Neutral Citation Number: [2010] EWHC 1529 (TCC)

Case No: HT-10-144

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2010

Before :

THE HON MR JUSTICE EDWARDS-STUART

- -

Between :

Anglian Water Services Ltd	**Claimant**
- and -	
Laing O'Rourke Utilities Ltd	**Defendant**

- -
- -

Andrew Wales and Sarah Martin (instructed by **CMS Cameron McKenna LLP**) for the **Claimant**
David Streatfeild-James QC (instructed by **Pinsent Masons**) for the **Defendant**

Hearing date: 25/05/2010

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE EDWARDS-STUART

The Hon Mr Justice Edwards-Stuart:

Introduction

1. This is the hearing of an arbitration claim by which the Claimant, Anglian Water Services Ltd ("AWS"), applies for

    1.1 A declaration that AWS validly notified its intention to refer a dispute to arbitration by 23 March 2010 and therefore in time; alternatively

    1.2 An extension of time for taking that step until 30 March 2010 or such other date as the court may permit, pursuant to section 12 of the Arbitration Act 1996.

2. By a contract that incorporated the terms of the 2nd Edition (1995) of the NEC Engineering and Construction Contract AWS engaged the Respondent, Laing O'Rourke Utilities Limited ("LOR"), to design and construct a number of tanks at AWS's Saltfleet Sewage Treatment Works ("SSTW").

3. It was common ground that the adjudication provisions in the contract did not comply with Part II of the Housing, Grants, Construction and Regeneration Act 1996 ("HGCRA") with the result that the Adjudication provisions in the Scheme for Construction Contracts ("the Scheme") replaced the adjudication provisions in the contract. This was for the simple reason that the provisions in the contract did not permit a party to the contract to refer a dispute to adjudication "at any time" as section 108 of HGCRA requires.

4. Clause 93.1 of the Core Clauses provided for arbitration in the following terms (the reference to *tribunal* in the clause means arbitration and words in italics are defined in terms in the contract):

> "If after the *Adjudicator*
>
> • notifies his decision or
>
> • fails to do so
>
> within the time provided by this contract a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the *tribunal*. It is not referable to the *tribunal* unless the dissatisfied Party notifies his intention within four weeks of
>
> • notification of the *Adjudicator's* decision or
>
> • the time provided by this contract for this notification if the *Adjudicator* fails to notify his decision within that time
>
> whichever is the earlier. The *tribunal* proceedings are not started before Completion of the whole of the *works* or earlier termination."

5. It is alleged by LOR that AWS failed to serve a valid notice of dissatisfaction under clause 93.1 within four weeks of a decision of the adjudicator, Dr Robert Gaitskell QC. The failure did not consist of a failure to send the document to LOR within the

prescribed four weeks, but a failure to send it to what LOR contends to be the correct address for service.

6. LOR relies on clause 13 of the Core Clauses, the relevant parts of which provide as follows:

> "Communications 13
>
> 13.1 Each instruction, certificate, submission, proposal, record, acceptance, notification and reply which this contract requires is communicated in a form which can be read, copied and recorded. Writing is in the *language of this contract*.
>
> 13.2 A communication has effect when it is received at the last address notified by the recipient for receiving communications or, if none is notified, at the address of the recipient stated in the Contract Data.
>
> 13.3 If this contract requires the *Project Manager*, the *Supervisor* or the *Contractor* to reply to a communication, unless otherwise stated in this contract, he replies within the *period for reply.*
>
> ...
>
> 13.7 A notification which this contract requires is communicated separately from other communications."

7. I will have to go into the facts in some detail later in this judgment, but what happened in outline was that at 16:19 on 22 March 2010 AWS's solicitors, CMS Cameron McKenna ("CMS"), sent a letter by fax to LOR's solicitors, Pinsent Masons ("PM"), which was a notice of dissatisfaction with the decision of Dr Gaitskell issued on 24 February 2010, together with a separate Notice to Refer a Dispute to Arbitration. This was acknowledged by an e-mail at 17:03 the same day from Andrew Shelling of PM saying "*I confirm safe receipt of your fax sent earlier today*".

8. PM then forwarded the documents to their clients and it is not in dispute that they went straight into the hands of the two individuals at LOR who were responsible for handling the dispute with AWS. The four week time limit for serving the notice of dissatisfaction expired at the end of the following day (or, possibly, the day after).

9. Having received the acknowledgement from PM, the partner and assistant at CMS - thinking that all was well - took no further steps in relation to further service of the documents. However, one week later, on 29 March 2010, CMS received a letter from PM saying that they would take instructions from their clients as to whether they were instructed to accept service and asking CMS to confirm that the relevant notice under clause 93.1 of the contract had been served on their clients in accordance with the contract.

The issues

10. These can be summarised as follows:

(1) Is clause 93.1 incompatible with Part II of HGCRA and of no effect? If not,

(2) Was delivery of the notice of dissatisfaction to PM within the four week period an effective communication of that notification under the contract? And, if not

(3) Since the notification of dissatisfaction was received by the relevant individuals at LOR within the four week period, did that of itself make it an effective communication under clause 13?

(4) If each of the above issues is answered in favour of LOR, should AWS be given an extension of time for service of the notice of dissatisfaction under section 12 of the Arbitration Act 1996?

11. Since the notice of dissatisfaction was subsequently served on LOR at the address given in the contract on 30 March 2010, that is the date to which AWS seeks an extension of time (if it needs it).

12. I will deal with the issues in the order in which I have set them out.

The validity of clause 93.1

13. The principal point made by Mr Andrew Wales, who appeared for AWS together with Miss Sarah Martin, was that since section 108(1) of HGCRA confers on a party to a construction contract the right to refer a dispute arising under the contract for adjudication under a procedure complying with the section, that must carry with it a right not to refer a dispute for adjudication but to refer it to some other method of dispute resolution.

14. At paragraph 62.3 of his skeleton argument Mr Wales put the point this way:

> "A contract which requires a mandatory adjudication prior to the chosen means of final determination is non-compliant with the HGCRA. The adjudication for which the Scheme provides will not (as required) be permissive in nature if contract terms remain effective to make an adjudication mandatory prior to the final determination of any dispute."

15. This is a short submission but unfortunately I cannot give it such a short answer. HGCRA provides that a contract must entitle each party to a construction contract to refer a dispute for adjudication at any time and it provides that the decision of the adjudicator will be binding until the dispute is finally determined by legal proceedings, or arbitration if that is what the contract provides, although the parties may agree to accept the decision of the adjudicator as finally determining the dispute.

16. The Adjudication provisions in the Scheme, which as I have already said have been incorporated into this contract, entitle any party to the contract to give written notice of his intention to refer any dispute arising under the contract to adjudication. But, as I have already noted, it is provided by section 108(2) of HGCRA that the contract must enable a party to give notice *at any time* of his intention to refer a dispute to adjudication. However, HGCRA is silent on the question of whether a referral to adjudication should be a precondition of starting proceedings in the courts or by way of arbitration, as appropriate. A contract that obliges a party to refer a dispute to adjudication before he can pursue it by either litigation or arbitration does not, in my view, impose any fetter on the right to refer a dispute to adjudication at any time.

However, it does prevent a party from starting proceedings in the courts or by way of arbitration at any time, because he cannot do so without having first referred the dispute to adjudication.

17. HGCRA does not provide that a party to a contract has a right to start proceedings, either by way of litigation or arbitration, at any time and I cannot see any room for reading such a requirement into its provisions as a matter of construction. But that is effectively what Mr Wales is seeking to do: he just puts the point in a much more subtle way. His argument, when looked at more broadly, amounts to this: that Part II of HGCRA entitles any party to the contract to give notice of his intention to refer any dispute arising under the contract to arbitration *at any time*. This it clearly does not do. Accordingly, I consider that there is nothing in the point that clause 93.1 cannot survive the provisions of Part II of HGCRA.

18. But Mr Wales has a further way of putting the point, albeit in a slightly different way. What he says is that "*the requirement for a mandatory adjudication prior to arbitration deprives the parties of the right under section 108(2)(a) to be able to give notification at any time*" (skeleton, paragraph 62.4). The fallacy in this argument is that it confuses relative time with absolute time. Under HGCRA and the Scheme a party is entitled to refer a dispute to adjudication at any time from day 1 of the contract. Provided that there is a legitimate dispute, that right subsists (at least, in England and Wales, in practice, if not in theory) up to the time when his cause of action becomes statute barred. The fact that a party cannot start proceedings by way of arbitration in respect of any particular dispute until he has obtained a decision from an adjudicator on that dispute has no bearing whatever on his ability to choose when to refer a dispute to adjudication.

19. It is only if one asks the question “can a dispute be referred to adjudication before or after it has been referred to arbitration?” that there will be a restricted answer. But one obvious reason for the restricted answer is that once the dispute has been decided by arbitration there can be no dispute to refer to adjudication. The dispute will have been finally determined by the arbitrator's award. If there is an adjudication of a dispute, that adjudication must, by definition, always precede the determination of the same dispute by arbitration.

20. So this just brings me back to the submission that the real effect of clause 93.1 is that it prevents either party to the contract from referring a dispute to arbitration at any time. But, for the reasons I have already given, unless this is contrary to HGCRA, the point goes nowhere.

21. But Mr Wales has another string to his bow. He submits that the importation of the Scheme into the contract means that all the adjudication provisions of the Scheme apply in place of the contractual provisions covering the same ground in the contract: see *Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [2010] EWHC 720 (TCC), a decision of mine (which I understand may be going to the Court of Appeal, but not on this point). Whilst it is not difficult to identify the adjudication provisions of the Scheme which are to be imported into the contract, because they are contained in Part I of the Scheme under the heading "Adjudication", it may not be so easy to identify the provisions in the contract that they are to replace.

22. Section 9 of ECC Option C is headed "Disputes and termination". Clause 90 is headed "Settlement of disputes", clause 91 is headed "The adjudication", clause 92 is headed "The *Adjudicator*" and clause 93 is headed "Review by the *tribunal*". On the face of it, therefore, these clauses as they stand suggest that clauses 90-92 inclusive are concerned with adjudication and clause 93 is concerned with arbitration.

23. However, some of these clauses were amended by the incorporation of Addendum Y(UK)2 to the second edition of the NEC form of contract. Clause 90 was deleted in its entirety and replaced by a new clause 90 with the heading "Avoidance and settlement of disputes"; clause 91 was amended by replacing the side heading "The adjudication" with the heading "Combining procedures", replacing clause 91.1 with a new clause and including certain minor amendments to the text of clause 91.2. In addition, there were some also minor amendments to the text of clause 92, but the heading of that clause was not changed. There were no amendments to clause 93.

24. Unfortunately, this particular paper trail does not stop there because there was then a further amendment to clause 90 by Option Z. By this amendment clause 90 was deleted in its entirety and replaced by new provisions in four sub-clauses, 90.1 to 90.4. Effectively, these provided that in the first instance any dissatisfaction or dispute under the contract was to be submitted to and settled by the Project Team and, failing resolution there, to a body called the Partnership Board. In the event that the Partnership Board was unable to settle the dissatisfaction or dispute, the matter was to be submitted to and settled by the Adjudicator. There were various consequential provisions in addition.

25. However, in the light of these amendments the long and the short of all this is that clause 90 sets out initial steps of a dispute resolution process that had to be followed before a dispute or dissatisfaction could be referred to adjudication, clause 91 deals with the situation where a matter in dispute involved a subcontractor and clause 92 deals with the adjudication process itself.

26. By contrast, clause 93.1 deals with the situation where the Adjudicator either made his decision within the time required by the contract or failed to do so within that time. In either event, a dissatisfied party was then entitled to refer the matter in dispute to arbitration provided that he notified his intention to do so within four weeks of the notification of the Adjudicator's decision or, if he failed to give a decision, within four weeks of the date by which he should have given it. In addition, the clause provides that the arbitration proceedings themselves were not to be started before completion of the works. Clause 93.2 deals with the powers and jurisdiction of the Arbitrator.

27. Paragraph 19(1) of the Scheme sets out the time limits within which an adjudicator must reach his decision. Paragraph 19(2) provides that if the adjudicator fails, for any reason, to reach his decision in accordance with those time limits, any of the parties to the dispute may serve a fresh notice of adjudication and continue with a new adjudicator.

28. In my view, paragraph 19 of the Scheme and clause 93.1 of the contract can be operated together and are not mutually exclusive. If they are to be read together (which Mr Wales disputes), they produce a situation in which, if the adjudicator fails to give a decision within the required time, a party can refer the dispute to arbitration under clause 93.1 provided that he notifies his intention to do so within four weeks of the date

by which the adjudicator should have notified his decision. If he fails or chooses not to do this, he can start a fresh adjudication with a new adjudicator under paragraph 19 of the Scheme. I accept that whilst the wording of clause 93.1 appears to be mandatory in its terms (in that it appears to be saying that if a party is dissatisfied with the failure to make a decision it must notify the other party of its intention to refer the dispute to arbitration), it provides no remedy at all if the dissatisfied party does not act within the four week time limit. It does not give that party the residual right to refer the dispute to a fresh adjudicator. I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance. Paragraph 19(2) of the Scheme, by contrast, is clearly drafted and provides no time limit within which the referral to a fresh adjudicator must take place.

29. The real difficulty, in my judgment, with the submission that clause 93.1 must be included within the provisions of the contract that are replaced by the Scheme is that it removes the operative part of the arbitration clause. Whilst the arbitration clause is the whole of clause 93, not just clause 93.1, the operative part of the clause is contained only in clause 93.1. If clause 93.1 is removed without any equivalent replacement (and there is no such replacement in the Scheme), then one is left with a clause that defines the role of the arbitrator but provides no entitlement to refer a dispute to arbitration, or any machinery by which to do so. Even if clause 93.2 was to be read as conferring a right to refer a dispute to arbitration, it would seem to be a right to refer the dispute to arbitration at any time because the clause is silent about any restriction on when a dispute can be referred to arbitration. This would not sit easily with the adjudication provisions in the Scheme.

30. Whilst I accept that the co-existence of clause 93.1 and the Scheme is not an entirely happy one, it is workable for the reasons that I have given. If, on the other hand, clause 93.1 is to be deleted it would be open to question whether or not there was a surviving right to refer a dispute to arbitration at all.

31. Standing back and looking at the matter more broadly, it seems to me that clause 93 does not form part of the adjudication provisions of the contract. Whilst it is relevant to the adjudication provisions because non-compliance with its requirements would leave the Adjudicator's decision as finally binding, it is both in form and substance concerned with the provision of a right to refer a dispute to arbitration.

32. For these reasons, therefore, I conclude that clause 93.1 is not incompatible with the Scheme and is not one of the adjudication provisions of the contract that falls to be deleted as a result of the incorporation of the adjudication provisions of the Scheme into the contract. The result is that it is a valid and surviving provision.

Was delivery of the notice of dissatisfaction to PM on 22 March 2010 effective?

33. This issue raises, I think, three further sub issues:

    (1) Is compliance with clause 13.2 of the contract the only means of rendering a communication required by the contract effective?

(2) As at 22 March 2010, what was the "last address notified" by LOR for receiving communications required by the contract, or at least communications relevant to the adjudication?

(3) If the answer to issue (2) is PM's office in Bristol for the purpose of communications relevant to the adjudication, was the notice of intention to refer the dispute to arbitration a communication relevant to the adjudication?

Is compliance with clause 13.2 the only means of achieving effective communication?

34. The argument, attractively put by Mr Wales, is that LOR is reading clause 13.2 as if it said that a communication only has effect when received at the last address notified. That, he submits, is a restrictive reading that is not justified as a matter of construction, and he cites various authorities in support of this proposition. Further, he submits that such a construction would be contrary to the commercial purpose of the clause, since it would preclude the parties from communicating in ways which must have been contemplated at the time when the contract was made. For example, communications that are physically handed over at a meeting on site (the site not being the last address notified) and recorded in the minutes. In short, he submits, clause 13.2 stipulates the effectiveness of a communication received in the stated way, but it does not preclude the effectiveness of communications made in other ways.

35. Mr David Streatfeild-James QC, who appeared for LOR, submits that clause 13.2 must be complied with in order to make a communication effective. He submits that there is a very good reason for this. He reminded me of numerous provisions in the contract that require notification of a particular thing or state of affairs which then has certain contractual repercussions. For example, within clause 13 itself there is clause 13.3 which requires the Project Manager and others to reply to a communication within the *period for reply* (which is 14 days). A failure to do so is a compensation event under clause 60.1. In order for the Project Manager to be able to do this, submits Mr Streatfeild-James, there must be certainty as to when the relevant communication was received.

36. Whilst he accepts that it may be cumbersome, and in some ways unsatisfactory, Mr Streatfeild-James submits that the contract requires every communication to be served at the notified address in order to be effective. It is dangerous, he submits, to construe clause 13.2 solely in the light of the events which have given rise to the present application: clause 13.2 applies to all communications that may take place throughout the contract and they take a wide variety of forms.

37. I now turn to the authorities relied on by Mr Wales. The first was *Manchester Diocesan Council for Education v Commercial & General Investments* [1970] 1 WLR 241. The Council wished to sell some school buildings and conditions of sale, incorporating a form of tender, were issued on its behalf by its surveyor. Condition 4 provided that the person whose offer was accepted should be notified by letter sent to him by post at the address given in his tender and that every letter should be "deemed to have been received in due course of post". The Council wished to accept the defendant's offer and its surveyor wrote to the defendant's surveyor - not the defendant - stating that the offer had been accepted. A dispute arose as to whether or not there was a binding contract. It was held that where an offeror prescribes a particular mode of acceptance, but does not stipulate that only acceptance in that mode shall be binding

acceptance may be communicated in any other mode not less advantageous to the offeror. Since condition 4 was included in the offer at the instance of the Council strict compliance with it could be waived by the Council, provided that the defendant was not thereby adversely affected. Accordingly it was held that there was a binding contract. At page 246, Buckley J said this:

> "Where, however, the offeror has prescribed a particular method of acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of opinion that acceptance communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract."

38. The next case was *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617. A clause containing an option to renew a lease concluded as follows: "*Should the Lessee decide to exercise this option it shall give to the Lessor notice in writing to be sent by prepaid registered mail to the Lessor's last known place of residence of its desire so to do not later than (blank) calendar months prior to the expiration of the term hereby granted*".

39. The option was exercised by ordinary post instead of registered post, and it was contended that this was a fatal defect. The judge, Wootten J, said that it appeared that the notice of exercise of the option was in fact sent by the plaintiff to the defendant prior to the expiration of the term and was received by the defendant in the normal course of post. He said that the question in the case was whether the clause should be construed as a stipulation that prepaid registered mail is to be not merely a sufficient method of giving notice, but the sole and essential method of doing so. His conclusion, at page 623, was:

> ". . . in the absence of a very clear indication of a contrary intention, it would not be reasonable to construe a provision for service by registered mail as excluding the giving of notice by other equally expeditious means which do in fact result in the actual receipt of the notice by the offeror, e.g. personal delivery or unregistered mail, although of course in the latter event the offeree will run the risk of non-delivery."

40. The third case relied on by Mr Wales was *Yates Building Company v RJ Pulleyn & Co* [1976] EG 123. That was another case of an option to purchase land and the relevant clause said that the option could be exercised by notice in writing "*to be sent by registered or recorded delivery post to the registered office of Pulleyns or the offices of their said solicitors*".

41. At page 125, Lord Denning MR said this:

> "It seems to me that this depends on the construction of the option clause. The option is an offer: an irrevocable offer. When a person makes an offer, he does sometimes prescribe the method by which it is to be accepted. If he prescribes it in terms which are mandatory or obligatory, the acceptance is only good if it complies with the stated requirements. Thus in the present case the notice of acceptance must be in writing, and *must* be given to Pulleyns or to Pulleyns' solicitors, and *must* be given between April 6, 1973 and May 6, 1973. But the question is whether the words "*such notice to be sent by*

> *registered or recorded delivery post*" are mandatory or directory. That test is used by lawyers in the construction of statutory instruments, but it can also be used in the construction of other documents. The distinction is this: a mandatory provision must be fulfilled exactly according to the letter, whereas a directory provision is satisfied if it is in substance according to the general intent . . . In applying this rule of construction, you must look to the subject matter, consider the object to be fulfilled, and then see whether the provision must be fulfilled strictly to the letter or whether the substance of it is enough."

42. The acceptance was not sent by registered or recorded delivery post but it arrived in time. Unsurprisingly, perhaps, Lord Denning held, as a matter of interpretation, that if the letter did reach the sellers in time, it was a valid exercise of the option. Orr and Scarman LJJ agreed, although Scarman LJ said that he was not convinced that the term "directory" has any application to the field of contract. He considered that contractual provisions were either obligatory or permissive.

43. Mr Streatfeild-James did not seek to challenge the principle established by these cases; however, he submitted that it was necessary to look at this particular clause in the context of this particular widely used standard form of contract.

44. An obvious difference between this clause and the clauses in the three cases to which I have referred is that this clause is intended to be of general application to a large number of different types of communications. In each of the cases cited, it was clear that the method of service in fact adopted caused no detriment to the other party and, indeed, may even have been advantageous. The problem here is that there is no way of knowing, as a matter of general application, whether service on a particular individual responsible for the matter concerned would in fact be more advantageous to the relevant party than service in the prescribed manner. One can readily envisage situations where that may not be the case.

45. It seems to me that the probable commercial purpose of the clause is to enable each party to the contract to work on the basis that all communications in relation to the contract will be channelled through one particular office, with the obvious advantage of enabling every incoming document to be properly filed and its arrival properly recorded. I think that, as a specialist judge in this field, I can probably take judicial notice of the fact that for the best part of a decade or so electronic document management systems for providing a database of all communications generated in the course of the contract have been employed in many substantial civil engineering and construction projects. Service through one designated office may be more cumbersome but it does enable proper records to be kept. It is then for the project manager or co-ordinator, or a particular member or members of his staff, to ensure that incoming documents are then copied to all those individuals who have an interest in seeing them.

46. Turning to the wording of the clause itself, it seems to me that clause 13.2 is there to fix the moment in time when a communication takes effect. For the reasons given by Mr Streatfeild-James, in the case of certain types of communication the date of its receipt will trigger the start of the period in which a response or action is required. The answer to the rhetorical question asked by Mr Wales - what is wrong with a document being handed over in a meeting? - is nothing, but I consider that the contract requires that a copy of the document should be sent also to that party's prescribed address.

47. It would be unsatisfactory, in my view, if in any case where there was a dispute about the time when a communication took effect, the parties had to investigate the circumstances in which the communication was made and received in order to determine whether the mode of delivery was actually as good as, or better than, the mode of delivery prescribed by clause 13.2. Apart from anything else, there might well be legitimate room for disagreement as to whether the actual mode of service was an improvement on the prescribed mode of service.

48. I accept the point forcefully made by Mr Wales that in the present case the notice of dissatisfaction found its way to the relevant individuals in LOR within the prescribed time and almost certainly sooner than if it had been sent to what LOR contends was the last notified address, namely the office in St Neots. However, that can provide no basis for reaching any general assumption in the context of a project such as this about whether delivery to the individuals concerned with any particular communication is in general going to be more advantageous to the receiving party than delivery to the prescribed address.

49. For these reasons I conclude that compliance with the mode of delivery specified in clause 13.2 is the only means of achieving or securing effective delivery of a communication under the contract because the communication only takes effect when it is received at the prescribed address.

50. The consequence of this conclusion is that I reject the submission that the fact that notification was received within time by the relevant personnel at LOR effectively trumps the failure to give notice in accordance with the contract. On this aspect I would echo the words of Gross J, albeit made in a different context and to a different end, in *Lantic Sugar Ltd v Baffin Investments* [2009] EWHC 3325 (Comm), namely:

> "If a claimant is required to serve X and, mistakenly purports to serve Y, the mere fact that Y informs X of the purported service so that X knows of it, cannot convert Y's receipt of the documents into good service upon X."

51. However, the fact that notice of AWS's intention to refer the dispute to arbitration was brought to the attention of the relevant officers or directors of LOR within the four week time limit is clearly a relevant factor if it becomes necessary to consider the application under section 12 of the Arbitration Act 1996 to extend time.

As at 22 March 2010, what was the "last address notified" by LOR?

52. Mr Streatfeild-James submits that the notification of a change of address under clause 13.2 is itself a communication that has to be sent to "the last address notified" and does not take effect unless this happens. Mr Wales's response to this was that the communication of a change of address was not a communication that "the contract requires" within the meaning of clause 13.1.

53. In support of this submission Mr Wales argued that a party did not have to change its address or give an address different from that stated in the Contract Data, and so the notification of a different address was not a communication that the contract required. It seems to me that precisely the same argument could be raised, for example, in relation to an instruction to search for defects under clause 42. The Supervisor does not have to give such an instruction - indeed, it would be possible for the works to be

carried out and completed without the need for such an instruction ever arising. But it is plain in my view that if such an instruction is given, it has to be communicated in the manner prescribed by clause 13.2. Accordingly, on this point I accept the submissions of Mr Streatfeild-James.

54. The next point is to consider which, if any, was the "last address notified" by LOR to AWS for the receipt of relevant communications as at 22 March 2010. I say "relevant communications" because I see no reason why an address should not be notified under clause 13.2 in respect of a particular type of communication but not others. For example, I do not see anything in the wording of clause 13.2 to prevent LOR from notifying an address solely for the purpose of, say, receiving certificates issued under the contract.

55. Whether or not this conclusion is correct may not matter because I was told that the contract works had been completed and that the only activity that was continuing under the terms of the contract was the dispute resolution process that has given rise to this application. As Mr Wales put it in his skeleton argument, "*the dispute was all that remained to the life of the contract*". I did not understand this to be disputed.

56. By a letter dated 29 February 2008, addressed to “Laing O'Rourke” (ie. not specifically to LOR, although there could have been no doubt that LOR was the identity of the intended recipient) at the St Neots office, CMS notified LOR that it had been instructed by AWS in relation to the recovery of the losses caused by the collapse of Reactor 2 at SSTW. After setting out the details of the claim and making some proposals for the way forward, the letter concluded "*We look forward to hearing from you as to your availability for a without prejudice meeting in the week commencing 7 April*".

57. Mr Wales submits that if it was necessary for AWS to give notice of an address for receiving communications in relation to this dispute, the letter of 29 February 2008 did this. I accept this submission. Clause 13.2 does not require a notification to be in any particular form, the only requirement is that for it to be effective it must be sent to the last address notified by the recipient for receiving communications. It appears to be common ground that the St Neots office was the "last address notified" on behalf of LOR at the time when this letter was sent. Although CMS's letter does not say in terms that communications relating to the dispute are to be sent to its office, that in my view is implicit given the terms of the letter as a whole and the concluding sentence. That sentence, in particular, makes it clear that the requested response should go to CMS.

58. On 11 April 2008 PM wrote to CMS saying that they were instructed by "Laing O'Rourke" in connection with CMS's letter of 29 February 2008. The letter did not address any of the substantive issues in the dispute but merely the proposals put forward by CMS as to the way forward. The letter concluded by saying that PM would be grateful if CMS "*would note our interest in this matter*" and asking CMS to confirm that its clients would be prepared to defer the issue of any proceedings until they had had sight of LOR's proposals as to a timetable for without prejudice discussions. I do not consider that the request to note PM's interest amounted to a notification of an address for the delivery of communications under clause 13.2. I did not understand Mr Wales to make any serious suggestion to the contrary.

59. On 14 November 2008 PM wrote to CMS enclosing a report prepared by Arup and setting out a summary of LOR's position. The letter concluded by saying that LOR

denied that it had any liability to AWS as alleged in the letter of 29 February 2008. After some further correspondence between the respective solicitors, on 11 December 2009 CMS wrote to PM enclosing "*by way of service*" a Notice of Adjudication in respect of the dispute. The letter stated that a copy of the Notice of Adjudication had also been served on PM's clients, and it was in fact copied (as it stated at its foot) to Mr Paul Grammer, who was the European Commercial Construction Director of Laing O'Rourke and was the person who had primary conduct of the dispute on behalf of LOR. The same day PM replied by an e-mail from Mr Adam Harris, the partner at PM who had the conduct of the case, stating "*Safe receipt of the Notice and correspondence is acknowledged*".

60. PM replied to this letter on 15 December 2009 and made various proposals for what they described as a "*sensible adjudication timetable*". The letter then addressed what were described as some matters of housekeeping and it is perhaps worth quoting the last three paragraphs of the letter in full:

> "The first matter is the identity of the parties. The contract for the Saltfleet facility was signed by Laing O'Rourke Utilities Limited. There is no company called Laing O'Rourke Limited. Consequently, as matters currently stand we do not believe that the notice settled by leading and junior counsel is, as served, fit for its purpose.
>
> The second matter may be of limited importance if a timetable and procedure can be agreed. It is common ground that the adjudication provisions of the contract fall away, therefore any adjudication will be subject to the Scheme and not to the ICE adjudication procedure as your covering letter suggests.
>
> We would hope that we can take a practical approach to these matters to enable an adjudication on the issues to proceed against the suggested timetable."

61. Since there was no direct indication in this letter that PM was instructed to accept service of documents in relation to the adjudication, CMS replied on the following day, 16 December 2009, by e-mail in the following terms:

> "We enclose a copy of our clients revised adjudication notice (together with covering letter), service copies of which will be served directly on your clients <u>as required by the contract</u>.
>
> We would be grateful if you that (sic), in future, service can be effected directly on your offices. In the absence of such agreement our client will serve the referral notice and supporting documents on your clients who will, in turn, have to arrange for these documents to be forwarded to your firm."
>
> (My emphasis)

62. In spite of the missing words, the request contained in the second paragraph of this e-mail was perfectly clear. There was no immediate response. On 17 December 2009 CMS sent a further e-mail to PM setting out the agreed timetable for the adjudication and referring to the fact that agreement had been reached on a standstill for purposes of limitation. The e-mail continued:

> "In the meantime ... we should be grateful if you would confirm by return (a) ... and (b) that your firm will accept service of the referral notice and any other documentation relevant to the adjudication."

63. About 20 minutes later Mr Harris replied by e-mail with the single word "*Confirmed*". In other words, PM had agreed that they would accept service of any documentation relevant to the adjudication on behalf of LOR. I am quite satisfied that this was a sufficient notification under clause 13.2 that PM's Bristol office would from then on be the address for service of communications relevant to the adjudication. Accordingly, I decide this issue in favour of AWS.

Was the notice of intention to refer the dispute to arbitration a communication relevant to the adjudication?

64. On 18 December 2009 Dr Gaitskell wrote to the parties noting the agreed directions and suggesting a date for a hearing if one was required. The letter directed (or asked) the parties to "*use email for speed, but with each recipient immediately confirming receipt by emailing back*". On 24 February 2010 Dr Gaitskell sent his Decision to the parties. Accordingly, the latest date for either party to serve a notice on the other of its intention to refer the matter to arbitration was 23 March 2010 or, possibly, 24 March 2010 (it probably does not matter which).

65. On 22 March 2010 CMS sent a fax to PM at 16:19, the cover sheet of which stated "*Notice to Refer a Dispute to Arbitration*". The letter that followed immediately was in the following terms:

> "We refer to the Decision of Mr Robert Gaitskell QC in the adjudication of the above matter, dated 24 February 2010. Needless to say our clients are dissatisfied with the Decision and we hereby put you on notice that they wish to refer the matter to arbitration in accordance with the ICE Arbitration Procedure (1997). We duly enclose by way of service a Notice to Refer."

The Notice to Refer followed in the remaining pages.

66. At 17:03 on 22 March 2010 Mr Andrew Shelling of PM replied by e-mail, copied to Mr Adam Harris, the partner responsible at PM, saying "*I confirm safe receipt of your fax sent earlier today*". It is relevant to note that by this e-mail Mr Shelling was confirming receipt of both the notice of intention to refer a dispute to arbitration, which was required by clause 93.1, and the Notice to Refer. The latter was not required by clause 93.1, but there was no reason why it should not have been sent at the same time since the works had been completed. The letter from CMS did not say that it enclosed the notice of intention to refer a dispute to arbitration by way of service; that was said only with specific reference to the Notice to Refer.

67. The first issue raised by this exchange is whether or not the letter giving notice of AWS's intention to refer the dispute to arbitration was a communication "*relevant to the adjudication*" and was therefore one which PM had confirmed could be served on PM instead of LOR.

68. In my view this is essentially a matter of impression. Whilst I have already concluded that clause 93 did not form part of the adjudication provisions of the contract, it does not follow that a notice of intention to refer to arbitration a dispute decided by the adjudicator is not a communication relevant to the adjudication. In my view it is. In the absence of a notice of intention to refer served within the four week period, the adjudicator's decision becomes finally binding on the parties. A valid notice of intention to refer served in time is therefore relevant to the adjudication because it prevents the adjudicator's decision being final. Whilst it is not part of the adjudication process itself, in my judgment it is relevant to the adjudication for this reason. I therefore reject the submission of Mr Streatfeild-James to the contrary.

69. Accordingly, I decide this issue also in favour of AWS with the result that AWS is in my judgment entitled to the declaration that it seeks. However, in case I am wrong in any of my conclusions so far, I will go on to consider the remaining issues.

Was the communication effective because it was received by the relevant individuals?

70. A few minutes after Mr Shelling sent his e-mail to CMS on 22 March 2010, Mr Harris sent an e-mail to his clients, Mr Grammer and Mr Clive McKenzie. The latter was Laing O'Rourke's General Counsel and the company secretary of LOR, and he was based at Laing O'Rourke's Dartford office. I should set out the text of this e-mail in full:

> "I attach a notice of arbitration that has been served by Anglian. There is a 4 week limit under the contract for the service of this notice to preserve the right to arbitrate. The Adjudicator's decision was dated 24 February. We calculate that effective notice has to be received by close of business 25 March at the latest. Fax is an acceptable method of communication. We have simply acknowledged receipt (which they will know from the fax confirmation sheet anyway).
>
> ...
>
> They may well have sent a notice direct to you. If they have not and do not do so within the contractual period, issues will arise as to service given the requirements of the contract. We have not indicated that we have instructions to accept service of notices under the contract and so service on us is unlikely to be effective service. The provisions of the contract require it to be served at the place notified or if no notice has been given at the St Neots address given in the contract. It would be sensible for people to be watching out for anything coming in over the next few days."

71. Apart from appreciating the brevity and clarity of the advice given, several points can be made about this e-mail, which was obviously privileged (but PM has been given limited authority to waive privilege in relation to this document). First, it is clear that PM accepted that AWS still had plenty of time in which to serve the notice of intention to refer on the St Neots office if it saw fit to do so. Second, for the reasons that I have already given I consider that Mr Harris was not correct to say that PM had not indicated that they had instructions to accept service of notices under the contract. They had, in my judgment, indicated that they had instructions to accept service of documents relevant to the adjudication. Third, PM had been careful not to say anything more to

CMS beyond acknowledging safe receipt of the notice of intention to refer and the Notice to Refer.

72. I should say at once that I do not consider that Mr Harris can be criticised for taking the line that he did. His primary duty was to his clients and they might have felt legitimately aggrieved if he had sold the pass on a time bar issue. He had to tread the delicate line between not consciously misleading his opponents whilst at the same time preserving his own client's rights. Mr Harris had to keep on one side of a fine line: I find that he just kept on the right side of it. This does not mean that CMS may not have been induced to take no further action in relation to the notices as a result of Mr Shelling's e-mail, but simply that Mr Harris and Mr Shelling did not act with the intention of deliberately misleading CMS.

73. Mr Harris has prepared and served a witness statement in response to this application. In that witness statement (at paragraph 33) he notes, correctly, that as at 17 December 2009 CMS were aware that PM did not have instructions to accept service and that they were aware of the contractual requirement for service at LOR's last notified address (being the St Neots office).

74. Mr Harris accepts, of course, that he confirmed that PM would accept service of documentation relevant to the adjudication, but he maintains that none of that documentation was required by the contract to be the subject of a notice within the meaning of clause 13 of the contract. He says that his instructions from LOR did not extend to notices required under the contract, or to documents that were not relevant to the adjudication. I accept his evidence about the extent of his instructions, although whether or not any documentation relevant to the adjudication should have been the subject of a notification that complied with clause 13 of the contract is a matter for the court. It will be apparent from what I have already said, that I do not agree with Mr Harris insofar as the notice of intention to refer is concerned.

75. However, for present purposes that does not matter. I find that Mr Harris did not have authority, actual or ostensible, to accept service of the Notice to Refer and CMS had no grounds for assuming before 22 March 2010 that he might have such authority. This is because the Notice to Refer was not a document relevant to the adjudication. However, nothing turns on that because service of the Notice to Refer itself was not subject to the four week time limit in clause 93.1.

76. Since I accept that the only authority in relation to service given to Mr Harris was to accept service of documents relevant to the adjudication, if, contrary to my earlier finding, the notice of intention to refer was not a document relevant to the adjudication, Mr Harris did not have authority to accept service of it and did not in fact do so. As I have already noted, the letter of 22 March 2010 that was sent by fax did not say that the notice of intention to refer was being sent by way of service: it just said that CMS were putting PM on notice that AWS wished to refer the matter to arbitration. In spite of the persuasive submission of Mr Wales, I do not accept that the consequence of not following the contractually prescribed method of service can be overcome by the fact that the documents were in fact passed on to the people who ultimately needed to receive them. As I have already held, the contract states that service takes effect when received at LOR's last notified address (or the address in the Contract Data if not changed). However, for the reasons that I have already given, the letter of 22 March 2010 was validly sent to PM because it was a document relevant to the adjudication.

The application under section 12 of the Arbitration Act 1996

77. Both parties have very properly reminded me of the fact that section 12 of the 1996 Act was intended to introduce a higher threshold for an applicant seeking an extension of time for starting arbitral proceedings than the test which existed under the 1950 Act. This reflects the advice of the Departmental Advisory Committee that in principle party autonomy should prevail and the jurisdiction of the court to interfere in the bargain made by the parties should be limited.

78. The application is made under section 12 of the Act, which provides that the court may extend the time for starting arbitral proceedings where an arbitration agreement provides that a claim shall be barred unless the claimant takes within a time fixed by the agreement a step to begin proceedings. Section 12(3)(b), which is relied on here, provides:

> "The court shall make an order only if satisfied -
>
> (a) ...
>
> (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question."

79. Mr Wales submits that in this case the conduct of PM, acting on behalf of LOR, in acknowledging receipt of the letter giving notice of AWS's intention to refer the dispute to arbitration and the Notice to Refer, was a material or effective cause of CMS's failure to take any further steps, which could easily have been taken, to serve the relevant documents on LOR's office in St Neots during the following day, 23 March 2010.

80. It is common ground that the test to be applied is that identified by Colman J in *Harbour & General v Environment Agency* [2000] 1 Lloyd's Rep 65, at 73, where he said:

> "For it to be held that the conduct of one party makes it unjust to hold the other party to the strict terms of the time bar, there must, in my judgment, at the very least be conduct which is proved somehow to have led the claimant to omit to give notice in time."

81. I do not propose to go into the facts of that case because in my judgment they provide very little assistance on the question that is before me.

82. Mr Wales relied strongly on the decision of Gross J in *Lantic Sugar Ltd v Baffin Investments* [2009] EWHC 3325 (Comm), a case to which I have already referred briefly. For present purposes I can simplify the facts of that case as follows. A dispute arose between the consignees of a cargo of raw cane sugar and the vessel's owners. Any claims under the Bill of Lading were subject to a 12 month time bar which was ultimately extended up to and including 12 March 2009. On about 11 March 2009 there was a telephone conversation between a Mr Behr, representing the consignees, and a Mr Morland, who was acting on behalf of the owners' P&I Club. A few days earlier, on 6 March 2009, Mr Behr had sent a Notice for Arbitration to the Club, for the attention of Mr Morland. The case for the owners was that during the telephone conversation on 11 March Mr Morland informed Mr Behr that he was taking

instructions on the fax (which had sent the Notice for Arbitration) but that, pending express instructions, the Club did not have authority to accept service on behalf of the owners.

83. The evidence of Mr Behr was that he did not remember Mr Morland telling him that the Club was not authorised to accept service of the Notice of Arbitration on behalf of the owners, but equally he did not remember being told expressly that the Club did have such authority. When, the following day, Mr Morland sent an e-mail to Mr Behr saying that he had previously told him by telephone that the Club had received the notice of arbitration but that the Club was not able to accept/acknowledge service, Mr Behr's reaction was that that was "absolutely untrue". The judge accepted Mr Behr's account. Thereafter, having received the e-mail from Mr Morland on 12 March 2009, Mr Behr did everything he could to serve the Notice for Arbitration, but the registered office of the owners' agents appeared to be in the Marshall Islands and it was simply not possible to effect service before the deadline because of the differences in the time zones.

84. In relation to the law, Gross J described the relevant test under section 12(3)(b) in the following terms:

> "Here, therefore, the court can only extend time if the conduct of [the owners] or the Club (acting on [the owners'] behalf) makes it unjust to hold the Claimants to the time bar. Some conduct must be shown that is causative of the failure to comply with the time bar or related to the injustice which would arise if relief is not granted: *Thyssen v Calypso* [2000] 2 Lloyd's Rep 243, at [24-25]; *Harris, Planterose & Tecks, The Arbitration Act 1996, A Commentary* (4th Ed), at p 81; that conduct, however, need not amount to an estoppel or something akin to it (*Harris et al, ibid*). Mere silence on the part of the party seeking to rely on the time bar, or failure to alert the party seeking the extension to the need to comply with the time bar, cannot make the barring of the claim unjust: *Harbour & General v Environment Agency* [2000] 1 Lloyd's Rep 65, at pp 73 (Colman J) and 82 (CA)."
>
> (Gross J's emphasis)

85. Applying this test, the conclusion of Gross J was in the following terms:

> "Pulling the threads together, the course taken by the 11th March conversation meant that if a point was to be taken on the Club lacking authority to accept service of the 6th March Notice, it was only fair that something should then have been said. However inadvertent, the failure to do so, against a background of the Club taking instructions on the Notice, was misleading - and none the less because its effect was to reinforce Mr Behr's own error as to the Club's authority to accept service. It is plain from Mr Behr's actions that the moment he did realise that there was a difficulty with serving the Club, he sought with determination and speed to serve [the owners] directly or through other agents (as in the Marshall Islands) with authority to accept service. Had Mr Morland said on 11th March that which he later claimed to have said (and which he did say on 12th March, upon receipt of the 12th March Notice), it is at least probable that the matter was still curable and that proper service would

> have been achieved in time ... That conduct on the part of the Club contributed to, even if it was not the sole cause of, the Claimants' failure to comply with the time limit in question. In my view, on the particular facts of this case, s 12(3)(b) of the Act is satisfied. That being so, in all the circumstances (as already set out) and in the exercise of my discretion under s 12(1) of the Act, I am amply persuaded that the just course is to extend time."

86. I must now turn back to the facts. On behalf of AWS witness statements were served by Belinda Schofield, the partner with conduct of the case, and Neil Winterbourne, her assistant. It was Mr Winterbourne who sent the fax to PM dated 22 March 2010 enclosing the notice of intention to refer. He also was the person to whom the e-mail in response from Mr Shelling was sent. In his witness statement he said:

> "I was conscious at the time that this was a confirmation of receipt by someone whom I knew was involved in the matter and in terms which did not give any cause for concern. When Belinda Schofield came into the office on the morning of 23 March 2010, she asked whether I had heard anything in response to the Notice sent the previous day. I confirmed that we had and, in fact, read out to her the e-mail which Mr Shelling had sent the previous evening. Belinda Schofield commented on the phraseology used; along the lines that it was the same as that required by the adjudicator. If Mr Shelling had given any indication or hint that a point might be taken on service of either the Notice to Refer or the notice of intention, or even if Mr Shelling had simply enquired whether the notice of intention had been sent directly to LOR, I would have noted that and reacted to it immediately.
>
> Tuesday 23 March 2010 was the last day of the four week period after notification to the parties of Dr Gaitskell QC's decision. However, I took no further steps on that day because, having received Pinsent Masons' e-mail on 22 March in the terms in which it was received, I believed I had satisfied the requirements of the contract by the fax and letter I had sent to Pinsent Masons the day before."

87. In her witness statement Miss Schofield said the following:

> "With reference to our e-mails of 16 December 2009 and 17 December 2009 regarding service of documents in the future on Pinsent Masons (NAW 2/p27 and p51), our intention was clear: we wanted to obtain comfort from Pinsent Masons that they had authority to accept service of all documents and pleadings relating to the adjudication. They so confirmed and it put this issue in my mind beyond doubt.
>
> . . .
>
> Following discussion with Leading and Junior Counsel, it was felt that the contract was not clear as to whether a notice of AWS's intention to refer to arbitration was separate and distinct from a Notice to Refer to Arbitration. We therefore decided that when informing LOR of AWS's intention to refer to arbitration we would also serve a Notice to Refer to Arbitration. Counsel drafted such a Notice to Refer on 22 March 2010.

I was mindful that insofar as clause 93 of the contract applied, AWS had until 23 March 2010 to serve notice of its dissatisfaction with the adjudication award and its intention to refer to arbitration. I was therefore concerned to ensure that we should get the notice delivered to Pinsent Masons before that date, as the address to which I understood the notification should properly be given.

On the morning of 22 March, having checked the draft Notice to Refer and the draft letter to go to Pinsent Masons, I asked Neil Winterbourne to let me know when these had gone to Pinsent Masons. As this was the penultimate day for service within the time period, I wanted to know that the letter and enclosure was delivered to Pinsent Masons. I left the office shortly after midday for a meeting in our Bristol office. Neil confirmed to me shortly after 5.00 pm that the Notices had been sent.

The next morning I enquired of Neil whether he had received any response from Pinsent Masons acknowledging receipt. I remained anxious that we had effected delivery so close to the deadline. I did not focus at the time on the fact that because we had sent the notice by fax, a transmission report would have been generated. Even if I had focussed on that fact, I believe I would have wanted comfort that it had made its way from the electronic fax system to those at Pinsent Masons with conduct of the matter. Neil confirmed that he had received a response, and read the e-mail from Mr Shelling of 22 March 2010 to me from his screen. I was assured by Pinsent Masons' response; I noted that the acknowledgement used the same phrase to acknowledge receipt and service of all the documents and pleadings in the adjudication . . .

Further, I also noted that there was no reference to Pinsent Masons taking instructions. That phrase would have been a surprise to me because the notification we had sent was not something that called for any action or response on the part of LOR. It would have prompted me to check the position regarding service of the notice and if no immediate comfort could have been obtained that Pinsent Masons were not taking a point on service, given the deadline, I would have insisted that the notification was sent directly to LOR.

Although I believed prior to the fax of 22 March that the offices of Pinsent Masons were the correct address for service, I am clear in my own mind that Mr Shelling's e-mail which Neil Winterbourne read out to me, influenced me in dispelling my lingering concern to know that the notification had been properly given and confirmed that this view was the right view - as a result of which no further steps were taken. The lingering concern I had was not a specific doubt - I was not taking a gamble on getting service right. It was a concern just in case any point we had not considered was raised and particularly so given that we were up against the time limit."

88. When considering the position of Miss Schofield and Mr Winterbourne I consider that it is most important to remember two things. First, they were well aware of the contractual requirement for service of documents at the contract address, or the last notified address, because that is what they had done in December 2009. The whole point of the requests to PM to confirm that they had instructions to accept service of documents relating to the adjudication was to avoid having to send them to St Neots

(only for them to be forwarded to PM and Laing O'Rourke's Dartford office). Second, there was no cost or difficulty involved in serving the relevant documents on LOR at its St Neots office: it would have taken a secretary a matter of a few minutes. No one in Miss Schofield's position would have failed to take such a simple precaution unless she was confident that it was not necessary. I find that that was Miss Schofield's state of mind.

89. I consider that it is abundantly clear that CMS did not serve the documents on LOR's St Neots office because they thought that they had achieved effective service when they sent the documents to PM and received unqualified confirmation of safe receipt. The service and acknowledgement of these documents followed exactly the same pattern as had taken place on several previous occasions when no question of the validity of the service had arisen.

90. It seems to me that they could be forgiven for assuming that if any point was going to be taken about service, particularly when the Notice to Refer had been sent expressly "by way of service", PM would have qualified their acknowledgement by saying something about taking instructions from their clients. I find that but for the terms in which PM acknowledged service of those documents, CMS would have sent them the following day to LOR's St Neots office. When they had doubts on previous occasions that is what they did, and there is no other rational explanation for the fact that they did not do so on this occasion. However, I repeat my earlier observation that I do not consider that Mr Harris at PM acted with any intention to mislead CMS. He felt that his duty to his clients was to say as little as possible and he knew that he was dealing with sophisticated solicitors who could reasonably be expected to know what they were doing.

For these reasons I find that the conduct of those acting for LOR was a material contributing cause to the fact that the notice of intention to refer the dispute to arbitration was not sent to St Neots on 23 March 2010 before the deadline expired. Given that the notice was in fact received in time by Mr Grammer and Mr McKenzie, who were the two people at LOR who needed to see them, I would regard it as unjust to hold AWS to the strict provisions in relation to service if they were in fact in breach of those provisions (contrary to my earlier finding). This seems to me to be a paradigm case for an extension of time under section 12 of the 1996 Act and, if it is required, I would have no hesitation in exercising my discretion in favour of granting the necessary extension of time.