Neutral Citation Number: [2017] EWHC 319 (TCC)

Case No: HT-2016-000171

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 28 February 2017

Before:

THE HON MR JUSTICE COULSON

- -

Between:

Costain Limited	**Claimant**
- and -	
Tarmac Holdings Limited	**Defendant**

- -
- -

Mr Sean Wilken QC and **Mr Adam Robb** (instructed by **Clyde & Co LLP**) for the **Claimant**
Mr David Turner QC and **Ms Clare Dixon** (instructed by **DWF LLP**) for the **Defendant**

Hearing dates: 7 and 8 February 2017

- -

Judgment Approved

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. This is an application by the defendant to stay these proceedings pursuant to section 9(1) of the Arbitration Act 1996 ("the 1996 Act"). However, that bland description does not accurately convey the plethora of issues and sub-issues which have arisen between the parties arising out of and connected with the stay application. I should at the outset therefore express my gratitude to leading counsel for their considerable assistance, and the excellence of their written and oral submissions.

2. Pursuant to a sub-contract agreement dated 7 February 2014, the claimant engaged the defendant to supply concrete for the new safety barrier between junctions 28-31 on the M1 motorway. The sub-contract incorporated, amongst other things, the NEC3 Supply Short Contract conditions which, at clause 93.3, contained an adjudication provision with a restricted timetable and a time bar, and a second stage arbitration provision. It is common ground that the concrete was defective but there is a dispute between the parties as to the scope of the appropriate remedial work.

3. It is the defendant's case that, by December 2015, the claimant had failed to comply with the provisions of clause 93.3, such that the claimant was barred from making a claim for the difference between the cost of the remedial works which the defendant accepted, and the cost of the (more extensive) remedial works proposed by the claimant. The defendant referred that dispute to adjudication. By a decision dated 5 February 2016, the adjudicator agreed with the defendant and decided that the

claimant was out of time to pursue the claim. Subsequently, the claimant issued these proceedings in the TCC, seeking to recover just under £6 million by way of damages for breach of contract. In reliance on clause 93, the defendant seeks to stay those proceedings for arbitration pursuant to s.9(1).

4. The claimant resists the application to stay on the grounds that the sub-contract agreement included another clause which allowed for adjudication "at any time" and made no reference to arbitration. The claimant also points to clauses in the sub-contract agreement which refer to the jurisdiction of the English courts. The claimant maintains that, as a matter of contract construction, clause 93 does not apply to this claim.

5. If the claimant is wrong about the construction issue, it maintains that, because of the course of dealing between the parties and their solicitors from March to December 2015, the arbitration agreement is "inoperative" in accordance with s.9(4) of the 1996 Act, so the court should not grant a stay in any event. This argument is put by reference to issues of abandonment, repudiation and estoppel (either by representation or by convention). That case is disputed by the defendant. Still further, the claimant argues, also by reference to s.9(4), that the arbitration agreement is "null and void", because the adjudicator exceeded his jurisdiction in reaching the decision he did and, without a valid adjudication decision, there is nothing to trigger the second stage arbitration agreement.

6. The disputes therefore range from issues of contract construction, to issues of fact concerning the parties' conduct during 2015, and on to detailed arguments about the excess of jurisdiction of the adjudicator. Although, during the course of the parties' submissions, some of these issues appeared to overlap, I shall deal with the issues one by one, in what I hope is a logical sequence. Accordingly, this Judgment is structured as follows. The first part of the Judgment (**Sections 2**, **3** and **4**) address the fundamental issue of contract construction: **Section 2** sets out the factual background to the sub-contract agreement; **Section 3** sets out the relevant terms of the sub-contract; and **Section 4** addresses the issue of whether or not there was a binding arbitration agreement. **Section 5** of the Judgment deals with the related, but separate, issue under s.9(1) as to whether the claim is "in respect of a matter which under the agreement is to be referred to arbitration". Thereafter, in **Sections 6**, **7** and **8**, I deal with the arguments arising under s.9(4). Thus **Section 6** sets out the dealings between the parties in 2015; **Section 7** addresses the issue as to whether, as a result of those dealings, the arbitration agreement is inoperative; and **Section 8** deals with the separate question as to whether the arbitration agreement is null and void as a result of the adjudicator's alleged want of jurisdiction. There is a short summary of my conclusions in **Section 9**.

2. THE FACTUAL BACKGROUND TO THE SUB-CONTRACT

7. It is of course important to construe the sub-contract by reference to its factual background. Although this did not seem a particularly controversial topic during the hearing, following ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1 WLR 896, it is as well for any judge construing a contract to identify, at least in brief terms, the factual background to that contract.

8. On 16 February 2010, Serco, the claimant and the Secretary of State for Transport ("SST") entered into a Framework Contract which was subsequently novated to the claimant in 2013. That Framework Contract allowed SST to contract with the claimant for particular transport infrastructure projects. It appears that that Framework Contract incorporated a version of the NEC3 Framework Contract conditions.

9. In March 2012, SST, acting through the Highways Agency, entered into a similar Framework Contract with the defendant in respect of the supply of concrete. Again, that Framework Contract also incorporated a version of the NEC3 Framework Contract conditions.

10. On 19 September 2013, pursuant to its Framework Contract with the claimant, SST engaged the claimant to carry out major infrastructure works to the M1 between the junctions 28 and 31.

11. Part of this main contract work included the construction of a concrete safety barrier. This had to comply with what was known as the Britpave specification and had to achieve compliance certificates ("CE"). The construction of the barrier was sub-contracted to specialist sub-contractors, Extrudakerb.

12. The claimant had to procure the necessary concrete from a supplier who had already entered into a Framework Contract with SST, unless it could demonstrate that savings could be made by procuring from a non-framework supplier. The defendant was of course an approved supplier who had entered into the necessary Framework Contract with SST (paragraph 9 above). To that extent, at least, the terms of any sub-contract agreement between the claimant and the defendant in respect of the supply of concrete were regulated by their (separate) Framework Contracts with SST.

3. THE TERMS OF THE SUB-CONTRACT

13. The one page sub-contract agreement provided as follows:

> "NOW IT IS AGREED THAT
>
> 1. The conditions of contract are the clauses of the NEC3 Framework Contract (2005) as amended by the Framework Contract "Z" clauses set out in the "Category Management: Pavement & Concrete Framework, Volume 1, Framework Contract Data Part One"
>
>   And
>
>   The NEC3 Supply (Short) Contract terms and conditions, as amended by the "Z" clauses in the "Category Management: Pavement & Concrete Framework, Volume 1, Supply Package Order Contract Data Part One Annex B [sic]" ("Data Applicable to All Supply Package Orders")."
>
> 2. The ***Supplier*** will provide the ***Goods*** in accordance with the ***conditions of contract***

> 2. The ***Purchaser*** will pay the ***Supplier*** the amount due in accordance with the ***conditions of contract***
>
> 3. The documents forming part of this agreement are:
>
> a. Volume 2 Additional Contract Data Part 1 and Part 2
>
> b. Volume 3 Additional Goods Information
>
> c. J28-21 Phase 1 Lot C Price Schedule"

It is convenient to set out the relevant terms by reference to the three main areas of documentation identified in the sub-contract agreement, namely: a) the Framework Contract conditions; b) the Supply Contract conditions; and c) the documents (such as the Additional Goods Information) referred to at paragraph 3 of the sub-contract agreement.

(a) The Framework Contract

14. The NEC3 Framework Contract referred to in the first part of paragraph 1 of the sub-contract agreement was in two parts: the core clauses and the amending Z clauses. It is important to note when considering these clauses that, for the purposes of these terms, the Contract Data document made clear that 'the Employer' was SST and 'the Supplier' was the defendant. The claimant had only a limited involvement as 'the Contracting Body'.

15. As amended by the Z clauses, the Framework Contract included the following terms:

> "10.1 The *Employer* and the *Supplier* shall act as stated in this contract and in the spirit of mutual trust and co-operation.
>
> 11.1 In these conditions of contract, terms identified in the Contract Data are in italics and defined terms have capital letters.
>
> 11.2(1) The Parties are *the Employer* and *the Supplier*.
>
> (2) Framework Information is information which specifies how the Parties work together and is in the document which the Contract Data states it is in.
>
> (3) A Work Package is work which is to be carried out under this contract.
>
> (4) Package Order is a Supply Package Order or a Term Service Package Order as the context requires.
>
> (8) Contracting Body is the entity that instructs *Supplier* to submit a quotation for a proposed Work Package in accordance with the *quotation procedure*.

(9) Supply Package Order is an instruction issued by a Contracting Body to carry out a Work Package in accordance with the *conditions of contract* for a Supply Package Order."

16. Clause 20 (which was not amended) stated as follows:

"**The Parties' Obligations**

20

20.1 When the *Employer* requires work to be carried out within the *scope*, he selects a supplier using the *selection procedure.*

20.2 The *Supplier* obeys an instruction which is in accordance with this contract and is given to him by the *Employer.*

20.3 The *Supplier* attends meetings with the *Employer* and others as stated in the Framework Information."

17. Under the heading 'Package Order' the core clauses had been amended by the Z clauses. As amended they read as follows:

"Z3.1 After the *Employer* selects the *Supplier*, the Contracting Body instructs him to submit a quotation for a proposed Work Package and provides the additional Contract Data specific to the Work Package.

Z3.2 The *Supplier* submits a quotation in accordance with the *quotation procedure*. The assessment is made using the *quotation information.* The *Supplier* submits details of his assessment with the quotation. The Contracting Body replies to the quotation within the period stated by the Contracting Body at the time he requests the *Supplier* to submit a quotation for a proposed Work Package.

Z3.3 If a quotation is to be revised, the Contracting Body advises the *Supplier* of the reasons for not accepting the quotation and the *Supplier* submits a revised quotation within the period stated by the Contracting Body."

18. Clause Z6 was entitled 'Interpretation and the Law'. Clause Z6.4 read as follows:

"This Framework Contract is governed by the law of England and Wales and subject to the jurisdiction of the courts of England and Wales. If the Contracting Body is governed by the law of Scotland then the Package Order is governed by the law of Scotland and subject to the jurisdiction of the courts of Scotland."

19. Clause Z8 was entitled 'Responsibility for Awards'. That provided:

> "The *Supplier* acknowledges that the *Employer* is not responsible for and shall have no liability whatsoever in relation to the performance or non-performance of any Package Order entered into under this Framework Contract between the *Supplier* and Contracting Body other than the *Employer*."

20. It is unnecessary to set out clauses Z9-Z19; they related to matters such as corrupt practices, non discrimination, records, confidentiality and the like, and they all concerned the relationship between the Employer (SST) and the Supplier (the defendant). Clause Z20, which dealt with Complaints Handling, required the Supplier to notify the Employer in writing of any complaint made by any Contracting Body.

21. Clause Z21 is entitled 'Appointment of Adjudicator'. It read as follows:

> "**Appointment of *Adjudicator***
>
> Z21.1 Any dispute arising under or in connection with this Framework Contract can be referred to and decided upon by an Adjudicator nominated by the Institution of Civil Engineers. A party may refer a dispute to the Adjudicator at any time.
>
> Z21.2 The parties appoint the Adjudicator under the NEC3 Adjudicator's Contract (June 2005) including the following additional condition of contract:
>
> 'Any information concerning the Contract obtained either by the *Adjudicator* or any person advising or aiding him is confidential, and is not used or disclosed by the *Adjudicator* or any such person except for the purposes of this Agreement. The *Adjudicator* complies, and takes all reasonable steps to ensure that any persons advising or aiding him comply, with the Official Secrets Act 1911 to 1989. Any information concerning the Contract obtained either by the *Adjudicator* or any person advising or aiding him is confidential, and may not be used or disclosed by the Adjudicator or any such person except for the purposes of this Agreement.'"

(b) The Supply Contract

22. In addition to the NEC3 Framework Contract, as amended, the parties also agreed that the sub-contract included the NEC3 Supply Short Contract, again as amended. The relevant clauses were as follows:

> "10.1 The *Purchaser* and the *Supplier* shall act as stated in this contract and in a spirit of mutual trust and co-operation…

11.2(5) Goods Information is information which

- Specifies and describes the *goods* and
- States any constraints on how the *Supplier* Provides the Goods and is in
- The document called 'Goods Information' or
- An instruction given in accordance with this contract…

20.1 The *Supplier* Provides the Goods in accordance with the Goods Information."

23. The key clause for the purposes of the s.9(1) application is clause 93 of the NEC3 Short Supply Contract, entitled 'Dispute Resolution'. It provided as follows:

"**93 Dispute resolution**

93.1 A dispute arising under or in connection with this contract is referred to and decided by the *Adjudicato*r.

The Adjudicator

93.2(1) The Parties appoint the *Adjudicator* under the NEC Adjudicator's Contract current at the *starting date*. The *Adjudicator* acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.

(2) If the *Adjudicator* is not identified in the Contract Data or if the *Adjudicator* resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen an adjudicator, either Party may ask the *Adjudicator nominating body* to choose one. The *Adjudicator nominating body* chooses an adjudicator within four days of the request. The chosen adjudicator becomes the *Adjudicator*.

(3) The *Adjudicator*, his employees and agents are not liable to the Parties for any action or failure to take action in an adjudication unless the action or failure to take action was in bad faith.

The adjudication

93.3(1) A Party may refer a dispute to the *Adjudicator* if:

- the Party notified the other Party of the dispute within four weeks of becoming aware of it and

- between two and four further weeks have passed since the notification.

If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the *Adjudicator* or the *tribunal*.

(2) The Party referring the dispute to the *Adjudicator* includes with his referral information to be considered by the *Adjudicator*. Any more information is provided within two weeks of the referral. This period may be extended if the *Adjudicator* and the Parties agree.

(3) The *Adjudicator* may take the initiative in ascertaining the facts and the law related to the dispute. He may instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time.

(4) A communication between a Party and the *Adjudicator* is communicated to the other Party at the same time.

(5) If the *Adjudicator's* decision includes assessment of additional cost or delay caused to the *Supplier*, he makes his assessment in the same way as a compensation event is assessed.

(6) The *Adjudicator* decides the dispute and notifies the Parties of his decision and his reasons within four weeks of the referral. This period may be extended by up to two weeks with the consent of the referring Party, or by any period agreed by the Parties.

If the *Adjudicator* does not notify his decision within the time allowed, either Party may act as if the *Adjudicator* has resigned.

(7) Unless and until the *Adjudicator* has notified the Parties of his decision, the Parties proceed as if the matter disputed was not disputed.

(8) The *Adjudicator's* decision is binding on the Parties unless and until revised by the *tribunal* and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The *Adjudicator's* decision is final and binding if neither Party has notified the other within the times required by this contract that he intends to refer the matter to the *tribunal*.

Review by the *tribunal*

> 93.4 A Party may refer a dispute to the *tribunal* if
>
> - the Party is dissatisfied with the *Adjudicator's* decision or
>
> - the *Adjudicator* did not notify a decision within the time allowed and a new adjudicator has not been chosen,
>
> except that neither Party may refer a dispute to the *tribunal* unless they have notified the other Party of their intention to do so not more than four weeks after the end of the time allowed for the *Adjudicator's* decision."

24. The Contract Data form, at Annex A, had been completed by the parties. It expressly stated that:

    (a) The payment period was 30 days;

    (b) The adjudicator was "such person as is nominated by the adjudicator nominating body";

    (c) The adjudicator nominating body was "the Institution of Civil Engineers";

    (d) The tribunal was "Arbitration";

    (e) If the tribunal was arbitration, the arbitration procedure was "Institution of Civil Engineers Arbitration Procedure 2006".

    The parties also agreed in this same Contract Data sheet that "the Supplier's liability to the Purchaser for indirect or consequential loss, including loss of profit, revenue and good will, is limited to [nil]".

(c) Other Documents

25. The third relevant part of the sub-contract agreement (paragraph 13 above) was paragraph 3, which identified other documents forming part of the agreement. The Additional Contract Data did not appear to add very much to the dispute before me. The Additional Goods Information contained the detailed specification for the work, including the references to the Britpave specification and the compliance certificate regime. The third and final document was the Price Schedule which was the quotation provided by the defendant and accepted by the claimant.

4. WAS THERE AN ARBITRATION AGREEMENT?

4.1 Overview

26. Section 9(1) of the 1996 Act provides:

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a

> matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter".

27. Thus the first question for the court to ask is whether or not there was an arbitration agreement. The burden is on the defendant to demonstrate the existence of such an agreement. In the present case, whether or not there was such an agreement turns on the proper interpretation of the sub-contract. It is therefore necessary to consider first the applicable principles of contract construction. I identify those in **Section 4.2**, dealing first with general principles and then with the principles which apply where there are different clauses dealing with the same subject-matter. Thereafter, in **Section 4.3**, I set out my analysis of the parties' competing submissions in relation to the construction of this sub-contract agreement.

4.2 Principles of Construction

4.2.1 General

28. The modern starting point is the judgment of Lord Clarke in ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50:

> "21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

29. More recently, in ***Arnold v Britton*** [2015] UKSC 36, Lord Neuberger summarised the relevant principles in clear terms:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant

provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)*** [1976] 1 WLR 989, 995-997 per Lord Wilberforce, ***Bank of Credit and Commerce International SA (in liquidation) v Ali*** [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in ***Rainy Sky***, per Lord Clarke at paras 21-30…

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in ***Chartbrook***, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial

> observations such as those of Lord Reid in ***Wickman Machine Tools Sales Ltd v L Schuler AG*** [1974] AC 235, 251 and Lord Diplock in ***Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)*** [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

4.2.2 Different Clauses Dealing With A Similar Topic

30. One of the potential difficulties in this case is that there are two separate clauses dealing with the topic of dispute resolution. Contracts with different clauses on the same topic are a not uncommon problem. It arose in the Court of Appeal case of ***RWE NPower Renewables Limited v J N Bentley Limited*** [2014] EWCA Civ. 150. Moore-Bick LJ said in that case:

> "15. **I start, as did the judge, from the position that the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner.** I also note, as he did, that Option X5 is worded in more general terms than clause 6.2, which identifies in rather greater detail the work comprised in each section. That is reflected in clause 1 of Part 1 of the Contract Data, which expressly recognises that the works "are more comprehensively set out in Part 2, Works Information." **Despite differences in detail, however, one would expect the two provisions to complement each other and that only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it.**
>
> …

> 17. However, if I am wrong about that and there is a genuine discrepancy between Option X5 and clause 6.2, the provision for precedence among the contract documents comes into play and one is left with the task of construing the language of the Options without regard to clause 6.2. **The judge approached the question of construction on the basis that it was intended to resolve discrepancies relating to individual obligations rather than forcing on the reader a choice between one entire clause and another. In principle I think he was right to do so.** A contract is a bundle of related obligations, each of which can be separately identified. I see no reason why in this case the parties should have intended to adopt the rather undiscriminating approach suggested by Miss Smith, which involves abandoning the whole of any complex provision if it can be shown to be inconsistent in any respect with another. Only to the extent that different provisions on their true construction impose different obligations in relation to the same subject matter is it necessary to decide which takes precedence." (**My emphasis**)

31. My attention was also drawn to the Court of Appeal decision by Beatson LJ in ***Trust Risk Group SpA v Amtrust Europe Limited*** [2015] EWCA Civ. 437. That was a case which involved a framework agreement and a (separate) terms of business agreement. Each contained different express law and jurisdiction clauses. It was acknowledged that there may be a presumption that the parties intended a 'one-stop' jurisdiction: see ***Fiona Trust and Holding Corporation v Privalov*** [2008] 1 Lloyd's Rep 254. But Beatson LJ said in ***Trust Risk Group*** that, although that presumption remained a useful starting point, it was not decisive. He explained why not:

> "46. Where the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements, however, the position differs in that one does not approach the construction of those arrangements with a presumption. So, the 14th edition of ***Dicey, Morris and Collins on the Conflict of Laws*** stated:
>
> > 'The decision in ***Fiona Trust*** has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes in contract B; the question is entirely one of construction…' (§12–094)
>
> That reflects *inter alia* the statement of Rix J in ***Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd*** [1999] 1 Lloyd's Rep 767 at 777 that:
>
> > 'where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it

> would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette'…

48. The current (16th) edition of ***Dicey, Morris and Collins*** states (at §12–110) that:

> 'Where a complex financial or other commercial transaction is put in place by means of a number of interlinked contracts, and each has its own provision for the resolution of disputes, the point of departure will be that it is improbable that a jurisdiction clause in one contract, even expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract. …Even if the effect is that there will be a risk of fragmentation of the overall process for the resolution of disputes, this is not by itself sufficient to override the construction, and consequent giving of effect to, the complex agreements for the resolution of disputes which the parties have made.'

In short, what is required is a careful and commercially-minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is "closer to the claim". In determining the intention of the parties and construing the agreement, some weight may also be given to the fact that the terms are standard forms plainly drafted by one of the parties.

49. There may be a difference between a complex series of agreements about a single transaction or enabling particular types of transactions, and the situation in which there is a single contract creating a relationship which is followed by a later contract embodying a subsequent agreement about the relationship. The agreements in the ***UBS*** case about the issues of securities under a collateralised debt obligation transaction which were "all connected and part of one package", and those in the ***Sebastian Holdings*** case enabling over the counter derivative contracts and trading in foreign exchange and equities are examples of the former. The agreements in this case, separated in time by just under six months, are an example of the latter. Where the contracts are not "part of one package", it may be easier to conclude that the parties chose to have different jurisdictions to deal with different aspects of the relationship…

53. In the ***Yien Yieh*** case, the question was whether one clause in a contract between a bailor and the bailee warehousing company was inconsistent with another clause. Lord Goff, giving the judgment of the majority, stated that "to reject one

> clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth irreconcilable". He stated that this was likely to occur only where there had been some defect of draftsmanship, and that the usual case was "where a standard form is taken and then adapted for a special need, as is frequently done in, for example, standard forms of charterparty adapted by brokers for particular contract". The problem arises when it is discovered that the typed additions cannot live with part of the printed form, "in which event the typed addition will be held to prevail as more likely to represent the intentions of the parties". He continued that:
>
> > 'Where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction.'…
>
> 69…I consider that there is no inconsistency with different clauses covering similar or the same ground in respect of different parts of the relationship dealt with in different agreements."

4.3 Analysis

32. In the present case there was one sub-contract agreement, although it was made up of two separate sets of (amended) contract conditions. The Framework Contract conditions contained a dispute resolution provision that permitted adjudication "at any time", a reference to the jurisdiction of the courts of England and Wales, and no reference at all to arbitration. The dispute resolution provision in the Supply Contract (clause 93) contained a restricted right to adjudicate and, if one or other party was dissatisfied with the adjudicator's decision, a right to arbitrate. On the face of it, that provision would not permit either party to go to court, because any court proceedings would be faced – as these are – with an application to stay under s.9(1) of the 1996 Act.

33. In their primary submissions, neither party suggested that the court should do any violence to the language of the sub-contract. Neither party submitted that one or more parts of the sub-contract agreement should be ignored or should take precedence over another. Both parties contended that the dispute resolution clauses could be operated side by side. However, the effect of their respective submissions could not have been more different.

34. The claimant contended that, when read together, the provisions allowed the parties either to adjudicate, or to arbitrate, or to litigate, depending on which forum was thought to be the most suitable for the particular dispute which had arisen. Mr Wilken QC said that, because of the "mutual trust" provision at clause 10.1 of both the Framework Contract and the Supply Contract, it was envisaged that, when a dispute

arose, the parties would liaise between themselves and agree which of the three possible dispute resolution routes should be adopted for that particular dispute.

35. Mr Turner QC maintained that, although there was only one overall sub-contract here, the existence of two separate sets of contract conditions, relating to the two separate aspects of the relationship between the parties, meant that ***Trust Risk Group*** was directly in point. He said that a dispute between the parties under the Framework Contract (which would relate to the seeking of the quotation and the provision of the quotation) would be governed by clause Z6, whereas any dispute as to the supply of the concrete itself would be governed by the specific adjudication/arbitration clause 93 of the Supply Contract. He said that this gave proper meaning and effect to the sub-contract agreement that the parties had reached and meant that no part of the sub-contract was rendered redundant or otiose.

36. I have reached the firm conclusion that the defendant's interpretation of the contract is the correct one, and in accordance with the principles explained in ***Arnold v Britton***, whilst the claimant's construction is impractical, uncertain and commercially unworkable. My reasons for those conclusions are set out below.

37. First, although there was one overall sub-contract agreement between the parties, that agreement itself expressly made plain that it incorporated two separate sets of contract terms and conditions. That was not a mistake or a piece of sloppy drafting; it was a deliberate decision. It reflected the fact that the claimant's decision to seek a quotation from the defendant was itself governed by the pre-existing Framework Contracts with the SST to which both parties were subject. Thus the NEC3 Framework Contract conditions covered the circumstances of the offer and the acceptance, whilst the NEC3 Supply Contract conditions covered the actual supply of the concrete in accordance with the specification.

38. Thus, the fact that there were two separate sets of NEC3 conditions was a deliberate decision which reflected the two elements of the relationship between the parties[1]. In those circumstances, the fact that the parties had agreed that those two separate aspects of their relationship required two different dispute resolution provisions is unexceptionable. The conclusion that, in this case, there were two separate dispute resolution procedures which did not overlap but complemented each other, because they related to two separate elements of the relationship between the parties, is in accordance with the approach in ***RWE Npower***.

39. Secondly, I consider that this conclusion is not only in accordance with the language that the parties used, but it is also in accordance with the commercial commonsense. The parties would have known that, if the dispute arose under the Framework Contract conditions, then the broader dispute resolution provision applied. If, on the other hand, the dispute arose in respect of the supply of the concrete itself, a different and more restricted dispute resolution provision applied.

40. This also results from the application of the 'centre of gravity' test set out in ***Trust Risk Group***. Like Beatson LJ there, I can see no inconsistency with different clauses

[1] I note that Z1.6 of the Framework Contract talked about "the performance of its obligations under the Framework Contract or any Package Order", thus making express the common understanding that two different sets of rights and obligations arose under the single sub-contract agreement.

covering similar ground in respect of different parts of the relationship. The fact that there was one overall agreement in the present case (albeit with two separate sets of conditions), rather than two separate contracts, seems to me to make the position even stronger. It is certainly not a good ground for distinguishing ***Trust Risk Group*** altogether, as Mr Wilken urged me to do.

41. By contrast, I consider that the claimant's interpretation is unworkable in practice. If all three potential dispute resolution avenues (adjudication, arbitration and litigation) were always theoretically open, then when a dispute arose, it would be entirely uncertain which the appropriate forum might be. Mr Wilken said that the appropriate forum would be agreed between the parties, but what if it was not? What if one party wanted to adjudicate and the other wanted to litigate? How would that be resolved? Would there be two parallel disputes in two different tribunals? It would be a recipe for uncertainty and confusion. Even if clause 10.1 meant that the parties had to co-operate before commencing proceedings, that would in no way lessen the uncertainty, or the scope for disagreement.

42. Dispute resolution provisions require certainty. The parties need to know from the outset what to do and where to go if a dispute arises. On the claimant's construction, there would be no such certainty; everything would depend on the attitudes the parties adopted in discussions, once the dispute had arisen.

43. Thirdly, I consider that the real difficulty with Mr Wilken's submissions is that, on analysis, they render part of the sub-contract agreement redundant. Under Z6.4 of the Framework Contract terms, there was a right to adjudicate at any time[2]. Under the Supply Contract conditions there was not, because the right to adjudicate carried with it a clear time bar. On the claimant's interpretation, if everything was a matter of choice once the dispute had arisen, then the party who wished to adjudicate would naturally seek to avoid the time bar restrictions in clause 93, just in case it failed to comply with them. Even a party who otherwise wanted to comply with them, if faced with an argument that it might not have done, would inevitably argue that it did not matter, and that it still had the right to adjudicate "at any time". In this way, the particular provisions of clause 93.3, which are at the heart of this dispute, would be rendered nugatory.

44. Thus, the logical consequence of the claimant's position was that the effect of clause 93 was nullified. Although the claimant argued that, pursuant to its construction, all options were open (and therefore no part of the contract was redundant[3]), the consequence of their submission was to the opposite effect, namely that the right to adjudicate "at any time" trumped the time bar in clause 93. So contrary to Mr Wilken's submissions, I conclude that the claimant's interpretation had the effect of putting a red line through clause 93. In my view that is an inappropriate approach to

---

[2] This was the only part of the clause of any relevance to this application. The references to English law and the jurisdiction of the English courts simply establish the curial law; they did not confer any jurisdiction on the courts to resolve disputes if the parties had agreed an alternative.

[3] I should add that, on a perusal of the witness statements, particularly that of Mr McIvor, it appeared that the claimant might have wanted to say that, although no hierarchy of documents was set out in the sub-contract agreement, there was a hierarchy (which favoured their case) based on pre-contract discussions. That case was not advanced orally. It would have been contrary to the claimant's basic submission, that nothing took precedence over anything else. It would also have constituted an illegitimate attempt to re-write the sub-contract based on pre-contract negotiations.

the construction of the sub-contract and is contrary to the principles noted in **Section 4.2** above.

45. Only if there is an irreconcilable discrepancy is it necessary to resort to some sort of order of precedence in order to make sense of the contract (see Moore-Bick LJ in ***RWE Npower***). Here on my construction of the sub-contract agreement there was no such irreconcilable difficulty, so there is no need to adopt that approach.

46. A final difficulty with the claimant's construction was that, on any view, it placed undue reliance upon Z21 of the Framework Contract ("may refer a dispute to the Adjudicator at any time"). Yet the claimant was not directly a party to the Framework Contract at all. The principal parties were the defendant and SST, whilst the claimant's only role was the very limited one of 'Contracting Body'. Even the Framework Contract itself had to acknowledge the centrality of the Supply Contract terms: the definition of a Supply Package Order in the Framework Contract was "an instruction…to carry out a Work Package in accordance with the conditions of contract for a Supply Package Order".

47. In my judgment, it would be contrary to commercial common sense if a dispute resolution provision that was part of a set of contract conditions to which the claimant was not directly a party (the Framework Contract) somehow took precedence over clause 93, which was the dispute resolution provision in the set of contract conditions (the Supply Contract) that only involved the claimant and the defendant.

48. The claimant also suggested that, by the time of the sub-contract agreement on 7 February 2014, the only provisions in the Framework Contract that were still operative were the mutual trust provision at 10.1 and the dispute resolution provisions at Z6 and Z21. It was said that everything else was redundant because, by 7 February the quotation had been sought by the claimant and provided by the defendant.

49. I do not accept that analysis: all of the Framework Contract conditions were incorporated because that is what the sub-contract agreement provided for. It is not appropriate for a court to construe a contract by picking through its terms, working out what might still be applicable at the date of the contract and what might relate to obligations which had been performed.

50. But in any event, I consider that this is a point against the claimant. The Framework Contract was not required to provide clause 10.1, because that was also in the Supply Contract. And the general dispute resolution provisions at Z6 and Z21 were not necessary either, because of the specific provisions of clause 93 in the Supply Contract. In other words, if this approach by the claimant was right in principle (which I do not accept) then it only confirms the defendant's interpretation of the sub-contract, set out above.

51. I should add this. Some of Mr Wilken's eloquent submissions were aimed at the time bar in clause 93 itself, suggesting that it would be monstrous if "you lose your rights if you don't use clause 93". I have some sympathy with that view; the clause 93 time bar is clearly contrary to the statutory scheme, referred to below, which made adjudication mandatory for construction contracts. But that is what clause 93 said, in plain terms: "if a disputed matter is not notified and referred within the times in this

contract, neither party may subsequently refer it…". So that time bar is what these parties agreed.

52. For all these reasons, I have concluded that the defendant's construction of the sub-contract agreement is the right one. It preserves the sub-contract agreement as a whole. It involves no artificial order of precedence or deletion of terms. And because of the different sets of contract conditions governing the two different aspects of the relationship between the claimant and the defendant, it produces a commercially sensible and workable result.

53. In those circumstances, it is unnecessary for me to go on to deal with the various other alternative submissions that were made. I have addressed the parties' principal submissions and reached a clear conclusion that the defendant's submissions are to be preferred. I therefore do not address some of the more speculative submissions that arose as part of the parties' alternative cases[4].

54. It follows from my analysis above that the part of the sub-contract agreement between the parties dealing with the supply of concrete contained, at clause 93, an arbitration clause. It provided a commonplace regime whereby a claim would be first the subject of adjudication and then, if one or other party was dissatisfied with the adjudicator's decision, would be referred to arbitration.

5. IS THE CLAIM "A MATTER WHICH UNDER THE AGREEMENT IS TO BE REFERRED TO ARBITRATION"?

55. The next issue for me is whether the claim in these proceedings is "a matter which under the Agreement is to be referred to arbitration" (s.9(1)).

56. The claim in these proceedings is a claim for damages in the sum of £5,870,575.59. The Particulars of Claim alleges that the concrete supplied by the defendant was contaminated, which meant that extensive and costly remedial works had to be carried out, including large scale replacement of the barrier. The damages claim is linked to the cost of those remedial works.

57. That is a claim which arises out of the supply by the defendant to the claimant of the allegedly defective concrete. It is quintessentially a dispute about the materials supplied, and is therefore directly covered by the conditions of the Supply Contract. A dispute about the quality of the concrete fell to be resolved under clause 93 of the Supply Contract[5]. That claim has been referred to adjudication, albeit that the adjudicator was dealing with the precedent question as to whether it was too late for the claim to be made at all. A dispute about the adjudicator's decision must therefore be referred to arbitration, subject to the matters arising under s.9(4), dealt with later in this Judgment.

---

[4] These arguments ranged far and wide. The claimant even suggested that the dispute about the quality of the concrete arose under the Additional Goods Information, which was independent of the Supply Contract terms and contained no dispute resolution procedure at all. The suggestion that, as a result, the court had the necessary jurisdiction was hopeless: any claim based on a breach of the Additional Goods Information arose under or in connection with the Supply Contract conditions and was therefore governed by clause 93.

[5] The claimant's pleaded claim is based on breaches of the Supply Contract terms. Understandably perhaps, there is no pleaded breach of the Framework Contract terms, because that governed the early stage of the relationship, namely the seeking and obtaining of quotations.

58. At one point it was suggested that, because the claim for damages had not itself been referred to adjudication, clause 93 was inapplicable. I reject that submission for a number of reasons.

59. First, the claimant cannot avoid the two stage dispute resolution provision set out at clause 93 (adjudication first, arbitration second) by ignoring the first stage altogether (by not referring the dispute about the remedial scheme to adjudication), and then claiming that the second stage had not arisen. That would be tantamount to the claimant relying on its own wrong to avoid the difficulties created by the time bar.

60. Secondly, the reason why, on the facts here, the claim for damages was not itself the subject of an adjudicator's decision was because the adjudicator decided the precedent point, namely that the claimant had failed to make such a claim within the time constraints set out in clause 93, and was therefore barred from making the claim at all. I address the separate arguments as to his jurisdiction in **Section 8** below, but for present purposes, it is plain that the reference of the so-called jurisdiction dispute to adjudication was sufficient to fulfil the first part of the two-stage process. Moreover, if the arbitrator decided that the adjudicator was wrong on that issue, he or she would then go on to consider the merits of the £6 million claim.

61. For those reasons, I take the view that the claim in these proceedings is a matter which, under clause 93, is to be referred to arbitration. The defendant has therefore made out each limb of s.9(1).

6. THE PARTIES' DEALINGS IN 2015

62. I set out below, in some detail, the parties' dealings in 2015. That is because, as a result of those dealings, and under a variety of legal labels, the claimant submits that clause 93 is "inoperative" and that therefore the court should not grant a stay pursuant to s.9(4).

63. On 9 October 2014, Mouchel, the engineers under the main contract, notified the claimant of a defect in the concrete. This was followed up by various letters from Britpave.

64. By 11 February 2015, the claimant and the defendant were engaged in discussions as to the scope and scale of any remedial works (see Mr Swain's email of that date). Shortly thereafter, on 4 March 2015, DWF, through Mr Adamson, became involved on the instruction of the defendant's insurers. Mr Adamson's letter of 4 March 2015 addressed the question of remedial works. It was plain, even at that early stage, that the defendant was contending that the scope of the remedial works should be significantly less than that indicated by the claimant. The claimant replied on 10 March 2015 pointing out various difficulties with the defendant's proposals.

65. On 2 April 2015, Mr Adamson wrote to the claimant dealing with questions arising from the remedial proposals and again disputing that "the only solution is removal and replacement". His letter made plain that the defendant was prepared to proceed on the basis "that it will bear the reasonable cost of implementing [the defendant's] proposal".

66. Clyde & Co, acting through Mr Rae-Reeves, were instructed on 27 April 2015. In the written exchanges at that time, Mr Adamson said he thought it would be useful if they could meet "in order that we may assist in bringing you up to date with matters and explore how the spirit of collaboration and assistance between the respective clients can continue for the common good of bringing about a speedy resolution to the issues with the barrier."

67. On 28 May 2015, Mr Adamson wrote to Mr Rae-Reeves enclosing a report on CE marking, reiterating the defendant's stance in relation to remedial costs. Much of the letter was concerned with proposals for impact testing and asking Mr Rae-Reeves if they could ascertain the approximate cost of closing J30-J31 of the M1 for one night to facilitate such testing.

68. Questions of testing arose in further correspondence, including Mr Rae-Reeves' reply on 3 June 2015 and Mr Adamson's further letter of 18 June. On 9 July 2015, Mr Adamson reiterated again the position that the defendant would not agree to pay the costs of anything beyond the defendant's proposal of 4 March. In his reply of 16 July, Mr Rae-Reeves sought further information in relation to the defendant's position, and in particular their attitude to an interim payment.

69. Following further correspondence, on 12 October 2015, Mr Rae-Reeves wrote a letter "in accordance with the Pre-Action Protocol for Construction and Engineering Disputes". It is common ground that this was a reference to the (now superseded) TCC PAP. The letter of claim was in relatively standard terms, although no precise figure for loss and damage was identified. The letter referred to the fact that quantity surveyors appointed by each side had met to discuss the figures as they currently stood. A reply was sought by 26 October.

70. On 19 October Mr Adamson replied, stating that the defendant "has previously made clear that it is prepared to bear the reasonable costs of implementing its own proposal for remedial works, and no more. That remains our client's position. However, before our client is in a position to respond in full to the content of your ten page letter, it requires additional information and/or documents to be provided by [the claimant]". It is important to note that, in his subsequent decision, the adjudicator decided that it was at this point – and not earlier - that the dispute between the parties arose for the purposes of clause 93.3(1). On his findings, therefore, from 19 October 2015, time under clause 93 had started to run against the claimant.

71. Following further exchanges between the solicitors, it was agreed that the defendant would provide their substantive response to the 19 October letter on about 26 November. However, before that, on 13 November 2015, Mr Rae-Reeves wrote to Mr Adamson, seeking to make arrangements for the without prejudice meeting between the parties on which (uniquely amongst pre-action protocols) the TCC PAP insists. Having dealt with the proposed meeting, he then said:

> "Finally, given we are following the pre-action protocol, do you agree to refer the dispute to the Technology and Construction Court notwithstanding that the Supply Contract calls for disputes to be resolved by arbitration or adjudication?"

72. Mr Rae-Reeves gave oral evidence at the hearing, and he was cross-examined in particular about this paragraph of the letter of 13 November. Although his answers were not always clear, and occasionally were contradictory, it was beyond doubt that this paragraph was a reference to clause 93 of the Supply Contract conditions. No other clause anywhere in the sub-contract agreement referred to arbitration. Thus it seems to me beyond dispute that, by 13 November at the very latest, and realistically at some time before that, Mr Rae-Reeves had considered and was aware of the provisions of clause 93. Of course, on the adjudicator's findings, that was still within the time period for referring the dispute to adjudication.

73. On 16 November, Mr Adamson replied, saying that the defendant thought it unnecessary and premature to fix a meeting, although he had no particularly strong feelings on the point. He also said:

> "We will take our client's instructions on your invitation to depart from the contractual dispute resolution procedure and revert in due course."

It was on this day that the adjudicator decided that the claimant's time for making a claim under the first bullet point of clause 93.3(1) expired.

74. On 26 November, Mr Adamson replied in detail to the claim letter. His letter made plain that it was written under the TCC PAP. The letter said that the dispute between the parties had crystallised as long ago as 4 March, and then set out various other alternative dates on which it might be said that the dispute had crystallised, the latest being said to be 12 October 2015. The letter went on expressly to say that, pursuant to clause 93.3, the claim was now out of time. This was the first time in the inter-solicitor correspondence that there had been any reference to the time constraints in that provision.

75. In his reply of 2 December 2015, Mr Rae-Reeves expressed some surprise at the taking of the time bar point. He argued that the sub-contract agreement permitted any party to refer a dispute to adjudication at any time (clause Z21 of the Framework Contract). Thereafter the parties' solicitors batted their positions back and forth in correspondence. The dispute as to the time bar became known, rather unhelpfully, as 'the jurisdiction dispute'. In the correspondence in December 2015, it appeared that both sides considered that that jurisdiction dispute should be resolved by the TCC but, in the end, just before Christmas, the defendant referred the jurisdiction dispute to adjudication.

76. The adjudicator's decision was dated 5 February 2016. He decided that clause 93 applied; that the dispute as to the scope of the remedial works arose on 19 October 2015 and therefore required to be notified by either party to the other party by 16 November 2015, and had to be referred to the adjudicator by 14 December 2015. Since none of this had happened, he concluded that the dispute which had arisen, as to whether the defendant had any liability to the claimant beyond the cost of the defendant's proposed remedial works, could no longer be pursued, pursuant to the clear words of clause 93.

77. After this, on 16 February, the claimant's solicitors wrote to the defendant's solicitors inviting them "to confirm that any referral or purported referral to arbitration by

Costain under clause 93 is not taken to be acceptance of Tarmac's interpretation of the Supply Contract and does not result in Costain losing any right to challenge the jurisdiction of the arbitrator, whether before the arbitrator or before the Court." Although Mr Wilken complained that the defendant did not even agree to this request, I am bound to say that I rather agree with the response from the defendant's solicitors of 29 February 2016, which was to say that whether or not the claimant referred the dispute to arbitration was entirely a matter for the claimant. In any event, that letter made plain that the defendant's (correct) understanding was that the claimant intended to commence proceedings against the defendant in the TCC. That is of course what has happened.

7. IS CLAUSE 93 INOPERATIVE?

7.1 Overview

78. Section 9(4) of the 1996 Act provides as follows:

> "(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

The claimant contends that clause 93 is inoperative for reasons addressed in **Sections 7.3-7.7** below. If the claimant is wrong about that, it contends in the alternative that the agreement is null and void. I deal with that aspect of the case in **Section 8** below.

7.2 Applicable Principles

79. The starting point in considering this part of the application must be that the court should endeavour not to allow the arbitration agreement to be undermined. S.9 was designed to replace the woollier words of s.4 of the Arbitration Act 1950, because it was felt that agreements to arbitrate were being unjustifiably circumvented by the courts for spurious reasons. When at one stage during the hearing, Mr Wilken was suggesting (albeit as part of his construction argument) that the potential involvement of third parties was a reason not to stay the claim, I was inevitably reminded of the days before the 1996 Act, and the wide range of arguments that used to be deployed as to why the court should conclude that there was a "sufficient reason why the matter should not be referred in accordance with the agreement". Those days are long gone; now there is an unfettered right to a stay unless the party opposing the stay can bring itself within s.9(4).

80. However, I think it goes too far to suggest (as Mr Turner did) that, in consequence, the sorts of arguments raised by the claimant here – repudiation, estoppel and the like – should be dealt with by the arbitrator, rather than the court. I consider that that is contrary to s.9(4). It is also contrary to the decision of the Court of Appeal in ***Joint Stock Co Aeroflot – Russian Airlines v Berezovsky and Others*** [2013] EWCA Civ 784, and in particular paragraphs 72, 76 and 78 of the judgment of Aikens LJ. To the extent that Longmore LJ indicated in ***Fiona Trust*** in the Court of Appeal[6] that this

[6] [2007] EWCA Civ 20

might be a matter for the arbitrator, I should say that I prefer the analysis of Aikens LJ, and I note that in any event, ***Fiona Trust*** was not a s.9(4) case.

81. There is very little authority on s.9(4) itself. Longmore LJ described it as "prescriptive", a description with which I respectfully agree. I derived no assistance from the parties' submissions relating to sections 67 and 69 of the 1996 Act. By far the most comprehensive summary of the law relating to s.9(4) itself can be found at paragraph 7-031 of ***Russell on Arbitration, 24th Edition***. The relevant passage is in these terms:

> "The court must make an order [staying the proceedings] unless…the court is satisfied the arbitration agreement is inoperative or incapable of being performed. Examples of where an arbitration agreement will be inoperative include where (i) it has been repudiated or abandoned, provided that the repudiation or abandonment has been accepted by the other party; (ii) it contains such an inherent contradiction that it cannot be given effect; (iii) a party is precluded by an estoppel from pursuing arbitration proceedings; and (iv) the dispute is not arbitral. …"

The paragraph then goes on to deal with particular examples of inoperative arbitration agreements, none of which are of any application here.

82. As to repudiation or abandonment, the footnotes in ***Russell*** refer to three cases only: ***Downing v Al Tameer*** [2002] EWCA Civ. 721; ***Elektrim v Vivendi Universal*** [2007] EWHC 11 (Comm) at 123-132; and ***Hashwani v Jivraj*** [2015] EWHC 998 (Comm) at 109-116 and 119. In relation to estoppel, the only case cited in the relevant footnote is ***Hashwani***, at paragraphs 126-127. It is therefore appropriate to deal with these three authorities before going on to consider the parties' submissions.

83. ***Downing*** was a case where the defendant's solicitors denied that there was any contractual relationship at all so that, when the claimant's solicitors said that they intended to issue proceedings in court, the defendants simply said that the proceedings would be defended and that there would be a counterclaim. The claimant's solicitors then wrote a letter before action accepting repudiation of the main agreement and making a claim for repudiatory breach of contract. The Court of Appeal concluded that, although the letter did not itself state that the defendants had by their conduct also repudiated the arbitration agreement, the defendants' continuing attitude remained open to be accepted as a repudiatory breach of it. They therefore concluded that the judge was correct to say that the defendant had evidenced an intention no longer to be bound by the agreement to arbitrate. Potter LJ said:

> "32. So far as the judge's first stated reason is concerned, it is of course the position that the existence of an arbitration agreement does not *prevent* either party from instituting court proceedings in respect of the underlying dispute. That is a principle based upon the rule that the parties may not agree to oust the jurisdiction of the court: see ***Scott –v- Avery*** (1856) 5HL Cas 811. However, it is inaccurate to speak of a right to commence proceedings in any more general sense. Whether or

> not such commencement is a breach of the arbitration agreement by the party instituting the proceedings will depend upon the circumstances. If satisfied that a breach is involved, as it usually will be, then the court will grant a stay. If not so satisfied, but the position is arguable, the court will grant a stay on the basis that the issue raised is not clear and that the arbitrator has the power to rule upon his own jurisdiction (see s.30 of the 1996 Act). However, the fact that a party is in broad terms free to commence proceedings despite the existence of a valid arbitration clause, at the risk of stay being granted, does not mean that, in the circumstances of a particular case and in the light of pre-writ correspondence, such commencement cannot constitute an acceptance of the defendant's previous refusal to arbitrate, so that the court is satisfied that a stay should not be granted.
>
> …
>
> 34. Although that does not on the face of it cover the situation where the issue is whether an arbitration agreement which was concluded has come to an end by reason of an accepted repudiation, the wording of s.9 of the 1996 Act is such that, when faced with an application for a stay in extant proceedings, it is open to the court to decide that there is no arbitration agreement for whatever reason and therefore to dismiss the application to stay. In ***Birse Construction Limited –v- Saint David Limited*** [1999] BLR 194, Judge Humphrey Lloyd QC made this clear in the course of enumerating the options open to the court when faced with an application for a stay, his analysis and observations upon the general approach to be adopted subsequently being approved by the Court of Appeal in ***Al-Naimi –v- Islamic Press Agency*** [2000] 1 Lloyd's Rep 522 at 524-5. Thus, in appropriate circumstances, the court may hold that it is clear that the arbitration agreement sought to be relied on for the purposes of a stay has in fact come to an end prior to the application for a stay being made or heard, and hence is 'inoperative' for the purposes of s.9(4) of the 1996 Act."

84. ***Elektrim*** was a very different sort of dispute. There already was an ongoing arbitration in that case. The relevant parts of Aikens J's judgment, at paragraphs 123-132, were concerned with alleged failures by one of the parties to comply with section 40 of the 1996 Act, and whether or not those obligations could be turned into implied terms so as to give the court the power to grant relief for breach. That has no application whatsoever to the present case.

85. ***Hashwani*** was a very particular case on its own facts. The claimant, who in 2014 before Paul Walker J was arguing that the arbitration still subsisted, had been saying almost 20 years before that the arbitration had "become a joke". The arbitrator's limited further involvement ceased in mid-1997. At paragraph 112 of his judgment, Paul Walker J noted that the claimant had become increasingly exasperated with the

arbitration and that he had expressly said that he was going to adopt alternative courses, in response to which the defendant had said that he "could not stop him from going to court". The judge found that this was an express indication that the defendant was content for the claimant to abandon the arbitration (if indeed it was still in existence). At paragraph 115 the judge concluded that the conduct of each of the claimant, the defendant, and the arbitrator, as evinced to the other and acted on by that other, amounted to an implied agreement to abandon the arbitration in agreement.

86. The findings in ***Hashwani*** in relation to estoppel are inevitably brief, given the earlier findings as to repudiation. They refer to different, later events in the long history with which the case was concerned. The judge concluded that the estoppel contentions did not rely on silence and inaction, and he identified the particular facts on which he based his finding of estoppel.

87. It appears that this is the extent of the authorities on abandonment/repudiation/estoppel by reference to s.9(4). In such relatively unchartered waters, therefore, I must inevitably stick close to general principles.

7.3 Abandonment: Analysis

88. In my view, for the arbitration provision to be inoperative because it has been abandoned, there must have been an agreement between the parties (either express or implied) that arbitration would no longer comprise the final means of dispute resolution. That was what Paul Walker J found in ***Hashwani***. In the present case, I find on the facts that there was no express and no implied agreement that arbitration would not be the final means of dispute resolution. The abandonment argument must therefore fail.

89. It is plain on the face of the documents that there was no agreement that arbitration would not be pursued. On the contrary, the documents show that arbitration was acknowledged as the applicable dispute resolution mechanism. In his letter of 13 November (paragraph 71 above), Mr Rae-Reeves expressly acknowledged the existence of the arbitration agreement, and accepted that a reference to the TCC instead would be outside the sub-contract. Hence he expressly sought Mr Adamson's consent in order to be able to do something that was not permitted by the express terms of the sub-contract agreement. Mr Adamson said that he would take instructions. Thereafter, on 26 November, the defendant expressly took the clause 93 point, and so refused the invitation to go outside the sub-contract agreement.

90. Accordingly, there was no agreement that arbitration would not be pursued. Instead, there was an express request to that effect which was refused by the defendant.

91. At one stage it was I think being suggested by the claimant that, because of the TCC PAP, which both parties agreed to instigate, there was an implied agreement not to pursue arbitration. To the extent that that point is maintained I reject it. As is set out expressly at paragraphs 8 and 10 of the **Practice Direction - Pre-Action Conduct and Protocols**, arbitration is one of the types of ADR which the parties are obliged to consider when following the protocol process. Contrary to Mr Wilken's submission, I consider that there is no basis for reading that reference as being somehow limited to ad hoc arbitration: it is equally applicable to cases such as this, where there is a pre-existing arbitration agreement.

92. I should also add that the TCC PAP, in the form in which it then existed, made clear, at paragraph 4.2, that a jurisdictional challenge should be taken within 28 days of the letter of claim (i.e. in the response letter), but that the failure to take any such point did not prejudice the defendant's right to take it subsequently. Here, the defendant took the jurisdictional point in its response letter of 26 November. Again that is the opposite of any implied agreement that the right to arbitrate had been abandoned by the defendant.

93. A final reason why there can be no implied agreement that arbitration would not be pursued is the non-waiver provision in the Supply Contract at clause 12.3. That stipulated that no change to the contract "has effect unless it has been agreed, confirmed in writing and signed by the parties". The claimant's abandonment case amounts to an assertion that the defendant has waived its right to rely on clause 93. If that was right, such a waiver would have had to have been expressly agreed in writing to have any effect. It was not. For this reason too, the abandonment argument must fail.

7.4 Repudiation: Analysis

94. In ***Downing***, the repudiation was clear: the defendants' conduct was only consistent with their regarding themselves as no longer bound by any of their contractual obligations, including the agreement to arbitrate. The claimant therefore had an election to make and decided to accept that repudiatory breach. In my judgment, this case is a long way removed from that situation.

95. Here the claimant has to argue that it was itself in repudiatory breach of the arbitration agreement, by writing the letter of 19 October under the TCC PAP, and that the defendant accepted that repudiatory breach by responding to the letter and engaging in the PAP process, to the exclusion of its right to arbitrate. Leaving aside the oddity that it is the claimant who is seeking to rely on its own repudiatory breach of contract in order to advance this argument, I consider that the analysis is not only contrived, but factually incorrect.

96. First, for the reasons noted in paragraphs 91-92 above, I reject the suggestion that involvement in the PAP process was, of itself, repudiatory of the arbitration agreement. The PAP process expressly envisaged that arbitration might be the outcome of any such process.

97. Secondly, I accept Mr Turner's submission that the claimant cannot be said to have repudiated the arbitration clause in circumstances where, on Mr Rae-Reeves' evidence, the claimant was unaware of the obligation under the sub-contract agreement to pursue adjudication (in the limited circumstances set out in clause 93) and then to arbitrate. As set out in greater detail in **Section 7.6** below, Mr Rae-Reeves made plain that he (wrongly) thought that there was always a right to adjudicate at any time because he (wrongly) thought that the statutory adjudication scheme applied. Since the claimant was unaware of the mandatory nature of the obligation under clause 93, it is impossible to say that the claimant repudiated it. Accordingly, in my view, there was no repudiatory breach.

98. In addition, I consider that there was no unequivocal acceptance of repudiation. In ***Bolton MBC v Municipal Mutual insurance Ltd*** [2006] EWCA Civ. 50, the Court of

Appeal reiterated that there must be a choice between inconsistent courses before a party to a contract is required to elect. One example given is a choice between accepting conduct as a repudiation of a contract, or affirming it. In the present case, no such choice has arisen and there was no clear and unequivocal acceptance of repudiation by the defendant. Again, therefore, a repudiation claim does not get off the ground here.

7.5 Estoppel: Principles

99. The claimant's oral submissions focused on the alleged estoppel in support of its contention that the arbitration agreement was inoperative. Having rejected both the abandonment and the repudiation cases, I now turn to that aspect of the claimant's case. I am conscious that the only authority dealing with estoppel in the context of s.9(4) is ***Hashwani***, which is of limited assistance because it only arose at all on what was called "the sixth fall-back argument" of the defendant. It is therefore appropriate to turn to some first principles in relation to estoppel prior to a consideration of the claimant's case.

100. In accordance with numerous authorities (such as ***Steria Ltd v Ronald Hutchison*** [2006] EWCA Civ 1551), the ingredients of estoppel by representation can be articulated as follows:

(a) One party to a contract makes a clear and unequivocal representation to the other;

(b) That representation is intended to effect the legal relations between the parties;

(c) The representation is that the promisor's legal rights under the contract will not be enforced or will at the least be suspended; and

(d) The promise, to the knowledge of the promisor, in reliance on the representation, alters its position to its detriment.

101. Similarly, authorities such as ***Ryan v Moore*** [2005] 2 S.C.R. 53 at 55, 59, show that the ingredients of estoppel by convention are that:

(a) The parties have established by their construction of their agreement or a shared view as to its legal effect, a convention basis, often referred to simply as a common construction of the contract;

(b) On the basis of that common understanding the parties have regulated their subsequent dealings; and

(c) One party would suffer detriment if the other were to be permitted to resile from that convention.

Estoppel by convention depends on a shared assumption, not a representation as to a state of facts or a promise in respect of future obligations. However, there are plainly some similarities between the two kinds of estoppel.

102. For the purposes of the estoppel case, the claimant submitted that, in all the circumstances, there was a duty on the part of the defendant to speak out, rather than

to stay silent and rely on clause 93. In this respect, the claimant relied in particular on two authorities. The first, ***Spiro v Lintern*** [1973] 1 WLR 1002, was a case in which the first defendant knew that, because of the conduct of his wife, the plaintiff was acting in the mistaken belief that the first defendant was under an obligation to sell the house to the plaintiff. In those circumstances, the court held that the first defendant was under a duty to disclose to the plaintiff that his wife had acted without his authority and his failure to do so amounted to a representation by conduct that she had his authority. Since the plaintiff had acted on that representation to his detriment, the first defendant was estopped from asserting that the contract was entered into without his authority. Goulding J said:

> "To found an estoppel it is not necessary that the representation relied on should be false to the knowledge of the representor, provided that the representor acts in such a way that a reasonable man would take the representation to be true and believe that he was intended to act upon it."

103. The second authority, ***Pacol Ltd v Trade Lines Ltd ('The Henrik Sif')*** [1982] 1 Lloyd's LR 456, was a case in which the defendants realised that the plaintiffs were mistakenly under an impression that the defendants, rather than the owners, were the parties to be sued and deliberately encouraged that belief. It was found that they were then estopped from saying that they were the wrong parties. Webster J said:

> "Nonetheless the dictum which I have cited seems to me most persuasive authority for the proposition that the duty necessary to found an estoppel by silence or acquiescence arises where "a reasonable man would expect" the person against whom the estoppel is raised "acting honestly and responsibly" to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations."

Applying those principles to the facts of the case the judge concluded that it would be unconscionable for the defendants now to be allowed to deny that they were the proper party to be sued on the bills of lading.

104. There was a third case in this category, a decision of Clarke J (as he then was) in ***The Stolt Loyalty*** [1993] 2 Lloyd's Rep 281. The claims against Stolt Loyalty had been extinguished unless either an extension of time was granted, or Stolt Loyalty were estopped from denying that they granted an extension of time. The judge found that time had been extended but said that, if there was confusion as to who was granting the extension, Stolt Loyalty were estopped from contending that the extension was not granted by them, or from relying on a time bar, because they were aware that the plaintiff had made a mistake by asking for an extension of time from the wrong party. Although they were under a duty to inform the plaintiff's solicitors of the true position, Stolt Loyalty failed so to do and it would be unconscionable to allow them to rely on the time bar. In setting out his reasons, Clarke J said "each case depended on its own facts and that opponents in litigation do not normally owe a duty to point out one another's errors."

105. These three cases are dealt with in paragraphs 9.57 and following in ***The Law of Waiver, Variation and Estoppel*** by Sean Wilken QC and Karim Ghaly (OUP, 2012).

The learned authors note the difficulties arising out of this line of authority, particularly in respect of ***Pacol***, and conclude at paragraph 9.59:

> "It was appropriate to impose the ***Pacol*** duty in ***The Stolt Loyalty***, because the defendants had responded to the request for an extension in deliberately equivocal terms in order to prolong the claimant's error. The duty to speak will not be lightly imposed in new situations, particularly in legal proceedings: the parties are not expected to 'nursemaid' their opponents, at least where they are well used to commercial litigation, otherwise the client might well ask which side his lawyer is on. It is therefore submitted that the application of the duty to speak, to parties in legal proceedings, in ***Pacol*** and ***The Stolt Loyalty*** was exceptional and triggered only by their special facts. Alternatively, it is submitted that the duty will be imposed only where on party has been guilty of sharp practice in the conduct of the litigation."

I respectfully agree with that analysis.

106. The two principal authorities relied on by the defendant on the issue of estoppel are more recent and are both concerned with limitation. ***Seechurn v Ace Insurance SA*** [2002] EWCA Civ. 67, concerned whether or not there had been a clear, unequivocal, unambiguous and unconditional promise by the insurers that they would not raise the limitation defence in their correspondence with the defendant prior to proceedings. In his judgment, Ward LJ said there had to be such a promise which had to be construed objectively. On the facts of the case, the Court of Appeal found that the insurers had made no such promise and that therefore they were entitled to rely on their accrued limitation defence.

107. In ***Fortisbank SA v Trenwick International Limited*** [2005] EWHC 399 (Comm), Gloster J (as she then was), reached a similar conclusion in a limitation case. The relevant passage in her judgment is paragraph 30 which I set out in full:

> "30. I accept Mr Turner's submissions that, in order for a claimant to establish the necessary constituents to demonstrate waiver or promissory estoppel in relation to a limitation clause, the following propositions of law are relevant:
>
> i) The claimant must show that 'there [is] a clear, unequivocal, unambiguous and unconditional promise by the insurers that they will not raise the defence that the action is statute [or otherwise time-] barred. The focus has to be on whether or not they were giving up that right'; see per Ward LJ in ***Seechurn -v- Ace*** [2002] 2 Lloyds Rep 390 at paragraph 26.
>
> ii) The claimant must establish that the conduct relied upon is not capable of more than one explanation,

since such conduct is indeed equivocal. Mere silence and inaction are of their nature equivocal. As Goff LJ said in ***Allied Marine Transport Limited -v- Vale do Rio Doce Navegacao SA*** [1985] 2 Lloyds Rep 18 at page 20:

> 'It is well settled that the principle [of equitable estoppel] requires that one person should have made an unequivocal representation that he does not intend to enforce his strict legal rights against the other; it is difficult to imagine how silence and inaction can be anything but equivocal …
>
> But silence and inaction are of their nature, for the simple reason that there can be more than one reason why the person concerned has been silent or inactive.'

This statement was cited with approval in ***Seechurn*** at paragraph 20.

iii) It is also necessary for the claimant to establish that, objectively construed, the representation or promise was a promise not to raise a limitation defence. As Ward LJ said in ***Seechurn*** at paragraph 26:

> 'The promise must be construed objectively, not subjectively. The question is whether the correspondence can reasonably be understood to contain that particular promise. It does not matter what Mr Seechurn thought it meant, nor does it matter what a layman might have thought, …. unless of course, that layman is a passenger on the Clapham omnibus.'

iv) The mere fact that an insurer has attempted to negotiate with the insured about a claim, both before and after the expiry of the limitation period, cannot *per se* amount to a waiver or an estoppel; as Ward LJ said in ***Seechurn*** (see paragraph 55 and 58) the mere fact insurers said in that case that the door to compromising the claim was still open was not impliedly to promise that a limitation point would not be taken when negotiations failed and the proceedings started out of time.

v) Once a representation in unequivocal form has been established, a claimant then has to demonstrate that, relying on such promise or representation, the claimant also altered its position to its detriment or otherwise relied on the promise so that it would be

> inequitable or unconscionable for insurers not to be held to the promise: see ***Seechurn*** at paragraph 26 and also ***The Kanchenjunga*** at page 339. The reliance must be positive in the sense that the representee must show that it attached significance to the representation alleged and acted on it; see ***HIH Casualty and General Insurance Limited -v- AXA Corporate Solutions*** [2003] 1 Lloyds Rep IR 1 at paragraph 29.

vi) A representee who is unaware that the representor had a particular right is unlikely to understand the relevant representation to mean that the representor will abandon any particular right in the absence of an express representation: see ***HIH Casualty and General Insurance (supra)*** per Tuckey LJ at paragraph 22.

vii) Once a limitation period has expired, in a case such as the present, it is in reality impossible for a claimant to alter its position to its detriment in reliance upon any representation as to limitation made after that date; see per Ward LJ in ***Seechurn*** at paragraph 59 where he said:

> 'After the limitation period had expired it is difficult to see how the claimant could have altered his position to his detriment. His claim was doomed. He could not be worse off.'"

108. Mr Wilken submitted that the limitation cases were of no assistance in the present case, in particular because he said that here there was no discreet date that triggered the start of the relevant period. I disagree with that. Here, the adjudicator identified the specific dates by which certain things should have happened. I consider that the attempts in ***Seechurn*** and ***Fortisbank*** to persuade the court that the defendant's conduct was such that they should not be allowed to rely on their accrued limitation rights are directly analogous to the situation here, and the attempt by the claimant to argue that the defendant should not be able to rely on its accrued rights under clause 93.

7.6 Estoppel: Analysis

109. Having heard oral evidence from Mr Rae-Reeves, it is necessary for me to make the following findings of fact which are relevant to the estoppel argument:

(a) Mr Rae-Reeves was aware of the provision in the **Housing Grants (Construction and Regeneration) Act 1996** ("***HGCRA***") that parties to a construction contract can adjudicate "at any time". He believed that that obligation was confirmed by the words of clause Z6.

(b) He was not aware that the agreement between the parties, which was concerned with the supply of materials, was not a construction contract under the 1996 Act because supply contracts are expressly excluded by operation of s.105(2)(d) of ***HGCRA***. He therefore did not know that such contracts would not contain such a provision, at least as of right.

(c) He was aware of the time bar in clause 93.3 in April/May 2015, within a few weeks of his instruction. But, because of his belief that there was a right to adjudicate at any time, he did not pay any particular attention to it. He said: "I did not consider it applied". He did not understand that clause 93.3 constituted a mandatory dispute resolution scheme for any disputes in respect of the concrete supply so, as he put it, "I did not consider that there was a risk".

(d) He was however aware that clause 93 provided for adjudication and then arbitration. As a result, he was aware that any attempt to litigate the dispute in the TCC was outside the contract and would require the other side's consent. That explains his letter of 13 November 2015 (paragraphs 71-72 above). He described this request in his evidence as "a formality", but that cannot detract from the need for such consent and his knowledge of that need. In any event, that would have been confirmed by the reply of 16 November, which he agreed made clear that the defendant's solicitors regarded his letter as an invitation to depart from the contract.

110. On a consideration of the parties' dealings, as noted in **Section 6** above, and on the basis of my findings of fact in the preceding paragraph, I have concluded that no estoppel case can be established in the present case. I deal with that position as a matter of basic principle, and I then go on to consider whether the "mutual trust" provision at clause 10.1 of both the Framework and the Supply Contract makes any difference to that analysis.

111. First, I do not consider that there was any representation, or any common understanding, that the parties would not arbitrate, much less that the defendant would not rely on its rights in relation to the time bar in clause 93.3. There is no correspondence that deals with either the arbitration agreement or the time bar, save for Mr Rae-Reeves' letter of 13 November 2015, which expressly acknowledges the existence of the arbitration agreement. Thereafter, the defendant said it would consider the position and, having done so, replied to the claimant on 26 November. There was therefore no common assumption and no representation by the defendant in respect of either the arbitration agreement or the time bar.

112. Secondly, on any view of the defendant's conduct, they did nothing 'wrong'; nothing which could now be regarded as underhand or unfair. They engaged in dialogue about the remedial works and made their position clear. They participated in the first stage of the TCC PAP. But they never once said or implied that they would not or might not rely on clause 93; they did not give any indication that there was any element of their contractual entitlement which they were prepared to forego. Thus, in respect of the right to arbitrate, they were asked if they agreed to give it up, and they said no; and in respect of the time bar, they said nothing whatsoever.

113. The finding that there was no sharp practice is important. If the passage at paragraph 105 above is a correct summary of the law (as I believe it to be) then a finding that

there has been no sharp practice or misleading behaviour may be sufficient on its own to defeat the estoppel argument. It distinguishes this case from ***Pacol*** and ***The Stolt Loyalty***.

114. The worst that can be said of the defendant is that its solicitors asked for time to respond to both the PAP letter of 19 October, and the letter seeking a waiver of the arbitration agreement on 13 November. It would be a significant extension of the circumscribed obligation discussed in ***Pacol*** and ***The Stolt Loyalty*** to find that solicitors who seek more time to answer correspondence from their opponents are then estopped from seeking to rely on their clients' legal rights. That is particularly so where, as here, for the reasons explained in paragraph 91 above, there was not necessarily any contradiction between the TCC PAP and arbitration.

115. During his oral submissions, Mr Wilken said that, if the defendant had told the claimant in March 2015 that they would use clause 93, "we would not be here". That may well be right, but to the extent that it was being suggested that the defendant's solicitors had a duty to explain to the claimant's solicitors, either in March or at any time later, how clause 93 worked and the need to refer a claim promptly, I reject it. That would be far beyond the limited obligations upheld in any of the authorities noted above.

116. Thirdly, for estoppel to work, the representee (in this case Mr Rae-Reeves on behalf of the claimant) had to know that the representor (in this case the defendant) had some right that it was giving up: see paragraph 88 above, in relation to the repudiation argument. As explained by Tuckey LJ in ***HIH Casualty & General ins Ltd v AXA Corporate Solutions*** [2003] Lloyds LR 1, "a representee who was not aware that the representor had a particular right was unlikely to understand the representation to mean that the representor was not going to insist on that right or abandon any rights he might have unless he expressly said so".

117. Here, Mr Rae-Reeves knew about the arbitration clause and had asked whether the defendant was giving up its right to arbitrate, so there can have been no representation or common assumption, at least until that had been answered in the affirmative, which it never was. Mr Rae-Reeves had not understood the mandatory nature of the time bar in clause 93. I agree with Mr Turner that if Mr Rae-Reeves did not understand that the defendant had a potential right under clause 93 to bar the claim, then he could not have accepted the withdrawal or abandonment of that right, either by way of a representation or by way of a common assumption.

118. Fourthly, even if I was wrong on each of these points, the claimant suffered no detriment as a result of any representation or common assumption. The adjudicator found, contrary to the defendant's submissions, that the time period under clause 93.3 was not triggered until 19 October 2015. That meant that, up until 16 November 2015, the claimant would have been in time to bring its claim in respect of the scope of the remedial work. Thus, even if at some earlier stage there had been any common assumption, or there had been a representation and an acceptance of that representation, it did not matter. That is because at some time before 13 November 2015, the true position in respect of clause 93 was known to the claimant (through Mr Rae-Reeves). He knew that the clause required arbitration (which is why he sought consent to vary it); it follows that he could and should have been aware of the time bar in the same clause (a topic on which in any event the defendant only ever stayed

silent). So nothing was lost as a result of anything said or done at an earlier date by the defendant.

119. I now turn to whether or not clause 10 (the 'mutual trust' provision) makes any difference to this analysis. It appears that the claimant maintains that, even if (as I have found) the defendant said or did nothing which 'crossed the line' (i.e. made a representation that was inconsistent with the point they subsequently took) the defendant was in breach of clause 10.1 in any event. This rather startling submission means that, in essence, the claimant must argue that, as a result of the mutual trust obligation, the defendant had an express obligation to point out to the claimant the nature, scope and potential effect of clause 93 (including the time bar). I consider that to be contrary to the passages set out at paragraphs 102-108 above. In any event, for the reasons set out below, I reject that submission.

120. In ***Keating on NEC3*** (First Edition 2012) at paragraph 2-004, a parallel is drawn between 'mutual trust and cooperation' and obligations of 'good faith'. The authorities dealing with 'good faith' are mainly from outside the United Kingdom, because good faith has not been, at least until recently, a concept that has gained much traction in the English common law. One of the leading Australian cases on the topic is ***Automasters Australia PTY Limited v Bruness PTY Limited*** [2002] WASC 286 which, as set out in ***Keating NEC3*** is authority for the following propositions:

> "(1) What is good faith will depend on the circumstances of the case and the context of the whole contract.
>
> (2) Good faith obligations do not require parties to put aside self-interests; they do not make the parties fiduciary.
>
> (3) Normal reasonable business behaviour is permitted but the court will consider whether a party has acted reasonably or unconscionably or capriciously and may have to consider motive.
>
> (4) The duty is one 'to have regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.'"

121. ***Keating*** goes on to say that, in the light of that authority and other cases concerned with implied terms in employment contracts, the term of mutual trust and co-operation suggests that, whilst the parties can maintain their legitimate commercial interests, they must behave so that their words and deeds are "honest, fair and reasonable, and not attempts to improperly exploit" the other party. Or as it is described in another Australian case, ***Overlook v Foxtel*** (2002) Aust Contract R 90-143, "a party is precluded from cynical resort to the black letter".

122. For completeness, I note that, in ***F & C Alternative Investments (Holdings) Limited v Barthelemey (Nos. 2 and 3)*** [2011] EWHC 1731 (Ch) Sales J (as he then was), when dealing with an obligation of utmost good faith, referred to another Australian case (***Macquarie International Health Clinic PTY Limited v South West Area Health Service*** [2010] NSWCA 268, and said that:

> "It is a form of contractual duty which requires the obliger to have regard to the interests of the obligee, while also being entitled to have regard to its own self-interest when acting."

123. I respectfully agree with that summary. I agree too with the passage in ***Keating*** about not improperly exploiting the other party, although I am a little uneasy about a more general obligation to act 'fairly'; that is a difficult obligation to police because it is so subjective. Further, it might be said that the mutual trust provision does little more than say expressly what Vinelott J thought was implied into all construction contracts: see ***Merton LBC v High Stanley Leach*** (1986) 32 BLR 51.

124. Taking the obligation of mutual trust and co-operation (or even good faith) at its highest, it meant that, in the present case, the defendant could not do or say anything which lulled the claimant into falsely believing that the time bar in clause 93 was either non-operative or would not be relied on in this case. For this purpose, I am also prepared to accept that this obligation would go further than the negative obligation not to do or say anything that might mislead; it would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant, either that clause 93 was not going to be operated or that the time bar provision was not going to be relied on. But beyond that, on any view of clause 10.1, there can have been no further obligation, because otherwise the provision would have required the defendant to put aside its own self-interest.

125. In the present case, I find that the defendant did and said nothing about clause 93 which was or could have been misleading. Their participation in the pre-action protocol process could not be regarded as misleading for the reasons noted above. Moreover, the defendant would have had no reason to consider that the claimant was failing to have regard to clause 93: for the reasons already explained, the letter of 13 November 2015 was positive proof that the claimant had it very much in mind. There was therefore no reason for the defendant to believe that the claimant was making any false assumption at all.

126. Accordingly, I reject the suggestion that, on the facts of this case, the obligation in clause 10.1 can somehow turn an otherwise unsuccessful assertion of estoppel (either by representation or by convention) into a successful one.

7.7 Summary

127. For the reasons set out above, the claimant's submissions as to abandonment, repudiation and estoppel must fail. They would push the concept of an 'inoperative' arbitration agreement into areas for which there is no authority, and would require the court, without any justification, to label what happened here as exceptional or extraordinary. The claimant may well consider that what has happened is, in a general sense, unfair, but that is a function of the terms of the contract to which the claimant agreed. It is not the fault of the defendant. That leaves the final argument under s.9(4) as to whether the arbitration agreement is "null and void".

8. IS THE ARBITRATION AGREEMENT NULL AND VOID?

128. The unusual case being run by the claimant on this aspect of s.9(4) is as follows. The claimant contends that the adjudicator's decision was a nullity because it was reached

in excess of his jurisdiction. Because the adjudicator's decision was a nullity, there was nothing on which any subsequent arbitration could bite. Thus it is said that the excess of jurisdiction on the part of the adjudicator meant that the arbitration provision was null and void.

129. There are two reasons why that argument is ill-founded: one short, one long.

130. The short reason arises out of clause 93 itself. It is trite law that an adjudicator's decision reached in excess of his or her jurisdiction is a nullity: see ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** [2000] BLR 49. So too is an adjudicator's decision which was not sent to the parties within the mandatory time limit: see ***Cubitt Building & Interiors Ltd v Fleetglade Ltd*** [2006] EWHC 3413 (TCC).

131. In my judgment, Clause 93.4 expressly allows for the possibility that the adjudicator's decision might be a nullity. It expressly allowed either party to go to arbitration even if the adjudicator's decision was a nullity because the adjudicator failed to "notify a decision within the time allowed". Thus, as a matter of common sense, a decision which was a nullity for a different reason (i.e. because of an excess of jurisdiction) must similarly trigger the right to arbitrate under clause 93. In other words, the right to arbitrate cannot depend on the reason for the adjudicator's decision being a nullity.

132. Any other result would not only require the contract to differentiate between the different reasons as to how and why a decision might be a nullity, and provide different remedies for each, but it would also offend against common sense. An adjudicator may very often produce a detailed decision which, because of one element of the decision which is in excess of jurisdiction, renders the whole decision a nullity. It would be absurd if, because of that one slip, not only is the decision rendered a nullity, but the whole agreement to arbitrate also came crashing down. That is particularly so when the failure to produce a decision at all does not have that draconian effect. In my view, that is not a purposive interpretation of these contract provisions.

133. When I put this point to Mr Wilken in argument, he said that, in some way, the second bullet point in clause 93.4 was administrative only and so the analogy drawn above was not applicable. I do not understand that submission. There is nothing administrative about a provision which allows the disgruntled party to go to arbitration even if the adjudicator has failed to produce a decision. In my view, there was no reason to downgrade clause 93.4 in this way.

134. Accordingly, I am satisfied that, on a proper construction of clause 93, even if an adjudicator's decision was reached in excess of jurisdiction, and was therefore a nullity, it would not have the destructive consequences argued before me by the claimant. If that is right, then the 'null and void' argument falls away and it is unnecessary for me to decide whether or not, in this case, the adjudicator acted in excess of jurisdiction.

135. The long reason for the same conclusion involves a consideration of the submissions made on behalf of the claimant to the effect that Mr Hough, the adjudicator, exceeded his jurisdiction. In my view, the adjudicator was validly appointed and reached a decision in accordance with his jurisdiction. I regard the points raised by the claimant as good examples of what, in the adjudication enforcement case of ***Carillion***

Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, Chadwick LJ memorably described as "simply scrabbling around to find some argument, however tenuous, to resist payment" or, in this case, to avoid the consequences of the contract terms.

136. The first suggestion was that the adjudicator was invalidly appointed because the contract conditions intended the identification of a particular adjudicator, whereas Mr Hough was appointed by the ICE. I regard that as a thoroughly bad point. The contract between the parties expressly said that the adjudicator was the person nominated by the ICE. Mr Hough was the person nominated by the ICE. He was therefore validly appointed.

137. As to the suggestion that he was appointed under the wrong clause, Mr Hough was appointed under clause 93 which, on my findings, was the right clause.

138. The next suggestion, that in some way the wrong parties appointed the adjudicator, is not understood. I note that it was not raised in oral submissions. The adjudicator was appointed by the ICE, the appointing body agreed in the Supply Contract. That in turn was part of the sub-contract agreement between the claimant and the defendant. He was therefore appointed by the right parties.

139. As to the criticism of the decision itself, I consider that the adjudicator decided the dispute that was referred to him, namely whether the claim made by the claimant in respect of the scope of the remedial works necessitated by the defective concrete was barred by operation of clause 93. He concluded that it was. He therefore decided the dispute that was referred to him. It is settled law that a party can refer a discrete jurisdictional issue to adjudication: see ***Fastrack Contractors v Morrison*** [2000] BLR 168 at paragraph 31. There is no difficulty arising under the rubric of *kompetenz-kompetenz*.

140. The suggestion that it was the defendant who was out of time in referring the so-called jurisdiction issue to the adjudicator is incorrect. It was the defendant's case that the claimant could not make its claim in respect of the full scope of the remedial works because the claimant had failed to trigger clause 93. Since that was a purely defensive point, only relevant if and when the claimant made a claim, it was open to the defendant to take that point whenever a claim was made or intimated.

141. The final suggestion was that the adjudicator could not preclude the bringing of any further claims. In my view that submission may be based on a misreading of the adjudicator's decision. All that the adjudicator decided was that the dispute which he found had arisen on 19 October had not been pursued in accordance with the time bar in clause 93, and was therefore barred by operation of clause 93.3(1). He had the jurisdiction to reach that conclusion. The alleged wider effects of that decision are manifestly not a matter for the court on this application. They are a matter for the arbitration. They certainly do not go to the adjudicator's jurisdiction.

142. This last argument raises an underlying issue which, for the sake of completeness, I should briefly address. The adjudicator decided that a particular claim could not be brought because of the time bar. Whether or not the adjudicator was right to do so is, on my analysis, a matter for the arbitrator. Furthermore, even if the arbitrator concluded that the adjudicator was right, the effect of the adjudicator's decision is

also a matter for the arbitrator. I can see that there may be all sorts of potential arguments arising in respect of clause 93. Is it a condition precedent? What effect does it have on an ongoing dispute or ongoing defects? What is the link between the time bar and the precise formulation of a claim? These may all provide fertile ground for debate between the parties. But none of them is a matter for the court on this application.

9. CONCLUSIONS

143. For the reasons set out in **Section 4** above, I have concluded that there was an arbitration agreement in accordance with s.9(1) of the 1996 Act.

144. For the reasons set out in **Section 5** above, I have concluded that the claim in these proceedings is "a matter which under the agreement is to be referred to arbitration" in accordance with s.9(1) of the 1996 Act.

145. For the reasons set out in **Section 7** above, I have concluded that the arbitration agreement is not "inoperative" in accordance with s.9(4) of the 1996 Act.

146. For the reasons set out in **Section 8** above, I have concluded that the arbitration agreement is not "null and void" in accordance with s.9(4) of the 1996 Act.

147. I will deal with all consequential matters at the handing down of this Judgment.