CA on appeal from QBD, (Mr Justice Colman, QC) before Waller LJ and Tuckey LJJ, 12 October 1999

JUDGMENT : Lord Justice Waller:

Introduction

1. This is an appeal from the judgment of Colman J given on 19 February 1999. Before the judge the appellants (HAGWL) sought an extension of the period of time within which to commence an arbitration under Section 12 of the Arbitration Act 1996; in the alternative they sought a declaration that no extension of time was required. In relation to both points Colman J ruled against the appellants.

Extension of time application

2. This application was for an extension of time for -the commencement of arbitration under a contract on the ICE Conditions. Under the contract HAGWL were employed by the respondents to carry out and complete works involving the construction of flood defences at Parkeston Quay, Harwich. In dispute were and are 5 distinct claims by the appellants for additional costs in respect of the carrying out of the works. The claims related to additional excavation costs (claim 1), additional costs due to delay to site access and temporary works approval (claim 2), additional costs incurred in 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 conditions of contract were the ICE Conditions (6"' edition) dated January 1991, incorporating the Corrigenda dated August 1993 but amended and added to in relevant respects as shown on pp 199-204 of our bundle. The relevant clause, so far as the first point is concerned, is clause 66, and I shall set that clause out in full incorporating the relevant Corrigenda but underlining the Corrigenda to clause 66(5) since that aspect is of relevance. **"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 before 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 case 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

(a) 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.

(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.

(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-clause (3) of this clause.

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

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

4. I can take the events leading up to the reference of the claim to arbitration from the judge's judgment:-

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

On 3rd April 1998 the Engineer issued an interim certificate in the sum of £39,662.08 including VAT in response to the submission of claims 1 to 5 by HAGWL in the course of 1997.

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

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

The Engineers, decision was issued on 29th 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.

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

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 29th June 1998, namely 28th 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 28th September 1998.

On Wednesday 23rd 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."***

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.

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."

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

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."

On the same day the Engineer issued a Final Payment Certificate. This was based on the Engineer's decision of 29th 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.

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

Then on 5th 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 28th July and that accordingly, the notices of conciliation served on 23rd and 25th September were invalid.

On the following day, 6th 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.

*(a) There was a "**Notice to refer Dispute to Arbitration"** by which they referred to the Notice of Dispute of 6th April 1998 and to the Engineer's decision issued on 29th June 1998. They state that they understood from HAGWL '**that there (was) some uncertainty whether that decision (had) to be read alongside the***

final financial evaluation of 28th 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 to arbitration." *The letter then set out "**the matters 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, out. 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."***

5. As the judge indicated, neither confirmation was given and it was for that reason that the appellants issued their application for an extension of time to 6 October 1998.

6. It is perhaps just right to add to the judge's summary, the following. HAGWL accept that they were out of time with their Notice of Conciliation. The explanation for that is to be found in an affidavit of Mr Jones dated 7 October 1998 paragraph 5 where he says:- *"This application arises because (the appellants) applied the time limits set out in the Contract Conditions and not the Corrigenda in challenging the Engineer's decision and seeking a review of that decision by a conciliator."*

7. Clause 66(5), prior to August 1993, placed no time limit on the giving of a notice of conciliation following the decision of an Engineer. After August 1993 the Corrigenda inserted the time limit of one calendar month and it was that time limit which had been inserted into the terms of the contract between the appellants and the respondents in this case.

Section 12 of the Arbitration Act 1996

8. That 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.

(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.

(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.

(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."

9. As the judge suggests, and is not in issue, an applicant for an extension of time under section 12 has to establish that:

(a) 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 time; or alternatively

(b) the conduct of one party makes it unjust to hold the other to the strict terms of the provision in question.

10. Mr Martin Bowdery before the judge, and before us, submitted primarily that the "circumstances" were outside the reasonable contemplation of the parties when they entered into the contract and he submitted that the relevant circumstances were as follows. First he said that there had been a procedural mishap in that the appellants had used the wrong type of notice but still notified the respondents that the Engineer's decision was challenged. Secondly he relied on the circumstance that the respondents only informed the appellants of this after the time for service of the correct notice had expired. Thirdly he relied on the fact that the Engineer only provided details of the financial consequences of his decision after the time for service of the notice to refer to arbitration had expired.

11. So far as the third point is concerned, the financial consequences of the Engineer's decision, so far as at least 90% of the claims, were clear. Those claims had been rejected. So far as one or two minor items were concerned it is true that they awaited quantification. There is no issue between the parties that, in so far as quantification has now been finalised by the final certificate produced by the Engineer, that quantification can itself be the subject of a decision by the engineer which can be referred to arbitration and which has indeed been referred to arbitration.

12. In relation to the proper approach to section 12 the judge said as follows: - "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 & So Ltd*** [1967] 2 QB 86, ***Consolidated Investment and Contracting C v Saponaria Shipping Co Ltd*** [1978] 1 WLR 986 and ***Nea Agrex SA v Baltic Shipping Co*** [1976] QB 933. 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 Order 3 rule 5. Paragraph 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 be 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.

    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 (b) 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 Order 3 rule 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

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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."

13. I agree with the above approach. I do not think it differs from the approach of Clarke J in ***Fox & Widley v Guram & Anr*** [1998] 1 EGLR 91; Geoffrey Brice QC sitting as a Deputy judge of the High Court in the Commercial Court in ***Cathiship SA v Allansons Ltd*** [1998] 3 All ER 714; or Mance J in ***Grimaldi Compagnia di Navigazione SpA v Sekihyo Line Ltd*** [1998] 3 All ER 943. Nor do I myself think that it differs very much from the approach of Judge Raymond Jack QC sitting as a judge of the High Court in the Commercial Court in ***Vosnoc Ltd v Transglobal Projects Ltd*** [1998] 2 All ER 990 albeit the judge obviously had some doubts about the actual decision.

14. I would however sound one note of caution as to what might follow on a rather strict application of the approach and which in my view cannot have been intended. The point which I would make can be made by reference to the circumstances of this particular case. Colman J categorised the circumstances as a ***"mistake as to the operation of clause 66"***, and held it came nowhere near "the area of circumstances outside the reasonable contemplation of the parties envisaged by section 12." The actual mistake on further refinement can be said to be a failure to read the provisions which had been agreed. If one were to pose the question whether it would be contemplated by the parties that they would not even read the provision that they had agreed when contemplating operating the provision, the sensible answer would seem to be that one could not even reasonably contemplate that.

15. Does that mean that the clearer it is that the circumstance is one that the parties would not have contemplated as happening or contemplated as one for which an extension of time would not be allowed if it had been asked for, the more likely it is that the circumstance is one not within the reasonable contemplation of the parties? In my view that cannot be the proper construction of the sub-section. The sub-section is concerned with party autonomy. Its aim seems to me to be to allow the court to consider an extension in relation to circumstances where the parties would not reasonably have contemplated them as being ones where the time-bar would apply, or to put it the other way round, the section is concerned not to allow the court to interfere with a contractual bargain unless the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time-bar might not apply; - it then being for the court finally to rule as to whether justice required an extension of time to be given. That is an approach which did not commend itself to Judge Raymond Jack QC (see 1001D), but I suggest that if the absurdity of some circumstances being outside the contemplation of the parties triggering the power under section 12(3) is to be avoided, the above construction gives best effect to the intention of the draftsman. In this very case it enables circumstances such as a failure to read the provisions which might not be reasonably contemplated, to be circumstances which do not trigger consideration of an entitlement to an extension of time.

16. I should also add that albeit if a circumstance was within the control of a party seeking an extension, that might be a material factor in assessing the significance of the circumstance; I would not think that control alone disqualifies a circumstance from being one to which the sub-section applies. I am not sure that this was the judge's view, but in case his reference to control is so interpreted, it is right to be clear about the matter. Thus, for example, if a notice to arbitrate was put through the wrong letterbox by the relevant party, that might be said to be within the control of that party at least to some extent, but that might be an example of a case where section 12(3) could apply.

17. I should just add a further sentence on Judge Raymond Jack QC's decision in ***Vosnoc*** (supra). I agree with the view of the judge that the mere fact that a notice is a near miss assists very little in considering whether the circumstances are within section 12(3). At the same time it seems to me not an irrelevant circumstance when taken with other circumstances, and I would not myself cast any doubt on the actual decision. I do not understand Mance J to have cast any doubt upon the decision in ***Vosnoc*** in his decision in ***Grimaldi*** (supra). Indeed, as I understand his judgment, he was merely reserving a further question when he said this :- *"On the approach adopted by Judge Jack, a mistake of law as to what suffices to refer a matter*

to arbitration within the meaning of a clause requiring such a reference to be made within a specific time may fall within section 12(3)(a), while a mistake of law as to what requires to be referred to arbitration within such time will not. The distinction is narrow, and I should like to reserve my judgment on the possibility of applying section 12(3)(a), both in a case of reasonable misapprehension about the scope of the circumstances falling within an arbitration agreement, and in a case of reasonable misapprehension about the need to commence arbitration within a particular time. The construction of a contract is a matter on which even courts can hold very different views, sometimes only resolved at the highest level. . . ."

18. In any event, as will now be apparent, I agree with the judge that the circumstances in this case of failing to properly read the provision relating to the time for commencement of an arbitration to challenge the decision of the Engineer is not a circumstance triggering the court's power under section 12(3).

19. As to the other two matters relied on by Mr Bowdery, I agree with the judge that they too do not amount to circumstances that would trigger that power and there is nothing I can usefully add to his reasons.

The Respondent's Conduct

20. Once again there is little that I can add to the judge's reasoning. There was no obligation on the respondents to advise the appellants that time was about to expire or that it appeared that the appellants had failed to read the relevant provisions. In those circumstances it does not seem to me unjust to hold the appellants to the strict terms of the time-bar.

The Declaration Application

21. The appellant rests this aspect of his appeal on three distinct grounds so far as the skeleton argument is concerned. First, the submission is that the dispute on the Final Payment Certificate would have to encompass claims 1-5 irrespective of whether or not the appellants have complied with any condition precedent for referring these claims to arbitration; second, that there was no Engineer's decision until he issued the Final Payment Certificate; and third there was no proper notice of dispute under clause 66(2).

22. That third point has not been pursued and there is thus no reason to consider it further.

23. It is convenient to deal with the second point next i.e. the submission that there was no Engineer's decision until the Final Payment Certificate was issued. This submission rests on an observation of Lord Denning in ***Monmouthshire C.C. v Costelloe & Kemple*** (1965) 5 BLR 83 at 90:- *"The third point is this: Did the Engineer state hi s decision in writing and give notice of it? It is said by the Council that the Engineer stated his decision in the letter of 7 April 1961. I do not think he did. The Engineer does not purport to state a decision. He only makes observations and comments on all the 11 claims. The judge has divided them into two groups. As to one half (as to which there has been a previous claim and rejection) the judge has held that the Engineer stated his decision on those matters. As to the other half (where there has been no previous claim or rejection) he held there was no decision within clause 66. I cannot agree with this view. It seems to me the whole 11 claims must stand or fall together. They are all on the same basis."*

24. On the basis of the above observation, the submission is that because the Engineer did not reach a final decision on claim 3 and items 2.9 and 2.11 of claim 5 in that he left quantification over, there was no decision of the Engineer at all. It was submitted that all the claims must stand or fall together in the phrase of Lord Denning.

25. It seems to me that the observation of Lord Denning is one that should be confined to the particular case. In fact in that case the primary ground of decision was that there had been no reference of a dispute to the Engineer. That involved examination of the letter under which the dispute was referred and was a conclusion with which all members of the Court of Appeal in that case agreed. Thus the observation was on any view obiter. More important however it was confined to the particular circumstances of that case and the authority cannot be taken as laying down as a rule of law that if the disputes are referred to an Engineer then there can be no decision of the Engineer at all if he only deals with 9 out of the 10 disputes referred.

26. When one examines what was referred to the Engineer in this case and examines the decision of the Engineer, one can see the specificity of the disputes referred to him and the specificity of the Engineer's decisions in relation to each item.

27. In my judgment there is nothing in the point that there has been no Engineer's decision in this case.

28. That brings me back to the submission that the dispute on the Final Payment Certificate will have to encompass claims I to 5 irrespective of whether the appellants have complied with any condition precedent for referring those claims to arbitration. There are three ways in which the appellants, through Mr Bowdery, suggest that the above proposition succeeds. First, he submits that the arbitrator is given jurisdiction over claims I to 5 by virtue of rule 5.2 of the ICE Arbitration Procedure (1997). Second, in the alternative, he submits that the arbitrator has such jurisdiction as a result of the judgment in ***Mid Glamorgan County Council v The Land Authority for Wales*** (1990) 49 BLR 61. Third, he submits, the arbitrator has such jurisdiction because on a proper construction of clause 66(4) there was no final and binding Engineer's decision.

Proper Construction of Clause 66(4)

29. It is convenient to commence with the third of the above propositions. The submission of Mr Bowdery is that clause 66(4) only provides "***temporary finality***" until the issue of the Final Payment Certificate. Mr Bowdery places great reliance on the decision of the House of Lords in ***Beaufort Developments v Gilbert Ash*** **[**1998] 2 WLR 860 particularly a passage of Lord Hoffman at 868F-H. That passage reads:- *". . . 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 I 9th 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."*

30. ***Beaufort*** seems to me to be of little assistance. The case concerned a form of contract in dissimilar form to the one with which this case is concerned. The question was whether the court had the same powers as an arbitrator to open up and review decisions of the architect administering the contract. Lord Hoffman drew distinctions between certificates which were final and certificates which were not, and it was in relation to certificates which were not final that the House of Lords concluded that the court had the same powers as an arbitrator to open up the same. There simply is no support for the view that where wording of the type used in clause 66(4) is used i.e. that decisions are to be ***"final and binding"*** unless certain steps are taken that those words should be construed as only "***temporarily binding".***

31. Mr Bowdery suggested that his construction. was commercially more convenient since it enabled the Engineer to deal with situations during the currency of a contract and allow those decisions to be re-opened at the end of the contract. That argument seems to me to be two-edged. Firstly, there is no necessity for the contractor to insist on a decision of an Engineer, albeit I appreciate that the employer may do so. Secondly, it may in fact be commercially more convenient if a decision which is final and binding can be taken at an early stage of the contract. All will depend on the particular circumstances that prevail in particular industries and indeed on particular contracts. What the court must do is simply construe the words of the contract which has been adopted by the parties in any particular situation.

32. In this case I see no basis on which the words used in clause 66(4) should be given anything other than their natural and ordinary meaning.

Mid Glamorgan County Council

33. I can find nothing in ***Mid Glamorgan County Council v The Land Authority for Wales*** which would support the argument, that matters which have been decided by the Engineer and not been the subject of an arbitration notice, and which are thus by clause 66(4) "final and binding" can be re-opened in an arbitration relating to the Final Certificate. Whether or not they can be re-opened would seem to me to have to rest on the particular provisions of the contract with which this case is concerned including rule 5.2 of the ICE Arbitration Procedure. Accordingly it is to that rule to which I now turn.

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Rule 5.2 of the ICE Arbitration Procedure

34. That rule provides:- *"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."*

35. The submission of the appellants is that if a matter has been referred to arbitration then it is open to the arbitrator to consider decisions of the Engineer on other matters even if those decisions have become final and binding because they were not challenged in accordance with the procedure under clause 66. So in the instant case after receipt of the Final Certificate which quantified those claims left unquantified by the Engineer's decision, the appellants gave notice to the Engineer of a dispute in relation to quantification. The Engineer having resolved that dispute, the appellants then gave notice for an arbitration to take place on those items. It is plain that the object of the appellants in commencing the arbitration was to try and give jurisdiction to the arbitrator to resolve those matters which were previously the subject of the Engineer's decision and in relation to which clause 66(4) prima facie applies.

36. The primary submission of Mr Elliott QC is that rule 5.2 does not allow an arbitrator to have jurisdiction over any issue which has been determined by the Engineer and which is final and binding by virtue of the provisions of clause 66(4). He submits, (and this was a submission accepted by the judge), that once the decision of the Engineer has become final and binding in relation to any matter, there simply is not an "***issue***" which could be said to be connected with and necessary to the determination of any dispute or difference. Albeit at one time I did wonder whether some assistance was given to Mr Bowdery by the final sentence of clause 66(8) in his argument that even decisions of the Engineer unchallenged were reviewable provided they could be said to be *"connected with and necessary to the determination of any dispute or difference already referred to (the arbitrator)"*, I was very much persuaded by Mr Elliott that there was no force in that point. Mr Elliott pointed out that there are decisions which are taken by the Engineer with a small "d" which are to be distinguished from a decision with a capital "D". The decisions with a capital "D" being those taken under clause 66.

37. It seems to me that the construction of rule 5.2 suggested by Mr Elliott is the correct construction and accords with commercial common sense. It seems unlikely that a contract would provide for decisions of the Engineer being ***"final and binding"*** and then leave the whole matter uncertain once the Final Certificate had been produced.

38. In any event, even if rule 5.2 did allow a decision of the Engineer, unchallenged and thus final and binding, to be re-opened in the context of an arbitration over some other aspect, it is difficult to see how the decisions in this case the subject of the Decision Letter could be said to be ***"connected with and necessary to the determination"*** of the dispute in relation to quantification that has been referred to the arbitrator.

Conclusion

39. In my judgment the appeal against the decision of the judge should be dismissed. I have not dealt with the Respondent's Notice because agreement has been reached on what will be the result if the appeal was otherwise to be dismissed.

Lord Justice Tuckey:

40. I agree.

Martin Bowdery (instructed by Beale and Company) for the appellant.
Timothy Elliott QC and (instructed by Mills and Reeve) for the respondent.