Neutral Citation Number: [2023] EWCA Civ 292

Case No: CA-2022-001646

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mrs Justice Joanna Smith DBE
[2022] EWHC 1595 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2023

Before:

LORD JUSTICE HOLROYDE
LORD JUSTICE COULSON
and
LORD JUSTICE POPPLEWELL

- -

Between:

(1) Kajima Construction Europe (UK) Limted **(2) Kajima Europe Limited**	**Appellants**
- and -	
Children's Ark Partnership Limited	**Respondent**

- -
- -

Simon Hargreaves KC and **Samar Abbas Kazmi** (instructed by Addleshaw Goddard LLP) for the **Appellants**
William Webb (instructed by Bevan Brittan LLP) for the **Respondent**

Hearing date: 25 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON :

1. Introduction

1. This appeal concerns the enforceability and effect of a contractual dispute resolution procedure. In particular, it is concerned with what the court should do in circumstances where one party has not activated that procedure, and has commenced court proceedings instead. Ordinarily, as the authorities show, the court is likely to stay the proceedings until the dispute resolution procedure has been completed. But, for two reasons, the present case is more complicated than that.

2. First, as we shall see, the dispute resolution process was described by the judge as a condition precedent to court proceedings: in other words, as a matter of contract, it was a process that should have been completed before court proceedings could be commenced. Accordingly, the appellants sought to strike out the claim, not merely to stay it. That would ordinarily seem like overkill: in all the relevant authorities, save one, a stay of the proceedings was regarded as sufficient. But that leads to the second complication: if these court proceedings are struck out because of the failure to comply with the condition precedent, then it is appears likely that any fresh claim against the first appellant ("Kajima Construction") would be statute-barred.

2. The Contractual Framework

3. On 10 June 2004, Brighton and Sussex University Hospital NHS Trust ("the Trust") engaged the respondent ("CAP") to design, build and finance the redevelopment of the Royal Alexandra Hospital for Sick Children in Brighton ("the Project Agreement"). On the same day, CAP engaged Kajima Construction to design, construct and commission the Hospital ("the Construction Contract"). On 17 October 2013, CAP entered into a deed of guarantee ("the Guarantee") with the second appellant ("Kajima Europe") pursuant to which Kajima Europe agreed to guarantee the due and punctual performance by Kajima Construction of each and all of its duties or obligations to CAP under the Construction Contract. In the body of this judgment I refer to Kajima Construction as "Kajima" for convenience, unless it is important to differentiate between the two companies.

3. The Project Agreement

4. This was a PFI Project. The Project Term expires on 9 June 2034. The overall scheme, common to many such PFI Projects, was that the Trust would make monthly payments to CAP relating both to the cost of the project and the ongoing maintenance. From those payments, deductions could be made if, for example, there were defects in the work which required remedial work.

5. Clause 12 of the Project Agreement was headed 'Liaison'. It provided:

> "*Liaison Committee*
>
> 12.1 The Trust and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "Liaison Committee"), consisting of three (3) representatives of the Trust (one of whom shall be appointed

Chairman) and three (3) representatives of Project Co which shall have the functions described below.

12.2 The functions of the Liaison Committee shall be:

(a) to provide a means for the joint review of issues relating to all day to day aspects of the performance of this Agreement;

(b) to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of the Trust, and possible variations of this Agreement to reflect those changes or for the more efficient performance of this Agreement; and

(c) in certain circumstances, pursuant to Schedule 26 (Dispute Resolution Procedure), to provide a means of resolving disputes or disagreements between the parties amicably.

12.3 The role of the Liaison Committee is to make recommendations to the parties, which they may accept or reject at their complete discretion. Neither the Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision which is binding on the parties (save as expressly provided in Schedule 26 (Dispute Resolution Procedure)). Neither party shall rely on any act or omission of the Liaison Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either party.

12.4 The parties shall appoint and remove their representatives on the Liaison Committee by written notice delivered to the other at any time…

Procedures and practices

12.5 Subject to the provisions of this Agreement, the members of the Liaison Committee may adopt such procedures and practices for the conduct of the activities of the Liaison Committee as they consider appropriate from time to time and:

(a) may invite to any meeting of the Liaison Committee such other persons as its members may agree (in accordance with Clause 12.6); and

(b) receive and review a report from any person agreed by its members.

12.6 Recommendations and other decisions of the Liaison Committee must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Trust and not less than one (1) representative of Project Co.

12.7 Each member of the Liaison Committee shall have one (1) vote. The Chairman shall not have a right to a casting vote.

12.8 The Liaison Committee shall meet at least once each quarter (unless otherwise agreed by its members) and from time to time as necessary…

> 12.10 Meetings of the Liaison Committee shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances…
>
> 12.12 Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Liaison Committee shall be kept by Project Co and copies circulated promptly to the parties, normally within five (5) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by either party at any time, upon request".

6. Other relevant clauses of the Project Agreement include:

   (a) Clause 56, which provided that:

   > "Except where expressly provided otherwise in this Contract, any dispute arising out of or in connection with this Contract shall be resolved in accordance with the procedure set out in Schedule 26 (Dispute Resolution Procedure)".

   (b) Clause 68, which provided that:

   > "Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this contract and irrevocably submit to the jurisdiction of those courts".

7. Schedule 26 to the Project Agreement set out the Dispute Resolution Procedure ("DRP"). Its scope was set out in paragraphs 1 and 2 as follows:

   > "1. The procedure set out in this Schedule (the **Dispute Resolution Procedure**) shall apply to any dispute, claim or difference arising out of or relating to this Contract (**Dispute**) except where it has been excluded from this procedure by an express term of this Contract.
   >
   > 2. This Dispute Resolution Procedure shall not impose any precondition on any party or otherwise prevent or delay any party from commencing proceedings in any court of competent jurisdiction to obtain either:
   >
   > 2.1 an order (whether interlocutory, interim or final) restraining the other party from doing any act or compelling the other party to do
   > any act; or
   >
   > 2.2 summary judgment pursuant to the Civil Procedure Rules 1998, Part 24 for a liquidated sum."

8. Schedule 26 provided for the referral of disputes under the Project Agreement to a Liaison Committee in the following terms:

> "3.1 Subject to paragraph 2 and 6 of this Schedule, all Disputes shall first be referred to the Liaison Committee for resolution. Any decision of the Liaison Committee shall be final and binding unless the parties otherwise agree.
>
> 3.2 Where a Dispute is a Construction Dispute the Liaison Committee will convene and seek to resolve the Dispute within ten (10) Business Days of the referral of the Dispute".

'Construction Dispute' was defined in the Project Agreement by reference to the Housing Grants (Construction and Regeneration) Act 1996 ("the 1996 Act").

9. As to other forms of dispute resolution, paragraphs 4, 5, and 6 of Schedule 26 provided that the parties "may" refer a dispute to mediation or adjudication. Court proceedings were dealt with at paragraph 7.1 as follows:

> "7.1 All Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule, shall be referred to the High Court of Justice in England by either party for resolution. The parties agree that where the nature of the Dispute so allows, the Dispute shall be tried by a Judge of the Technology and Construction Court. To avoid doubt, this paragraph shall not preclude either party from commencing court proceedings to enforce any decisions of the Liaison Committee or the Adjudicator or to enforce any agreement reached under the mediation procedure."

4. The Construction Contract

10. In the definitions section of the Construction Contract, "the Liaison Committee" was defined as "the committee referred to in clause 12…of the Project Agreement". The only reference to the Liaison Committee in the body of the Construction Contract was at clause 12. In the Project Agreement, clause 12 set out the detailed provisions which I have reproduced at paragraph 5 above. In the Construction Contract, clause 12 is in very different form. Although it is headed 'Liaison' with a sub-heading of 'Liaison Committee', the only relevant provision is clause 12.1 which provided that:

> "The Contractor shall provide such assistance as is reasonably necessary to assist Project Co in the performance by Project Co of its obligations under the Project Agreement in respect of Work related matters considered by the Liaison Committee"

Thereafter, although the Construction Contract identifies by number clauses 12.2-12.11, each bears the legend "[Not Used]". On the face of it, that suggests that those drafting the Construction Contract may have looked across at the equivalent provisions in the Project Agreement, and concluded that they were not applicable to the Construction Contract. So clause 12.1 of the Construction Contract simply limited Kajima's obligation to provide assistance to CAP in respect of "Work related matters considered by the Liaison Committee".

11. However, Clauses 56 and 68.2 of the Construction Contract were in precisely the same terms as their equivalent clauses in the Project Agreement, set out at paragraph 6 above. Similarly, Schedule 26 of the Construction Contract was, save for its title page, in the

same form as Schedule 26 of the Project Agreement (set out at paragraphs 7-9 above). It is this importation of the terms from the Project Agreement that gives rise to most of the issues between the parties.

12. As the judge noted at [18] of her judgment, the Liaison Committee comprised only representatives from the Trust and from CAP: Kajima had no representation at all on the Liaison Committee. Furthermore, the minutes of the Liaison Committee were only open to inspection by the parties to the Project Agreement, not the parties to the Construction Contract. Accordingly, despite the clear words of paragraph 3.1 of the Construction Contract (that any decision of the Liaison Committee shall be "final and binding unless the parties agree otherwise"), Mr Hargreaves was obliged to submit that any such decision could not be binding on Kajima. If that were right, as the judge noted at [19], "it must (at best) be extremely doubtful whether obtaining a decision on a dispute between CAP and Kajima from such a committee is a particularly useful form of ADR". I return to these points in greater detail below.

13. Finally, as to the limitation position, Clause 9.7 of the Construction Contract provided that no claim, action or proceedings would be commenced against Kajima Construction after the expiry of 12 years from the "Actual Completion Date of the Works". The Actual Completion Date was 2 April 2007. Accordingly, the relevant date for limitation purposes was originally 2 April 2019.

5. The Factual Background

14. As was the case with so many buildings across the UK, the tragedy at Grenfell Tower in 2017 caused checks to be undertaken in respect of the cladding and fire-stopping works at the Hospital. Concerns were then notified to Kajima Construction in about September 2018, and they agreed to carry out remedial works at their own cost, but without admission of liability. Those works commenced in December 2018 but had to be sequenced over a long period of time in order to minimise disruption at the Hospital. It appears that they were ongoing until early 2022.

15. As previously noted, the original limitation period expired on 2 April 2019. As a result of the remedial works, the parties reached a "Standstill Agreement" dated 29 March 2019. It is agreed that this had the effect of extending the limitation period.

16. In the Recitals to the Standstill Agreement, what were called "fire safety issues" were identified. These included issues regarding the exterior cladding. Clause 2 identified the two ways in which the Standstill Period might come to an end. Under clause 2.2, it terminated 30 days after the giving of notice by either side. Under clause 2.3, it automatically terminated 24 months from the effective date (which was 29 March 2019).

17. Clause 2.4 of the Standstill Agreement provided as follows:

> "2.4 Nothing in this Agreement shall prevent:
>
> (a) as between Project Co [CAP] and the Building Contractor, taking any step in the Dispute Resolution Procedure (as defined in the Building Contract and as set out in Schedule 26 of the Building Contract);

(b) as between Project Co, the Building Contractor and the Guarantor, taking steps in the Dispute Resolution Procedure (as defined in the Parent Company Guarantee);

(c) as between Project Co and the Building Contractor taking any step in the Procedure (as defined and set out in clause 12 of the Interface Agreement); and

(d) issuing and dispatching and serving proceedings in relation to the Dispute between the Parties;

during the Standstill Period or otherwise."

18. On behalf of Kajima, Mr Hargreaves was entitled to point out that the Standstill Agreement was dated just three days before the original limitation period expired. I explore that point, and the submissions that build upon it, below. But I should say at the outset that, in my view, this is not one of those cases where a standstill agreement was reached because of indolence or a failure to get on with the underlying dispute (for an example of that, see *Russell v Stone* [2017] EWHC 1555 (TCC); [2018] 1 All E.R. (Comm)). This was instead a situation where there were significant issues in relation to fire safety, investigation of which had been prompted by a national tragedy, and where both sides, and the Trust, were endeavouring to co-operate and work out a solution acceptable to all three of them. Indeed, but for the Standstill Agreement, limitation would have expired at a time when the remedial work to rectify the alleged defects had only just started.

19. There were four further variations to the Standstill Agreement. The last of these, dated 27 September 2021, extended the limitation period by 33 months from 29 March 2019 to 29 December 2021. The notice provision was reduced from 30 days to 10 days. The provision set out in paragraph 17 above as to the recourse to the DRP and the court, was unchanged.

20. The evidence was that on four occasions in 2019 and once in 2020, the Liaison Committee discussed the ongoing remedial works to the cladding and fire-stopping. Kajima Construction was invited to those meetings and it appears that they attended the majority of them. There was never an express referral to the Liaison Committee of Kajima's liability for defects in the cladding and the fire-stopping. Neither was there a referral to the Liaison Committee of any claim by the Trust against CAP in respect of deductions under the Project Agreement triggered by the defects. The evidence was that, until the remedial works had been completed, the Trust was unsure precisely what their claim against CAP might comprise, and did not wish to raise the matter formally with the Liaison Committee.

21. On 30 November 2021, Kajima Construction's solicitors informed CAP in writing that the remedial works had largely been completed and that, in consequence, they no longer wished to extend the Standstill Period beyond 29 December 2021 (33 months after the effective date). On that basis, although not entirely clear, the limitation period would expire either on 29 December 2021 or, at the latest, 3 days later, on 2 January 2022.

22. In their reply dated 6 December 2021, CAP's solicitors noted that, on 29 December 2021, the remedial works would not be completed. They also noted the absence of any admission of liability on the part of Kajima and the fact that CAP still faced the possibility of a claim from the Trust under the Project Agreement arising from the

requirement to carry out the remedial works. Although they sought a further extension to the Standstill Agreement, CAP said that, in the absence of such an extension, they would have no option but to commence proceedings. They made no mention of the DRP.

23. There was further correspondence, from Kajima's solicitors on 10 December 2021, and from CAP's solicitors in reply, on 16 December 2021. In that letter, CAP said that, at the end of 2019, the Trust's position in respect of the value of the deductions was that they were worth somewhere between £14.8 million and £21.4 million. The letter went on:

> "9. In your letter of 30 November 2021, you expressed a desire to explore the possibility of reaching a full and final settlement of liability. Our client wants to achieve the same result, but as you are well aware, any settlement discussions must include the Trust. The Trust have indicated that they are willing to discuss a sensible proposal. If all parties want to achieve the same result, then a settlement must be realistic.
>
> 10. However, as you know, the Trust cannot meet until after the expiry of the Standstill Agreement, so it needs to be extended to allow for a settlement discussion to take place. An extension to the Standstill Agreement of three months to 31 March 2022 should not prejudice your client's position. There are still 10 weeks to the trial of your client's claim against its supply chain at that point."

24. No further reply was received so, on 21 December 2021, CAP issued its Claim Form against Kajima Construction and Kajima Europe arising out of the alleged defects in the design and/or construction of the Hospital. These relate, in one way or another, to the cladding and fire safety issues previously noted. In the Particulars of Claim, served subsequently, CAP plead that the Trust had indicated that the total deductions would be a little under £14 million if the remedial works were completed by 13 September 2020, but that, since that had not happened, the claim was likely to be greater than that. Accordingly, CAP claimed against Kajima as damages any amounts that CAP was liable to pay to the Trust in respect of the defects, and CAP's own losses of £352,305. There was a separate claim, which I address at section 9 below, against Kajima Europe, under the Guarantee.

25. On 12 January 2022 Kajima learnt that the claim form had been issued and requested that it be served upon them. In response, on 18 January 2022, CAP noted that "the Trust has finally agreed to meet with our client on 26 January 2022 on a without prejudice basis". CAP said that they intended, following that meeting, "to convene the Liaison Committee to discuss the matter…the Liaison committee is a mandatory part of the dispute resolution process". They went on to say that CAP would have engaged this process first but "due to limitation issues and your client's refusal to extend the Standstill, our client was forced into issuing proceedings".

26. On 3 February 2022, CAP issued an application to stay the proceedings for two months so as to comply with the DRP. On the same day, Kajima made an application under CPR 11 to set aside or strike out the claim form on the ground that CAP had failed to comply with the DRP.

6. The Judgment

27. These applications were dealt with by Mrs Justice Joanna Smith DBE ("the judge") at a hearing in late April 2022. Her judgment was dated 22 June 2022 ([2022] EWHC 1595 (TCC)). There were a total of six issues before the judge, five of which she identified at [54] and the last of which she noted, but did not decide, at [105].

28. The issues were:

(a) Whether the DRP gave rise to a condition precedent;

(b) Whether the provisions of the DRP were enforceable;

(c) Whether, if they were enforceable, the provisions of the DRP were complied with by CAP in advance of the issue of the claim form;

(d) Whether CPR 11(1)(a) or (b) was engaged;

(e) If CPR 11(1)(b) was engaged, how the court should exercise its discretion in the circumstances of the case;

(f)Whether, even if the claim against Kajima Construction was struck out, the claim under the Guarantee against Kajima Europe would continue, because there was no DRP in the Guarantee.

29. As to issue (a), the judge found that the DRP gave rise to a condition precedent: see [55]-[58]. There is no cross appeal by CAP in respect of that finding. It may be important to note, however, that the judge said that this conclusion was based on paragraph 2, paragraph 3.1, paragraph 3.2 and paragraph 7.1 of schedule 26, the last of which permitted recourse to the court "to the extent not finally resolved pursuant to the DRP".

30. As to issue (b), the judge found that the DRP was not enforceable: see [59]-[66]. The challenge to that conclusion comprises Ground 1 of the appeal.

31. As to issue (c), the judge found that the provisions of DRP had not been complied with by CAP: see [67]-[73]. There is no cross appeal by CAP in respect of that finding.

32. As to (d), the judge found that CPR 11(1)(a) was not engaged but that CPR 11(1)(b) was engaged: see [74]-[80]. There is no appeal or cross-appeal in respect of that finding.

33. As to issue (e) the judge concluded that, even if the DRP had been enforceable, she would not have exercised her discretion under CPR 11(1)(b) to do anything more than stay the proceedings: see [81]-[92]. She would not have struck them out. This part of the judgment is the subject of Grounds 2 and 3 of the appeal. Ground 2 complains that the judge wrongly found that a stay of proceedings was the "default remedy". Ground 3 complains that she erred in the exercise of her discretion by failing to have regard to relevant matters and having regard to matters that were irrelevant.

34. Finally, in respect of issue (f) above, the judge said at [105] that, in view of her other findings, she did not need to determine CAP's alternative argument that, even if the claim against Kajima Construction fell to be struck out, the claim against Kajima

Europe could not be struck out because the Guarantee did not contain the DRP. That point is expressly revived in CAP's Respondent's Notice.

35. Accordingly, in section 7 below, I deal with Ground 1 of the appeal and the enforceability or otherwise of the DRP. In section 8 below, I deal with Grounds 2 and 3, the inter-related issues arising out of the judge's conclusion that, if the DRP had been enforceable, she would have exercised her discretion to stay the proceedings and nothing more. In section 9 below, I address the point about Kajima Europe set out in the Respondent's Notice.

7. Ground 1: The Enforceability of the DRP

7.1 The Law

a) General Principles

36. Wherever possible, the court should endeavour to uphold the agreement reached by the parties and "not incur the reproach of being the destroyer of bargains": see *Hillas (WN) & Co. v Arcos* [1932] 43 Ll New L Rep 359 at 364 per Lord Tomlin. As Arden LJ (as she then was) put it in *Anglo Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd* [2009] CP Rep 30 at [13] "if the agreement is susceptible of an interpretation which will make it enforceable and effective, the court will prefer that interpretation to any interpretation which will result in its being void".

37. However, it should be noted that, in cases where there is a dispute about the enforceability of alternative or bespoke dispute resolution provisions which are being relied on to defeat or delay court proceedings, the courts have not shied away from concluding that such provisions may not be enforceable. This may be because clear words are needed to oust the jurisdiction of the court, even if only on a temporary basis. Examples of cases where contractual ADR provisions have been found to be unenforceable include *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 ("*Sulamerica*"), upholding Cooke J's decision at first instance, and *Tang and Another v Grant Thornton International Limited and others* [2012] EWHC 3198 (Ch); [2013] 1 All ER (Comm) 1226 ("*Tang*").

b) Dispute Resolution Provisions

38. I take the authorities in chronological order.

39. The starting point is that an agreement to the effect that the parties shall seek to settle their disputes amicably, and only refer the matter to arbitration in the event of being unable to settle, is not a legally enforceable obligation: see *Itex Shipping Pte Limited v China Ocean Shipping Co.* ("*The Jing Hong Hai*") [1989] 2 Lloyd's Rep 522 (Steyn J as he then was).

40. In *Cable & Wireless v IBM UK Limited* [2002] EWHC 2059 (Comm), Colman J noted that, whilst there was an obvious lack of certainty in a mere undertaking to settle a dispute amicably (because the court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision), a clause which went on to prescribe the means by which an attempt to resolve the dispute should be made, was different. In that case there was an express reference to an ADR procedure

as recommended to the parties by the Centre for Effective Dispute Resolution (CEDR), one of the principal providers of ADR. Colman J found that resort to CEDR and participation in its recommended procedure were engagements of sufficient certainty for a court to readily ascertain whether they had been complied with. Colman J went on to say:

> "28 For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnett v. Railtrack*, supra…
>
> 32 Before leaving this point of construction I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms or whether , as is the case with the standard form of ADR orders in this court, the duty to mediate was expressed in qualified terms – "shall take such serious steps as they may be advised". The wording of each reference will have to be examined with these considerations in mind. In principle, however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find."

41. In *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), a dispute arose about the applicability of the NHBC dispute resolution scheme. Ramsey J said at [81]:

> "It seems to me that considering the above authorities the principles to be derived are that the ADR clause must meet at least the following three requirements: first, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."

The judge went on to find that the contract provisions did meet those criteria. However, it may be important to note that this was all *obiter,* because, as the judge made plain at [66], for other reasons, he had concluded that there was no binding obligation to refer the disputes to the NHBC resolution service in any event.

42. In *Sulamerica,* Cooke J at first instance had found that there was no enforceable requirement to mediate because the relevant clause contained no unequivocal undertaking to enter into a mediation, no clear provisions for the appointment of a mediator, and no clearly defined mediation process. Essential matters therefore remained for agreement between the parties. The clause therefore gave rise to no binding legal obligations of any kind. In the Court of Appeal at [35], Moore-Bick LJ said that he had little doubt that the parties intended the condition to be enforceable; the parties thought they had achieved that objective; and the court should be slow to hold that they had failed to do so. But he reiterated at [35]-[36] that the absence of any provision for the process by which any mediation was to be undertaken meant that the conditions were too uncertain to render them capable of enforcement.

43. Finally, in *Tang*, the dispute concerned a bespoke and detailed series of provisions involving dispute resolution, first by the Chief Executive and subsequently by a Panel of three members of the Board. There were various criticisms of this process which it was said led to the whole scheme being unenforceable. At [60] Hildyard J said:

> "In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."

44. The judge's detailed reasons for concluding that the dispute resolution provisions in that case did not meet his own criteria are set out between [63]–[70]. I note in particular that, at [63], the judge said this about the first stage:

> "63. As to the positive obligations:
>
> (1) At the first stage all that is required is a reference to the Chief Executive: that seems to me to be a clear requirement, satisfaction of which is demonstrated by the objective fact of a reference;
>
> (2) However, no more is said in section 14.3(b) as to (i) what form the process of conciliation should take (apart from the injunction that it is to be undertaken "in amicable fashion"); nor as to (ii) who is to be involved in it and what (if anything) they are required to do by way of participation in the process; nor indeed as to (iii) what the obligation to attempt to resolve the dispute or difference requires the Chief Executive to do;
>
> (3) In relation to the next stage, of a reference to the Panel, again no more is said as to (i) what the form or process of resolution should be; nor (ii) whether it is to include participation by the parties to the dispute; nor again (iii) what will suffice in terms of an "attempt to resolve" the dispute or difference, whether on the part of the Panel or on the part of the other parties to the dispute or difference;
>
> (4) As to the fourth stage, (i) nothing is stated as to whether the Panel must at least take some step calculated to lead to resolution of the dispute or whether it may determine that it cannot resolve it without taking any steps at all; but (ii) the provision for the Panel to have only one month at most to attempt to resolve the dispute or difference is clear."

7.2 The Judge's Findings

45. In the present case, the judge concluded that the DRP did not comply with the minimum requirements noted in the authorities to which I have referred. She identified five reasons for that at [61]. They can be summarised as follows:

(i) There was no meaningful description of the process to be followed. It was unclear how the Liaison Committee would seek to resolve the dispute, particularly in the absence of one of the parties to the Construction Contract (Kajima Construction). There was no obligation on the Trust (which was represented on the Liaison Committee) to play its part in any particular way: [61](i).

(ii) There was no unequivocal commitment to engage in any particular ADR procedure. In circumstances where Kajima was not obliged to take part in the process, and had no right to do so, it was impossible to see how the process could be said to "provide a means of resolving disputes or disagreements between the parties amicably". The judge said she could not see how it was possible to resolve a dispute between two parties amicably when one was not involved in the process: [61](ii).

(iii) It was unclear how a dispute between CAP and Kajima should be referred to the Liaison Committee, which had led to a dispute between the parties as to whether the issue had in fact been referred to the Liaison Committee or not. There was no certainty as to the circumstances in which the Liaison Committee will be deemed to be 'providing a means of resolving disputes or disagreements': [61](iii).

(iv) It was unclear what impact any decision of the Liaison Committee had on Kajima. If "the parties" referred to in paragraph 3.1 of Schedule 26 were the Trust and the CAP, as Mr Hargreaves had contended, then the process had no final binding effect on Kajima and so was rendered pointless. If "the parties" was a reference to CAP and Kajima then it would subject Kajima to a final and binding decision from a committee of which it was not a member: [61](iv).

(v) It was not clear when the process of referral to the Liaison Committee came to an end, so it was unclear when the condition precedent was satisfied. She said that "it seems unlikely that referral on its own can satisfy the condition precedent, but it is otherwise unclear from paragraph 3.1 whether a resolution or decision is required before litigation may ensue". The judge did not consider that it was clear from the wording that Mr Hargreaves was right to say that litigation was possible as soon as the 10 day period identified in paragraph 3.2 had expired: [61](v).

7.3 The Submissions In Summary

46. In his skeleton argument and oral submissions before this court, Mr Hargreaves argued, as he had done before the judge, that the result of the DRP could never be binding on Kajima Construction because of their lack of representation on the Liaison Committee. But he submitted that the judge had erroneously focused on the functions of the Liaison Committee rather than asking the simple question of whether the DRP was sufficiently certain. He submitted that the process was sufficiently clear to be enforceable; the clear procedure identified was the referral of the dispute to the Liaison Committee which would convene and seek to resolve it within 10 days; and that it would be obvious whether or not the dispute had been referred to the Liaison Committee, a point which

the judge herself determined at [68]-[73]. Mr Hargreaves said that the judge had wrongly concentrated on the utility of the process, instead of determining whether it was sufficiently certain. He reiterated that the process came to an end once the 10 day period had elapsed.

47. In response, in his written and oral submissions, Mr Webb sought to uphold the judge's specific conclusions as to the unenforceability of the DRP. He said that, because Kajima were not involved in the Liaison Committee, the process under the Construction Contract was not and could not be one of amicable settlement by agreement between the affected parties. Instead it involved CAP working with the Trust to reach a decision which was then imposed on Kajima. He emphasised the problems with the outcome of the process. If Kajima was right, and the reference to "the parties" in paragraph 3.1 of Schedule 26 was a reference to the Trust and CAP, then it would mean that CAP and Kajima could refer a dispute between themselves to the Liaison Committee, with the resulting decision final and binding on both the Trust and CAP, but not on Kajima. That was, he said, an unattractive interpretation of the contract. But if the reference to the parties was a reference to CAP and Kajima, then the Liaison Committee would be entirely made up of representatives of parties whose interests were inevitably contrary to those of Kajima, and as a decision-making body they would be infected with actual or apparent bias from the outset.

7.4 Analysis

a) Kajima's Primary Case

48. I focus my analysis on Kajima's primary case, as advanced to the judge below and to this court. That was based on the submission that Schedule 26 provided a complete DRP procedure, with a beginning, a middle and an end, which met the criteria set out in the authorities noted above. I deal subsequently with what emerged, somewhat shyly, as an alternative argument, based solely on the initial referral to the Liaison Committee. For the reasons set out below, I consider that, however Kajima's case is put, the judge was right to conclude that the DRP was unenforceable.

49. The underlying problem with the DRP, insofar as it related to the Construction Contract, was apparent from Mr Hargreaves' own submissions. He was forced to argue that the DRP under the Construction Contract somehow involved the Trust and CAP, not Kajima, despite the fact that the Trust were not a party to the Construction Contract and Kajima were. He also had to argue that any decision of the Liaison Committee in respect of any claim referred to them by Kajima would not be binding on Kajima (despite the clear words to the contrary), and that the parts of Schedule 26 which talked about "final and binding" decisions of the Liaison Committee were, to use his word, "repugnant" to parts of the Project Agreement, and so should be ignored. It was, therefore, a feature of this case that the DRP on which Mr Hargreaves relied was not the full version in the Construction Contract, but a suitably rewritten version of it. That is an unpromising starting point for a submission that the DRP was enforceable.

50. Turning to the detail, the first issue was who "the parties" were in paragraph 3.1 of Schedule 26 of the Construction Contract. As I have said, Mr Hargreaves was obliged to argue that this was a reference to the Trust and CAP, not Kajima. If that were right, it would mean that, on their case, Kajima *must* take part in a process (because it was a

condition precedent), the result of which cannot and will not bind them. That makes no commercial sense. As the judge said, it would render the DRP "pointless".

51. I am in no doubt that "the parties" in paragraph 3.1 of Schedule 26 of the Construction Contract was a reference to CAP and Kajima. That fits with paragraph 12 of Schedule 1 of the Construction Contract, which provides that a "reference to 'parties' means the parties to this Agreement". But that immediately gives rise to another set of difficulties. On the face of it, it would impose (via paragraph 3.1 of Schedule 26) a final and binding decision on Kajima, made by the Liaison Committee, on which Kajima had no representative, whose meetings Kajima had no right to attend, to which Kajima was not entitled - at least according to the DRP - to make representations, and whose documents Kajima were not entitled to see. That could not possibly lead to "an amicable settlement", which was identified as another outcome of the DRP. Again, that suggests to me a pointless and an unenforceable process.

52. The Liaison Committee was made up of three representatives of the Trust and three representatives of CAP. Given the absence of any Kajima representative on the Liaison Committee, and the absence of any entitlement on their part to attend meetings, make representations or see documents, I consider that there is force in Mr Webb's submission that actual, or at least perceived, bias would be inherent in the whole structure of the DRP if it was extended to a dispute between CAP and Kajima.

53. In this way, I consider that the Liaison Committee was, for the purposes of the Construction Contract, a fundamentally flawed body which could neither resolve a dispute involving Kajima "amicably", nor could fairly provide a decision binding on Kajima in any event. That too suggests an unenforceable process. That may explain why clause 12 of the Construction Contract is fundamentally different to clause 12 of the Project Agreement (see paragraph 10 above). Clause 12.1 of the Construction Contract provides that Kajima's only obligation in respect of the Liaison Committee was to provide assistance to CAP with any disputes (presumably between CAP and the Trust) that CAP were addressing via the Liaison Committee.

54. That overview leads me to the same conclusion as the judge as to the unenforceability of the DRP. I now turn to some of the other uncertainties, looking in a little more detail at the intended commencement, process and completion of the DRP under the Construction Contract.

55. Whilst it is not entirely clear how the process was intended to commence (a point made by the judge at [61](i) and (iii)), I accept that a referral to the Liaison Committee could probably have been made. That is similar to the position in *Tang*, where Hildyard J concluded that the commencement of the process by way of referral may itself be capable of being established. In *Tang*, however, he went on to find that the process as a whole was too uncertain to be enforceable, because it was unclear what procedure was to be followed either at the outset or thereafter. In my view, the same applies here, a point the judge made at [61](i). There was no contractual commitment to engage in any particular procedure either covering the referral, or the process to be followed once the dispute had been referred.

56. As to the process itself, the authorities (such as *Cable & Wireless*) talk about the need for a binding contractual process to contain a definable minimum duty of participation. It is impossible to look at the DRP and see what, if any, minimum participation is

required of either party. Kajima, as we know, had no right to attend the Liaison Committee or to make representations to it. Part of Mr Hargreaves' submissions suggested that, after the referral, Kajima's minimum duty was non-existent or zero, which unsurprisingly caused Mr Webb to submit that, if that were so, it could hardly be an effective dispute resolution process. In addition, although it was not addressed in argument, I note that CAP's obligations to participate as a respondent to any referral by Kajima (if any) were also unclear; they were nowhere set out in the Construction Contract.

57. As to when the process was to come to an end, I note that, pursuant to paragraph 3.2 of Schedule 26, the Liaison Committee would have to try and resolve the dispute within 10 days of the referral but, save in an emergency, clause 12.10 of the Project Agreement allowed them 10 days' notice before they even held a meeting[1]. So the process could, on one view, be over before it even began. This was not like *Cable & Wireless*, where there was a clear procedure to be followed, as recommended by CEDR. Here, at best, everything after the referral would depend on further agreements between the parties along the way. As summarised at [60] of the judgment of Hildyard J in *Tang*, the need for such agreements does not give rise to an enforceable dispute resolution process.

58. When there is a contractual dispute resolution procedure, one party cannot commence court proceedings until that process has been concluded. If it is not clear when that might be, the process is not enforceable. Mr Hargreaves' submission, maintained in his reply, was that the process was governed by paragraph 3.2 of Schedule 26, and concluded 10 days after the referral (or earlier, if they met earlier) and that, if the Liaison Committee had not resolved the matter by then, that would not prevent CAP from going to court. But there are a number of difficulties with that submission. The Construction Contract does not say that: the 10 days is purely aspirational ("seek to resolve"), and it says nothing about what may happen thereafter, much less when the process is completed. Moreover, this submission takes no account of the point I have already made, namely that the Liaison Committee had to be given 10 days' notice before it even met.

59. Assume that the Liaison Committee required 10 days' notice to meet, and then decided at the end of their meeting that they needed more time. There is no period specified in the Construction Contract by which they had to reach a decision. So they were entitled to ask for more time, a request which they could subsequently repeat. That would, however, require the parties' continuing agreement: again, for the same reasons as noted above, such a process is not enforceable.

60. These uncertainties are exacerbated by paragraph 7.1 of Schedule 26. In my view, it is impossible to read that clause as somehow indicating that the process was definitely over 10 days after the referral, as Mr Hargreaves submitted. On the contrary, the clause specifies that "all disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule" shall be referred to the High Court. Those words plainly suggest that the process had to be completed before there could be

[1] The position in respect of all other (non-construction) disputes was even more uncertain. The 10 days in paragraph 3.2 was limited to construction disputes. There was no time limit (whether aspirational or otherwise) stated in respect of all other disputes.

a referral to the court. That is the whole process, not just the commencement and the aspiration to amicably resolve the dispute within 10 days.

61. For these reasons, I consider that the judge was right to say at [61](v) that, under the DRP in Schedule 26, it was not clear when the condition precedent might be satisfied.

62. Finally, there is the related question of the status of any resolution of the dispute. In my view, it is tolerably clear that the DRP (drafted as it was for the Project Agreement) was intended to result in a resolution which would be "final and binding unless the parties otherwise agree": see paragraph 3.1 of Schedule 26, and the reference to "finally resolved" in paragraph 7.1. These provisions anticipate a resolution of any dispute through the decision of the Liaison Committee. That makes complete sense amongst representatives from the two parties to the Project Agreement. If those representatives reached an agreed decision, then it is easy to see why it was also agreed that that would be final and binding.

63. But under the Construction Contract, notwithstanding the absence of representatives of Kajima and the myriad difficulties to which I have already referred, the Liaison Committee could, on the face of it, reach a decision binding on Kajima. I do not consider that this was what the parties ever intended: although Mr Hargreaves eschewed that outcome, he still relied on the provisions which gave rise to it.

64. I do not accept the proposition that, if it was dealing with a dispute between CAP and Kajima, by reference to clause 12.2 of the Project Agreement, the Liaison Committee was only "to provide a means of resolving disputes or disagreements between the parties amicably", rather than reaching a binding decision. The reference to amicable resolution comes from clause 12.2 of the Project Agreement which was not followed through into the Construction Contract (where clause 12.2 was said to be "[Not Used]"). Moreover, clause 12.3 of the Project Agreement (which was again "Not Used" in the Construction Contract) stated that, whilst the Liaison Committee shall have no authority to make any decision that is binding on the parties, that was subject to the express exception, which provided the opposite, in paragraph 3.1 of Schedule 26 (which was, of course, translated directly into the Construction Contract). If there was a conflict between the terms of the Project Agreement and the terms of the Construction Contract, the latter must take precedence because it was the contract between the parties.

65. For all these reasons, therefore, although mindful of the need to enforce the parties' agreement whenever possible, I would dismiss Ground 1 of the appeal.

b) Kajima's Alternative Argument

66. During the course of the hearing, and prompted by various questions from the members of the court, Mr Hargreaves developed an alternative argument based solely on the requirement to refer the dispute to the Liaison Committee. Although there were times when he moved away from the simplicity of this argument, it is right that the court considers it.

67. The alternative argument is straightforward. It focuses entirely on the requirement to refer the dispute to the Liaison Committee. It assumes that the condition precedent was limited to the making of the referral to the Liaison Committee, so that all of the uncertainties and muddle which affect the process from then on become irrelevant. So

it assumes that CAP were obliged to refer this dispute to the Liaison Committee, but that that was their only obligation. On this basis, as Mr Hargreaves accepted, the argument is that CAP could have written their letter of referral and then, 30 minutes later, commenced court proceedings, and would thereby have complied with the condition precedent.

68. Attractive though that simple argument is, there are two main reasons why I do not accept it.

69. First, this appeal is premised on the basis that the judge found that the DRP was a condition precedent. But that was the DRP as a whole. It would be wrong to assume that, if the only enforceable component of the DRP was the initial referral, the judge would have concluded that that was a condition precedent. On the contrary, at [61](v), the judge herself said that it was "unlikely that referral on its own can satisfy the condition precedent". Deciding now that the referral alone could constitute a valid condition precedent would be to upset the delicate balance maintained in the remainder of the judge's judgment.

70. Secondly, I consider that, whilst the court has to endeavour to enforce the agreement between the parties, it should not overstrain to do so, so as to arrive at an artificial result. There is already a danger of that in this case, because of Kajima's reliance on certain terms and disavowal of others. To take just the referral in isolation would be to ignore all the other parts of the process. It is not appropriate to ignore those provisions, and the difficulties that arise from them, and instead to freeze the frame at the outset of the process. That is not considering the process as a whole.

71. The authorities stress that it is important to do just that: see in particular *Holloway* and *Tang*. The judges in those cases treated the process as a whole to see whether or not that process was enforceable. I consider that to be the correct approach.

72. In this context, I would refer, if only by analogy, to those authorities concerned with the correct approach if one part of a construction contract dealing with interim payments and adjudication does not comply with the 1996 Act. On the question of whether the court simply replaces the part which is non-compliant, or instead incorporates the statutory Scheme for Construction Contracts lock stock and barrel, the authorities are plain that the latter is the correct approach: see *Banner Holdings Limited v Colchester Borough Council* [2010] EWHC 139 (TCC), [2010] 131 Comm LR 77; *Yuanda (UK) Co. Limited v WW Gear Construction Limited* [2010] EWHC 720 (TCC), [2010] BLR 435; *Sprunt Limited v London Borough of Camden* [2011] EWHC 3191 (TCC); [2012] BLR 83; and *Pioneer Cladding Limited v John Graham Construction Limited* [2013] EWHC 2954 (TCC).

73. In the same way, I do not consider that it is appropriate for the court to try and tease out of the contractual process one element that may be capable of being salvaged, even if other parts are plainly unenforceable. In those circumstances, I consider that, by analogy with those adjudication cases, the right approach is to consider the DRP as a whole. When that is done, and when considered under the umbrella of the Construction Contract, I consider that the process was unenforceable.

74. Finally, in respect of the both the primary and the alternative argument, I am unable to accept that the court cannot have at least a weather eye on the issue of utility. The DRP

process under the Construction Contract, even when taken as a whole, was described by Mr Hargreaves with eloquent understatement as having a utility that "is not easy to identify". If the process was just about the referral to the Liaison Committee then I consider the process to be equally, if not more, pointless. It would mean that, immediately after that referral, CAP could commence proceedings against Kajima. In those circumstances, it is impossible to ascribe any value to the referral. It might be said that the process allowed the "talking shop" element of the DRP to proceed in parallel with court proceedings, but that was precisely what was achieved by the commencement of the proceedings and the subsequent application by CAP for a stay. There is no difference between those two parallel processes: one could merely start 30 minutes before the other, and it makes no practical difference which is first.

75. In those circumstances, to say that CAP's failure to utilise a pointless DRP now prevents them from pursuing proceedings started in time against Kajima (who say that they would never have been bound by the Liaison Committee's decision in any event) seems to me to elevate form over substance. That conclusion may be relevant to Ground 3 (the exercise of discretion).

7.4 Conclusions on Ground 1

76. For all those reasons, I consider that the judge was right to find that the DRP was unenforceable under the Construction Contract. Although that conclusion, if my Lords agree, means that the appeal must be dismissed, I go on to deal with Grounds 2 and 3 in any event.

<u>8. Grounds 2 & 3: The Exercise of Discretion</u>

8.1 The Law

a) The CPR

77. The relevant parts of CPR 11 provide as follows:

> "11(1) A defendant who wishes to-
> (a) dispute the court's jurisdiction to try the claim; or
> (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
> …
> (6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including-
> (a) setting aside the claim form;
> (b) setting aside service of the claim form;
> …
> (d) staying the proceedings."

As noted at paragraph 32 above, it is accepted that this is a case under r.11(1)(b) only: it is a matter for the court's discretion.

78. In *IMS SA v Capital Oil and Gas Industries LTD* [2016] EWHC 1956 (Comm), Popplewell J (as he then was) distinguished between challenges under r.11(1)(a) and r.11(1)(b). The first is a complaint that the court's jurisdiction had not been successfully invoked; the second is an assertion that the court should decline to exercise its discretion. At [28], Popplewell J said:

> "The two types of challenge are logically and juridically separate and distinct. Moreover they typically involve different forms of relief. Where there has been no valid service necessary to found *in personam* jurisdiction, the court will set aside service and set aside the claim form. On the other hand where the challenge is to the exercise of jurisdiction on grounds of *forum non conveniens*, the appropriate relief is usually a stay of proceedings, which is capable of being lifted, if appropriate, in the light of subsequent events."

b) The Inherent Power To Grant A Stay

79. Starting with *Channel Tunnel v Balfour Beatty Ltd* [1993] AC 334, there is a good deal of authority to support the proposition that the court has the inherent power to stay proceedings which have been brought in breach of a contractual dispute resolution clause. The clause in that case was mandatory. Lord Mustill said at p.362 E-E:

> "Here, it is quite clear that the presence of the clause does not deprive the court of jurisdiction over a dispute arising under the contract. If an action is brought to enforce the contract, and either the defendant does not apply for a stay, or the court decides in its discretion not to grant one, the action proceeds in exactly the same way as if the arbitration clause did not exist…"

80. In both *Cable & Wireless,* referred to above, and *DGT Steel and Cladding Ltd v Cubitts Building and Interiors Ltd* [2008] Bus LR 132, the courts stayed the proceedings in order to enforce the contractually agreed dispute resolution procedure. In neither case was it suggested that the mandatory procedure was a condition precedent.

81. In *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] BLR 576 (TCC), O'Farrell J stayed proceedings which were commenced in breach of a contractual mediation scheme. She found the contractual agreement to mediate to be a condition precedent to the right to commence court proceedings. She did not strike out those proceedings. She said:

> "[58] There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement.
> [59] <u>The Court must consider the interests of justice in enforcing the agreed machinery under the Agreement. However, it must also take into account the overriding objective in the Civil Procedure Rules when considering the appropriate order to make." (Emphasis supplied)</u>

82. Counsel were unable to find any case where proceedings brought in breach of a contractual dispute resolution clause were struck out, as opposed to being made the subject of a stay. The only case where the proceedings were struck out was on rather unusual facts, and is dealt with at paragraph 87 and following below.

83. It is also right to note what the TCC Pre-Action Protocol ("PAP") and Court Guide say about non-compliance with alternative dispute procedures (in this case, with the PAP itself) before starting proceedings. In the PAP at paragraph 12.1, claimants are advised that if they have a claim which is close to the limitation period and they have not complied with the PAP, then they should commence the claim and seek a stay so as to comply with the PAP. Similarly, in the TCC guide at paragraph 2.3.2, precisely the same regime is set out. That provides:

> "In addition, a claimant need not comply with any part of the [TCC Pre-Action] Protocol if, by so doing, the claim may become time-barred under the Limitation Act 1980. In those circumstances, a claimant should commence proceedings without complying with the Protocol and must, at the same time, apply for directions as to the timetable and form of procedure to be adopted. The Court may order a stay of those proceedings pending completion of the steps set out in the Protocol."

c) Setting Aside/ Striking Out

84. The only authority where the proceedings were struck out is *Snookes v Jani-King (GB) Ltd* [2006] EWHC 289 (QB); [2006] I.L. Pr.19. This was not concerned with a failure to follow a contractually-agreed ADR process. Instead, a claimant brought court proceedings in Swansea District Registry, in breach of an obligation to bring such proceedings in London. Silber J set aside the claim form under CPR 11(6)(a). He said:

> "73. In my view, Mr Snookes and his advisors cannot show that they have acted reasonably in not issuing proceedings in London for the following six reasons which have individually and cumulatively led me to that conclusion and which I will now set out in no particular order of importance. Firstly, Mr Snookes only issued his claim against the defendants at or after the end of the limitation period for some of his causes of action with the result that he must therefore take the risk of limitation problems arising. Secondly, before the present proceedings were commenced, neither Mr Snookes nor his legal representatives asked the defendants whether they would waive cl.27.14. Thirdly, it appears that the reason why proceedings were not issued in London is apparently that, at the time of their issue, cl.27.14 was not according to Mr Hitchcock, the claimants' solicitors, in "the forefront of his mind." No cogent explanation is given by Mr Hitchcock as to why he did not consider properly the impact of cl.27.14 before issuing the present claims. The mere fact that in a previous case the defendants have not relied on cl.27.14 does not mean that it would always take that stance; in any event, the defendants' solicitors could have been asked if they agreed to proceedings being commenced in Swansea. Fourthly, the legal representatives for the claimant ought to have known from reading the agreements that by issuing proceedings in Swansea, they might be subject to an application for a stay and if this application was successful, new proceedings would then have to be issued in which the defendants would or could run a limitation defence against part of the claim. Fifthly, there is no

reason why it could be thought by the claimant or their solicitors that Swansea District Registry was an appropriate forum especially as neither party lives nor works in Swansea and Mr Snookes lives and works in Birmingham, which is closer to London than Swansea. Sixthly, there are no obvious disadvantages to the claimants in *issuing* proceedings in London as compared with Swansea, because this application is only concerned with where proceedings should be instituted and not subsequential issues, such as where the claim should be heard.

74. In my view, this is a clear case in which there should be a stay of the present proceeding or the claims forms should be struck out. The claimants would then be obliged to comply with cl.27.14 which for the reasons I have sought to explain, required the present proceeding to have been brought in a court of competent jurisdiction in London and that this is contractual pre-condition with which the claimants had to comply in the absence of "*a strong case for doing so*" if they wished to sue the defendants. It would be wrong to permit the claimants to by-pass this requirement in the absence of "*a strong case for not doing so*". In reaching that conclusion I have not over looked Mr Hitchcock's' contention that the defendants' application amounts to "procedural manoeuvring", but in my view, there is nothing improper or questionable about a party invoking a clear contractual provision such as cl.27.14 especially if the party complaining about its effect has not been able to state that he would not have entered the agreement if he had been aware of it."

8.2 The Judge's Findings

85. At [82] and [85], the judge said that, in the circumstances of this case, a stay was "the default remedy". She referred to *IMS* specifically in support of that proposition. That finding gives rise to Ground 2 of the appeal.

86. At [81]-[89], the judge sets out the reasons why, even if the DRP had been enforceable, she would have exercised her discretion to stay the proceedings, rather than striking them out. Her conclusion at [89] was that CAP's decision to issue proceedings so as to avoid expiry of the limitation period, and thereafter to seek an extension of time to facilitate compliance with the pre-action protocol and with the contractual DRP, represented what she called "an entirely sensible approach".

87. The judge also set out her reasons for concluding that setting aside or striking out the claim form would be a "a draconian remedy, wholly unsuitable for the circumstances of this case" at [88]. Amongst other things, she concluded that:
(i) CAP was not in a position to refer the issue of any Deductions made or to be made by the Trust to the Liaison Committee prior to the expiry of the limitation period: [88(i)].

(ii) The Deductions calculation was a very complex one, such that the quantum of CAP's claim against Kajima was never discussed at the Liaison Committee prior to the commencement of the proceedings, because CAP did not have any figure from the Trust as to the level of deductions which it would seek to make: [88(iii)].

(iii) CAP had initial discussions with the Trust during the first standstill period, but thereafter it was Kajima who asked CAP not to progress such negotiations. That was

because, although Kajima had commenced the remedial works, it still had a great deal to do and was not certain about the total extent of those works. That plainly impacted upon the stance Kajima would or might take to any claim made against them. In this way, it was Kajima's choice to carry out the remedial works before engaging in any discussions: [88(ii)].

(iv) The evidence was that it was unrealistic to have expected CAP and the Trust to achieve a settlement of the claims arising out of the remedial works in the period between 30 November 2021 and 31 December 2021, "particularly as the Trust was in the midst of dealing with the latest developments in the COVID pandemic". CAP had informed Kajima on 16 December 2021 that the Trust would not begin any settlement discussion until after the remedial works had been completed. Such works were not completed until after the expiry of the limitation period: [88(iv)].

(v) The remedial works were not in fact substantially completed until mid-January 2022 and the Trust finally agreed to meet with CAP on 26 January 2022, again after the expiry of the limitation period: [88(v)].

(vi) The judge found that this was not a claim in respect of which the failure to follow the DRP meant that Kajima did not understand the claim that it would have to meet and/or was not expecting such a claim. On the contrary, Kajima had been aware of the potential of a claim for some considerable time. It had sought to protect its own position by commencing separate TCC proceedings against its own sub-contractors in respect of the same defects: [88(viii)].

8.3 The Proper Approach to Those Findings On Appeal

88. Because this was an exercise by the judge of her discretion, the threshold for any appeal against that exercise is a high one. It has been repeatedly said that it is important for this court to uphold robust, fair case management decisions made by first instance judges: see *Mannion v Ginty* [2012] EWCA Civ 1667 at [18]; *Mitchell v News Group Newspapers Limited (Practice Note)* [2014] 1WLR 795 at [52]; *Chartwell Estate Agents Limited v Fergies Properties SA* [2014] 3 Costs LR 588 at [63]; and *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 WLR 110. In *Abdulle and others v Commissioner of Police of the Metropolis (Practice Note)* [2015] EWCA Civ 1260; [2016] 1 WLR 898, Lewison LJ reiterated these principles even though, as he made plain at [24], had he been the first instance judge, he would have reached a different conclusion.

8.4 The Submissions in Summary

89. In his oral and written submissions, it was Mr Hargreaves' position that the judge was wrong to suggest that a stay was the 'default remedy'. He invited this court to re-decide the CPR r.11(6) discretion afresh because, he said, the judge took into account irrelevant matters and failed to take into account relevant ones, in particular Kajima's deprivation of a limitation defence. Mr Hargreaves invited this court to deal head-on with the clash between the deprivation of a claim, on the one hand, and the deprivation of a limitation defence, on the other, and set aside the claim form. Mr Hargreaves relied on *Snookes v Jani-King (GB) Ltd* as a case where the court exercised its discretion in this way. He submitted that this would not be a draconian remedy because CAP had

breached a contractually agreed condition precedent and had chosen not to refer the dispute despite having ample time to do so.

90. In response, Mr Webb took issue with the premise of a limitation defence ever arising for Kajima, given that CAP was aware of the impending deadline and would not let it pass without launching proceedings. He characterised the exercise of the judge's discretion as a case management decision which had to be 'perverse' for it to be altered on appeal. On CAP's case this threshold was not met, particularly as the judge had the limitation defence in her mind, given that it was included at paragraph 1 of her judgment. Accordingly, the judge was correct to say she would have granted a stay in this case.

8.5 Was the Judge Right to Describe a Stay as 'The Default Remedy' (Ground 2)?

91. In these circumstances, a stay of proceedings is not a default remedy in the sense of an automatic or inevitable relief which the court will grant to A, when B ignores the contractual dispute resolution procedure. The right remedy will always turn on the facts of the case. *IMS*, which the judge cited as authority in support of her conclusion, is expressly dealing only with *forum non conveniens*, which does not arise here.

92. However, I take the judge to have used the expression "default remedy" simply as a shorthand to describe the usual (as opposed to the inevitable) order that the court will make when proceedings are started in breach of a mandatory contractual dispute resolution mechanism. On that basis, she was plainly right: in all of the cases noted above, with the exception of *Snookes*, where there was an enforceable contractual dispute mechanism, there was a stay of the court proceedings started in breach of the contract. They did not lead to the court proceedings being struck out. Furthermore, whilst most of those cases are concerned with mandatory provisions rather than provisions that are described as conditions precedent, it is right to note that *Ohpen* was a case involving a breach of the condition precedent. O'Farrell J stayed the proceedings in that case to allow the condition precedent to be fulfilled.

93. I am also satisfied that, even if the judge did overstate the wide applicability of stays in these circumstances, it did not affect the exercise of her discretion. Indeed, the judge expressly said at [85] that, even though "a stay is the appropriate or default remedy", she could see no reason why in a case which engaged r.11(1)(b), "the court could not determine that a different form of relief was appropriate having regard to the particular facts."

94. In those circumstances, Ground 2 on its own must fail. The real questions raised by Ground 3 are: (a) Was the judge's exercise of her discretion in some way flawed, requiring this court to exercise it afresh; (b) If so, does the fact that, on Kajima's case, they have been deprived of a limitation defence mean that the claim form should have been set aside? I deal with those two issues in section 8.6 below. I do so on the basis that, contrary to my views on Ground 1, the DRP was enforceable under the Construction Contract.

8.6 Analysis of Ground 3

a) The Judge's Exercise of Discretion

95. In my view, the matters taken into account by the judge in the exercise of her discretion (as summarised in paragraph 87 above) were all relevant. She was entitled to take them into account in the exercise of that discretion. In particular:

(a) They all went to the conduct of the parties, and the consequences of that conduct. They were relevant to how and why it was that the court proceedings were started when they were, without activating the DRP. They formed the basis of the judge's conclusion that CAP had acted reasonably throughout.

(b) This was not a case in which, through indolence or incompetence, a limitation period was in danger of being missed. Instead, limitation was at the forefront of everybody's mind. The reason why such a long time had elapsed since the original construction works had been carried out was because of the tragedy at Grenfell, the consequential survey, the discovery of alleged defects, and the ongoing remedial works.

(c) If Kajima were going to be liable for more than just the costs of the remedial works, which they had already agreed to bear, their liability would be triggered by i) claims from the Trust against CAP, which would either be agreed by CAP or determined against CAP, and which would then be passed on to Kajima; ii) CAP's own claims against Kajima. There was no dispute that neither of those claims could be fully quantified until the end of the remedial works, which were still ongoing in early 2022.

(d) Under the Project Agreement, any claims by the Trust against CAP would have to be discussed with CAP either informally or under the auspices of the Liaison Committee. But the evidence was that those negotiations had been delayed at Kajima's request so as to allow Kajima to focus on the remedial works. That was sensible, but was again an important factor relevant to the exercise of the judge's discretion.

(e) CAP were therefore in a difficult position. Up the contractual chain, the Trust did not want to take any action until the remedial works had been completed. Down the contractual chain, Kajima had asked for the same indulgence. It meant that CAP was effectively caught between two parties who had both sought, for perfectly understandable reasons, to delay resolving issues of liability and quantum. Again that was plainly relevant to the exercise of the judge's discretion.

96. Although the judge did not make this point in this way, it is not unfair to say that, on her findings, it was Kajima who were primarily responsible for the position in which CAP found themselves. They carried out works which, on the Trust's and CAP's case, were defective. Those defects were hidden, not deliberately, but by the nature of the building works themselves: defective or incomplete fire-stopping is a notorious problem because, once the building has been completed, it cannot usually be identified, save by way of targeted inspections which involve opening up. Such inspections are intrusive, so they usually need a trigger: something to justify them in the first place. Here, that was the Grenfell fire tragedy. But the existence of such hidden defects and the delay in their discovery was, on this basis at least, the responsibility of Kajima.

97. Conversely, I do not accept that the judge failed to take into account the matters now relied on by Mr Hargreaves. In particular:

(a) Mr Hargreaves' principal submission was that the judge did not take account of Kajima's contention that it was being deprived of a limitation defence. As Mr Webb demonstrated in his submissions, that point was front and centre in the judgment: indeed, it is expressly referred to in the very first paragraph of the judgment. It is the explanation for her careful analysis of the reasonableness of Kajima's conduct.

(b) The judge was plainly aware that, pursuant to the Standstill Agreement, steps could be taken under the DRP. She expressly referred to it at [21] and [88](i). It was something that she took into account.

(c) The judge was also aware of why the court proceedings were commenced prior to the subsequent referral. The critical parts of the evidence were set out at [88](ii) – (iii). The judge accepted CAP's reasons for acting as they did, describing them as comprising "an entirely sensible approach": [89].

(d) Again contrary to Mr Hargreaves' submission, the judge acknowledged that Kajima had given one month's notice that it would not agree to extend time further. She referred to that expressly at [88](iv).

(e) Finally, the judge took into account the letter from Kajima's solicitors of 30 November 2021. She referred to it expressly at [88](iv).

98. For those reasons, I consider that the criticisms of the judge's exercise of her discretion have not been made out, and this court has no basis in law for interfering with that exercise. That means that, if my Lords agree, Ground 3 must also be dismissed.

b) The Limitation Issue and the Balancing Exercise

99. Now let us assume that my primary conclusion as to the judge's exercise of discretion is wrong. Any re-exercise of discretion could only be on the basis of the first point addressed in paragraph 97 above, namely that the judge did not take into account, or did not give sufficient weight to, the submission made by Kajima that they had been deprived of a limitation defence. That was at the heart of Kajima's case: as Mr Webb correctly characterised it, their submission was that "all that matters is the lost limitation defence". That was the issue which Mr Hargreaves invited us to address "head-on". In my view, for the reasons set out below, that point, even when it is accorded the greatest possible weight, is not sufficient to result in the striking out of the claim against Kajima.

100. I should say that I do not necessarily accept the premise that Kajima Construction have been deprived of a limitation defence. I think in principle that Mr Webb may well be right to say that what Kajima have been deprived of was a referral to the Liaison Committee immediately before the issue of these proceedings. That may be a very different thing. However, I am prepared to accept the premise for the purposes of this argument.

101. The deprivation of a limitation defence is an important element of the balancing exercise. But it cannot alone be decisive. That is why, in *Snookes*, the only case in which the proceedings were struck out, it was only decisive because it was balanced

against the judge's finding of unreasonableness on the part of the claimant. There was thus little to be said in the claimant's favour. That is also why, in *Ohpen*, O'Farrell J expressly balanced the importance of keeping parties to their contractual bargain against the need to consider the overriding objective, in order to arrive at a proportionate result.

102. Here, for the reasons already explained, CAP acted reasonably at all times. In my view, the balancing of the relevant factors on the particular facts of this case, even giving the greatest possible weight to the deprivation of a limitation defence, still results in a proportionate order for a stay, not a strike out. The position here could be said to be similar to a case where there has been an abuse of process, but where the court has concluded that striking out would not be a proportionate response: see, for example, *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685; [2015] 1 WLR 4534.

103. In reaching that conclusion, I do not underplay the significance of cases, like *Cecil and Others v Bayat and others* [2011] EWCA Civ 135, [2001] 1 WLR 3086 which, following a request from the court, was addressed by the parties in post-hearing submissions. But on my analysis, *Cecil v Bayat* provides some further support for my conclusion. Although it did not directly involve CPR r.11, it is of at least some assistance by analogy, because it addressed the question of how the court's discretion under CPR r.7.6(3) should be exercised, when this will have the effect of depriving a party of a limitation defence. Stanley Burnton LJ said:

> "54. In paragraph 181 of his judgment, when considering the balance of hardship, the judge referred to the Claimants' loss of their claim, but did not refer to the Defendants' loss of their limitation defence, other than to say that the extension in question was "only just outside the extended period". But in the law of limitation, a miss is as good as a mile. Furthermore, the primary question in a case where limitation is engaged is not whether the Defendants could or could not assume that the claim was no longer being pursued (to which the judge did refer). The primary question is whether, if an extension of time is granted, the defendant will or may be deprived of a limitation defence.
>
> 55. It is of course relevant that the effect of a refusal to extend time for service of the claim form will deprive the claimant of what may be a good claim. But the stronger the claim, the more important is the defendant's limitation defence, which should not be circumvented by an extension of time for serving a claim form save in exceptional circumstances."

104. In a concurring judgment Rix LJ continued:

> "109. … in a limitation case, a claimant must show a (provisionally) good reason for an extension of time which properly takes on board the significance of limitation. If he does not do so, his reason cannot be described as a good reason. It is only if a good reason can be shown that the balance of hardship could arise." (Emphasis added)

Consequently, in *Cecil v Bayat,* this court set aside the claim form because the claimant's reason for seeking an extension of time to serve it (in order to raise litigation funding) was not a good reason to deprive the defendants of a limitation defence. It was

a decision which turned on a defendant's right to finality, balanced against the reasonableness – or otherwise – of the claimant's conduct. As in *Snookes*, reasonableness remained an important factor. In this case, that same balancing exercise produces a different result, for the reasons I have already set out.

105. This analysis also provides the answer to Mr Hargreaves' related point, by reference to the judgment of May LJ in *Steamship Mutual v Trollope & Colls* [1986] BLR 77 at 88, that limitation periods give effect to the strong policy reasons for achieving "swift justice". What May LJ had in mind was an ordinary case where the clock ticks round to the expiry of the limitation period and, at the last moment, the claimant wakes up to his or her claim; not a case like this, where the claimant has acted reasonably throughout and the remedial works (which are likely to be the subject of claim and cross-claim in the proceedings) have not even been completed. In addition, as I have said, this is a claim arising indirectly out of the tragedy at Grenfell. One of the other consequences of that fire has been the Building Safety Act 2022, which has the effect, in some instances, of increasing the limitation period to one of 30 years. I would venture to suggest that that is nobody's idea of "swift justice".

106. For these reasons, therefore, it seems to me that, even if Mr Hargreaves was right and the judge did not pay sufficient regard to the deprivation of Kajima Construction's limitation defence, it makes no difference to the outcome. I would re-exercise the discretion in favour of CAP and grant a stay for the reasons that I have given.

107. On the potential re-exercise of discretion, I have one final observation. There was some debate as to whether, if the DRP was enforceable, but of no practical value, that lack of utility was relevant to the exercise of the court's discretion. I am bound to say that, if I had concluded that any part of the DRP was enforceable, it would only have been the initial referral to the Liaison Committee. Because such a referral could and would have been carried out effectively simultaneously with the court proceedings, it would have been pointless: see paragraphs 74-75 above. I consider that this would be an additional factor in any re-exercise of the court's discretion, and whilst not as important as the reasonableness of CAP's conduct, it would have provided yet further support for the conclusion that, notwithstanding the assumed deprivation of the limitation defence, the court proceedings should be stayed, and not struck out. It would not be proportionate to exercise the court's discretion to strike out a claim because of a failure by a party (who has otherwise acted reasonably) to activate a useless procedure.

8.7 Conclusions on Grounds 2 and 3

108. For the reasons set out above, I consider that the judge was right to conclude that the usual remedy in cases such as this is a stay rather than a strike out. I conclude that, on the merits, the judge was right to exercise her discretion in favour of a stay, rather than a strike out. If I was obliged to re-exercise the court's discretion, I would come to the same conclusion.

9. The Respondent's Notice

109. The Guarantee contained the following relevant provisions:

> "**Promise To Pay**

> 2.1 The Primary Guarantor as primary obligor guarantees the due and punctual performance by the Contractor of each and all of its duties or obligations to Project Co under or in connection with the Building Contract past, present or future when and if such duties and obligations shall become due and performable according to the Building Contract and if the Contractor fails to pay any debt, damages, interest or costs past, present of future due from the Contractor to Project Co under or in connection with the Building Contract, the Primary Guarantor shall as principal debtor pay such amount to Project Co provided always that the Primary Guarantor's liability under this Deed in respect of any matter shall not exceed that of the Contractor under the Building Contract in respect of that matter (or which, but for a circumstance of the type referred to in clause 4.3 below, the liability of the Contractor under the Building Contract would have been) and, for the avoidance of doubt, the Primary Guarantor shall (for the purpose of ascertaining the extent of the Contractor's liability under the Deed) be entitled to rely on the same defences (including any rights of set-off or limitations of liability) as those which the Contractor is entitled to raise under the Building Contract save for any as referred to in clause 4.3 below…
>
> 2.4 The guarantee given by the Primary Guarantor shall be a primary obligation and accordingly Project Co shall not be obliged before enforcing this guarantee to any action in any court or arbitral proceedings against the Contractor, to make any claim against or any demand of the Contractor, to enforce any other security held by it in respect the obligations of the Contractor under the Building Contract or to exercise, levy or enforce any distress or other process of execution against Contractor"

110. It is common ground that the Guarantee provided by Kajima Europe contained no alternative dispute mechanism. It is also common ground that the claim against Kajima Europe was brought within the limitation period, as extended by agreement in the Standstill Agreement.

111. Notwithstanding that, Mr Hargreaves submitted that, if he was right on both grounds of appeal, then there could be no claim against Kajima Europe under the Guarantee. He put this in two ways. First, he said that, if Kajima had been deprived of a limitation defence, that in turn deprived Kajima Europe of a defence under clause 2.1 of the Guarantee. Alternatively, he said that, if Kajima Construction's appeal was allowed, there would be no claim against them, which meant that its obligations would not become due and so could not form the subject matter of the Guarantee provided by Kajima Europe.

112. In my view, for the reasons set out below, neither of these arguments are correct.

113. On the assumption that Kajima Construction have a complete limitation defence to the claim, and the claim form against Kajima Construction is struck out, then of course CAP would not be able to recover anything from Kajima Construction. But it is trite law that a successful limitation defence does not extinguish the claim: it merely bars the remedy: see in particular *Royal Norwegian Government v Constant & Constant* [1960] 2 Lloyd's Rep 431 at 442. As the editors of Chitty on Contracts (34th Ed) put it at 31-127, "Limitation is a procedural matter and not one of substance; the right continues to exist even though it cannot be enforced by action".

114. Accordingly, if the appeal was successful, CAP would be prevented from seeking any remedy against Kajima Construction. But they would not be prevented from seeking any remedy against Kajima Europe because limitation bars only the relief they would otherwise have claimed against Kajima Construction.

115. There is nothing in clause 2.1 that changes that position. Kajima Construction, as the contractor, would fail to pay any debt, damages, interest or costs, because (on this hypothesis) they had a valid limitation defence. But Kajima Europe as the Primary Guarantor, had no such defence and would therefore be liable as the "principal debtor" to pay such sums.

116. Mr Hargreaves sought to rely on the proviso in clause 2.1, which contained the usual limiting provision: "…provided always that the Primary Guarantor's liability under this deed in respect of any matter shall not exceed that of the Contractor under the Building Contract…". But that only reinforces the point I have previously made. The limitation defence would not have any effect on Kajima Construction's *liability* to CAP: it would simply bar CAP from recovering damages from them. It is quite common under guarantee claims, when the contractor has, for example, gone into liquidation, for the claim against the guarantor to be pursued and assessed on the basis of the assessment of the notional liability of the contractor to the employer.

117. Mr Hargreaves also referred to the second part of the proviso and the reference to the primary guarantor being "entitled to rely on the same defences" as Kajima Construction. But that was not an open-ended provision. It applied solely "for the purposes of ascertaining the extent of the Contractor's liability". At the risk of repetition, the existence of a limitation defence is irrelevant for the purposes of ascertaining the extent of Kajima Construction's *liability* under the Construction Contract, so irrelevant to the claim against Kajima Europe.

118. Furthermore, I consider that this basic position is confirmed by the express terms of clause 2.4 of the Guarantee. In accordance with clause 2.4, CAP were not obliged to bring any proceedings against Kajima Construction, or to make any claim against them. Instead the Guarantee is a primary and a standalone obligation on the part of Kajima Europe. The issues as to the DRP therefore have no effect in law on the validity of CAP's claim against Kajima Europe.

10. Conclusions

119. For the reasons set out in section 7 above, I would dismiss Ground 1 of the appeal. For the reasons set out in section 8 above, I would dismiss Grounds 2 and 3 of the appeal. For the reasons set out in section 9 above, I would in any event allow the point in the Respondent's Notice which the judge (for understandable reasons) did not address. Of course, this last point means that, whatever the outcome of the appeal had been, the full claim against Kajima Europe remains a valid claim, brought in time.

120. Finally, I note that, 12 days after the hearing of this appeal, counsel courteously informed the court that the entire case had settled. They went out of their way to stress that they were *not* asking the court not to hand down judgment. We considered that, in view of the fact that our judgments were largely complete by then, and the points raised were of some importance generally, we would accept the parties' implied invitation to

finalise the judgments and hand them down. We are, however, grateful to the parties for keeping the court informed as to the progress of their negotiations.

LORD JUSTICE POPPLEWELL

121. I agree that the appeal should be dismissed on grounds 1 to 3, but on a narrower basis than that suggested by the reasoning of Coulson LJ. Since the case has settled, and I understand Holroyde LJ to agree with Coulson LJ's reasons in full, I do not propose to do more than explain very briefly my points of agreement and disagreement. No useful purpose would be served by an elaboration of my reasoning on points of disagreement, which largely turn on an interpretation of what on any view is a clumsy adoption of particular terms from a head contract into a sub-contract.

122. There can be no doubt, in my view, that Kajima and CAP intended the DRP to apply to disputes between them, and to form a condition precedent to the commencement of proceedings. Schedule 26 to the Construction Contract contained identical provisions in paragraphs 1 to 8 to those in Schedule 26 to the Project Agreement; but Schedule 26 to the Construction Contract had a different heading, additional definitions, and additional clauses at paragraphs 9 to 11. This was not simply a careless cut and paste, or incorporation by reference, but a conscious adoption of these DRP provisions as governing disputes between CAP and Kajima.

123. Clause 1 of the Construction Contract provided that terms defined in Schedule 1 should have the meaning there specified and that the Contract and Recitals should be construed accordingly. Schedule 1 provided, amongst other definitions:

> 124. "'Liaison Committee' means the committee referred to in clause 12 (*Liaison Committee*) of the Project Agreement."

That must necessarily have included, for the purposes of the DRP in Schedule 26 to the Construction Contract, all the features of the Liaison Committee referred to in clauses 12.1 to 12.12 of the Project Agreement, which defined its membership, voting and other procedures and, importantly, its powers and functions. Indeed that was common ground before us, notwithstanding the "[not used]" rubric in clause 12 of the Construction Contract.

125. Mr Webb's submission, that the proper construction of the provisions is that Kajima was to be bound by an adjudication, through a process in which it had no ability to participate, by a body on which it was not represented, and which was adverse to Kajima's interests, is, as both sides agreed, commercially absurd. The conclusion to be drawn is not, however, that the provisions are therefore insufficiently certain to be enforceable, but rather that that is not how they are to be construed. As Lord Diplock said in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, in the well-known passage cited with approval by Lord Hofmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, "…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense." The function of the Court is first to decide what the parties have agreed, before then considering whether such agreement is too uncertain to be enforceable: see "Lewison, *The Interpretation of Contracts,* 7th Edn" pp. 518-9.

126. If the parties to the Construction Contract intended the Liaison Committee to have the powers and functions as defined in the Project Agreement, as it is common ground that they did by their adoption of the definition of 'Liaison Committee' in their own contract, the DRP must be understood to be a mediatory process conducted by the Liaison Committee, in which it performs a facilitative, not adjudicatory, role. This is because the relevant function of the Liaison Committee in relation to the DRP is defined by clause 12.2(c), namely to provide a means pursuant to the DRP of resolving disputes or disagreements *amicably*. An amicable resolution does not involve an adjudication imposing a resolution on an unwilling party. It is true that paragraph 3.1 of Schedule 26 to the Construction Contract provides that any decision of the Liaison Committee shall be final and binding unless the parties otherwise agree; and I agree with Coulson LJ that "parties" in paragraph 3.1 means Kajima and CAP. However, if a construction of paragraph 3.1 would involve Kajima being bound by a decision in circumstances which would be commercially absurd, such a construction must yield to business common sense, which involves confining the role of the Liaison Committee to the function ascribed to it by clause 12.2(c). In context it is a permissible linguistic manipulation of the qualificatory wording in paragraph 3.1 itself ("unless the parties otherwise agree") to identify this agreed function as a contrary agreement between the parties. In that way sensible content is to be given to all the contractual provisions, consistently with business common sense.

127. Performing the function of seeking to have the dispute resolved amicably would require the Liaison Committee to provide Kajima with a fair opportunity to be involved in the mediatory process, which its clause 12 powers enabled it to do. I would not, therefore, accept Mr Webb's submissions that Kajima would have no entitlement to make representations or see documents or participate in the process. It is necessarily implicit in a good faith exercise of the Liaison Committee's function that Kajima would be entitled to do so.

128. There is nothing, in my view, which is uncommercial about the parties providing for such a non-binding form of ADR. It is what is provided for in most forms of mediation, and would be provided in this case by a body with particular experience and expertise in this project. Nor would it necessarily be the case that the CAP and Trust appointees on the Liaison Committee would act in a way which was contrary to the interests of Kajima. Even assuming that in bad faith they would choose solely to advance the interests of their party appointers, CAP's interests would not always align with the Trust's against Kajima. Indeed in the current dispute, the interests of CAP would be aligned with those of Kajima against the Trust were there any doubt about the solvency of Kajima. But even if in a particular case the interests of CAP and the Trust were aligned with each other and adversely to those of Kajima, and the Liaison Committee did not act in good faith in its mediatory functions, the result would simply be the absence of an amicable resolution; Kajima would not be bound.

129. Clause 12.5 empowers the Liaison Committee to adopt such procedures and practices for the conduct of its activities as it considers appropriate from time to time. The fact that the specific steps in the procedure to be adopted in relation to seeking amicable resolution are not agreed by the parties, but are left to be determined by the Liaison Committee, does not, in my view, render the DRP process insufficiently certain to be enforceable. The process would not depend upon further agreement between the parties but upon what was decided, procedurally, by the Committee. Kajima's obligations

would be to engage in the mediatory procedure required by the Liaison Committee, in good faith. The same is true of CAP. There is nothing uncertain about the scope of their minimum obligations.

130. Nor, in my view, would there be anything uncommercial in Kajima's alternative argument, namely that it was the commencement of the process, rather than its completion, which formed the condition precedent to the commencement of proceedings. An agreement which made the commencement of the mediation process a condition precedent to the commencement of proceedings, rather than the completion of the mediation process, would still force a party to comply with the contractual bargain by engaging in the mediation process, and following it in good faith; neither party could just ignore it. This would not be a pointless requirement, but one of real substance. The ability to commence proceedings as soon as this commitment were made would maintain this useful function, whilst balancing it by removing any impediment arising from the approaching expiry of a limitation period, so as to mirror the position in relation to the PAP in the TCC. Any potential prejudice from the processes taking place in parallel would be met by the court's case management powers, which would fall to be exercised in the fact specific circumstances of the progress of the DRP; no doubt there would be a strong presumption in favour of an early stay for so long as the process was potentially capable of producing an amicable resolution.

131. I am attracted by this interpretation, in the light of the principles referred to by Coulson LJ at paragraph 36, which are also reflected by the learned author of *The Interpretation of Contracts,* 7th edn at p 521 in a formulation cited by this Court with approval in *Willis Management (Isle of Man) Ltd v Cable & Wireless PLC* [2005] 2 Lloyd's Rep 597 at [21] as being: "Where parties have entered into what they believe is a binding agreement, the court is most reluctant to hold that their agreement is void for uncertainty and will only do so as a last resort."

132. However, I do not regard the alternative argument as one which is open to Kajima in this Court. The Judge's finding that the DRP was a condition precedent was that the completion, not commencement, of that process was the condition, and there has been no appeal from that aspect of her finding. The alternative argument was not advanced below, and it is not inconceivable that there might have been factual matrix evidence which had a bearing on it. Moreover, it was not even unequivocally adopted by Mr Hargreaves when raised in the course of argument by the Court on this appeal: in his reply he appeared to disavow it.

133. Ground 1 must therefore be determined on the basis that the condition precedent is the completion of the DRP process. On that basis, I agree that the condition is too uncertain to be enforceable because of the uncertainty as to how and when the DRP process is complete. I agree with Coulson LJ's reasons at paragraph 58 for rejecting Mr Hargreaves' submission that the process is necessarily complete 10 days after referral. I do not agree, however, that there is any other aspect of the DRP which renders it unenforceable for uncertainty.

134. As to Ground 2, I agree that the Judge misinterpreted what I said in *IMS* if she thought it supported the notion that a stay was the usual remedy in anything other than *forum non conveniens* cases. Nor, in my view, is a stay the "default remedy" in the sense of there being any presumption in favour of it, or it being the usual remedy, in the present context. All depends upon the particular features of the individual case. If a party has

commenced proceedings in breach of contract, and a stay rather than strike out will deprive the other party of a limitation defence, both those factors are important considerations in favour of striking out rather than staying the claim.

135. If the condition precedent under consideration in this case were the commencement of the mediation process rather than its completion, I would strongly incline to the view that the appropriate remedy would be to strike out the claim. To do otherwise would be to allow CAP to rely on its breach of contract to deprive Kajima of a limitation defence; and to do so when in the period following notification that the Standstill Agreement was not going to be renewed, there was ample time to comply with the condition and no practical obstacle to doing so. None of the Judge's reasons for declining to strike out the claim would have any significant weight in the face of those very important considerations, based as they are on the premise that proceedings could not be commenced until the DRP was completed.

136. However, on the footing that the condition precedent was the completion of the process, I agree with Coulson LJ that there are no grounds for interfering with the Judge's exercise of her discretion for the reasons he gives in paragraphs 93 to 98.

137. On the Respondent's Notice point, I also agree that the issues as to the DRP have no effect in law on the validity of CAP's claim against Kajima Europe under the Guarantee, for the reasons expressed by Coulson LJ at paragraphs 109 to 118.

138. For these reasons I too would dismiss the appeal.

LORD JUSTICE HOLROYDE

139. I have had the advantage of being able to consider both of my Lords' judgments in draft. I agree that the appeal should be dismissed on all three grounds, and that the point made in the Respondent's Notice should in any event be allowed. I do so for the reasons given by Coulson LJ, with which I am in full agreement, and to which there is nothing I can usefully add. It follows that, with respect to Popplewell LJ, I am unable to agree with the points of disagreement which he has raised.