HAGWL in respect of claims I to 5 and those in their statement of final account, which lacked full supporting information.

24. The enactment of section 12 of the 1996 Act marked a clear change in the law and practice relating to the extension of time for commencement of an arbitration beyond that specified in a contractual time bar provision. This is clear both from the change in the wording previously applicable and to be found in section 27 of the Arbitration Act 1950 and in the Report on the 1996 Bill of the Departmental Advisory Committee under the chairmanship of Lord Justice Saville as he then was. Under section 27 the court had given the words *"if (the court) is of the opinion that in the circumstances of the case undue hardship would otherwise be caused"* a broad meaning and relatively benevolent application. This is clear from the leading authorities on the section, such as **Liberian Shipping Corporation v A King and Son Lid** [1967] 2 QB 86, [1967] 1 Lloyd's Rep 302, **Consolidated Investment and Contracting Co v Sapononia Shipping Co Ltd** [1978] 1 WLR 986 [1978] 2 Lloyd's Rep 167 and Nea Agrex SA v Baltic Shipping Co [1976) QIB 933 [1976) 2 Lloyd's Rep 47. The courts approached the concept of undue hardship by reference to such factors as the size and strength of the claim, the extent of the claimant's fault, the pendency of negotiations between the parties, whether the respondents had been obstructive, the extent to which the respondents would suffer prejudice in addition to the loss of their time bar defence if time were extended **and generally whether the** hardship was not only excessive but undeserved and unmerited. The approach was not unlike that to extensions of time under RSC Ord 3 r 5. Paragraphs 69 and 70 of the DAC Report explained the change to the wording of section 12 as intended to reflect the underlying philosophy of the Act as being that of ***"party autonomy".*** By that phrase was meant among other things, that *"any power given to the court to override the bargain that the parties have made must he fully justified"*. The idea that the court had *'some general supervisory jurisdiction over arbitrations has been abandoned"*. It was for that reason that the court's power of extension was confined to the two cases covered by section 12(3) (a) and (b) of the Act.

25. It is to be observed that these two cases (a) circumstances beyond the reasonable contemplation of the parties when the agreement was made and when it would be just to extend time and (0) where the

respondent's conduct makes it unjust to enforce the time limit - are very closely related to party autonomy and are conceptually quite different from the "***undue hardship***" and Ord 3 r 5 approach.

Accordingly, the approach to the construction of section 12 has, in my judgment, to start from the assumption that when the parties agreed the time bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in. not unusual circumstances arising in the ordinary course of business. the claim would be time-barred unless the conduct of the other party made it unjust that it should. In this connection, it would appear quite impossible to characterise a negligent omission to comply with the time bar, however little delay were involved, as, without more, outside their mutual contemplation. Narrowly overlooking a time bar due to an administrative oversight is far from being so uncommon as to be treated as beyond the parties' reasonable contemplation. The process of identifying and evaluating in the balance the disparity between the prejudice to the claimant on the one hand and the degree of fault on his part on the other will not normally be a relevant exercise in determining whether there were circumstances beyond the reasonable contemplation of the parties. The circumstances in question must in each case include those which caused or at least significantly contributed to the claimant's failure to comply with the time bar.

26. There have been three reported decisions on section 12. The first was in ***Vosnoc Ltd* v *Trans Global Projects Ltd*** [1998] 2 All ER 990,' [1998] 1 Lloyd's Rep 711. In that case His Honour Judge Raymond Jack QC. when sitting as an additional judge of the Commercial Court, held that where the claimant had, within the contractual period, sent a letter which stated that the dispute was thereby referred to the arbitrator in London but did not call upon the respondent to appoint an arbitrator, that letter was not an effective commencement of suit within the Hague Rules' one-year period, but concluded that an extension of time ought nevertheless to be granted because the failure of the letter to have the effect of commencing suit was outside the reasonable contemplation of the parties. It was a "near miss". He therefore held in effect that an omission to commence proceedings due to that particular error of law was capable of being outside the parties' reasonable contemplation.

27. The next case was the decision of Mr Geoffrey Brice, QC, sitting as a deputy judge of the High Court, in the Commercial Court in ***Cathiship SA* v *Allansons Ltd, The Catherine Helen*** [1998] 3 All ER 714, [1998] 2 Lloyd's Rep 511. Shipowners commenced an arbitration within the one-year time period under a voyage charter claiming against charterers' demurrage and additional berthing and shifting expenses. They subsequent heard of various claims by cargo receivers under the bills of lading and notified the arbitrators that they might seek an implied indemnity against the charterers. However, no such claim was made or any arbitrator appointed within the one year. An application for an extension of time was rejected. The circumstances were not outside the reasonable contemplation of the parties. In the course of his judgment Mr Brice said this at [1998] All ER 714 at pp 72~727; [1998] 2 Lloyd's Rep 511 at 520, col 2: *In the addition to what I have said above this criterion requires further consideration. One must focus on the parties and the relevant time. It is said in Merkin, Arbitration Law (1991) para 11-43: "What is required . . . is the occurrence of an event in respect of which the parties could not reasonably have made provision when the agreement was entered into". One can think of examples which are fortuitous such as the lawyer handling the claim suffering a heart attack just before serving notice of the claim, or the vehicle in which the written claim was to be served being involved in a serious accident. I do not say that a "fortuity" such as this is a necessary prerequisite as a matter of law: each case will depend on its facts. Turning to the present type of case, in a common commercial transaction such as a Gencon charterparty and operations under or in respect of it the parties would reasonably have in contemplation the type of events which experience has demonstrated are prone if not certain to occur. One may be cargo claims against owners where owners wish to be indemnified under the ordinary principles of English law by the charterers. In my judgment this must be taken to be within the reasonable contemplation of owners and charterers. Similarly their reasonable contemplation will include the making of a claim and the appointment of an arbitrator under the Centrocon arbitration clause and the consequences which must follow if the time limit imposed by cl 23 is not observed.*

However, is the fact that a party (here the owners) makes a mistake as to the operation of cl 23 both in regard to making a claim and appointing an arbitrator something which is outside their reasonable contemplation when they concluded the charterparty? I do not believe that a court is justified in finding that it is. The clause is well

established and quite straightforward in its operation and consequences. True that in any given case the actual sequence of events which occurred may not have been foreseen eg as indicated above and as set out in the correspondence. However, I believe that to allow such matters absent some unforeseeable circumstances to fall within para (a) would not be to give effect to para (a) nor the commercial purpose of the Centrocon arbitration clause.

These passages in my judgment accurately identify the general approach to the construction of section 12(3)(a). At page 728, [1998] 2 Lloyd's Rep 511 and 521, col 2, he referred to the decision in ***Vosnoc* v *Trans Global Projects***, supra, as one which turned on its own facts.

28. Finally, in ***Grimaldi Compagnia di Navigazione SpA* v *Sekihyo Line*** [1998] 3 All ER 943; [1998] 2 Lloyd's Rep 636 Mance J held that the applicant's and respondents' failure to appreciate within the time period that the Hague Rules' time bar in Article III rule 6 operated in respect of a time-charterers' claim against the shipowners under a time charter was quite insufficient to show that its applicability was a circumstance outside the reasonable contemplation of the parties since the contract was governed by English law. Mance I also rejected a submission that the change in arbitration law involved in the replacement of section 27 by section 12 could amount to such a circumstance.

Were there circumstances outside the reasonable contemplation of the parties?

29. In this case it is an irresistible inference from their conduct that HAGWL failed to refer their disputes to arbitration within the relevant time simply because they failed to understand how clause 66 worked. They presumably thought that they had three months in which 10 start conciliation and more time after the conciliator's recommendation (one month) to refer the disputes to arbitration. This clause was not difficult to operate. It was in a standard form of contract in use in the construction industry. The fact that they made a mistake as to its operation which involved notifying the respondents of the five claims in dispute within the period for starting an arbitration but yet failing to start one, in my judgment, comes nowhere near the area of circumstances outside the reasonable contemplation of the parties envisaged by section 12.

30. Mr Bowdery submitted that this was the same kind of "***near miss***" as that **in *Vosnoc* v *Trans Global Projects,*** supra. The problem in that case was that there were conflicting judicial views on the requirements for the commencement of Suit. It could perhaps thus be said that the conclusion arrived at by Judge Jack, although right in law, was outside the reasonable contemplation of the parties. I am bound to say, however, that I am quite unable to see that the nearness of the miss in itself as identified by the judge can be relevant to the question whether the circumstances were outside the parties' mutual contemplation. It is the circumstances which gave rise to any miss, however near, that are relevant and in this case it was HAGWL's failure to operate the clause properly. That was a matter entirely within their control and not outside the parties' reasonable contemplation.

31. On whether the conclusion arrived by Judge Jack could be justified on the basis of the perceived uncertainty of the law as to when an arbitration was commenced I entertain very considerable doubt but I express no concluded view, as that is necessary for the issue now before me.

32. It is submitted that the respondents' failure to state what was wrong with the Notice of Conciliation until after the time for arbitration had expired was a circumstance outside the parties' mutual contemplation. I cannot accept this submission. Provided that they did not obstruct or mislead HAGWL, they were entitled simply to ignore the ineffective Notice of Conciliation for as long as they chose. After all, by their letter of Friday 25 September 1998, they warned HAGWL that there might be something wrong with the Notice of Conciliation. That should have alerted HAGWL to re-investigate the effectiveness of that Notice. The respondents' solicitors simply said that they would revert as soon as possible. Whereas, had they done so by Monday 28 September, the very last day for service, the respondents might have been made aware of the need to serve the notice of reference to arbitration in time, it is far-fetched to suggest that these circumstances were outside the parties' mutual contemplation. They were exactly what one might well anticipate happening.

33. Finally, it is submitted that the Engineer's failure to supply a quantification of the financial consequences of his decision until the last day for giving notice to refer to arbitration was another circumstance outside the parties' mutual contemplation.

34. This submission is, however, fallacious. It assumes that the absence of final financial quantification for claims 3 and 5 led in some way to the delay in referring the five disputed claims to arbitration. However, the issues were perfectly adequately defined by the Engineer's decision to enable HAGWL to appreciate that there were many issues of substance. After all, most of the five claims had been wholly rejected by the Engineer's decision. There was no doubt that if they wished to pursue the bulk of those claims, they would have to refer them to arbitration. These circumstances were emphatically not the kind of circumstances which are within the ambit of section 12.

35. Accordingly, taking these three suggested circumstances, nothing about them either individually or collectively can be said to involve any relevant matter outside the reasonable contemplation of the parties which had any material impact on the omission of HAGWL to refer their disputes to arbitration within the contractual time bar. To hold otherwise would be to create out of section 12 something akin to the benevolent regime of section 27 which the 1996 Act set out to abolish.

I therefore conclude that HAGWL have failed to bring themselves within section 12(3)(a).

The respondents' conduct

36. It is submitted that by their letter of 25 September and subsequent silence the respondents' solicitors' conduct made it unjust to hold HAGWL to the strict terms of the contract.

37. I have already referred to the terms of that letter and the subsequent silence in the context of the submissions that they were circumstances outside the mutual contemplation of the parties.

38. For it to be held that the conduct of one party makes it unjust to hold the other party to the strict terms of the time bar, there must, in my judgment, at the very least be conduct which is proved somehow to have led the claimant to omit to give notice in time. The exchanges between the parties during the last two working days of the period come nowhere near the kind of situation envisaged by section 12(3)(b). It cannot be said that the absence of a further response to and critique of the conciliation notice involved some kind of injustice to HAGWL. In no way were they diverted from compliance with the requirement of clause 66. On the contrary, the letter of 25 September should have alerted them to the time bar period in relation to their conciliation notice. As Mr Geoffrey Brice, OC held in ***Cathiship*** [1998] 3 All ER 714 and 729, [1998] 2 Lloyd's Rep 511 at 522, col I. mere silence or failure to alert the claimant to the need to comply with the time bar cannot render the barring of the claim unjust. There is certainly no conduct on the part of the respondents in this case which would cause it to be unjust for the claim to be time-barred.

The declaration application

39. This is for a declaration that no extension of time was needed to enable the five claims to be referred to arbitration because
    (i) these same claims will have to be or at least can be referred to arbitration when the dispute in respect of the Final Payment Certificate is arbitrated; and
    (ii) there was no valid Engineer's decision until he issued the Final Payment Certificate on 28 September 1998 and therefore time for reference to arbitration had not expired by 6 October 1998 when the notice of reference was given by HAGWL.

40. The starting point for consideration of ground (i) is rule 5.2 of the ICE Arbitration Procedure. This provides as follows: *"Once his appointment is completed the Arbitrator shall have jurisdiction over any issue connected with and necessary to the determination of any dispute or difference already referred to him whether or not any condition precedent to referring the matter to arbitration had been complied with."*

41. It is submitted that the five claims are issues which it is open to HAGWL to raise again as part of its facility for raising issues which were *"**connected with and necessary to**"* the determination of a dispute over the Final Payment Certificate. The substance of this submission is therefore that. notwithstanding the failure of HAGWL to comply with the time period laid down in clause 66(6) for commencing arbitration in response to the Engineer's decision in respect of the five claims, these same

claims can be referred to arbitration because they raise issues connected with and necessary to the determination of the dispute or difference referred to arbitration in respect of the final certificate. Further, it is argued that clauses 66(2) and (4) are in sufficiently wide terms to permit the Engineer's April 1998 decisions on the five claims to be revisited, following the issue of his Final Payment Certificate, by HAGWL issuing a further notice of dispute relating to that Certificate, leading in turn to a further Engineer's decision and to the right to refer the same issues to arbitration. It is submitted on behalf of HAGWL that under clause 66(4) when the Engineer makes a decision, that decision has no more than ***"temporary finality"*** and can be re-opened for the purposes of challenging the Engineer's Final Payment Certificate.

In support of that last proposition Mr Bowdery has deployed by way of analogy the decision of the House of Lords in ***Beaufort Developments Ltd* v *Gilbert-Ash Ltd*** **[**19981 2 WLR 860.

42. Finally, it is submitted that the Engineer never arrived at a decision within the meaning of clause 66(3) because of his failure to quantify the financial consequences of claim 3 or of those parts of claim 5 which he accepted. There being no decision. a subsequent reference to the arbitrator could be made in respect of all those matters covered by claims I to 5 which formed part of the basis for the Final Payment Certificate.

43. Clause 5.2 is designed to avoid the disablement of the arbitration of disputes which have been referred to arbitration under clause 66 where the determination of those disputes can be arrived at only if the arbitrator can only also determine other disputes which have not been specifically referred to the arbitrator following the process referred to in clause 66. This is clear from the use of the words "any dispute connected with *and* necessary to the determination of any dispute or difference already referred to him" (emphasis added). What is envisaged is that the arbitrator should not be prevented from deciding issues which have been referred in accordance with clause 66 merely because they can only be decided if other issues which have not been referred in accordance with the clause 66 code are also decided. Hence, the phraseology "whether or not any condition precedent to referring the matter to arbitration had been complied with".

44. The crucial question is whether this provision applies where, as in the present case, there has already been a decision by the Engineer on a Notice of Dispute but where no effective reference to arbitration has been made. Is the exclusion of the need to comply with the time limit for referring disputes to arbitration apt to cover an omission to refer an arbitrator's decision within the prescribed time? In this connection it is necessary to examine clause 66(4). The first sentence is clearly designed to achieve continuing operation of the contract.

45. Unless and until a decision of the Engineer is the subject of successful conciliation or is disturbed by an arbitration award made and published, such a decision is to be final and binding. In that sense only it has the attribute of temporary finality. However, that finality becomes permanent, as distinct from temporary, if it is left undisturbed by the results of conciliation or an arbitration award. Similarly, if there is no conciliation or arbitration, the temporary nature of the finality cannot realistically remain. The sense of clause 66(4), (5) and (6) is thus that the *only* means by which the decision of the Engineer can be disturbed is by way of conciliation or arbitration in accordance with the code in sub-clause (5) and (6) and that if the party who disputes the decision fails to operate that code by, for example, omitting to commence arbitration within the agreed time, temporary finality becomes permanent finality as regards those issues already determined by the Engineer's decision.

46. In this connection I do not consider that the decision or reasoning in ***Beaufort Developments* v *Gilbert-Ash***, supra. assists HAGWL, The issue in that case was whether architect's certificates issued pursuant to the JCT contract could be re-opened and adjudicated upon by the courts as distinct from the arbitrator. Lord Hoffmann, having observed, at p 868, that clause 30.9 of the ICT form expressly provided that the final certificate was conclusive evidence as to various matters but that clause 30.10 provided that, apart from the final certificate, no certificate should be conclusive evidence that any works, materials or goods to which it related were in accordance with the contract, said this: "If the certificates are not conclusive, what purpose do they serve? If one considers the practicalities of the construction of a building or other works, it seems to me that parties could reasonably have intended

that they should have what might be called a provisional validity. Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can be at least provisionally determined with some precision. This machinery is provided by architect's certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge.

47. On the other hand, to make the certificate conclusive could easily cause injustice. It may have been given when the knowledge of the architect about the state of the work or the effect of external causes was incomplete. Furthermore, the architect is the agent of the employer. He is a professional man but can hardly be called independent. One would not readily assume that the contractor would submit himself to be bound by his decisions, subject only to a challenge on the grounds of bad faith or excess of power. It must be said that there are instances in the 19th century and the early part of this one in which contracts were construed as doing precisely this. There are also contracts which provided that in case of dispute, the architect was to be arbitrator. But the notion of what amounted to a conflict of interest was not then as well understood as it is now. And of course the inclusion of such clauses is a matter for negotiation between the parties or, in a standard form, the two sides of the industry. so that what is acceptable will to some extent depend upon the bargaining strength of one side or the other. At all events, I think that today one should require very clear words before construing a contract as giving an architect such powers.

48. The argument that, founded on this reasoning, the Engineer's decision on claims I to 5 can be re-investigated when at the end of the contract the Final Payment Certificate is disputed to the Engineer and then the Engineer's decision is referred to arbitration is, in my judgment ***unsustainable***. As Mr Timothy Elliott QC has submitted on behalf of the respondents, clause 66(4) clearly states that *all* the Engineer's decisions are final and binding upon the parties. There are no decisions incapable of becoming permanently final and binding as in that case. As a matter of construction, I hold, therefore, that once the time for commencing arbitration has passed without the issues in respect of an Engineer's decision having been referred to arbitration that decision is final and binding in respect of those issues and that must remain the position before and after and for the purposes of the Final Payment Certificate. Clauses 66(4), (5) and (6) are already directed to achieving permanent finality at an early stage by reference to the time limits imposed for starting conciliation and arbitration.

49. It is against that background that the application of rule 5.2 of the ICE Arbitration Procedure has to be viewed. If the effect of clause 66(4) is to render the Engineer's decision final and binding in respect of a particular issue and the opportunity for disturbing it is not taken under clause 66(5) or (6). that issue cannot subsequently be re-opened before the arbitrator. It is simply permanently final and binding. That is the effect of clause 66. Rule 5.2 does not on its proper construction go further than to give the arbitrator jurisdiction over connected and necessary issues which have not yet become permanently final and binding. Accordingly, the omission to prevent an issue becoming time-barred is, in my judgment, intrinsically incapable of coming within the non-compliance with a condition precedent to referring a connected and necessary issue to arbitration contemplated by rule 5.2. Any other conclusion would take away from clause 66(4Y(6) the finality which it is the function of the timetable to achieve.

50. For these reasons I am unable to accept the submissions on behalf of HAGWL that rule 5.2 can justify the re-opening in a further arbitration on the Final Payment Certificate of the Engineer's decision on any claims which are already time-barred. The reference in that rule to non-compliance with a condition precedent can, as Mr Elliott submits, refer only to a case where the matter in issue has not been referred to the decision of or decided by the Engineer in the first place and therefore there is no final and binding decision about it.

Was there an Engineer's decision?

51. It is argued on behalf of HAGWL that if any issue identified in an Engineer's decision is left undecided, as was the case with the quantification of the monetary consequences of claim 3 and sev-

eral parts of claim 5, there has been no decision for the purposes of clause 66 and accordingly time began to run under clause 66(6) in accordance with clause 66(6)(a)(ii) and (0) and HAGWL therefore had six months from service of the notice of dispute to serve notice to refer to arbitration.

52. The Engineer in his decision arrived at unequivocal conclusions on claims 1,2 and 4 and rejected them outright. On claim 3 he came to the conclusion that the claim should be accepted and provisionally quantified it, subject to final certification review. Within claim 5 there were included no less than 13 largely unrelated sub-claims. One of the sub-claims, numbered 2.09, comprised 16 distinct matters of claim. Of the 13 heads of claim seven were rejected and eight were accepted in principle, but were not quantified. One was accepted in an agreed amount. The Engineer's decision involved the rejection of claims amounting to about 90 per cent of the total claims in monetary value.

53. The substance of this submission is that where several issues are referred for the Engineer's decision, and he is able to and does give a decision on many of them, but is not able at that stage to attach monetary consequences to what he has decided as a matter of liability, then he is taken not to have given a decision on anything. This would involve a most un-businesslike approach which this court would not adopt unless driven to it by clear words in the contract. There is, however nothing in clause 66 which suggests that the maintenance of any such inseparability is required. Indeed, sub-clauses (3), (5) and (6) appear to contemplate that clause 66 can work by reference to disputes upon each of which the Engineer has given a decision.

54. In my judgment, the construction advanced on behalf of HAGWL is completely at variance with what the mutual intention of the parties to this contract could be expected to have been and is not reflected in any part of the wording of clause 66. The meaning which the business sense of the clause strongly demands and which is entirely compatible with the wording is that to the extent that the Engineer decided the separate issues referred to him his decision on those issues is final and binding under clause 66(4), but subject to being challenged in conciliation and arbitration in accordance with clause 66(5) and (6). Thus, if the Engineer accepted a claim "in principle", that would be a conclusive determination on liability, but quantification would remain at large. To hold otherwise would involve the parties having the right to re-open issues that had already been determined by the Engineer and to invite him to re-consider those same issues simply because they are comprised in a decision which also covered other issues which were not resolved to the point of quantification. That would be an absurd result and ought to be avoided unless unavoidably required by the express contract wording.

55. Accordingly, the position that arose following the Engineer's decision of 29 June 1998, was that to the extent that some matters of quantification were left undecided or were only provisionally decided, there was no decision on those matters and it would be open to HAGWL to refer such matters to arbitration following the Final Payment Certificate. That would apply to each of the unresolved questions of quantification under claim 5 and to the provisional quantification under claim 3 but not to any of the matters in issue which he had resolved.

56. Conclusion

(1) To the extent that the Engineer's decision of 29 June 1998 decided issues comprised in HAGWL's Notice of Dispute, such decisions were final and binding under clause 66(4) unless HAGWL referred them to conciliation or arbitration in accordance with the time limit imposed by clauses 66(5) and (6) and they were agreed to be varied in conciliation or reversed by the arbitrator.

(2) HAGWL, having allowed the time for refer-ring these issues to arbitration to expire, required an extension of time under section 12 to enable them validly to refer each of these issues to arbitration.

(3) Their application for an extension of time is refused.

(4) To the extent that the Engineer's decision of 29 June 1998 left certain of the items of claim un-quantified, the issue of quantification in each case remained at large on 6 October 1998 and it was then open to HAGWL in the course of their challenge to the Engineer's Final Payment Certificate to challenge also his determination of each of those matters of quantification. They were not, however, entitled to refer either to the Engineer or the arbitrators any issue which could have been but was not, referred to the arbitrators, previously unless it fell within rule 5.2.

(5) It follows that HAGWL are not entitled to a declaration in the form which they seek.