Lafarge Redlands Aggregates Ltd v Shephard Hill Civil Engineering Ltd [2000] ABC.L.R. 07/27

HL before Lords Hope; Cooke; Clyde; Hobhouse; Millett. 27th July 2000

LORD HOPE OF CRAIGHEAD : My Lords,

1. The framework within which work is carried out by participants in the construction industry is provided by the law of contract. They are assisted in their negotiations within this framework by the various standard forms of contract which are in current use. Among the matters provided for in these standard forms is a mechanism for the resolution of disputes between the parties to the contract. This invariably includes an arbitration clause which includes provision for the appointment of an arbitrator.

2. Arbitration is a means of dispute resolution which is widely practised within the construction industry. But it too depends on the law of contract. The arbitrator provides his services to the parties under the contract which he enters into with them when he is appointed to act as their arbitrator, and it is the agreement between the parties to the arbitration clause that renders the arbitrator's award enforceable. This contractual framework causes no difficulty where the dispute is of concern only to the parties to the contract which contains the arbitration clause. But it is not well adapted to the position which is commonplace throughout the construction industry where work which the contractor has undertaken to carry out for the employer under the main contract is executed on the contractor's behalf by a sub-contractor. The only contract which binds the employer is his contract with the contractor under the main contract. The only contract which binds the sub-contractor is his contract with the contractor under the sub-contract. The doctrine of privity of contract inhibits the formation of any kind of implied contractual relationship between the employer and the sub-contractor. This arrangement usually works well enough while the works are in progress, as the main contract and any sub-contracts entered into by the contractor are designed to operate independently as regards the execution, completion and maintenance of the contract or sub-contract works and the payments due to the contractor and to the sub-contractor respectively. Its limitations are thrown into sharp focus where a dispute arises which is of concern to all three parties and arbitration is the preferred means of resolving it.

Background

3. The disputes which have arisen in the present case relate to the construction of the A133 Little Clacton and Weeley Heath Bypass. The main contract was entered into on 24 February 1993 between Essex County Council as employer and the appellant, Shephard Hill, as contractor. The works which were to be carried out under it consisted of the construction of approximately seven kilometres of carriageway together with associated side roads, bridges and culverts, drainage and accommodation works. It incorporated an amended form of the I.C.E. 5th Edition (June 1973) Standard form of Contract for Civil Engineering Works (Revised January 1979) (Reprinted January 1986) *("the I.C.E. Conditions*"). The contract price was £7.7 million, to be measured and paid against a schedule of rates. By a contract dated 31 August 1993 the appellant entered into a sub-contract with the respondent, Lafarge Redland, for the work of supplying and laying the asphalt surfacing for the new carriageway. The sub-contract incorporated, with amendments, the F.C.E.C. Standard Form of Sub-Contract (September 1984 Edition) generally known as the Blue Form.

4. The commencement date of the main contract was 22 March 1993 and its completion date was 18 December 1994. This was a period of 91 weeks. The sub-contract works were to be carried out in accordance with the appellant's programmes and schedule of durations, the effect of which was that they were to be completed in 135 days. The main contract works commenced on 22 March 1993. The sub-contract works were scheduled to start in June 1993, but due to earlier delays the start was delayed until 1 October 1993. They were substantially completed on 17 January 1995. The engineer under the main contract certified that the main contract works were substantially completed on 19 February 1995. The effect of his decision was that there was a delay in the completion of the main contract works of 9 weeks as compared with the contractual completion date of 18 December 1994. Two interim extensions of time were granted to the appellant by the engineer under the main contract which amounted in total to 7.5 weeks. The effect of these decisions was that there was a period of 1.5 weeks for which no extension of time had been granted.

5. Disputes arose between Essex County Council and the appellant and between the appellant and the respondent during and following completion of the main contract and the sub-contract works. These disputes related primarily to the causes of delay to the main contract and the sub-contract works. They raised questions as to entitlement to extensions of time, entitlement to additional remuneration as a result of delays to completion, the appellant's right to withhold from sums otherwise due to the respondent monies in respect of the loss which the appellant claimed to have incurred by reason of the respondent's alleged delay in completion of the sub-contract works, whether or not additional work was instructed and, to the extent that it was instructed, the value of the additional work. The respondent's claims against the appellant amounted in total to about £450,000 exclusive of VAT and interest. The appellant's claims against Essex County Council amounted to about £1.7 million.

6. The provisions for the settlement of disputes arising under the main contract are set out in an amended clause 66 to the I.C.E. Conditions. The relevant parts of this clause provide:

> *"(1) If any dispute or difference of any kind whatsoever shall arise 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 referred to and settled by the engineer who shall state his decision in writing and give notice of the same to the employer and the contractor. Unless the contract shall have been already determined or*

abandoned the contractor shall in every case continue to proceed with the works with all due diligence and he shall give effect forthwith to every such decision of the engineer unless and until the same be revised by an arbitrator as hereinafter provided.

Such decisions shall be final and binding upon the contractor and the employer unless either of them shall require that the matter be referred to arbitration as hereinafter provided. If the engineer shall fail to give such decision for a period of 3 calendar months after being requested to do so or if either the employer or the contractor be dissatisfied with any such decision of the engineer then and in any such case either the employer or the contractor may within 3 calendar months after receiving notice of such decision or within 3 calendar months after expiration of the said period of 3 months (as the case may be) require that the matter shall be referred to the arbitration of a person to be agreed upon between the parties or (if the parties fail to appoint an arbitrator within one calendar month of either party serving on the other party a written notice to concur in the appointment of an arbitrator) a person to be appointed on the application of either party by the President for the time being of the Institution of Civil Engineers. ... Any such reference to arbitration may 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 and in cases where the President of the Institution of Civil Engineers is requested to appoint the arbitrator he may direct that the arbitration is conducted in accordance with the aforementioned procedure or any amendment or modification thereof. Such arbitrator shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the engineer and 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 above referred to. The award of the arbitrator shall be final and binding on the parties. . . ."

7. The provisions of this clause provide a system for the settlement of disputes between the contractor and the employer which derives its binding force from the contract which they have entered into. The decisions of the engineer are to be "*final and binding*" on the contractor and the employer unless either of them requires that the matter be referred to arbitration. If the matter is referred to arbitration the award of the arbitrator is to be "final and binding" on the parties to the contract between the contractor and the employer. No mention is made in the clause of any third party with whom either the employer or the contractor may be in dispute. Neither the engineer nor any arbitrator appointed under clause 66 has power to issue a decision or to make an award which is binding on any third party by virtue of the provisions of the main contract.

8. The sub-contract between the appellant and the respondent contains a preamble in which the following references are made to the main contract:

"WHEREAS the contractor has entered into a contract (hereinafter called "the main contract") particulars of which are set out in the First Schedule hereto:

AND WHEREAS the sub-contractor having been afforded the opportunity to read and note the provisions of the main contract (other than details of the contractor's prices thereunder), has agreed to execute upon the terms hereinafter appearing the works which are described in the documents specified in the Second Schedule hereto and which form part of the works to be executed by the contractor under the main contract."

9. These provisions have an important bearing on the contractual relationship between the contractor and the sub-contractor. But it is not, and could not be, suggested that by entering into the sub-contract with the contractor the sub-contractor was entering into a contractual relationship of any kind with the employer. The system which the amended clause 66 of the I.C.E. Conditions provides for the resolution of disputes between the employer and the contractor under the main contract is not available for the resolution of disputes between the contractor and the sub-contractor. So the sub-contract contains its own system for the resolution of these disputes.

10. This system is set out in clause 18 of the standard form of sub-contract, which - as amended by the parties to the sub-contract by the substitution of the word "*shall*" for "*may*" where indicated - is in these terms:

"(1) If any dispute arises between the contractor and the sub-contractor in connection with or arising out of this sub-contract or the carrying out of the sub-contract works including any dispute as to any decision, opinion, instruction or direction of the contractor and/or engineer or any dispute as to payment under clause 15 it shall, subject to the provisions of this clause, be referred to the arbitration and final decision of a person agreed between the parties, or failing such agreement, appointed upon the application of either of the parties by the President for the time being of the Institution of Civil Engineers and any such reference to arbitration [shall] be conducted in accordance with the Institution of Civil Engineers' Arbitration Procedure 1983 or any amendment or modification thereof in force at the time of the appointment of the arbitrator.

(2) If any dispute arises in connection with the main contract and the contractor is of the opinion that such dispute touches or concerns the sub-contract works, then provided that an arbitrator has not already been agreed or appointed in pursuance of the preceding sub-clause, the contractor may by notice in writing to the sub-contractor require that any such dispute under this sub-contract shall be dealt with jointly with the dispute under the main contract in accordance with the provisions of clause 66 thereof. In connection with such joint dispute the sub-contractor shall be bound in like manner as the contractor by any decision of the engineer or any award by an arbitrator.

(3) If at any time before an arbitrator has been agreed or appointed in pursuance of sub-clause (1) of this clause any dispute arising in connection with the main contract is made the subject of proceedings in any court between the employer and the contractor and the contractor is of opinion that such dispute touches or concerns the sub-

contract works, he may by notice in writing to the sub-contractor abrogate the provisions of sub-clause (1) of this clause and thereafter no dispute under this sub-contract shall be referable to arbitration without further submission by the contractor and sub-contractor.

(4) Notice of any dispute under this agreement shall be given by the sub-contractor to the contractor in writing as soon as practicable after the event giving rise to the dispute. The sub-contractor shall be bound by the time limits imposed on the contractor by clause 66 of the main contract in respect of any decision given by the engineer thereunder insofar as such decision affects the sub-contract works."

11. The questions which are before your Lordships in this appeal relate to the meaning and effect of clause 18(2) of the sub-contract. They arise in the context of the following events, all of which occurred after the completion of the sub-contract works.

12. By letter dated 15 February 1995 the respondent gave notice to the appellant of its intention to refer disputes between them to arbitration under clause 18(1). This notice was followed by further notices to the same effect dated 21 March and 11 September 1995. On 20 February 1995 the respondent gave notice to the appellant to concur in the appointment of Mr. D.T. Simmonds, F.C.I.A., as sole arbitrator. In response to these initiatives the appellant replied that it considered the appointment of an arbitrator to be premature, that in its view the normal negotiating channels had not yet been exhausted and that it did not wish to escalate the disputes under the main contract at that stage. It then gave notice to the respondent by letter dated 6 March 1995 that it required the disputes to be dealt with jointly with disputes under the main contract under clause 18(2). Further notices to the same effect were given by the appellant to the respondent on 9 June, 17 July and 26 September 1995. On 20 March 1995 the respondent applied to the President of the Institution of Civil Engineers for the appointment of an arbitrator. On 3 April 1995 the appellant notified the respondent that it considered the application to the President premature and that it would challenge the jurisdiction of any arbitrator who was appointed in response to the respondent's request. On 6 April 1995 the appellant invited the President of the Institution of Civil Engineers to reject the respondent's request for the appointment of an arbitrator. On 13 April 1995 the respondent asked the President of the Institution of Civil Engineers to postpone the making of the appointment for the time being. On 12 September 1995, having on 11 September listed sixteen disputes which it required to be referred to arbitration, the respondent gave a further notice to the appellant to concur in the appointment of Mr. Simmonds as sole arbitrator. But on 26 September 1995 the appellant required that nearly all of the disputes be dealt with jointly with the disputes under the main contract and again notified the respondent that it considered the application to be premature and that it would challenge the appointment of any arbitrator appointed under clause 18(1).

13. Two of the disputes which had arisen under the main contract were then referred by the appellant to the engineer for his decision under clause 66 of the main contract. The engineer gave his decision on these disputes, and the appellant referred them to arbitration under that clause. By agreement between the appellant and the employer the arbitration proceedings in regard to these disputes were deferred. None of the other disputes between the appellant and the employer, and in particular none of the disputes which had arisen between the appellant and the respondent and were the subject of the clause 18(2) notices given to the respondent by the appellant under the sub-contract, were the subject of a request for a formal decision by the engineer under clause 66 of the main contract. The respondent then raised these proceedings against the appellant to challenge the validity of the clause 18(2) notices and for a declaration that the appellant was not entitled to rely upon them.

14. On 22 May 1997 the recorder, B.J. Knight Q.C., held that the notices which were given under clause 18(2) were valid notices, and he rejected the respondent's alternative arguments that the appellant was in breach of obligations imposed on it by clause 18(2), that it was estopped from relying upon that clause, that it had by its conduct frustrated the purpose of clause 18(2) and that it had repudiated the agreement for arbitration in clause 18(1). On 11 December 1998 the Court of Appeal (Auld and Chadwick, L.JJ. and Sir Christopher Staughton) allowed the respondent's appeal. It declared that the respondent was no longer obliged to take part in a tripartite arbitration under clause 18(2) and that it was entitled to call upon the President of the Institution of Civil Engineers to appoint an arbitrator on its disputes with the appellant under clause 18(1).

15. The following issues arise for decision in this appeal. Mr. Friedman for the appellant conceded that the effect of the serving of a notice on the sub-contractor under clause 18(2) was to oblige the contractor to initiate the procedure under clause 66 of the main contract within a reasonable time. The first issue relates to the question how that period is to be determined. In particular, is the effect of clause 18(2) that the contractor must have a present intention of invoking the clause 66 procedure at the time when it serves the notice under clause 18(2) and, if so, does it lack that intention if its intention is to invoke clause 66 only if and when negotiations between it and the employer fail? The second issue relates to the nature of the procedure that is envisaged by clause 18(2). Does it require a tripartite operation of the arbitration procedure provided for by clause 66 of the main contract? If, not, what form of procedure is required to achieve a decision which is binding as between the contractor and the sub-contractor in terms of clause 18(2)?

The reasonable period of time issue

16. The question as to what amounts to a reasonable time for the performance of an obligation is in almost every case a pure question of fact. But in this case an issue of law is involved. It arises because the reason which the appellant has given for not initiating arbitration proceedings under the main contract is its wish to negotiate a

settlement of its disputes with the employer rather than obtain a formal decision from the engineer under clause 66 with a view to referring the matter to arbitration under that clause.

17. The recorder dealt with the matter as a pure question of fact. He said that he did not think that it was unreasonable for the appellant to have embarked on negotiations with the employer. He accepted that they might not have proceeded at a pace acceptable to the respondent, but he did not consider that they had been unreasonably protracted. In the Court of Appeal Sir Christopher Staughton also dealt with the question as one of fact. He said that the obligation on the contractor was to set up and conduct the procedure contemplated by clause 18(2) of the sub-contract with all deliberate speed. He summed the matter up in this way: *"How should a reasonable time be viewed? Seeing that the sub-contractors have requested arbitration to enforce their claims, and that the contractors have placed an obstacle in the way of that request, and in the light of the very short periods, relatively speaking, which feature elsewhere in the clause, it seems to me that a reasonable time would be quite a short period, and certainly not two years or 18 months or anything like it."*

18. But Chadwick L.J. said that it seemed to him that the requiremet to which the exercise of the power under clause 18(2) gave rise, that the sub-contract dispute be dealt with "*jointly with the dispute under the main contract*" gave rise to two further conditions on the exercise of the power, which he described in these terms: *"They are: (i) that at the time when the power is exercised the contractor has a present intention of invoking the provisions of clause 66 of the main contract in order to resolve, as between itself and the employer, the main contract dispute which it has identified; and (ii), that following the exercise of the power, the contractor does take steps timeously to invoke the provisions of clause 66 in relation to the main contract dispute."*

19. I agree with Chadwick L.J. that there is more to this matter than an implied obligation on the contractor to initiate the procedure within a reasonable time. The assumption on which clause 18(2) proceeds is that a dispute has arisen in connection with or arising out of the sub-contract or the carrying out of the sub-contract works which would otherwise fall to be resolved by arbitration under clause 18(1) of the sub-contract. In the typical case a dispute of that kind involves a request by the sub-contractor for payment of money which the contractor has declined to pay under the terms of the sub-contract, and it will normally be in the best interests of the sub-contractor that the dispute between them be resolved as quickly as possible. The effect of the exercise of the power under clause 18(2) is to remove from the sub-contractor the power to take the initiative by referring the dispute to arbitration under clause 18(1). A different dispute resolution procedure is to be substituted, over the timing of which the sub-contractor has no control as it is not a party to the main contract. But the procedure which clause 66 of the main contract describes is a procedure for the resolution of disputes by means of a decision of the engineer which failing that of an arbitrator. A process of negotiation whose purpose is to avoid the necessity of referring the matter for the decision of the engineer whom failing of an arbitrator is a quite different procedure. It is an informal procedure which is conducted without regard to the mechanism for the resolution of disputes set out in the contract. It is not mentioned anywhere in clause 66 of the main contract, nor is it mentioned in clause 18(2) of the sub-contract.

20. Clause 18(2) of the sub-contract provides that the sub-contractor is to be bound in like manner as the contractor by any decision of the engineer or any award by an arbitrator. But there is nothing in the clause which makes an agreement which results from negotiations between the contractor and the employer binding on the sub-contractor. The result of these negotiations, in which the sub-contractor has no right under its contract with the contractor to participate, may be unacceptable to the sub-contractor. In that event its dispute with the contractor, which would otherwise have gone to arbitration under clause 18(1), will remain unresolved. That plainly is not a situation which sub-clause 18(2) contemplates. The purpose of clause 18(2) is to avoid the risk of inconsistent findings on matters which arise in connection with the main contract and touch on or concern the works under the sub-contract. The risk of negotiations with the employer resulting in an agreement between the contractor and the employer which is unacceptable to the sub-contractor is not within the mischief that clause 18(2) seeks to avoid. Negotiation is the antithesis of submitting the dispute for the decision of the engineer or an award by an arbitrator.

21. I would readily accept that it may well be in the best interests of the parties to a dispute to attempt to settle their dispute by negotiation and agreement rather than embarking upon a process of litigation with a view to its resolution by means of an award by an arbitrator. The expense and delay which is inevitable in litigation has the effect of putting up costs and increasing overheads. The hardening of attitudes which results is not good for continuing business relationships. Everyone would agree that it is sensible to avoid those consequences by negotiation wherever possible. But a contractor who seeks to take advantage of the power under clause 18(2) is not entitled to have regard only to its own interests in selecting a means of resolving its dispute with the employer. It must have regard also to the interests of the sub-contractor, which is being deprived of its power to make use of the procedure set out in clause 18(1).

22. The meaning and effect of clause 18(2) was considered in ***Erith Contractors Limited v. Costain Civil Engineering Limited*** [1994] A.D.R.L.J. 123. In that case His Honour John Lloyd Q.C., sitting as an official referee, said that it was axiomatic that if the contractor requires the sub-contract dispute to be dealt with jointly with the main contract dispute with the employer in accordance with the provisions of clause 66 of the main contract, he is under an obligation to take the necessary steps to have the two disputes dealt with in accordance with clause 66. I agree. Clause 18(2) of the sub-contract does not give the contractor the right to deprive the sub-contractor of the benefit of the procedure in clause 18(1) while he attempts to settle the main contract dispute by negotiation with

the employer. There is nothing in either clause 66 or in clause 18(2) to prevent the contractor from attempting to settle the dispute under the main contract by negotiation once it has initiated the procedure that clause 18(2) contemplates. But any delay which is attributable to the negotiation process must be left out of account when consideration is being given to the question whether the contractor has fulfilled its obligation to the sub-contractor to have the dispute which has arisen under the sub-contract resolved within a reasonable time under clause 66.

23. I would therefore hold that it is an implied condition of the exercise of the power under clause 18(2) that the contractor intends to invoke the procedure under clause 66 of the main contract. This means that it is no answer for the contractor, if challenged on the ground of its failure to invoke that procedure within a reasonable time, to attempt to explain the delay by referring to time which has elapsed due to negotiations entered into with the employer with a view to rendering that procedure unnecessary. My noble and learned friends Lord Cooke of Thorndon and Lord Hobhouse of Woodborough have indicated that they would prefer an objective approach to this matter rather than one which has regard to the subjective intent of the contractor. But I do not believe that the disagreement between us is on a point of any real substance. As my noble and learned friend Lord Hobhouse has observed, the subjective intent of the contractor may provide evidence of repudiation or anticipatory breach which will deprive it of the right to enforce clause 18(2) against the sub-contractor.

24. I do not think that the recorder was in error when he held that the notices which the contractor gave to the sub-contractor under clause 18(2) were valid notices. In ***M.J. Gleeson Group Plc. v. Wyatt of Snetterton Limited*** [1994] 72 B.L.R. 15 the Court of Appeal rejected the sub-contractor's argument that a dispute between the contractor and the employer within the meaning of clause 18(2) can only arise when clause 66 is invoked. The court held that the word "*dispute*" in clause 18(2) must be given its ordinary meaning which, in the words of Steyn L.J. as he then was at p. 22, prima facie comprehends the case where a claim has been put forward and rejected. It seems to me that this approach is entirely consistent with the opening words of clause 18(2), and I did not understand Mr. Ramsay Q.C. for the respondent to contend otherwise.

25. Where the recorder went wrong, in my opinion, was when he asked himself the question whether it was reasonable for the appellant to embark on negotiations with the employer once it had exercised its power under clause 18(2). That was a question which had no bearing on the question whether the contractor had performed its obligation to invoke the procedure within a reasonable time after service of the relevant notices. Once that question was left out of account, the appellant had no answer to the respondent's case that the contractor had failed to invoke the clause 66 procedure within a reasonable time and that for this reason it was no longer entitled to rely on the clause 18(2) notices.

The procedure required by clause 18(2)

26. Although it is sufficient for a decision in this appeal to hold that the appellant was in breach of the obligation to invoke the clause 18(2) procedure within a reasonable time, I think it would be appropriate for your Lordships also to say something about the nature of the procedure that is envisaged by this clause. This is because of the views that were expressed in the Court of Appeal on this matter, and because the true meaning of the clause is of general interest and importance to the construction industry.

27. Sir Christopher Staughton said in the Court of Appeal that in his judgment the plain wording of clause 18(2) contemplates a tripartite arbitration. He rejected the appellant's argument that what the clause contemplated was (1) an arbitration in which the contractor put forward the sub-contractor's claims, (2) two separate arbitrations by one arbitrator, who would be bound in the sub-contract arbitration by his findings in the main arbitration or (3) two separate arbitrations by different arbitrators, the sub-contact arbitrator being bound by the findings of the main contract arbitrator. He said that these alternatives were so unfair to sub-contractors that they could not be supposed to have agreed to it unless they had expressly said so. Nevertheless he recognised that it might well be that the employer could not be compelled to participate in a tripartite arbitration, and he was willing to accept that on his construction of clause 18(2) the appellant had agreed to a procedure which it might not be able to deliver. Chadwick L.J. also recognised that neither clause 66 nor any other provision in the main contract provided that the employer would be obliged to participate in a joint arbitration. He referred to various circumstances in which a joint arbitration might take place, but he accepted that it would not necessarily do so. However he too rejected the appellant's suggestions as to other possible constructions of clause 18(2) on the ground that they were so oppressive and unfair to sub-contractors as to be untenable.

28. I would be unwilling to place a construction on clause 18(2) which had the result of committing the contractor to a procedure which it plainly could not deliver if the employer declined to agree to modify the procedure laid down in clause 66 of the main contract in order to accommodate it. It is clear that the context in which the words are used in clause 18(2) is one in which the contractor is party to two entirely separate contracts - one with the employer and the other with the sub-contractor. The purpose of clause 18(2) is to enable the contractor to avoid the risk of inconsistent findings as a result of the use of the independent dispute resolution machinery provided for in each contract. The draftsman must have had in the forefront of his mind the fact that the dispute resolution machinery provided for in each contract was binding only on the parties to that contract. And both parties to the sub-contract must be taken to have known perfectly well when they entered into it that nothing that was said in clause 18(2) about the provisions of clause 66 of the main contract would bind the employer. Yet there is nothing in clause 18(2) to indicate that its operation is conditional on the contractor being able to secure the agreement of the employer to implement it. These considerations suggest strongly that the clause should be read in such a way that it is capable of being operated without the employer's agreement.

29. A further consideration supports this view. That is the position of the arbitrator appointed under clause 66. He derives his authority to pronounce decisions which bind the parties to the arbitration purely and solely from the agreement by virtue of which he has been appointed. This is so whether his appointment was by agreement between the parties to the contract which contains the arbitration clause or was by the use of the agreed appointment machinery. He has no jurisdiction of any kind over any other party, as the entire procedure on which he is engaged depends upon contract. For example, the only parties who are liable for the payment of his fees and expenses are the parties to the contract by which he was appointed: see section 28 of the Arbitration Act 1996. Accordingly when clause 18(2) refers to the dispute under the sub-contract being dealt with *"jointly with the dispute under the main contract in accordance with the provisions of clause 66"* it must be taken to have in view the fact that what clause 66 envisages, once the dispute has left the engineer, is an arbitration in which the arbitrator derives his authority to issue a binding award solely from the contract which the contractor and the employer have entered into. No provision is made in clause 18(2) for securing the appointment of an arbitrator in which all three parties have participated either by agreeing to his appointment as their arbitrator or by agreeing to the machinery by which he has been appointed. Indeed the person who is to act as arbitrator under clause 66 may already have been agreed or appointed before the contractor gives notice to the sub-contractor under clause 18(2).

30. I do not think that there can be such a thing as a tripartite arbitration that does not have as its starting point a tripartite method of conferring jurisdiction on the arbitrator. Clause 18(2) does not address this difficulty. I would conclude that, whatever else it has in mind, it is not a tripartite arbitration in the sense of an arbitration in which the employer, the contractor and the sub-contractor are all engaged as parties to the proceedings before the clause 66 arbitrator. In this situation some other meaning must be found for the expression "*to be dealt with jointly with the dispute under the main contract"* in clause 18(2).

31. One possibility lies in the fact that both clause 66 of the main contract and clause 18(1) of the sub-contract refer to the Institution of Civil Engineers' Arbitration Procedure (1983). This, as I understand it, is the argument which has found favour with my noble and learned friends Lord Cooke and Lord Hobhouse. Clause 66(5)(a) of the I.C.E. conditions provides that any reference to arbitration under that clause "shall" be conducted in accordance with the procedure. In the amended form of clause 66 which was adopted for the purposes of the main contract the word "*shall"* has been replaced by the word "*may"*. Conversely, while clause 18(1) of the F.C.E.C. standard form provides that any reference to arbitration under that clause "*may*" be conducted in accordance with the 1983 Procedure, the clause as amended for the purposes of the sub-contract has replaced the word "*may"* with the word "*shall"*. Rule 7 of the 1983 Procedure provides:

"Rule 7. Power to order concurrent Hearings

7.1 Where disputes or differences have arisen under two or more contracts each concerned wholly or mainly with the same subject matter and the resulting arbitrations have been referred to the same arbitrator he may with the agreement of all the parties concerned or upon the application of one of the parties being a party to all the contracts involved order that the whole or any part of the matters at issue shall be heard together upon such terms or conditions as the arbitrator thinks fit.

7.2 Where an order for concurrent hearings has been made under Rule 7.1 the arbitrator shall nevertheless make and publish separate awards unless the parties otherwise agree but the arbitrator may if he thinks fit prepare one combined set of reasons to cover all the awards."

32. A revised version of the Procedure was issued in 1997 in which this rule appears in almost identical terms as rule 9. As the reference in the contracts with which your Lordships are concerned in this case was to the 1983 Procedure, I propose to base my observations on the terms of rule 7 of that version of the Procedure.

33. It is plain that one of the pre-conditions for the operation of rule 7 is the fact that disputes have arisen under two or more contracts which have resulted in a reference of these disputes to the same arbitrator. It is conceivable that this precondition will have been satisfied in a case where a reference of a dispute to arbitration under clause 66 of the main contract has been accompanied by a reference of a dispute to arbitration under clause 18(1) of the sub-contract. But in the situation to which clause 18(2) applies no arbitrator will have been agreed or appointed under clause 18(1). Nor does clause 18(2) provide for the appointment of an arbitrator for the purposes of resolving the dispute between the contractor and the sub-contractor which is the subject of the notice given under that clause. The reference at the end of clause 18(2) *to "any decision of the engineer or any award by an arbitrator"* is to a decision of the engineer or an award by the arbitrator agreed or appointed under clause 66 of the main contract. The absence of any machinery in clause 18(2) for the reference of the dispute between the contractor and the sub-contractor to an arbitrator agreed or appointed under the sub-contract means that clause 18(2) has been drafted on the assumption that there will be only one arbitration and only one arbitrator - that is to say, the arbitrator agreed or appointed under clause 66 of the main contract. The assumption is not that the arbitrator will make an *award* against the sub-contractor - he could not do that unless the sub-contractor was a party to his appointment as arbitrator - but that the arbitrator's award against the contractor will be binding on the sub-contractor under the contractual arrangement between the contractor and the sub-contractor which is set out in clause 18(2) of the sub-contract. In this situation I do not see how rule 7 of the 1983 Procedure as to concurrent hearings can have any application.

34. My noble and learned friend Lord Hobhouse states that the contractor must *"procure"* that the arbitrator for the purposes of clause 18(2) is the same as that for the purposes of clause 66. If he can achieve this result then, of

course, everything will fall into place and the system which he and Lord Cooke have described will be able to operate. But neither the main contract nor the sub-contract nor the 1983 Procedure provide any mechanism by which the contractor may procure such an appointment if the employer or the clause 66 arbitrator are unwilling to agree to it. Unless they will co-operate with him in setting up this procedure - which neither is obliged to do and which may have an effect on the smooth running of an arbitration under clause 66 which they may find objectionable - there is nothing the contractor can do about it.

35. A further difficulty about the 1983 Procedure in the present case is the fact that under the amended clause 66 the arbitrator is not obliged to conduct the arbitration under that clause under that Procedure. Even if he decides to do so, he is not bound by rule 7.1 to order that there shall be a concurrent hearing. He may be expected to do so if all the parties concerned agree that he should do so, but if the contractor's application is opposed by the employer the prospect of a concurrent hearing is much less certain. At best therefore the 1983 Procedure provides a facility which may or may not be available according to the circumstances and the position which the other parties wish to adopt when one of them wishes to make use of it. But my main reason for discounting this Procedure as a solution to the problem raised by clause 18(2) is that that clause envisages that there will be only one arbitration and only one arbitrator.

36. Of the three possible solutions which were advanced in the Court of Appeal only one deserves further scrutiny. This is that the joint mechanism for the resolution of the dispute that clause 18(2) assumes is one which requires the contractor to represent the interests of the sub-contractor in the proceedings before the engineer and the arbitrator under the main contract.

37. The use of the words "*shall be dealt with jointly with the dispute under the main contract*" clearly admit of this construction. No particular procedure is laid down, but the fact that the provisions of clause 66 of the main contract are to be used indicates that the mechanism for the resolution of the dispute is one in which the sub-contractor cannot participate directly as it is not a party to the main contract. At first sight it might appear that there must inevitably be a conflict of interest between the contractor and the sub-contractor which would make it impossible for the contractor to present the sub-contractor's argument jointly with its own argument. But the likelihood that such a conflict of interest will arise in practice is much reduced once one appreciates the consequences of the fact that the sub-contract works will always fall, in a question with the employer, to be regarded as the sole responsibility of the contractor under the main contract. Payment for works undertaken by the sub-contractor can only be obtained from the employer under the provisions of the main contract. And the financial consequences of any delay in the sub-contract works must also be worked out through the provisions of the main contract. The contractor's interest in disputes arising under the sub-contract will in many cases be confined to obtaining money from the employer which will enable it to settle such disputes and to retain for itself the appropriate percentage uplift on the rates and prices quoted by the sub-contractor for the carrying out of the sub-contract works.

38. The question whether this procedure is unfair and oppressive to the sub-contractor is, according to ordinary principles, a matter of judgment for the parties to take when they are entering into their contract. It is not for us to attempt to rewrite the contract for the parties according to our own conception of what is fair and unfair. In ***M. J. Gleeson Group Plc. v. Wyatt of Snetterton Limited*** [1994] 72 B.L.R. 15, 23 Steyn L.J. accepted that clause 18(2) was capable of causing serious financial difficulties for sub-contractors. But he insisted that it was not for the court to rewrite the sub-contract in order to substitute its judgment of what was commercially fair between the parties.

39. That is not to say that the contractor is free to do what it likes when making use of the procedure under clause 18(2). The fact that the sub-contractor is unable to participate directly in the procedures laid down by clause 66 carries with it obligations which the law will imply in the interests of fairness. The contractor must observe these obligations if it wishes to enforce any decision of the engineer or any award of the arbitrator against the sub-contractor in terms of that clause. The sub-contractor must be kept informed about the progress of the procedure and must be given a reasonable opportunity to provide the contractor with the information which is needed to present the arguments that it wishes to present to the engineer and in his turn to the arbitrator.

40. At the stage when the matter is before the engineer for his decision the practice is for the engineer to communicate only with the contractor. It is not the practice of the engineer to engage in tripartite discussions with the employer, the contractor and the various sub-contractors. In these circumstances the obligation on the contractor will normally involve placing before the engineer for his consideration all the relevant statements and documents on which the sub-contractor wishes to rely for the purposes of his dispute with the contractor. It will also involve providing copies to the sub-contractor of the submissions made on its behalf and of the decision of the engineer when it is known. The time limits imposed by clause 66 for requiring that the decision of the engineer be referred to arbitration is binding on the sub-contractor for the purposes of his dispute with the contractor in terms of clause 18(4) of the sub-contract. If contractor is content with the engineer's decision and the sub-contractor does not request that the matter be referred to arbitration within those time limits, the engineer's decision is final and binding upon the sub-contractor in terms of clause 18(2). If the sub-contractor intimates to the contractor that it wishes the matter to be referred to the arbitrator it is the duty of the contractor to initiate that procedure without delay under the provisions of clause 66 of the main contract.

41. Clause 18(2) assumes that once an arbitrator has been appointed the contractor will deal with all the issues which the sub-contractor wishes to raise in the course of the presentation of its case to the arbitrator. The sub-contractor has no right to appear as a party to the arbitration between the employer and the contractor. So here again the

contractor must keep the sub-contractor informed about progress and must take all reasonable steps to present the sub-contractor's case to the arbitrator. This will involve providing the sub-contractor with a reasonable opportunity to supply the contractor with the necessary evidence so that the contractor may then place that evidence before the arbitrator.

42. I do not think that it can be suggested that the procedure which seems to me to have been envisaged by clause 18(2) is ideal for the resolution of these disputes. But, in the absence of prior agreement between the employer and the contractor that they will submit such disputes to a tripartite arbitration procedure, there is no way in which either the employer or the clause 66 arbitrator can be forced to submit to such procedure by an agreement entered into between the contractor and the sub-contractor. If the clause 18(2) procedure were to be operated in the way that I have described it would provide a reasonable solution to the problems caused by the contractual context which surrounds such disputes. In the end of the day the parties would require to exercise their own judgment before entering into a contract in these terms as to whether they wished to commit themselves to this procedure. However that may be, as my noble and learned friend Lord Clyde has said, the difference of view which has arisen between us as to the interpretation of the clause indicates that further thought should now be given to providing the machinery that is needed to ensure that a joint arbitration can be achieved by the contractor when he wishes to invoke clause 18(2) against the sub-contractor.

Conclusion

43. I consider that the appellant was in breach of the implied obligation to initiate the procedure under clause 66 of the main contract within a reasonable time. What amounts to a reasonable time is a question of fact in each case, as to which no hard and fast rules can be laid down. But in this case time was allowed to elapse due to the appellant's wish to negotiate a settlement rather than to make use of the procedure which clause 66 provides for the resolution of disputes. This was an irrelevant consideration, as it had nothing to do with the procedure contemplated by clause 18(2). In these circumstances the appellant had no answer to the respondent's contention that, as more than a reasonable time had elapsed, it was no longer in a position to resist its demand for a reference of its dispute to arbitration under clause 18(1). I would dismiss the appeal.

LORD COOKE OF THORNDON : My Lords,

44. I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hope of Craighead. For the reasons which he gives I would dismiss the appeal. But I have difficulties on two of the other matters with which my noble and learned friend deals; and, although it is unnecessary to do so for the purpose of disposing of the appeal, I think it right, like him, to say something about them as they are of general importance in the construction industry.

45. First, I entirely agree that a contractor who wishes to invoke against a subcontractor the procedure under clause 18(2) of the subcontract is bound to initiate and progress the procedure under clause 66 of the main contract within reasonable times. In particular the contractor is not entitled to defer the main contract procedure while he negotiates with the employer. Of course there is nothing to prevent his negotiating, but he cannot delay for that purpose. It is common experience indeed that effective negotiation can be promoted by the pendency of hearings. This very case happens to provide an illustration. Your Lordships have been informed by the solicitors that when, soon after the hearing before your Lordships' Committee, the arbitration between the subcontractor and the contractor commenced at long last on 11 May 2000, their dispute was settled at the end of the first day.

46. I agree, too, that what is a reasonable time is a question of fact. The contractor's duty under clause 18(2) with regard to the clause 66 procedure was therefore encapsulated happily by Sir Christopher Staughton as being to proceed with all deliberate speed. Balthazar's all convenient speed would not do. In this case the contractor manifestly did not fulfil that condition and so forfeited the benefit of clause 18(2), leaving clause 18(1) available to the subcontractor.

47. A connected point on which I have some hesitation in agreeing with Lord Hope and Chadwick L.J. is whether it is necessary to identify as a further and separate condition that at the time when the power to invoke clause 18(2) is exercised the contractor must have a present intention of invoking clause 66. That would seem to entail a subjective inquiry of a kind not common in contract law. If the contractor does proceed within a reasonable time, that will normally be enough. On the other hand an unreasonable delay will normally be fatal. A proclaimed intention to delay, as here, will normally disqualify the contractor from relying on clause 18(2), but this is because a reasonable party in the shoes of the subcontractor will be justified in taking the contractor as having repudiated the obligation of reasonable speed. The test would seem to be objective. I acknowledge, however, that this point may seem something of a cavil.

48. The second matter may be of more moment. I share the view of the Court of Appeal that clause 18(2) of the subcontract contemplates a tripartite arbitration in which the subcontractor can take part. Where clause 18(2) applies there will be at least two disputes. They will be linked because in the opinion of the contractor they both touch or concern the subcontract works. Clause 18(2) contemplates that they will be dealt with jointly under the procedure specified in clause 66 of the main contract. If this cannot be or is not done, the contractor will no longer be able to utilise clause 18(2) and the subcontractor will be free to pursue a separate arbitration with the contractor under clause 18(1), as eventually happened in this case.

49. The question becomes what is a joint dealing with the disputes within the meaning of clause 18(2). As to the employer's engineer, in the ordinary course he is not bound to communicate directly with the subcontractor nor to give anything in the nature of a formal hearing. Provided that he acts even-handedly, it will no doubt usually

satisfy clause 18(2) if he receives the subcontractor's claims and any supporting representations relayed through the contractor, and, after considering the contractor's representations also, determines the dispute between the contractor and the subcontractor as well as the dispute between the contractor and the employer.

50. If there is an arbitration, clause 18(2) likewise contemplates a dealing with the disputes jointly. It is plain from the wording of the subclause that they remain different disputes between different parties, though linked in their subject-matter as they touch or concern the subcontract works. The power to order concurrent hearings conferred by rule 7 of the Civil Engineers' Arbitration Procedure (1983) or an equivalent present-day rule may be apt for such a case. I think it must be that kind of procedure which clause 18(2) contemplates.

51. The foregoing approach requires no rewriting of the subcontract. It does no more than give realistic effect to the provisions of clause 18(2) by recognising that the parties to the subcontract have agreed that their dispute will be determined by the engineer acting under the main contract or an arbitrator appointed under the main contract, as the case may be. The last sentence of clause 18(2) is explicit that the subcontractor is to become bound thereby. It may well have been thought desirable to emphasise this, as only the contractor can take advantage of the subclause. The approach also gives full effect to the purpose of clause 18(2) in providing a machinery whereby the contractor may avoid inconsistent findings. The contrary view recognises that under clause 18(2) there may be an award of the arbitrator against the subcontractor. It is difficult to see how that can be so unless the subcontractor is a party to an arbitration before the arbitrator.

52. The procedure contemplated by clause 18(2) might fail for various reasons. For instance, the employer is not bound by the subcontract and may not be willing to concur in a joint dealing with the disputes. Similarly the engineer might not be willing to determine the dispute between the contractor and the subcontractor. The contractor might negotiate a settlement with the employer only or might be content not to take an engineer's decision to arbitration. Again, the arbitrator under the main contract might be unwilling to determine a subcontract dispute or the power to order concurrent hearings might not be exercised. These illustrations are not exhaustive. If, for whatever reason, the joint procedure fails without default on the part of the subcontractor, the latter will be able to fall back on arbitration under clause 18(1).

53. The last sentence of clause 18(4) of the subcontract is a puzzling provision which in argument counsel could do little to elucidate. I am inclined to think that its intention was to impose on the subcontractor the same time limits regarding the reference of an engineer's decision to arbitration as apply to the contractor. This would be relevant, for instance, if the contractor were to accept the engineer's decision and only the subcontractor sought an arbitration. Be that as it may, the import of the last sentence of clause 18(4) is not clear enough, in my view, to affect the natural and ordinary meaning of clause 18(2).

54. In the Court of Appeal counsel for the contractor disclaimed the interpretation of clause 18(2) that it envisages an arbitration in which the contractor puts forward the subcontractor's claims. He described it as untenable. In this House he was nevertheless permitted to advance it; but I prefer his earlier position. As Lord Hope of Craighead points out, although the work under the main contract may be described as executed on the contractor's behalf by a subcontractor, the main contract and any subcontracts are designed to operate independently as regards the execution, completion and maintenance of the contract or subcontract works and the payments due to the contractor and to the subcontractor respectively. As my noble and learned friend also says, the likelihood of a conflict of interest is reduced - perhaps much reduced - by the fact that in a question with the employer the subcontract works will be regarded as the sole responsibility of the contractor. Even so, in an arbitration between the subcontractor and the contractor it would be incongruous - perhaps it is not too much to say grotesque - that the contractor should be responsible for presenting the arguments against himself. And the incongruity is not diminished by the circumstance that the same arbitrator is dealing jointly with a dispute between the contractor and the employer. It may be added that, according to a standard work, *" . . . it is only rarely that a sub-contractor's entitlement or liability will correspond exactly with the main contractor's corresponding rights or liabilities in the main contract" (Hudson's Building and Engineering Contracts* 11th ed. (1995) vol. 2, para. 18-16).

55. Accordingly I agree with the unanimous opinion of the Court of Appeal that clause 18(2) envisages that disputes under the different contracts will be dealt with jointly; and that it would be neither consistent with the terms of clause 18(2) nor fair to the subcontractor to treat the subcontractor's claims against the contractor as merely subsumed within the contractor's claims against the employer.

LORD CLYDE : My Lords,

56. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hope of Craighead. I agree with it, and for the reasons he gives I too would dismiss the appeal.

57. I should add, in light of the evident divergence of views about the operation of clause 18(2), that I agree with the view expressed by my noble and learned friend Lord Hope of Craighead. The last words of the clause seem to me to point to the conclusion that what is envisaged is an arbitration to which the employer and the contractor are the only formal parties. But, since the clause is clearly open to differences in interpretation, it would certainly seem desirable that consideration should be given to a revision of its terms, and, if a joint arbitration is thought to be the fair and proper course, then the clause should provide the machinery for that to be achieved.

LORD HOBHOUSE OF WOODBOROUGH : My Lords,

58. This appeal concerns the marriage of the arbitration provisions of respectively a sub-contract on the FCEC Standard Form, 1984 edition (the 'Blue Form') and a main contract on the ICE Standard Form (1979) revised 5th

edition (the 'ICE Conditions'). The parties to the appeal are the contractor and one of the sub-contractors. The sub-contractor is only a party to the sub-contract and it is with the construction and correct understanding of this contract that the appeal is primarily concerned. The employer is not a party to the sub-contract and is not a party to the present proceedings.

59. The sub-contract has however to be construed having regard to the surrounding circumstances in which it was made and the references to the commercial and contractual structure of which it forms a part. The sub-contract, as one would expect, makes numerous references to the main contract and many of its provisions are expressed in terms of the main contract and its provisions. The sub-contract recites that the contractor has entered into the main contract and that the sub-contractor has *"been afforded the opportunity to read and note the provisions of the main contract"* except for the prices. The arbitration provision in the sub-contract (clause 18), as does that in the main contract (clause 66), refers to the "ICE Arbitration Procedure 1983" (and any amendment or modification of it in force at the time of the appointment of the arbitrator). This procedure is something to which all the relevant persons have agreed and to which I will have to refer again later in this speech

60. The circumstances surrounding the making of the sub-contract were normal for those involved in the construction industry. No special surrounding circumstances are relied on. Thus it is contemplated that the performance and completion of the main contract works will involve a number of other sub-contractors besides the parties to this particular sub-contract. It must also be contemplated that both external factors and the performance of other sub-contractors may affect the performance of the sub-contract by the sub-contractor, as indeed may the performance of the contractor of any part of the works which he has reserved for himself. Variations may be ordered. Any of these things may affect the cost to the sub-contractor of doing the sub-contract work, the time it takes and its extent. Likewise these things may affect the remuneration to which the sub-contractor is entitled from the contractor and any liability of the sub-contractor to the contractor (and *vice versa*).

61. The financial consequences may involve any of a number of conflicts of interest and various combinations of them. A delay may be attributed to one sub-contractor or another; the contractor may or may not be neutral. One sub-contractor may be blaming the contractor who may be blaming the employer who may be blaming (factually) another sub-contractor who may be blaming, say, soil conditions. A disputed method of measuring or pricing the work may be advantageous to one sub-contractor but not to another, or to a sub-contractor and the employer but not to the contractor. Major construction works are complex operations. It is easy to approach contracts as if the parties to them were the only persons involved whereas the sub-contract is merely one of a number of interlocking contracts and the parties are merely two of a considerable number of participants in a project performing their tasks in relation to one another.

62. In such a situation, any dispute is capable of affecting a number of participants and affecting them in a different way. Making provision for dispute resolution becomes correspondingly complex. Where the resolution is left to the court, the procedures of the court can and do accommodate this complexity. But where the resolution is to be by hostile arbitration the problems are greater. Commercial arbitration is a contractual concept originating from the law of agency. The arbitrator derives his jurisdiction to decide a dispute from the authority given to him by the parties to that dispute. Unless he has been appointed *ad hoc*, he will derive his authority from an appointment made under an antecedent contractual provision which will bind only those bound by that contract. Accordingly an appointment under the main contract will only confer jurisdiction on the arbitrator as between the employer and the contractor and an appointment under the sub-contract will only do so as between the contractor and the sub-contractor. All this is elementary.

63. But practical and legal problems arise. Some additional agreement is required where it is wished to authorise an arbitrator to decide a dispute as between the parties to more than one contract. This is not a problem which is peculiar to the construction industry. It is to be found in other fields as well, for example, shipping and charters and sub-charters. The problem exists at two levels. There is the capacity of the arbitrator to make an award binding upon a given person. There is also the capacity of an arbitrator, otherwise than by the express consent of all those involved, to hold a joint hearing at which all the interested parties have a right to adduce evidence and be heard in relation to any issue relevant to the issue of an award binding upon them. In the absence of specific agreement, each arbitration must be kept distinct; only the parties to the dispute to be decided by the award and who have given the arbitrator the authority to make that award may be present at and take part in the arbitration hearing. Thus, other things being equal, each sub-contract dispute must be arbitrated and decided independently of the arbitration and decision of a dispute under the main contract or another sub-contract. Again, this is elementary and the Arbitration Act 1996, unlike the rules of court, does not provide the answer.

64. It is for the commercial parties to provide the answer, if they wish to do so, by making the appropriate contracts. The ICE has laid the ground for them to do so in its *'Arbitration Procedure'*. As previously observed, the version relevant to this appeal is that of 1983. We understand that there are later versions which may or may not resolve some of the matters presently under discussion. Rule 26 provides that the procedure shall apply where the parties have at any time so agreed or the president of the ICE so directs when making an appointment or the arbitrator so stipulates at the time of his appointment. (If the arbitrator does so stipulate, both parties can within 14 days agree otherwise and terminate his appointment.) The Procedure does not apply to arbitrations under the law of Scotland.

65. Rule 7 has already been quoted by my noble and learned friend Lord Hope and I will not set it out again. It applies where there are disputes which arise under more than one contract and which are concerned wholly or

mainly with the same subject matter and the same arbitrator has been appointed. That arbitrator may, either with the agreement of all the parties concerned or on the application of one of those parties being a party who is a party to all of the contracts under which the dispute has arisen and the arbitrator has been appointed, order that the whole or part of the matters in issue shall be heard together. The arbitrator is given a wide discretion as to the terms on which he does this. The arbitrator still has (unless otherwise agreed) to make separate awards in respect of each dispute but can give a single set of reasons.

66. Rule 7 provides a sensible scheme for hearing related arbitration disputes. The only substantial precondition is that the parties must procure that the same arbitrator is appointed in all the arbitrations. Thereafter the arbitrator is given adequate powers to make arrangements for the hearing which are appropriate to arrive at a just outcome for all concerned without causing any undue expense delay or inconvenience to any particular party. The arbitrator's awards will (or should) provide consistency in the decision of related issues. It is therefore not surprising that both the main contract and the sub-contract make express use of the Procedure. The use if any that is made of rule 7 is in the discretion of the arbitrator. If he decides to exercise his discretion no party has the right to gainsay him.

67. Clause 66 of the main contract was reworded by the parties. It is a suitably detailed arbitration provision of a type which is fully familiar to those involved with construction contracts. It has already been quoted by my noble and learned friend; it did not fully follow the wording of the 1979 form. The use of the Procedure by the arbitrator is not mandatory but he is authorised to use it; therefore, for present purposes the alteration makes no difference. The clause provides for any dispute or difference to proceed through various stages in accordance with a time-table and imposes certain limits (irrelevant in the present case) upon the ability to refer disputes to arbitration before completion. The involvement of the engineer in the earlier stages of the dispute could in theory affect the involvement of a sub-contractor in the earlier stages but, if it be relevant, not in practice.

68. My Lords, with this somewhat lengthy but necessary introduction, I come to clause 18 of the sub-contract. Again, I will not re-quote it. Paragraph 2 gives the contractor an option. I agree that the contractor was here entitled to serve a paragraph 2 notice. There was a dispute of the requisite character and no arbitrator had been appointed under paragraph 1. It is the contractor's choice whether or not he chooses to exercise the option. In making up his mind he need not consult any commercial interest but his own. Where a contractual option is given to a party it is his to exercise in his own interest unless the contract (expressly, impliedly or by inference) provides otherwise. But having chosen to exercise it he must perform the obligations attached to that choice as well as take the benefit. The effect of the exercise of the option is to displace the arbitration procedure provided for in paragraph 1 and replace it with that in paragraph 2 (or 3). In my judgment there are certain implied obligations arising from the exercise of the option under paragraph 2 and it is a condition of the contractor's right to proceed under paragraph 2 and not paragraph 1 that the contractor perform those obligations. If the contractor fails to perform the obligations or evinces an intention not to or demonstrates an unwillingness or inability to do so, he can no longer rely on and enforce paragraph 2 and must accept a paragraph 1 arbitration. The principles which apply are those governing the performance of an obligation and the loss of the right to enforce a contractual obligation (*cf.* repudiation and anticipatory breach). The subjective intent of the contractor is not relevant except in so far as it may provide evidence to support one of the above conclusions. On this point I must, like my noble and learned friend Lord Cooke of Thorndon, respectfully disagree with my noble and learned friend Lord Hope.

69. In the present case it is not in dispute that the contractors came under an obligation to proceed with the arbitration under paragraph 2 and failed to do so. The contractors argue that their time for doing so was open ended as they were engaged in negotiations with the employers and it was reasonable for them to do so. This argument was mistaken. The obligation is not to act reasonably but to carry out the obligation within a reasonable time. What is a reasonable time is the time reasonably required to carry out that obligation. (The time limits reiterated in paragraph 4 are not irrelevant.) I agree with my noble and learned friends that the Court of Appeal were right to reject the argument.

70. This conclusion suffices for the dismissal of the appeal. But, like your Lordships, I agree that it is useful that we should provide assistance by answering the other questions argued on this appeal concerning the meaning and effect of the second paragraph. On this I agree with my noble and learned friend Lord Cooke of Thorndon and must respectfully disagree with my noble and learned friend Lord Hope.

71. The second paragraph must be construed in conjunction with the remainder of the clause and the sub-contract and with clause 66 of the main contract as amended and the Procedure, in particular rule 7. When this is done I consider that the paragraph is tolerably clear. The contractor must procure that the arbitrator for the purpose of paragraph 2 is the same as that for the purpose of clause 66. This is borne out by the condition precedent that an arbitrator shall not already have been appointed under paragraph 1, the absence of any separate procedure for appointment under paragraph 2 and the terms of rule 7 - *"have been referred to the same arbitrator"*.

72. Next, the contractor must procure that the arbitrator is willing to apply, and make an order under, rule 7. This is so that there can be an arbitration which deals *"jointly"* with the disputes under both the contracts. In the context of clause 18 and clause 66 of the main contract and the Procedure to which they both refer, *"jointly"* is a reference to the procedure authorised by rule 7. The resultant award will be one which will bind both the contractor and the sub-contractor. Anything less than the rule 7 procedure will not ensure natural justice to the sub-contractor. I agree with those who have expressed the view that it would be both uncommercial and unprincipled to construe paragraph 2 as requiring the sub-contractor to be bound by an arbitration from which he was

excluded and to which the only parties were persons who might well both have a conflict of interest with him. Further, as will be apparent from what I have said earlier about the surrounding circumstances, in no way unusual, in which this contract was made, it does not remove these objections to suggest that the contractor could be relied upon to present the arguments and evidence of the sub-contractor or sub-contractors to the main contract arbitrator. It is also hard to visualise how the arbitrator would deal with this situation given that arbitration, like litigation, is essentially adversarial. One might just be driven to accept that the parties had agreed to some of these unlikely consequences if they had not also agreed, as they have (and as has the employer), to the Procedure and rule 7.

73. One minor points remains. Paragraph 2 also refers to the engineer and the sub-contractor being bound by his decisions. In the pre-arbitration stage all decisions are provisional in the sense that they can be challenged and reviewed provided the stipulated procedure is followed. This requirement is also to be found in paragraph 4. It is not one which need cause significant difficulties for the sub-contractor who probably can procure that his view is put before the engineer. The only addition that this makes is therefore that it gives rise to a further implied obligation of the contractor to give any requisite notices to protect the rights of the sub-contractor and keep open his right to challenge the engineer's decision in the arbitration. If the contractor fails to do this, he will have failed to preserve the position of the sub-contractor in the paragraph 2 arbitration and will have created a disparity which makes it no longer appropriate that the sub-contractor should be bound under paragraph 2.

74. I agree that the appeal should be dismissed.

LORD MILLETT : My Lords,

75. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Cooke of Thorndon and Lord Hope of Craighead. On the procedure contemplated by Clause 18(2) of the contract I prefer Lord Cooke of Thorndon's reasoning, which appears to me to give full effect to the fact that the contract requires two separate arbitrations to be dealt with jointly. Subject to this point, I agree with the speech of Lord Hope of Craighead, and for the reasons he gives I too would dismiss the appeal.