CA on appeal from the TCC, Liverpool District Registry, HHJ Mackay before Auld LJ, Hale LJ, Dyson LJ : 18th December 2003

JUDGMENT : LORD JUSTICE AULD:

1. These are two appeals involving the same parties and arising out the same construction contract. They concern provisions of the IChemE model form of contract, 3rd (June 1995) edition ("the model form") enabling the contractor to refer to an expert matters in dispute between them on the employer's "termination" of the contract without default on the part of the contractor, and the extent of expert's powers under such a reference. The first main issue is one of interpretation of the contract as a whole as to its incorporation of certain standard terms of the model form, in particular as to the jurisdiction of an expert to determine matters so referred to him under the contract. The second concerns the effect of an expert's decision on such a reference on any provisional and/or final certification by a duly appointed project manager of sums payable thereunder by one party to the other.

2. The background to this appeal is as follows. The appellant, Rhodia Chirex Limited ("Rhodia") manufactures chemicals on a large scale for use by pharmaceutical companies in the production of a number of pharmaceutical products. The respondent, Laker Vent Engineering Limited ("Laker Vent") is a mechanical engineering and pipe-work contractor with experience in the pharmaceutical industry. The disputes arose from a piping sub-contract under which Rhodia employed Laker Vent as part of a project known as "the Orion Development" at Rhodia's plant at Homes Chapel, Cheshire. Rhodia's project manager until the last few days of the history of the matter was Jacobs Engineering Limited ("Jacobs Engineering").

The contractual scheme

3. Before I turn to the detail of the contractual provisions in question, I should note that the contract documentation includes, the agreement itself, special conditions and general conditions in the model form. The agreement expressly provides, in clause 6, that, in the event of any conflict between any of the contract documentation, the order of precedence is the agreement, the special conditions and then the general conditions in the model form.

4. Putting aside for a moment problems of conflict and precedence as between different parts of the contract documentation, I should try to summarise the scheme of "***termination***" of a contract for which the model form, in clause 43, provides. It is a scheme enabling the employer (the model form terminology is "***the purchaser***") to terminate the contract at any stage without fault on the part of the contractor. As the notes accompanying the model form and the provisions of clause 43 itself indicate, the scheme is designed to achieve speedy and orderly cessation of work and a final financial settlement between the parties as at the settlement date. The settlement is to include payment to the contractor, as provided in clauses 43.5(b) and (c) and 43.7, in respect of additions or deductions that have accrued prior to the termination order and in respect of the disruptive costs to the contractor of the termination itself.

5. The termination process, for which clause 43 provides, starts with the issue by the employer of a "***termination order***", on receipt of which the contractor must stop work, except as otherwise instructed by the project manager for the purpose of doing so and for leaving the uncompleted contract works in good order (clause 43.1-4). Within 90 days of the contractor's cessation of work pursuant to the termination order, the project manager must issue to the parties a "***termination certificate***" showing the balance of monies due to the employer or contractor as the case may be, taking into account a number of factors specified in clause 43.5, including the two in paragraphs (b) and (c) that I have mentioned. If, because of any unresolved dispute between the parties as to the matters in those paragraphs or as to what the employer has already paid "or by reason of any other matter which prevents the ascertainment of" those matters, it is not possible for the project manager to issue a final termination certificate within the 90 days period, he must issue instead a provisional termination certificate containing his "***best estimate***" of any amounts in those paragraphs and of the resultant balance due one way or the other.

6. If the contractor disagrees with the project manager's "***best estimate***", clause 43.9 requires reference of the dispute to an expert for resolution in accordance with provisions in clause 45 of the model form.

Clause 45, headed "Reference to an Expert", provides for resolution by an expert, upon the application of either party, of any dispute expressly made referable to an expert by the contract.

7. Clause 43.9, when read with clause 45.2, has the effect of providing for revision of a project manager's provisional termination certificate. Clause 45.2 provides that the expert*: "... shall decide all disputes referred to him as an expert and not as an arbitrator. Any decision of an Expert may revise or overrule any decision or instruction of the Project Manager* **as may be requisite**.*"* [my emphasis]

   One of the reasons why an expert's decision should have that effect - i.e. "***be requisite***" - in relation to a challenged provisional termination certificate is that its issue carries with it a contractual entitlement under condition 43.10 to prompt payment. This is of obvious importance to a contractor, which, under this scheme, may be dismissed in mid-contract without any default on its part and, in consequence, suffer financial hardship if amounts outstanding, in particular for pre-termination work, are not assessed and paid promptly, albeit subject to a final taking of account at the stage of final certification.

8. Once the project manager is armed with all the relevant information, clauses 43.9 and 43.10 require him to issue the final certificate and the debtor to pay promptly any balance due under it. Where there is one, an expert's decision revising a provisional termination certificate may be the basis, or one of the bases, upon which the project manager, "***when ascertainment of the amount***" to be taken into account under the paragraphs in clause 43(5)(b) and (c) "***becomes practicable***", must issue a "***final termination certificate".*** I say "***may be the basis or one of the bases***" upon which the project manager may have to act in issuing the final certificate because there may be matters impeding a final ascertainment not capable of resolution by the expert at the provisional certification stage and/or which, for one reason or another, are not referred to him for his determination. And there may be, as clause 43.9 expressly contemplates, "***other matter[s]***", for example, discovery of defects or billings, charges and credits that have prevented ascertainment of amounts under paragraphs (b) and (c) because they have only come to light or have been fully formulated and/or presented after the issue of the provisional certificate and/or the expert's decision on it.

9. As I have said, the final certificate is, or should be, a final statement of account between the parties and, as such, has effect as a final revision of a provisional certificate, if there is one, and of any expert's revisions to such certificate (which would only have been binding for the purpose of that certificate and payment thereunder), and for prompt payment of any outstanding final balance either way. The important matter to keep in mind in the application of clause 43 is that it provides variously for 1) (final) certification without earlier provisional certification; 2) final certification following an unchallenged provisional certification; and 3) final certification following a challenged provisional certification whether or not revised by an expert. Where there have been both a provisional certification, whether or not revised by an expert, and a final certification, each carries with it an obligation of prompt payment; the two stages of certification and their respective payment consequences should not be elided.

10. I have so far attempted to summarise the termination scheme provided in clause 43 of the model form on the assumption that it is part of this contract. As I have mentioned, clause 6 of the agreement provides that, in the event of conflict between any of the contract documents, the agreement should take precedence over the special conditions and it and the special conditions should take precedence over the model form. An important issue in the first appeal, and critical to the outcome of the second, is whether clause 11 of the agreement, which directs all disputes under the contract for resolution "in accordance with the terms of clause 46" of the model form, excludes reference to an expert under clause 45 and, by extension, to disputes arising in the context of termination under clause 43.

11. Clause 11 in its present form says nothing about resolution of disputes by reference to an expert. However, clause 46, which is headed simply "***Disputes***", does. It begins with the words *"[s]ubject to the provisions of clause 45 (Reference to an Expert)"*, and then requires the parties first to attempt settlement, and, failing that points them towards mediation, and, failing that, requires reference to an arbitrator. Of a piece with that express reservation of the parties' right of reference to an expert are provisions in many other clauses of the model form for such form of determination of disputes, not least in clause 45 itself, which also excludes reference to arbitration once there has been a reference to

an expert (clause 45.7) and renders the decision of an expert binding and unchallengeable in any proceedings by either party (clause 45.6).

12. In attempting that summary of the scheme of resolution of disputes in the context of termination under clause 43 of the model form, I have anticipated some of my conclusions on the issues of the first appeal, conclusions to which I shall return and, where necessary, set out the relevant contractual provisions

The facts

13. The parties entered into the contract on 31st July 2000. It originally provided for a retention of £100,000, but at the request of Laker Vent, the project manager removed that provision. Laker Vent began work in August 2000. The contract works were subsequently varied so as substantially to increase the scope of the work, leading to disputes between the parties. On 8th June 2001 the project manager issued a termination order pursuant to clause 43.2 of the model form, requiring Laker Vent to cease work by the end of 15th June 2001, which, on that date, it immaterially amended. And, on 14th January 2002, the project manager, purportedly pursuant to clauses 43.5 and 43.9, issued a provisional termination certificate showing a balance of the comparatively small sum of £1,160.57 due to Laker Vent. The certificate included among the figures giving rise to that balance a sum under clause 43.5(b) for pre-termination order variations and under clause 43.5(c) a nil sum for termination losses, and a deduction of £100,000 by way of retention.

14. Laker Vent disagreed with the provisional termination certificate, in particular as to the amount allowed for variations, the absence of any sum for termination loss and the inclusion of the retention. On 24th January 2002, pursuant to clauses 43.9 and 45 of the model form, its consultants advised Rhodia's project manager of that disagreement and Laker Vent's wish to refer the matter to an expert for determination. Rhodia, by letter in reply of 1st February 2002, stated that it did not agree to the appointment of an expert.

15. By letters of 5th and 6th February 2002 Laker Vent's consultants requested the Institution of Chemical Engineers to appoint an expert to resolve the dispute over the project manager's estimates in the provisional termination certificate of amounts due to Laker Vent under clause 43.5(b) and (c). They indicated that the total amount in dispute attributable to those matters was £485,415.17. On 21st February 2002 the Institution appointed Mr. J.G. Challenger to determine the matters. Within a few days of his appointment he raised by letter to the parties the question of his jurisdiction under the contract as it stood because clause 11 of the agreement, unlike an earlier form, made no reference to resolution of disputes by an expert under clause 45 and required any disputes to be settled or decided in accordance with clause 46. He asked them to give their respective views and suggested that they should consider reinstating in clause 11 the reference to clause 45. Laker Vent's consultants replied by letter of 27th February 2002 maintaining that clause 11, through its reference to clause 45 in the opening words of clause 46, retained resolution of disputes by way of reference to an expert as an alternative to arbitration. Rhodia's solicitors replied by letter to the expert on 28th February 2002 maintaining that he had no jurisdiction, rejecting his suggestion to reinstate an express reference to clause 45 in clause 11 and mentioning that Rhodia was preparing a cross-claim against Laker Vent - anticipated to be in the region of £1m - for overpayments to Laker Vent.

16. Mr. Abdul Jinadu, for Rhodia, has emphasised in his submissions to the Court that Rhodia, by their letter of 28th February, did not invite the expert to determine the matter of his jurisdiction. Nevertheless, that is what the expert then proceeded to do. By letter to the parties of 7th March 2002, he informed them of his conclusion that he had jurisdiction, and followed it by a letter of 18th March 2002 setting out his terms of reference. On 21st March 2002 he held a meeting with the parties, in preparation for which each side prepared a written position statement. Laker Vent's statement, which their consultants confirmed at the meeting, was an acceptance of the expert's determination of his jurisdiction and an outline of its claims, principally in relation to the variations and termination costs and also challenging the inclusion £100,000 retention in the provisional termination certificate. Rhodia's position statement, to which its solicitor adhered at the meeting, began: *"This statement is*

made without prejudice to the Respondent's primary contention that the expert does not have jurisdiction to deal with the matters referred to him."

However, the statement continued by setting out Rhodia's case in some detail on the issues arising from the figures in the provisional termination certificate, indicating an amount in dispute of £524,000 and maintaining the correctness of the inclusion in it of £100,000 for retention.

17. Following the meeting, the expert wrote on 22nd March 2002 to the parties confirming the instructions he had given at the meeting. He also sought representations from them as to his jurisdiction to deal with any counter-claim that Rhodia might make, but emphasised that they should not treat that request as an opportunity to re-open his ruling on jurisdiction in relation to the matters already referred to him. On 3rd April 2002, Rhodia's solicitors replied, stating that: *".... In an effort to save time and costs, the parties representatives have discussed the jurisdiction issue and have reached agreement on which matters are referred to you for determination".*

    The letter then set out the disputes referred to him by Laker Vent and specifically excluded any counterclaims that it, Rhodia, might have. As to the latter, the solicitors added: *"Full details of these have not as yet been collated and sent to Laker Vent Engineering. Accordingly, they have not yet crystallised into disputes which could be referred to you."*

    Rhodia followed that indication with statements of its case on 22nd and 29th May 2002 dealing with the issues referred by Laker Vent, each prefaced with the statement that the submissions were made "without prejudice to its primary contention that the expert ... [did] not have jurisdiction to deal with the issues before him".

18. On 19th June 2002 the expert issued his decision on the issue of the retention monies of £100,000, namely that Rhodia had wrongly withheld them and that the provisional termination certificate should be revised accordingly. He "instructed" Rhodia to pay Laker Vent the £100,000 retained, plus VAT, forthwith. Rhodia did not comply with that decision. On 19th June 2002 Rhodia's solicitors wrote reiterating Rhodia's contention that the expert had no jurisdiction to deal with any of the matters referred to him by Laker Vent. The solicitors added that, in their view, he had no power under clause 43.9 to instruct Rhodia to release the retention monies of £100,000. They maintained that, at best, the only relief he could give under that provision was a decision as to the sums to be incorporated in the final termination certificate. No payment fell to be made, they said, until a final certificate was issued in correction or adjustment of the provisional certificate, which correction or adjustment would have to take account of any future counterclaims of Rhodia.

19. The effect of Rhodia's stance was thus to deny Laker Vent the opportunity to secure payment of the sum certified in the provisional certificate within 45 days, to which it was entitled under clause 43.10 if that certificate was valid and to leave it waiting for a final certificate incorporating provision for Rhodia's counterclaims when eventually formulated. Laker Vent took the view that it should not have to wait that long before payment under what it regarded as a contractual scheme for prompt payment on a provisional certificate to be followed by a later taking of account between the parties at the stage of final certification. On 12th July 2002 it commenced proceedings to enforce the expert's decision, revising the provisional termination certificate so as to remove the £100,000 retention sum and instructing its payment forthwith, and applied, pursuant to CPR 24.4, for summary judgment and for an abridgement of time in which to do so.

20. The applications came before His. Hon. Judge Mackay in the Technology and Construction Court who, on 30th August 2002, ordered summary judgment for Laker Vent in respect of the £100,000 retention monies, plus VAT, and ordered Rhodia to pay the costs of the applications. In so ordering, the Judge held that: 1) the contract, in clauses 11, 45 and 46, provided for reference of the dispute to an expert; 2) if not, Rhodia had submitted to the jurisdiction of the expert; and 3) in either event, clause 43.9 of the contract empowered the expert to instruct payment to Laker Vent of the retention monies forthwith. The Judge granted Rhodia permission to appeal on those three issues.

21. In the meantime, on 5th July 2002 the expert had issued his decision on the balance of the issues raised in the reference to him, determining that Rhodia owed Laker Vent a further sum of £327,518.49,

inclusive of VAT, purporting to instruct the project manager to issue a *final* termination certificate to that effect and Rhodia to pay the sum within 14 days The expert expressly excluded from his determination any of Rhodia's potential cross-claims, which, as I have mentioned, had been specifically excluded from the reference: *"... the Responding Party has indicated that there are matters of dispute outside this determination that they intend to pursue including the abatement and offset of costs arising out of their claim on the Contractor for non-performance under the Contract. Since these matters have not been referred to me I shall make no determination on them and furthermore I have excluded from my decisions any inference that may be drawn from the statements made in the course of the determination unless directly related to the matters in hand."*

22. The contractual period within which the expert should have instructed payment, if he had power to do so, was in fact 45 days. But nothing turns on this since Rhodia did not comply with his instructions, either to issue a final certificate or to make payment, before 16th October 2002 when Laker Vent commenced its second proceedings against Rhodia, claiming payment of the further sum to which the expert had decided it was entitled. It did so primarily on the same basis that it had successfully sought release of the retention monies under the earlier decision, namely that, despite the expert's wording of his decision, it took effect as a revision of the *provisional* termination certificate. It also pleaded two other, alternative bases for the claim, namely that the expert had directed the issue of a *final* termination certificate based on his determination and had ordered payment of it, and, in the further alternative, that the contractual machinery had broken down in that, for whatever reason, the project manager had not issued the instructed final certificate and that in its absence the Court should intervene by giving judgment in the sum directed by the expert; see ***Bernhards Rugby Landscapes Ltd. v. Stockley Park Construction Ltd.*** **(**1998) 14 Const LJ 329. Rhodia opposed the claim, seeking a stay to arbitration pursuant to section 9 of the Arbitration Act 1996 or a stay or an adjournment under the court's general powers pending the outcome of Rhodia's appeal in respect of the summary judgement against it in respect of the retention monies.

23. Over a month later, on 27th November 2002 and two days before the start of the hearing of Laker Vent's second application for summary judgment on 29th November, Rhodia's project manager - a new one - purportedly issued a final termination certificate. It took account of the expert's decisions on the retention monies and the balance of the issues referred to him, but it also contained a sum due to Rhodia in the sum of £476,954.33 as his valuation of "***Remedial Works Carried out by others***". This produced a certified balance due from Laker Vent to Rhodia of £197,954.33, instead of the sum of £327,518.49, inclusive of VAT owing by Rhodia to Laker Vent as instructed by the expert.

24. The circumstances giving rise to the issue of that final certificate merit brief mention. Rhodia had been trying for some time and without success to persuade its project manager, Jacobs Engineering, to issue a final certificate. On 27th November 2002, only two days before the start of the hearing, it dismissed Jacobs Engineering as project manager and appointed Mr. Stewart McKinlay in its stead. Mr. McKinlay had formerly been a professional adviser to Rhodia in respect of this and other matters, and Laker Vent had successfully objected to an attempt by it a year earlier to substitute him as project manager because of such relationship. Within a few hours of his appointment, Mr. McKinlay issued the final certificate.

25. Following hearings before His Hon. Judge Mackay on 17th and 22nd January 2003, the Judge gave judgment for Laker Vent on 6th February 2003 for the sum claimed based on the expert's decision, and made an order for summary judgment on 10th March 2003. He held that in the circumstances Rhodia could not rely on the purported final certificate to defeat the claim, refused its application for a stay of the matter to arbitration and held that Laker Vent was entitled to summary judgment in the amount instructed by the expert, seemingly on the basis that it was a binding determination taking effect as a final termination certificate.

26. By permission of the Judge, Rhodia now appeals against that order as well as against his earlier order in respect of the retention monies.

The first appeal

27. As I have indicated, the Judge found against Rhodia on three grounds, the first two being in the alternative. All three issues are now the subjects of appeal, as is the Judge's entitlement to make the findings he did on an application for summary judgment. I should preface my discussion of the issues by noting that the Judge clearly had in mind in reaching his decision on each of them that this was an application for summary judgment under CPR, Part 24.2, which he could only give in favour of Laker Vent if he was satisfied that Rhodia had no real prospect of successfully defending the claim (see page 6E-G of his judgment).

1. The amendment of clause 11 of the contract

28. The first issue is whether the contract retained provision for the reference of certain disputes to expert determination or whether the effect of an amendment of a previous version of clause 11 in the form of agreement used by Rhodia was to remove the provision for such reference from clause 43.9 of the model form. Clause 11, in its original form, provided*: "11. Any claims, disputes or differences which may arise between the Purchaser, or the Project Manager acting on his behalf, and the Contractor shall be settled or decided in accordance with the terms of Clause 45 (Reference to an Expert) or Clause 46 (Disputes) of the General Conditions as appropriate."*

    In that original form, there was obviously no conflict between clause 11 of the agreement and clauses 43.9 and 45 of the model form. In its amended form, it reads as follows: *"Any claims, disputes or differences which may arise between the Purchaser, or the Project Manager acting on his behalf, and the Contractor shall be settled or decided in accordance with the terms of Clause 46 (Disputes) of the General Conditions".*

29. Rhodia's case was and is that the effect of that amendment was to introduce a conflict with the result that, in accordance with clause 6 of the agreement, clauses 43.9 and 45 of the model form should yield to clause 11 of the agreement. Given that history of amendment, it maintained that the present absence of any reference in clause 11 to clause 45 should be read as an express exclusion of it as an option for resolution of disputes, including those arising in the context of termination under clause 43.9. Accordingly, Rhodia maintained, the expert had no jurisdiction under the contract to make any decision binding on the parties under the contract.

30. The Judge rejected that argument. He held that, although clause 11 had been amended so as to omit any express reference to clause 45, clause 46, to which it did refer, expressly contemplated in its opening caveat, the preservation of clause 45 as one of the contractual options for resolution of disputes. He reasoned that, though there was no longer any requirement to refer disputes to an expert under clause 11, albeit formerly expressed as alternative to reference to arbitration under clause 46, clause 11 still left it open to the parties or either of them to opt for resolution by an expert if they wished. In short, he held that there was no conflict between clause 11 in its present form and clauses 43, 45 and 46.

31. Mr. Abdul Jinadu put the history of amendment of clause 11 of the agreement, deleting the provision for reference in clause 45 to expert determination, at the forefront of his argument that there was a conflict between that clause in its present form and clauses 43, 45 and 46 of the model form. He went so far as to say that the existence of the conflict for which he contended "turned on the fact of its amendment". He submitted that the Judge, in concluding that there was no conflict failed to give proper effect to the amendment and, in consequence, failed to construe the contract properly. He maintained that the Judge wrongly relied on the caveat in clause 46 in concluding that it left open the possibility of reference to an expert where necessary, and that he failed to have proper regard to clause 6, which, he said, gave clause 11 in the case of such conflict, precedence over both clauses 45 and 46 in this respect. He submitted that the Judge's construction rendered the amendment to clause 11 as irrelevant and of no effect. At the very least, he submitted, this was not a case for summary judgment; Rhodia had a real prospect of successfully defending the claim on that basis.

32. Mr. Simon Lofthouse, on behalf of Laker Vent, submitted that the Judge rightly found no such conflict. He maintained that clause 11, in its amended form, did not purport to delete clause 45. He relied on the opening words of clause 46, "[s]ubject to the provisions of clause 45 (Reference to an Expert)", as had the Judge. And he drew attention to a number of other clauses in the model form giving effect to

clause 45, most notably clause 43.9, all of which remained untouched by the lengthy and detailed special conditions making many amendments, by way of deletion and otherwise, to other provisions in the model form.

33. In my view, the Judge correctly held that there was no conflict between clause 11 of the agreement and clauses 43, 45 and 46 of model form so as to require him, pursuant to clause 6 of the agreement, to exclude from the contract the provisions of clause 45 for reference to an expert. As to the fact and effect of the amendment of clause 11 removing the reference to clause 45, it simply removed the former qualified obligation to refer any disputes to an expert. As the Judge held, it did not remove it as an option available to the parties under the contract. Not only was its continuance as part of the contractual scheme evident from the fact that it had not been deleted by the special conditions from the model form. It was also evident in: the opening words of clause 46; as part of the machinery of termination in clause 43.9; in the provision for resolution of disputes as to variations in clause 16.7; and in many other contexts in the model form, all of which had been left untouched by the special conditions. In short, if clause 11 had been intended to have the effect for which Mr. Jinadu contended, it would have been necessary to carry it through into the special conditions in amendment of the general conditions, clauses 16.7, 43, 45, 46 in particular.

34. It follows that, even if recourse to the earlier form of clause 11 were permissible as an aid to construction of this contract, which I doubt, it could not have assisted Rhodia's case. There are two reasons why, in any event, it would not have assisted. First, as the editors of the current edition of *Chitty on Contracts* observe, in Vol 1, para. 12-067, such authority as there is going to the deletion of provisions in a printed form is to the effect that regard might be paid to the deletions in interpreting the meaning of what remains. However, as I have said, there are no material deletions from the printed form in this case, namely the model form; clause 45 is still there. Second, as the editors of Chitty observe in the same passage, there is weighty authority to the contrary. Lewison, *The Interpretation of Contracts, 2nd cd*. (June 1997), after a useful examination of the case law, at para. 2.04, expresses the same view, concluding that, "[a]t best, the consideration of deleted words may negative the implication of a term in the form of the deleted words" and "that a consideration of deleted words is an unsafe guide to the meaning of a contract".

35. Accordingly I would dismiss this ground of appeal. The Judge was plainly entitled on all the material before him, and as a matter of construction, to give summary judgment in favour of Laker Vent on this part of their case. Rhodia, in my view, and for the reasons I have given, had no real prospect of successfully defending this part of the claim or issue. If I am right about that, the expert had jurisdiction to resolve the dispute as to the retention monies referred to him under clause 43.9 in accordance with the provisions of clause 45. Whether what he did was within those provisions is the third issue in the first appeal.

2. Submission of the dispute to the expert

36. If I am right on the first issue that the expert had jurisdiction, there is no need to consider the second issue, namely whether, in the absence of such jurisdiction, Rhodia submitted to it. However, in deference to the submissions of counsel, and because I disagree with the Judge's ruling on this issue, I should deal briefly with it. The Judge held, in reliance on the letter from Rhodia's solicitors to the expert of 3rd April 2002 and his application of two authorities to the facts of this case, that Rhodia had done so because it had failed to reserve its position as to the expert's jurisdiction until it was too late. He held, at pages 9E-G and 13H-14B of his judgment: *"It is quite clear ... that the Defendants did not make it clear what they were saying if it was that they were not abandoning any jurisdictional point. What they now seek to suggest is that the words in the letter of 3rd April 2002, 'the parties representatives have discussed the jurisdiction issue and have reached agreement on which matters are referred to you for determination', should be read to include the words: 'if it was ultimately decided by the court in any enforcement proceedings that the expert did in fact have the jurisdiction'".*

I am ... satisfied that following the authorities indicating what the Defendants needed to do with regard to the use of an expert, the Defendants did not reserve their position but put the matter before the expert, perhaps

believing that they could have another bite of the cherry later, but they put it unequivocally before the expert. I consider that even if the contract did not provide for it, the parties themselves did."

It may be that failure by a party expressly to reserve its position coupled with other circumstances could amount to a submission to the jurisdiction of an expert. But neither of the authorities upon which the Judge relied for that proposition, ***Fastrack v. Morrison*** (2000) 4 BLR 168 and ***Whiteways Contractors (Sussex) Ltd. v. Impressa Castelli Construction UK Ltd.*** [2001] 75 Con LR 92, are directly in point. More important is whether on the facts of this case, it can be said that Rhodia had no real prospect of successfully defending Laker Vent's claim that it had submitted to the jurisdiction of the expert. This is essentially a factual question. It turns largely on the documentary evidence before the Judge, the essentials of which I have summarised.

37. Mr. Jinadu submitted that the Judge's reliance on Rhodia's solicitors' letter of 3rd April as evidence of its submission to the expert's jurisdiction was in error because such submission as it might have constituted was contingent and related only to Rhodia's indicated counterclaim against Laker Vent. He also maintained that the Judge's reliance on the two authorities was misplaced in that such principles as they established were inapplicable to the facts of this case. He said that the evidence before the Judge, put at its lowest for Rhodia, was that it had a real prospect of successfully establishing that it had not submitted to the expert's jurisdiction on this issue.

38. Mr. Lofthouse maintained that Rhodia, in its letter to the expert of 28th February 2002, though challenging his jurisdiction as a matter of construction of the contract, did not effectively reserve its position with regard to it, and that its later express attempts to do so were too late. The matter was put beyond doubt, he said, by Rhodia's solicitors' letter to the expert of 3rd April 2002 indicating that the parties' representatives and discussed and agreed on the matters to be referred to him for his resolution. He added that, had there been any suggestion in it or at that stage that the agreement was one of expediency conditional on a final determination of the court that he had jurisdiction, it should have been expressly stated as a reservation of Rhodia's position on the issue of the expert's jurisdiction.

39. If it had been necessary for Laker Vent to rely on this ground it would have had to show on the application for summary judgment that Rhodia had no real prospect of defending the claim that it had submitted to the jurisdiction. The history of the matter, as I have summarised it, shows no express submission by Rhodia to the expert's jurisdiction. The letter of 3rd April 2002 is, it seems to me, capable of being construed as one of an acceptance perforce and as a matter of expediency of the consequences of the expert's decision that he had jurisdiction, whilst reserving its future entitlement to challenge it if it did not like the expert's determination in purported exercise of it. Such an approach is one of the four alternatives recognised by His Hon Judge Thornton Q.C. in ***Fastrack***, at para 31, as open to a party challenging jurisdiction in such a context - in that case the jurisdiction of an adjudicator: *"... the challenging party could reserve its position, participate in the adjudication and then challenge any attempt to enforce the adjudicator's decision on jurisdictional grounds, ..."*

40. As to whether failure by a contracting party to reserve its position on jurisdiction would amount to a submission to it is a more difficult question, and one that is highly fact sensitive. To succeed on such a basis at trial, a claimant would have to show that such silence, when considered with all the other material facts, amounted to a clear submission to the jurisdiction. See e.g. ***Project Consultancy Group v. The Trustees of the Grey Trust*** (1999) BLR 377; ***Nordot Engineering Services Ltd. Siemens Plc*** *(unreported)* 14th April 2000; and ***Cowlin Construction Ltd. V. CFW Architects*** (2003) BLR 241 It would not be enough to conclude, as the Judge did at the beginning of the passage I have set out in paragraph 34 above, that Rhodia *"did not make it clear what they were saying if it was that they were* **not** *abandoning any jurisdictional point."* [my emphasis]

Still less is that a permissible basis upon which to give summary judgment against it on such an issue. Given the history of the matter as contained in and illustrated by the documentation before the Judge, I would have held, had it been necessary, that Laker Vent had not shown that Rhodia had no real prospect of successfully defending on this issue, and would have allowed this ground of appeal.

3. Whether clause 43.9 conferred the" requisite" jurisdiction on the expert

41. The third issue in the first appeal is whether the expert, if appointed to determine a dispute pursuant to clause 43.9 of the model form has jurisdiction, by virtue of that clause and clause 45, to revise a provisional termination certificate and to order payment that he has found due from one party to the other.

42. I have already summarised, in paragraphs 6 to 9 of this judgment, the effect, as I see it, of Clause 43.9, when read with clause 45.2 on this issue, namely that the expert may revise or correct the project manager's provisional termination certificate. I reproduce here, for convenience of reference, clause 43.9 in full, the relevant parts of clause 43.5 and clauses 45.2 and 45.4: *"If by the expiry of the period specified in clause 43.5 it is not possible for the Project Manager to issue a Final Termination Certificate by reason of any unresolved dispute between the Contractor and any Sub-Contractor or by reason of any other matter which prevents the ascertainment of the amount referred to in paragraph (b), (c) and (d) of sub-clause 43.5, the Project Manager shall, at the expiration of such period, issue a Provisional Termination Certificate which shall contain the best estimate that can be made of any amounts referred to in the said paragraphs (b) and (c) and of the resultant balance due. If the Contractor disagrees with the Project Manager's estimate then the dispute shall be referred to an expert for resolution in accordance with clause 45 (reference to an expert). As soon thereafter as the ascertainment of the amount referred to in the said paragraphs (b) and (c) becomes practicable, the Project Manager shall issue a Final Termination Certificate which shall operate as a correction or adjustment of the Provisional Termination Certificate and payment shall be made between the Purchaser and the Contractor accordingly."*

The amounts referred to in paragraphs (b) and (c) of clause 43.5 are:

"(b) the net amount to be added to or deducted from the Contract Price by virtue of additions thereto or deductions therefrom which have accrued in accordance with Contract prior to the Contractor's receipt of the Termination Order; and

(c) the net amount of the saving of costs to the Contractor by reason of its having been relieved by the Termination Order of his obligation to complete performance of the Contract taking into account the disturbance and termination charges incurred by the Contractor as a result of termination."

And clauses 45.2 and 45.4 provide:

"45.2 ..[the] Expert shall decide all disputes referred to him as an expert and not as an arbitrator. Any decision of an Expert may revise or overrule any decision or instruction of the Project Manager as may be requisite"

"45.4 The powers of the Expert to determine disputes referred to him shall not be limited to quantum but shall include the determination of contractual and factual issues."

43. Rhodia's case before the Judge was that an expert's power under the above provisions was limited to determining, under clause 43.5 (b) and (c), the quantum of variations prior to the termination order and/or the amount of net saving of costs to the contractor as a result of the termination order relieving it of its obligation to complete performance of the contract. In addition, it maintained that, in giving his decision on those matters, the expert was not entitled vary the *provisional* termination certificate and the payment, if any, to be made shortly after it took effect. The only effect of the decision, it maintained, was in the input it provided to the project manager's calculation and payment of the *final* certificate. The Judge held that the expert's power went beyond that, in particular, enabling him to instruct payment in accordance with his determination, and, in so holding, seemingly placing considerable reliance on the provisions of clause 45.2. He said, pages 14C-G of his judgment: *"... I consider that the expert was correct in what he did. I consider that clause 45 gave him considerable powers, and he used those considerable powers. I do not accept the manner of looking at clause 43.9 that the Defendants seek to put forward.*

It seems to me that in providing an expert with the powers that he had, if the expert chose to use those powers in the way that he did in this case he was not being extra-contractual. He was not going beyond those powers and, as it happens, the period for payment of the provisional certificate had already expired and the expert was merely doing what he could to remedy the financial situation of the two parties in the best way that he could, and I consider that he had power to do this."

44. Mr Jinadu submitted that the Judge was wrong to conclude that clause 43.9 gave the expert jurisdiction going beyond determination of quantum for variation and uncompleted work before the termination order. In particular, he submitted that the clause confers only on a project manager, not an expert, the power to correct or adjust the provisional certificate by a *final* certificate, and to do so "as soon ...after ... the ascertainment of the amount" referable to such variations or uncompleted work "becomes practicable". He maintained that, in the absence of an express power in clause 43.9 for an expert to revise a provisional termination certificate, he has no power to do so and that the Judge wrongly sought to fill that gap by his reliance on clause 45.2 He submitted that the Judge, in doing so, failed to have regard to its concluding words, "as may be requisite". Proper regard to them, he submitted, leads to the conclusion that clause 45.2 does not enable an expert as a matter of course to revise or overrule any decision of a project manager under a contract, but only where necessary. He cited as an example of such necessity, a reference under clause 17.2 in respect of a project manager's decision not to order a variation, which he contrasted with clause 43,9 which, he said does not require an expert to revise the provisional termination certificate. That, he said, was what the clause expressly empowered and obliged the project manager to do, where necessary, but only in his *final* termination certificate.

45. Mr. Jinadu also pointed out that the model form contains a number of clauses providing for reference of disputes to an expert, for example: clause 16.7 - valuation of variations; 17.1 & 2 -failure to instruct variations, and 33.7 -withholding a certificate of completion Such clauses, he pointed out, define the type and scope of disputes referable to expert determination and provide the basis of an expert's jurisdiction; and clause 45 sets out the mechanics of its exercise. Given the finality and conclusiveness of expert determination, he argued that the contractual powers of an expert and the range of matters over which he can exercise them should be construed strictly in accordance with those powers, citing ***Jones v. Sherwood Services Plc*** [1992] 1 WLR 277, CA, and ***NIKKO Hotels (UK) Ltd v. MEPC Plc*** [1991] 2 EGLR 103.

46. Mr. Lofthouse put at the forefront of his submissions that the provision in clause 43.9 for the reference to an expert of a dispute over a provisional termination certificate is a separate exercise from final certification for which that clause also provides. He said that by the time of final certification the project manager has got beyond the "best estimate" stage and should be in a position to ascertain, by reference to the expert's decision on any issue referred to him and on other material the precise make-up of the final sum, if any, due either way. He advanced three bases on which the expert had jurisdiction to instruct payment of the retention monies to Laker Vent "forthwith", though I take them in a different order from that in which he put them. First, he relied on the power given to the expert in clause 45.2 to revise a provisional termination certificate with the consequence under clause 43.10 of prompt payment of the retention monies, which he said was the effect of the expert's decision. Second, he relied on the expert's power under clause 45.4 to determine contractual and factual issues, one of which, he submitted, is the time for payment of any sum due under the contract. Such a decision, he said, was a matter of established principle binding, even if incorrect, as to the date of payment, citing ***Jones v. Sherwood***, per Dillon LJ (with whom Balcombe LJ agreed) at 284C-E, following a dictum of Lord Denning MR in ***Campbell v. Edwards*** [1976] 1 WLR, 403, CA, at 407. Third, he noted, by parity of reasoning with his first argument, by 19th June 2002 when the expert issued his decision, the retention monies wrongly deducted on 14th January 2002 in the provisional termination certificate were well overdue for payment in any event.

47. In my view, Mr. Lofthouse's arguments prevail, whether, in the case of the first two, they are considered separately or, in the case of all three, cumulatively. As I have already noted, the starting point in construing clause 43.9 is that it does not provide as a matter of course for a provisional termination certificate and then a final certificate. Only if the amounts due under paragraphs (b) and (c) of clause 43.5 are not ascertainable within the requisite period, is it necessary for the project manager to take the "***best estimate***" course and issue a provisional termination certificate for which the clause makes provision. In that event, the provisional termination certificate is to contain *"the best estimate that can then be made of any amounts referred in the said paragraphs (b) and (c) and of the resultant*

balance due". And, in the absence of a dispute as to those provisional amounts, it must be followed promptly by payment of the provisional balance, pursuant to clause 43.10.

48. But if there is a dispute as to the project manager's "***best estimate***" forming the basis of the provisional certification, that dispute must be referred to an expert. The expert's decision, which is final, if different from the provisional certification takes effect as a revision of it. Then in accordance with the last sentence of clause 43.9 - which applies whether or not there has been a provisional certification and, if so, whether or not there has been a dispute over it - as soon as the project manager is in a position to do better than a "best estimate" in those respects, that is, as soon as "ascertainment of the amount ... becomes practicable", he must issue a final certificate. If there has been a provisional certification, whether or not disputed or referred to an expert, the final certificate takes effect when issued as a correction or adjustment of the provisional certificate, to be followed in its turn, in accordance with clause 43.10, with prompt payment of any final balance due.

49. On the facts here, the expert's decision of 19th June 2002 took effect as a revision of the project manager's provisional termination certificate of 14th January 2002 so as to remove the deduction of the retention monies of £100,000, thereby substituting for the balance due to Laker Vent on the certificate the sum of £101,160.57 for the sum of £1, 160.57. As a result, that revised sum became payable immediately to Laker Vent pursuant to clause 43.10, as more than 45 days had elapsed since the certificate's issue in January 2002. The expert's inclusion in his decision of an "instruction" to Rhodia to pay the retention monies "forthwith", though arguably a permissible revision pursuant to clause 45.2 of the project manager's implicit instruction in the certificate to pay the sum certified, was strictly unnecessary. And, in fact it was less than the contract, in clause 43.10 required as a result of the decision on the retention monies, namely to pay the revised balance of £101,160.57 due within a period that had already expired.

50. Accordingly, I would reject this ground of appeal as well as ground one and would, in consequence, dismiss Rhodia's first appeal.

The second appeal

51. As I have said, the primary basis for Laker Vent's claim to enforce the expert's decision on the balance of the issues referred to him was the same as that on which it had successfully sought release of the retention monies under his earlier decision, namely that it took effect as a revision of the provisional termination certificate. Rhodia, whilst seeking to support Mr. McKinlay's final certificate, as I have said, asked the Judge to stay the proceedings to arbitration pursuant to section 9 of the 1996 Act or for a stay or an adjournment under the court's general powers pending the outcome of its appeal in respect of the effect of the expert's decision on the retention monies. However, the Judge did not give Laker Vent judgment on the primary basis of its claim - reliance on the provisional termination certificate as revised by the expert, but on the third and alternative way in which it had put its case, namely that the contractual mechanism had broken down because the final certification of Mr. McKinlay was in the circumstances of its issue vitiated.

52. I have mentioned the circumstances in which Rhodia's newly appointed project manager, Mr. McKinlay, issued what purported to be a final termination certificate a few hours after his appointment and two days before the start of the hearing of the claim, a certificate that took account of the expert's decision on the balance of the matters referred to him in respect of the provisional termination certificate, but added a sum of £476,693.48 by way of cross-claim by Rhodia producing a balance due to it of £197,954.33. The Judge clearly regarded that as a suspect contrivance of Rhodia in an attempt to defeat the claim, refused Rhodia's application for a stay of the matter to arbitration and held that Laker Vent was entitled to summary judgment in the amount instructed by the expert, seemingly on the basis that it was a binding determination as to the amount due by way of final certification. In doing so, he made observations about Rhodia having deliberately withheld its cross-claim from the expert and as to actual or apparent bias on the part of Mr. McKinlay in issuing his "final" certificate, observations which, for reasons I shall give, were not necessary to his determination of the issue before him. He said, at paragraphs 11 and 12 of his judgment:

... "The Claimant makes the point that Mr. McKinlay was appointed 2 days before the hearing in November and was able to issue the certificate on the first day of his appointment. No one can say that Mr. McKinlay was impartial as between the purchaser and contractor in issuing the Final Termination Certificate hours after his appointment. It follows that my view is that the contractual mechanism in this case had broken down and the Claimant is entitled to claim the sum which the expert found. The Defendant can put the matter before an arbitrator and say that the counterclaim and sums due from the Claimant is reasonable and correct and can seek an appropriate order. What the Defendant cannot do is challenge the expert's finding. That no doubt is the reason why Mr. McKinlay put in the expert's figure and merely made deductions from it.

*12. I agree that the Defendant has strong arguments for saying that on the Claimant's construction of 43.9 any defects which were found at a later stage would disappear into a black hole. It may well be that later defects, defects found out after the contractual mechanism had been started, would be capable of being argued before an arbitrator. In the present case it is clear that the Defendant well knew of their allegations and sums and deliberately chose not to put it before the expert. Clause 43.9 sets out a pattern of conduct by each party. The Defendant in this case sought to put its own construction what it could do and put its own man in the position of the Project Manager. I do not consider that there was a contractual power to issue the certificate in the form of that issued by McKinlay. In this particular case I agree with the Claimant in that the Claimant argues that it is a matter of appearance. I agree with ... what the Claimant says that certificates are in effect of where 'although there had been no improper attempt to influence the engineer, he had appeared to assume the role of advisory more than that of a professional man holding the scale' (***Canterbury Pipelines Limited v. Christchurch Drainage Board** *[1979] 2 NZLR 347)*

13. I agree with the Claimant that Mr. McKinlay's statement does not disclose an unattached temperate view. The statement of Mr. Baldwin indicates that there are certain matters where Mr. McKinlay appears to have accepted complaints without any investigation and has also found certain matters proved which were considered by the expert. I agree with the Claimant that the issue of the Final Termination Certificate by reason of the Defendant's own default has resulted in the position being that no certificate within the meaning of the contract has been issued. I accept what the Claimants alleged in that not only has the contractual machinery broken down entitling the court to give relief but to preclude relief would be to allow the Defendant to benefit from its own wrong.

14.... There is no right to issue a Final Termination Certificate in a sum other than that determined by the expert. That sum has been determined. That determination was final. I agree that this may well be the reason why the previous Project Managers found themselves unable to see how they could make a deduction to a Final Certificate when the sum of that certificate had been finally determined under clause 43. ..."

53. Rhodia sought to rely on no less than twelve grounds of appeal. They were all designed to meet the Judge's reliance on the expert's second decision as having the effect of a final termination certificate so as to preclude any reopening before him, though possibly not before an arbitrator, of Rhodia's cross-claims not put to the expert. However, as Mr. Jinadu conceded in his closing submissions, if the provisional construction of the contract that the Court then indicated and to which I have adhered in this judgment on the first appeal is correct, the basis of the Judge's ruling on the second claim and of Rhodia's challenge to it becomes academic. There are two reasons for that. The first is that the second claim and any judgment on it relates only to the provisional termination certificate; when Laker Vent issued proceedings on it on 16th October 2002 Mr. McKinlay's "final" termination certificate had not yet been issued. The second is that, in any event, the expert's second decision on the balance of the issues referred to him, like his first decision as to the retention monies, could only take effect, pursuant to clause 45.6 as a binding revision of the provisional, not a final, certificate.

54. It follows that, whatever the rights and wrongs of the final certificate on which Rhodia sought to rely as a defence to Laker Vent's claim, it can have no bearing on the expert's further revision of Laker Vent's entitlement under the provisional termination certificate, carrying with it, by now, an unchallengeable contractual entitlement to immediate payment of the sum provisionally certified. That was the primary and sufficient basis on which Laker Vent put its case on the claim to the Judge. And, in my view, for the reasons I have given in relation to the first claim, that is how the Judge

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should have dealt with it, not as a matter of final certification. If I am right about that, whether Rhodia is in breach of its obligation under clause 43.8 to provide the project manager with information in good time and issues as to the validity of Mr. McKinlay's final termination certification and/or as to what should be put in its place, in relation to Rhodia's cross-claims not the subject of reference to the expert, may yet be capable of determination in fresh proceedings. These could possibly be by way of arbitration pursuant to clause 46 (since only disputes referred to an expert for resolution are barred by clause 45.7 from resolution by arbitration under clause 46) or by the court on the ***Bernhard Rugby Landscapes*** basis that the contractual machinery has broken down. Among the matters that may fall for consideration in that event is whether Rhodia is in breach of its obligation under clause 43.8 to provide the project manager "***as soon as practicable***" with all information and documents that he might reasonably have required for the purpose of issuing the termination certificate (whether provisional or final).

55. Whatever the machinery adopted, the issue is clearly not apt for disposal by way of summary judgment or by this Court on appeal from such judgment. Nor, given the binding quality for this purpose of a provisional certification when revised by an expert (see clauses 45.2, 6 and 7), does it seem to me to qualify under the lower threshold of the mere existence of "***a dispute***" in respect of which section 9 of the 1996 might provide for a stay to arbitration (see ***Halki Shipping Corporation v. Sopex Oils Ltd***. [1998] 1 WLR 726, CA). That is because it is not a dispute in relation to the subject of these proceedings, namely the effect of the provisional termination certificate. Whether a stay of execution could be sought in respect of any future proceedings based on Mr. McKinlay's final certificate or otherwise on Rhodia's cross-claim is another matter, but not one for this Court. In the meantime, the provisional certificate as revised is enforceable.

56. For those reasons, and because I do not wish to be thought to be pre-judging any issues that might arise in them, I do not consider it appropriate to consider or express any view on Rhodia's various grounds for its second appeal. It is enough for disposal of the appeal that the Court should be of the view that Laker Vent was entitled to summary judgment on the primary basis of its claim that it was entitled to payment under clause 43.10 to payment of the amount determined by the expert taking effect as a further revision of the provisional termination certificate. Determination of the issue as to final certification and the payment either way of any balance due thereon may be for another day and another proceeding. In my view, Rhodia had no real prospect of successfully defending the claim on that basis, and that is how the Judge should have dealt with it.

57. In the result, I would also dismiss Rhodia's second appeal and uphold the Judge's order of summary judgment against it in respect of the sum determined by the expert in his second decision, plus interest and VAT, though not, as I have explained, for the reasons he gave.

LADY JUSTICE HALE:

58. I agree.

LORD JUSTICE DYSON:

59. I also agree.

Simon Lofthouse (instructed by Knowles) for the claimant.
Abdul Jinadu (instructed by DLA) for the defendant.