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Case No: CL-2018-000778

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter lane, London EC4A 1NL

Date: 21/06/2019

Before :

CHRISTOPHER HANCOCK QC (SITTING AS A HIGH COURT JUDGE)

- -

Between :

(1) CHRISTOPHER O'BRIEN	**Claimants**
(2) LISA O'BRIEN	
- and -	
TTT MONEYCORP LIMITED	**Defendant**

- -
- -

Lance Ashworth QC and Dan McCourt Fritz (instructed by **Brabners LLP**) for the **Claimants**
Daniel Toledano QC and Andrew Lodder (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing dates: 20 and 21 March 2019

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Approved Judgment

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

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CHRISTOPHER HANCOCK QC

Christopher Hancock QC (Sitting as a High Court Judge):

Introduction.

1. Various applications were before me, as follows:

   (1) The Claimants' application dated 5 December 2018 (the "**Injunction Application**") seeking an interim injunction (a) requiring the Defendant ("**Moneycorp**") to provide certain documents and information to the Claimants, and (b) prohibiting Moneycorp from taking any further steps in relation to the independent accountant procedure under a Share Purchase Agreement dated 1 December 2017[1] (the "**SPA**") until such date as ordered by the Court;

   (2) Moneycorp's application dated 13 February 2019 ("**Moneycorp's Application**") seeking (inter alia) reverse summary judgment in respect of part of the Claimants' claim and summary judgment on its counterclaim; and

   (3) The Claimants' cross application dated 1 March 2019 (the "**Claimants' Summary Judgment Application**") seeking the converse relief (summary judgment on their claim and reverse summary judgment in respect of the counterclaim).

   (4) An application by Moneycorp to strike out references to correspondence in late June 2018 and in particular an email from Mrs O'Brien dated 25 June 2018 on the basis that it was part of without prejudice correspondence between the parties.

2. The same essential question was at the heart of the first three applications, namely: was the election notice purportedly served by Moneycorp dated 6 August 2018 (the "**Purported Election Notice**") under paragraph 6 of part 1 of schedule 9 to the SPA ("**Schedule 9**") valid and effective, so that the Independent Accountant had or has jurisdiction to determine the Completion Accounts for First Rate FX Limited ("**First Rate**")?

3. It was said by the Claimants that the Injunction Application has been largely but not entirely overtaken by the rival summary judgment applications. That is because, if summary judgment is granted to the Claimants in the terms sought then (i) Moneycorp will be required to comply with its Paragraph 5 Obligations on a final rather than interim basis, and (ii) the need for the interim prohibitory injunction will fall away. However, if Moneycorp's Application were to succeed then the Claimants contended that it would still be just and convenient to require Moneycorp to provide the documents and information sought by the Injunction Application, for reasons discussed below.

4. Finally, as to Moneycorp's strike out application, it is necessary for me to consider this application in the context of considering part of the summary judgment applications, because the material which Moneycorp seeks to preclude the Claimants relying on goes to the question of whether there has been a failure to comply with the provisions of paragraph 5 of part 1 of Schedule 9, an issue discussed below.

[1] As amended and restated on 31 January 2018.

5. Accordingly, after setting out the relevant facts, I will deal with the summary judgment applications, dealing with the strike out application as part of my consideration of those applications. I will then deal, finally, with the Injunction Application.

The facts.

6. I take the statement of facts set out below principally from the skeleton argument of the Claimants.

7. By the SPA, the Claimants (who held in excess of 80% of the shares) and two others, collectively referred to in the SPA and herein as "**the Vendors**", sold to Moneycorp the entire issued share capital of First Rate, a foreign exchange business founded by the Claimants.

8. Prior to completion under the SPA, various daily reconciliations were apparently carried out by the Claimants, which were monitored by Maureen Samsudeen ("**Ms Samsudeen**"), an employee of First Rate, and which were also available for inspection by the FCA and by the Claimants' banks. It is the evidence of Mrs O'Brien that these reconciliations did not reveal any significant discrepancies.

9. Under paragraph 1 of part 1 of Schedule 9[2], the Completion Accounts have to comprise a balance sheet of First Rate as at the Effective Time (which is 31 December 2017) in the form and including the items set out in part 3 of that Schedule.

10. Paragraph 3 obliged Moneycorp to use its reasonable endeavours to procure the preparation and submission to the Vendors of Draft Completion Accounts within 45 Business Days of Completion.

11. Paragraph 4 provides:

> *"4.1 The Draft Completion Accounts shall be deemed to have been accepted by the Vendors as the Completion Accounts unless, within 20 Business Days (increased by the number of Business Day[s] taken to prepare the Draft Completion Accounts over the 45 Business Days referred to in paragraph 3) of their being received by the Vendors, the Vendors deliver to the Purchaser notice to the contrary specifying (i) the item or items disputed; (ii) the Vendors' reasons for such dispute; and (iii) how the Draft Completion Accounts and the Consideration should be adjusted ("**Notice**")*
>
> *4.2 On receipt by the Purchaser of the Notice, the parties shall endeavour to agree the matters in dispute within 15 Business Days ("**15 Day Period**"). If the parties resolve the matters raised in the Notice during the 15 Day Period, the draft Completion Accounts (adjusted, if necessary, as agreed between the parties) shall be certified by the parties as being the Completion*

[2] Unless otherwise stated, references to paragraph numbers are references to paragraph numbers of part 1 of Schedule 9.

> *Accounts and the Completion Accounts shall become final and binding on the parties."*

12. Paragraph 5 obliges Moneycorp to give (and procure First Rate to give):

> *"the Vendors (and their respective agents and advisers) access during normal working hours to all relevant files and/or working papers (with the right to take copies at the Vendors' expense) in the Purchaser's and/or the Company's possession or control to the extent that they are reasonably required for the purposes of the review of the Draft Completion Accounts by the Vendors."*

13. Finally, paragraph 6 provides:

> *"If the parties are unable to reach agreement within the 15 Day Period, or such other period agreed in writing between the parties, the matter(s) contained in the Notice that remain in dispute may, at the written election of the Purchaser or the Vendors ("**Election Notice**"), be referred to the decision of an independent chartered accountant (the "**Independent Accountant**") in accordance with part 2 of this schedule 9."*

14. Moneycorp, following the SPA, submitted four different versions of the Draft Completion Accounts:

    (1) On 6 April 2018, a version was submitted that did not identify any Alleged Client Money Shortfall[3] and stated that the total sum due to Moneycorp was £255,094.13. In response to this, Mr Rumble of KPMG LLP ("**KPMG**"), acting on behalf of the Claimants, emailed Mr Chandler of Moneycorp asking for various items of supporting documentation;

    (2) On 18 May 2018, following an agreed extension of time for service of a further version, a second set of accounts was served, which identified an Alleged Client Money Shortfall of £969,351.57, with an increase in the total sum said to be due to Moneycorp to £1.074 million;

    (3) On 31 May 2018, a third version was served, which identified an Alleged Client Money Shortfall of £1,196,104.30. The total sum now said to be due to Moneycorp had increased to just over £1.3 million; and

    (4) On 4 June 2018, a final version was served, which identified an Alleged Client Money Shortfall of £1,058,071.14. The total sum said to be due to Moneycorp had reduced to £1.16 million.

15. On 6 June 2018, two days after Moneycorp submitted its fourth version of the Draft Completion Accounts, Mr Rumble of KPMG, acting on behalf of the Claimants, emailed Owen Chan of Moneycorp saying:

> *"We anticipate that we will require the following information for the purposes of reviewing the client monies balances but may*

[3] The principal reason for the financial claim herein is the claim by reference to the client money shortfall – hence the importance of the references to this aspect of the accounting.

> *need further information following the meeting we are proposing:*
>
> - *Electronic (excel or database files) lists of all balances by customer comprising: the currency FRFX system E2E balances at 31/1; the amounts not allocated to clients showing source; the details of inflight transactions from E2E*
> - *Copies of bank statements from RBS, Velocity and Saxo*
> - *Copies of client account reconciliations for every day from 31 January through to-date (to enable us to identify funds subsequently received)"*

16. It is the Claimants' case that this email (the "**6 June Request**") constituted a request for relevant files and/or working papers under paragraph 5. They contend that it is appropriate to infer that Mr Rumble (of KPMG) considered that the documents and information that he requested were reasonably required for the purposes of the review of the Draft Completion Accounts.

17. On 7 June 2018, Mr Chandler replied to the 6 June Request enclosing a draft of the KPMG Report and stating: "*With your information requests in 1 and 2 below* [i.e., the first two bullet points in the 6 June Request] *you are seeking to reperform the work already carried out by the KPMG buyside team for us.*"

18. On 8 June 2018, Raj Mehta, another of the KPMG accountants acting for the Claimants, stated that the Claimants required "*sufficient evidence [to enable the Claimants] to calculate the amount of the shortfall themselves*". Mr Mehta also stated that he understood that Maureen (ie Ms Samsudeen) was to be made redundant and stated that the Claimants would welcome the cooperation of Moneycorp to make sure that the numbers were correct.

19. Mr Chandler of Moneycorp did supply some documents to the KPMG sell side team on 11 June 2018. The Claimants contended that this was an inadequate response, whilst Moneycorp's case was that this was a complete response to what had been asked for. The documents supplied were various Excel workbooks covering client funds as at 31 January 2018; unapplied funds as at 31 January 2018; in flight deals; bank balances as at 31 January 2018; an RBS statement supporting the margin balance; and bank statements from RBS, Velocity and Saxo.

20. Also, on 11 June 2018, Mr Haslehurst (of Moneycorp) replied to Mr Mehta's email dated 8 June 2018: *"The request for a daily client funds reconciliation from 31/1 – to today is not relevant to the balance on the 31st Jan and would require a significant amount of work to be created as such we will not be providing this as it is not a reasonable request".*

21. Mrs O'Brien sets out in her second witness statement various dealings that she said that she had with Mr Horgan, the CEO of Moneycorp, about providing Ms Samsudeen with access to the documents and information that the Claimants required for the purposes

of reviewing the Draft Completion Accounts. It is her evidence that she made a number of oral requests for documents at this time. I have seen no evidence from Mr Horgan.

22. The Claimants also maintain that during the period, access to documents was blocked when Ms Samsudeen was made redundant by Moneycorp with immediate effect on 11 June 2018 just as the Claimants were requesting the relevant information.

23. There then followed an exchange of correspondence in late June 2018 which Moneycorp contend I should not take into account because it formed a without prejudice exchange. I deal with this separately below, but before I do so I will complete my account of the facts.

24. On 6 July 2018, Mrs O'Brien sent a Notice under paragraph 4.1 of Part 1 of Schedule 9 that the Vendors disagreed with the Draft Completion Accounts. The Notice stated:

> *"The Vendors have disputed a number of items on the grounds that insufficient information has been provided by the Purchaser. Accordingly, the balance sheet items to which such items relate have been disputed in their entirety. Accordingly, in the continued absence of all relevant information, the Vendors are unable to specify how the Draft Completion Accounts and the Consideration should be adjusted."*

25. By a letter dated 18 July 2018, DLA Piper purported to give notice to the Claimants under clause 28 of the SPA of General Warranty Claims (under clause 8.2 of the SPA) and Indemnity Claims (under clauses 10.1.4.2 and 10.2 of the SPA) in relation to the Alleged Client Money Shortfall and a further discrete issue (the "**Warranty Claims**"). There has since been substantial correspondence regarding such claims, which are claims that the Claimants deny.

26. On 6 August 2018, Moneycorp served the Purported Election Notice. After some further correspondence, the parties agreed to have a without prejudice meeting.

27. The meeting took place at DLA Piper's London office on 9 October 2018. There are disputes as to whether (i) an enforceable mechanism (the "**Allegedly Agreed Mechanism**") was agreed at this meeting (as the Claimants allege), and (ii) the Claimants may refer to the terms of the Allegedly Agreed Mechanism. In fact, I was not addressed on this to any extent, and I do not consider it is necessary to take a view on this in order to deal with the issues in front of me.

28. The Claimants instructed a forensic accountant, Ian Thompson of FTI Consulting ("**Mr Thompson**"). Mr Thompson made a request for documents and information for the purposes of reviewing the Draft Completion Accounts by way of a letter dated 24 October 2018 (the "**24 October Request**"). Although this request was sent by Brabners under cover of a letter marked "Without prejudice save as to costs", the parties have agreed that in any submissions to the Court the parties may refer to: (1) the fact of the without prejudice correspondence that commenced with FTI's letter dated 24 October 2018 including any future correspondence, and (2) the documents and information that Moneycorp has provided pursuant to FTI's requests, and the requests that Moneycorp has refused.

29. It is accepted that since this request, various information has been provided, and indeed I was informed that the parties were continuing to work together whilst I was preparing this judgment. There is obviously dispute as to the extent to which the information provided is sufficient, but again I address this below.

30. At the time of the original Injunction Application, there was an ongoing expert determination procedure, and an independent accountant had been appointed. However, the parties agreed that no further steps should be taken in this regard pending the hearing before me.

The summary judgment applications.

31. I deal first with the two summary judgment applications, which are the mirror images of one another. In essence, each side says that its construction of the SPA is correct, and that this issue is suitable for a summary determination; and that the question of whether there has been compliance with the SPA is also at least potentially suitable for summary determination.

32. There are therefore two issues which I have to determine under this head:

(1) The first is whether paragraph 5 of part 1 of Schedule 9 is a condition precedent to the operation of the remainder of the clause.

(2) The second is whether the provisions of that clause have been complied with.

33. The relevant legal principles relating to summary judgment were not in issue between the parties. Thus, in *EasyAir Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], Lewison J (as he then was) provided a convenient summary of the leading authorities on the application of the test:

i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;*

ii) *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*

iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*

iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*

v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:*

Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

34. I accept this summary of the relevant principles, which has been approved on a number of occasions in subsequent cases[4].

Is paragraph 5 of Part 1 of Schedule 9 a condition precedent to a reference to expert determination under the clause?

The relevant legal background.

35. The Claimants' primary case was that on the true construction of Schedule 9, Moneycorp's compliance with its Paragraph 5 Obligations is a condition precedent to the issuance of an Election Notice referring a dispute regarding the Draft Completion Accounts to the Independent Accountant. Moneycorp denied this.

36. Both parties referred me to the Supreme Court's decision in *Wood v. Capita Insurance Services Ltd* [2017] AC 1173, and the comments of Lord Hodge at paragraphs 8-15.

[4] eg, in *AC Ward Ltd v. Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301 at [24]; *Global Asset Capital Inc v Aabar Block and others* [2017] EWCA Civ 37.

For its part, Moneycorp relied in particular on paragraph 13, in which Lord Hodge stated:

> *"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning … in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause …"*

37. Moneycorp also argued that the textbook modern approach to interpretation of contracts is exemplified by the recent Court of Appeal decision in *National Bank of Kazakhstan v Bank of New York Mellon* [2018] EWCA Civ 1390 at [39]-[72], in which Hamblen LJ approached the construction of the contract by considering first the words of the contract to arrive at an initial view of what the text required and whether it was ambiguous, before going on to consider where there was any justification for departing from that construction on the basis of contextual considerations and commercial sense.

38. I quite accept of course these authoritative statements of the principles of the interpretation of contracts. However, following the hearing, because I was not sure that this was in truth simply a question of the interpretation of the terms of the SPA, I invited further submissions from the parties as to whether any guidance was to be gained from cases considering classification of terms. I asked for this because, in my judgment, the real question here was indeed what the status of the relevant term was.

39. The parties helpfully responded. There was agreement between them that this term was not a condition of the contract, in the sense that failure to comply with it would entitle the other party to terminate the contract, a submission which I accept without reservation. This leaves the question of whether the interrelationship between the contract clauses indicated that compliance with one clause was a condition precedent to the right to rely on the other.

40. In this regard, I note *Chitty on Contracts*, 32nd ed, at 13-027 to 13-028, which provides as follows:

> *"**Promissory and contingent conditions***
> ***13-027***
> *A condition in the sense mentioned above may conveniently be termed a "promissory" condition, being a promise or assurance for the non-performance of which a right of action accrues to the innocent party. This sense must be carefully distinguished from that of a "contingent" condition, i.e. a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. In this latter case, the non-fulfilment of the*

> *condition gives no right of action for breach; it simply suspends the obligations of one or both parties….*
>
> ***… Conditions precedent***
> ***13-028***
> *The liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the occurrence or non-occurrence of some further event. In such a case the contract is said to be subject to a condition precedent. The failure of a condition precedent may have one of a number of effects. It may, in the first place, suspend the rights and obligations of both parties, as, for instance, where the parties enter into an agreement on the express understanding that it is not to become binding on either of them unless the condition is fulfilled. Secondly, one party may assume an immediate unilateral binding obligation, subject to a condition. From this he cannot withdraw; but no bilateral contract, binding on both parties, comes into existence until the condition is fulfilled. Thirdly, the parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fulfilment of the condition. These conditions precedent are, however, normally contingent and not promissory, and in such a case neither party will be liable to the other if the condition is not fulfilled."*[5]

41. Here, in my judgment, the question is not really one of interpretation at all, but is properly speaking one of classification. The question is whether compliance with the provisions of paragraph 5 is necessary as a trigger or precondition to the operation of the remainder of the clause.

The parties' respective submissions.

42. I turn therefore to a consideration of the parties' respective submissions on this point, beginning with those of Moneycorp.

43. Moneycorp submitted as follows:

(1) Looking first at the express words of Schedule 9:

a. The parties could have, but did not, elect to make compliance with paragraph 5 a condition precedent to the right to serve an Election Notice under paragraph 6 of Part 1 of Schedule 9. The two paragraphs are consecutive and any interaction between them would clearly have been in the mind of the drafters and the parties, as is clear from the fact that paragraph 6 in fact specifies the condition precedent for submitting an Election Notice. Having specifically turned their minds to what the condition precedent would be, however, the parties elected to make the condition precedent the failure to agree the Completion Accounts within the

[5] See also The Interpretation of Contracts, 6th ed, at 16-02.

15 Day Period, not compliance with the obligations set out in the previous paragraph 5.

b. There is no basis for reading such a requirement into the unambiguous words of the parties' agreement; indeed, to do so would do violence to the dispute resolution mechanism in Schedule 9 for the reasons set out below.

c. It is also important for the Court to bear in mind the case law on expert determination as a dispute resolution mechanism. In particular, the Courts have recognised that:

   i. Parties elect to use expert adjudication dispute resolution as it is quick and inexpensive: see *Premier Telecom Communications Group Ltd v Webb* [2014] EWCA Civ 994 at [12].

   ii. Where, as here, expert adjudication is specified to be final and binding, the Court will not usually allow parties to circumvent the agreed process. The onus is therefore on a party seeking to litigate rather than submit to the expert adjudication procedure to demonstrate why the Court should not stay its proceedings in favour of the contractually agreed expert process: *DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd* [2008] Bus. L.R. 132 (TCC) at [5]-[12]; Kendall on Expert Determination, 5th Edition, 2015 at §6.4-1.

   iii. The Court will generally decline, save in exceptional circumstances, to intervene in anticipation of the determination of an expert of a matter remitted to him, as this is likely to prove wasteful of time and costs, the saving of which is presumed to be one of the reasons why the parties agreed to expert determination: *British Shipbuilders v VSEL* [1997] Lloyd's Rep 106 at 109.

   iv. The Court will also take into account the fact that expert adjudication would be more likely to produce a speedy and more economic solution to the dispute: *Turville Health Inc v Chartis Insurance UK Ltd* [2013] BLR 302 (TCC) at [70]-[71]; *Barclays Bank v Nylon Capital* [2012] 1 All ER (Comm) 912 at [36]-[38].

   v. It is well-established that there is no necessary requirement for natural justice or procedural fairness in expert determination, which is typically part of the reason why the mechanism is adopted in the first place: *Ackerman v. Ackerman* [2011] EWHC 3428 (Ch) at [263]-[267] and [272]-[273] (Vos J); *Barclays Bank v Nylon Capital* at [37]-[38]. The Court will therefore not assume that the parties intended to mimic court proceedings, when they elected for an expert determination instead.

d. To the extent that it is necessary for the Court to move on to the stage of considering the contextual considerations and commercial sense of the competing constructions of Schedule 9, those considerations militate in favour of Moneycorp's construction:

i. Following Moore-Bick LJ's guidance in *Premier Telecom*, the parties are to be taken to have chosen expert adjudication as a quick and inexpensive method of settling the Completion Accounts, in this case within a short period of 2-4 months.

ii. Under paragraph 1.2 of Part 2 of Schedule 9, unlike the adjudication clause in *British Shipbuilders v VSEL*, the parties here chose to give the Independent Accountant the power to determine what assistance and documentation he reasonably requires to finalise the Completion Accounts. This makes sense given the Independent Accountant will inevitably have far greater expertise than the Court to decide what information is in fact reasonably required for the Completion Accounts to be finalised.

iii. The initial obligation on Moneycorp under paragraph 5 is therefore made effective, not as a condition precedent to the power to appoint the Independent Accountant, but rather by empowering the Independent Accountant to determine what is reasonably required to finalise the Completion Accounts Dispute. Indeed, the Claimants have identified issues with information in the Notice of Dispute referred to the Independent Accountant; they will also be able to make submissions to him on what further information they say is reasonably required. The Independent Accountant is best placed to decide that question.

iv. Moreover, the Claimants' submissions on the documentation required may in due course be accepted by the Independent Accountant, in which case Moneycorp has made it clear that it will comply with any order made. That mechanism would prevent any alleged breach of paragraph 5 from having any material effect on the adjudication process, as the Claimants would have been given access to the relevant material and the opportunity to make submissions to the Independent Accountant in relation thereto, curing any prior breach.

v. On Moneycorp's construction, the Court would not be precluded from deciding any claim for breach of paragraph 5 in due course. If the Claimants are correct that further information was required to be provided by Moneycorp, then Moneycorp would be in breach of the SPA and the Claimants would be able to pursue remedies for that breach in Court in due course. However, the parties did not make that a precondition to the exercise of the Independent Accountant's jurisdiction to finalise the Completion Accounts, for the very good reasons set out above.

vi. Therefore, the construction proposed by Moneycorp gives effect to the clear and unambiguous terms of Schedule 9, which does not make paragraph 5 a condition precedent to an Election Notice, and ensures that the question of what information is "*reasonably required for the review of the Draft Completion Accounts*" is decided

> quickly and inexpensively within the parties' chosen adjudication process by an expert who is best placed to determine this question. In those circumstances, the Court should not read words into the SPA to achieve a different result that would be slower, more cumbersome and more expensive.

44. This is to be contrasted, argues Moneycorp, with the unworkability of the Claimants' proposed construction, which would tend only to undermine the reasons for choosing expert adjudication in the first place:

(1) If the resolution of disputes about compliance with paragraph 5 were a condition precedent to appointing an Independent Accountant, then the Court would have to decide any issue arising under paragraph 5 first, before the expert determination procedure could begin. That would enable the parties to derail the expert determination procedure simply by making extensive requests and then filing a claim disputing the scope of the documentation provided under paragraph 5, which would mean the adjusted consideration to be paid under Clause 4 of the SPA would not even begin to be finalised by the Independent Accountant until Court proceedings on a satellite point about the scope of a disclosure obligation are resolved by the Court, which could take many months or years, as is evidenced by the facts of the present case.

(2) The Court deciding a claim about the scope of paragraph 5 would inevitably require expert accounting evidence on the documentation reasonably required for an accountant to finalise the Completion Accounts. Expert accountants would accordingly need to be appointed, probably by both sides, to enable the Court to determine a question that would otherwise be capably and quickly determined by an expert accountant.

(3) The parties, as sensible commercial counterparties, would not have intended such a result, because it would occasion considerable delay to the expert adjudication procedure for which they had agreed a tight and streamlined timetable. The parties' intention can be discerned from the wording of the SPA itself, both from the decision not to make paragraph 5 a condition precedent to appointing the Independent Accountant and because Part 2 of Schedule 9 to the SPA sets up a mechanism for resolving the issue by putting it in the hands of the Independent Accountant to decide what information he reasonably requires.

45. Furthermore:

(1) To the extent that a decision by the Independent Accountant as to what information is reasonably required to finalise the Completion Accounts involves any point of construction of the terms of the SPA, it is a mixed question of law and fact that is eminently capable of adjudication by an expert accountant: see *Barclays Bank v Nylon Capital* at [31]-[35]. Indeed, an accountant would find the point easier to decide than the Court, which would require assistance from an expert accountant to do so.

(2) The expert adjudication process would not be undermined by the failure to comply with paragraph 5, nor is there any reason to be concerned that the process will need to be 'run again'. An Independent Accountant, with no ties to either party, will have

to decide, based on submissions from the parties, what he reasonably requires to finalise the Completion Accounts. It should not be assumed, wholly prematurely, that the Independent Account will fall into error by finalising the Completion Accounts without requesting the documentation and information that is reasonably required for that purpose, particularly in circumstances where he will be assisted by the parties' submissions on that very point (noting, again, that the Claimants have already identified alleged issues about lack of information in the Notice of Dispute that has been referred to the Independent Accountant).

(3) If the Independent Accountant does fall into error in a way that is adverse to the Claimants, then it is the Claimants' own case that they will be able to claim damages for breaches of paragraph 5 in Court. But that itself reveals the prematurity of the Claimants' attempt to enjoin the Independent Accountant process: it may well be that the Independent Accountant agrees with them, requests production of the relevant documentation and resolves the Completion Accounts Dispute in their favour.

46. For their part, the Claimants submitted that Moneycorp's Paragraph 5 Obligations were engaged (at the latest) on 6 April 2018 when it first purported to submit Draft Completion Accounts to the Vendors, because the expressly stated purpose of paragraph 5 is to enable the Vendors to review the Draft Completion Accounts. Without access to the relevant "*files and/or working papers*" in Moneycorp's possession or control that they reasonably required for that express purpose, the Vendors could not:

(1) Decide whether to agree the Draft Completion Accounts (or simply do nothing, in which case they would be deemed to have accepted them); or

(2) Prepare a notice under paragraph 4.1 *"specifying (i) the item or items disputed; (ii) the Vendors' reasons for such dispute; and (iii) how the Draft Completion Accounts and the Consideration should be adjusted."*

47. Once engaged, the Claimants submitted, the Paragraph 5 Obligations remained in force unless and until the Completion Accounts were agreed (or were deemed to be accepted) or determined by the Independent Accountant. Without continuing access to the relevant documents and information, the Vendors would not be able to (i) engage in the paragraph 4.2 process (under which the parties are required to "*endeavour to agree the matters in dispute*"), or (ii) review any subsequent versions of the Draft Completion Accounts submitted by Moneycorp in a properly informed or meaningful way.

48. Thus, submitted the Claimants, the procedure that the parties must follow before a referral to the Independent Accountant can be made is prescribed in part 1 of Schedule 9 (the "**Part 1 Procedure**"). In summary:

(1) Moneycorp must procure and prepare the submission to the Vendors of Draft Completion Accounts (paragraph 3);

(2) The Vendors then have a minimum of 20 Business Days[6] to review the Draft Completion Accounts and (if so advised) prepare and deliver a notice identifying any disputed item(s) (paragraph 4.1);

(3) The parties must then spend 15 Business Days[7] endeavouring to agree the matter(s) in dispute (paragraph 4.2);

(4) It is only if the parties are unable to reach agreement as to the Draft Completion Accounts after these steps that they are entitled to refer the dispute to the Independent Accountant by serving an Election Notice (paragraph 6).

49. Unless on the true construction of part 1 of Schedule 9, compliance by Moneycorp with its Paragraph 5 Obligations is a condition precedent to the issuance of an Election Notice under paragraph 6, Moneycorp could (as the Claimants say it is trying to do) unilaterally shortcut the Part 1 Procedure: it could decide not to give the Vendors any real opportunity to review or analyse the Draft Completion Accounts, let alone to agree them on an informed basis. The Claimants submitted that this would obviously be inconsistent with the parties' objectively construed intentions that agreement should be reached on the Draft Completion Accounts if possible, and offensive to business common sense.

50. Whilst, the Claimants accepted, it is true that the Independent Accountant (once validly appointed) can require the parties to provide "*assistance and documents … for the purpose of reaching a decision*", there is no guarantee that the Independent Accountant would oblige Moneycorp to provide him (let alone the Vendors) with the documents and information that the Vendors had reasonably requested under paragraph 5. Nor is there any provision within the Part 1 Procedure for the parties to have the right or any opportunity to comment on any such documents which the Independent Accountant has requested and received. The Vendors would therefore have no right to make any submissions as to what those documents say, even if the Independent Accountant accepted their submissions as to what documents and information were needed.

51. On Moneycorp's construction of Schedule 9, there would be a material risk that the Independent Accountant would therefore determine the Completion Accounts without the Vendors ever having access to the files and working papers that they reasonably required for the purposes of reviewing the Draft Completion Accounts.

52. This would be profoundly unjust. The Independent Accountant is not obliged to give reasons for his decision. His determination can only be challenged on the grounds of manifest error or fraud, as made clear by the Schedule itself; and a decision not to require Moneycorp to provide documents or information to the Vendors would not (without more) be sufficient for such a challenge.

53. Overall, submitted the Claimants, their construction makes the Part 1 Procedure coherent, workable and purposeful. It gives effect to the parties' (objectively construed) intentions in agreeing that part (and indeed Schedule 9 as a whole). In contrast,

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[6] Increased by the number of Business Days taken to prepare the Draft Completion Accounts over the 45 Business Days referred to in paragraph 3.

[7] Or such other period as they agree in writing: see paragraph 6.

Moneycorp's interpretation subverts and frustrates the purpose of the Part 1 Procedure and creates stark information and power asymmetries.

54. Further, if (in accordance with its stated intention) Moneycorp issues proceedings by way of a Warranty Claim in relation to the Alleged Client Money Shortfall, it will inevitably have to disclose in those proceedings the information which is required to review the Alleged Client Money Shortfall. The Claimants submitted that this was an important aspect of the context for the present applications. It would be a remarkable conclusion that the Draft Completion Accounts could be prepared on a basis that binds the Vendors and requires them to pay out substantial sums of money, but in a breach of warranty claim based on the same Alleged Client Money Shortfall, the Court could come to a completely different conclusion because it had the required information which the Claimants were not able to rely on before the Independent Accountant. This would make no commercial sense at all.

Conclusions.

55. I can state my conclusions on this issue briefly.

(1) The structure of the clause, taken as a whole, makes clear that the procedure is intended to be a unitary one. There are a series of steps to be taken, and on the face of things, each is, in my view, a necessary precondition to the next.

(2) The authorities to which I was referred, in answer to my question after the hearing, reinforce my view on this, since they indicate that, as long as the steps to be taken prior to the reference to arbitration or adjudication are sufficiently certain, they will be enforced as preconditions to such arbitration or adjudication.

(3) The most relevant and helpful authority, in my judgment, is that of the Court of Appeal in *Barclays Bank PLC v Nylon Capital LLP* [2011] EWCA Civ 826. That was a case in which the question was whether a determination as to an allocation of profits, which had not yet been made, was a condition precedent to the reference to expert determination. Thomas LJ (as he then was) gave the leading judgment of the Court. He decided, at paragraph 52ff, as follows:

> *"52 In my view, even if it was appropriate to give cl. 26.1 a wide and generous construction (which for reasons I have set out at paragraphs 25-28 above I do not consider I should), then this particular clause makes it quite clear that the word 'regarding' could not be given such a wide construction. Under the clause 30 days were to elapse after the allocation before the reference to the expert. That provision in my judgement makes it clear that the expert determination clause was only to apply to a dispute about the allocation, as the making of an allocation was a condition precedent to the appointment of an expert. Furthermore the clause refers to 'any affected party'; that can only be a reference to a party affected by the allocation, again making it clear that allocation was a condition precedent to the reference to an expert.*
>
> *53 Notwithstanding the clarity of that part of the clause, it was argued that cl. 26.1(B) was in such wide terms that the accountant*

> *to be appointed as an expert was to have a wide jurisdiction to decide upon his own jurisdiction, even if an allocation had not been made. Again it seems to me that the clear language of the clause points to a contrary conclusion. Clause 26.1(B) begins with the words, 'Such accountant'. Those words plainly refer back to the provisions of cl. 26.1(A) which therefore make it clear that the person who is to exercise the jurisdiction under 26.1(B) is the person who can be appointed under 26.1(A). In short sub-clause (B) cannot enlarge the jurisdiction of the expert unless the expert can validly be appointed under 26.1(A).*
>
> *54 This view also accords with the commercial rationale of sensible businessmen. They would have considered it sensible to entrust to an accountant for expert determination questions relating to the allocation once an allocation had been made or it had been determined that Mr Burnell was entitled to make an allocation. The parties would not have gone beyond this. In contradistinction to arbitration, they would not have had any procedural safeguards and would have wanted a tribunal suited to the broader issues, in accordance with cl. 26.2. It was suggested by the LLP that an accountant might be able to take legal advice because of the provisions of cl. 26.1(D) which makes provision for the payment of fees and expenses of the expert. It may be that the clause is wide enough to enable the accountant to employ a lawyer to advise him on the interpretation of the clause, but it is difficult to understand why, save in relation to narrow questions of interpretation relating to the process of allocation, it would have been contemplated by rational and sensible businessmen that general issues of interpretation of the agreement in its contractual matrix would fall to be determined by an expert accountant relying on the advice of a lawyer rather than by a judge to whom the opposing arguments would be put briefly and a decision obtained within the well understood procedures of the Chancery Division or the Commercial Court as the courts chosen by the parties under cl. 26.2.*
>
> *55 In my view, therefore, there can be little doubt about the meaning of the clause, even if a very generous construction is given to it. The expert does not have jurisdiction to determine any issues until there has been an allocation. There has been none. Moreover, the question whether Mr Burnell was entitled to make an allocation which brought into account the profit on Barclays capital investment was an issue which went to the jurisdiction of the expert for the reasons I have explained at paragraphs 46 and 47 above."*

(4) Other authorities to which the Claimants referred me related to the distinct question of whether the preconditions in question were sufficiently clear to be enforceable: see for example *Tang Chung v Grant Thornton* [2012] EWHC 3198, and *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2015] 1 WLR 1145. These authorities are of limited assistance; but they do indicate that where a clause such as the present one is sufficiently clear to be enforceable, it will be construed as a condition precedent to the next step in the dispute resolution procedure.

(5) Moneycorp, for its part, referred me to the case of *Heritage Oil and Gas Ltd v Tullow Uganda Ltd* [2014] EWCA Civ 1048 as the leading authority in the area[8]. In fact, however, it seems to me that this authority is distinguishable on a number of bases:

a. The case concerned the question of whether the giving of notice under a contractual regime was a condition precedent to the right to an indemnity provided for in a later part of the clause. The Court of Appeal held that it was not.

b. The reasoning of the Court of Appeal is instructive.

i. Beatson LJ, who gave the leading judgment, pointed out that in that case, the impact of a finding that the clause was a condition precedent would be to deprive the other party of a very valuable right – there a right worth many millions of dollars. That is not the case here. The condition here is a suspensory one, not a final one.

ii. The clause in that contract used the express term "condition precedent" in some parts of the clause and not others. This is a clear indication that the parties wish to distinguish between different obligations, an indication lacking in the current case.

iii. The fact that the consequences of a breach might be major or minor was viewed as of importance by the Court. Here, the consequence of a breach, or failure to comply, is always going to be the same – namely an inability to move on to the next stage of the dispute resolution regime.

iv. Overall, I have not found this case to be of any real assistance in the current case.

(6) The construction which I prefer, in my judgment, makes good commercial sense. The intent behind the clause is that the precise ambit of any dispute to be referred to an expert determination should be defined prior to such reference. That in turn requires that each party should be apprised of all relevant information in order to define the scope of the issues.

(7) The suggestion that this runs counter to the parties' choice of an expert determination is in my judgment misconceived. The provisions of this clause are designed to ensure that the scope of the disputes which are for the expert to determine are defined in advance of the reference. The suggestion that it is for the expert to determine what he or she needs to see in order to determine these disputes puts the cart before the horse.

[8] In my judgment, it is not really helpful to talk in terms of cases being leading authorities in this area. Each case is related to the construction of a particular clause in a particular contract, which is an enquiry which, by definition, is heavily fact dependent.

56. Overall, therefore, I have no doubt but that compliance with this clause is a condition precedent to the right to refer matters to adjudication.

Implied term.

57. In the light of my conclusion on this aspect, it is unnecessary for me to deal with the Claimants' alternative case based on an implied term.

Has there been compliance with the relevant precondition?

58. I turn to the factual question of whether there has in fact been compliance with this precondition. As I have noted, where there is a factual dispute, I cannot properly determine this on an application for summary judgment; but if a case is clearly hopeless, I can and should say so.

59. Under this head, there are the following sub-issues.

(1) First, what are the relevant facts?

(2) Secondly, what is the test for determining whether the Claimants are entitled to documents?

(3) Thirdly, are the Claimants entitled to refer me to the "without prejudice" correspondence in late June 2018?

60. Again, I deal with each in turn, remembering that this is an application for summary judgment.

The relevant facts.

61. Moneycorp's case on this, in very outline summary, is as follows:

(1) The relevant accounts were those produced on 4 June 2018. Time therefore runs from that date. It is common ground that the deadline for the raising of queries would therefore be 58 days from that date, ie 21 August 2018;

(2) The first queries raised were those on 6 and 8 June 2018. Those queries were however answered by emails sent by Moneycorp on 11 June 2018;

(3) No further query was raised until 25 June 2018. However, that query cannot be relied on by the Claimants since it was sent without prejudice;

(4) The Claimants then purported to refer the matter to the independent expert. No further specific dispute had been raised. Instead, all that the Claimants had done was to make generalised complaints about the lack of documentation; and

(5) At that stage, the expert determination process was, therefore, commenced.

62. The Claimants respond, again in very brief outline, as follows:

(1) The initial queries made on 6 and 8 June remained outstanding at all times and were never properly answered;

(2) Further queries were raised, orally, by Mrs O'Brien during the period prior to the termination of Ms Samsudeen's employment;

(3) There was a further enquiry made on 25 June 2018, which the Claimants are entitled to rely on for the purposes of showing the fact of the enquiry;

(4) Therefore, at the date of the expiry of the relevant period, there was an outstanding request which had not been answered; and

(5) In those circumstances, it was not open to Moneycorp to invoke the expert adjudication procedure.

63. I have concluded that I cannot come to a firm decision on the basis of the facts currently before me, and accordingly that this is not an appropriate case for summary judgment in favour of either party. I have reached this conclusion for the following reasons:

(1) There were undoubtedly requests for documents in the emails of 6 and 8 June. I have been told that these documents were reasonably required in order to check the accounts, and the independent evidence from Mr Thompson supports this submission. There is contrary evidence from Moneycorp; but this is the type of dispute that is not suitable for summary judgment.

(2) There were also, I am told, requests made orally for further information by Mrs O'Brien during the course of June 2018. I have no countervailing evidence from Moneycorp. Again, therefore, I take the view that this is not an appropriate question for summary determination.

(3) Finally, there was also further correspondence during the relevant period, even if it was marked without prejudice. I do not intend to say anything further about this correspondence, nor do I intend to make any decision on the question of whether it is open to the Claimants to refer to it, since, in my judgment, this is not an appropriate case for summary judgment in any event.

64. Overall, therefore, I have concluded that this is not an appropriate case for summary judgment in favour of either party. There are disputes of a factual nature as to whether or not the condition precedent to an expert determination has been satisfied which are of a type which make the case unsuitable for summary judgment.

65. In the light of this conclusion, then I do not need to, and in my judgment should not, make findings on the second and third issues identified above. The relevant test as to whether documents were in fact reasonably necessary will be for the trial judge to determine on the evidence available at that stage. Further, the question as to whether the Claimants are entitled to refer to the June correspondence to establish the fact of a request is also one which is better determined by the trial judge.

The Injunction Application.

66. The Injunction Application seeks an interim injunction:

(1) Requiring Moneycorp to provide the Requested Information; and

(2) Restraining the Independent Accountant from proceeding with his adjudication of the Completion Accounts Dispute.

The relevant legal principles

67. Moneycorp submitted that the principles that apply to the grant of an interim injunction under CPR 25.1(1) are as follows:

(1) Sections 37(1)-(2) of the Senior Courts Act 1981 state that the High Court may by order grant an injunction in all cases in which it appears "*just and convenient*" to do so, and any such order may be made either unconditionally or on such terms as the Court thinks just. Interim injunctions are therefore discretionary but the discretion is to be exercised judicially in light of the overriding objective in CPR 1.1.

(2) Applying the well-known approach deriving from *American Cyanamid* [1975] AC 396 (HL), the onus is on the applicant to establish: first, that there is a serious question to be tried; second, that damages would not be an adequate remedy for the applicant if the injunction were refused; and third, that the balance of convenience favours the grant of the interim injunction. These tests are usually applied by reference to the seven guidelines extracted from *American Cyanamid* by Browne LJ in *Fellowes & Son v Fisher* [1976] 1 QB 122 (CA) at 137.

(3) On an application for an interim injunction, the Court should not attempt to resolve "*critical disputed questions of fact or difficult points of law*" on which the claim of either party may ultimately depend, particularly where the point of law "*turns on fine questions of fact which are in dispute or are presently obscure*": *Sukhoruchkin v Van Bekestein* [2014] EWCA Civ 399 at [32] (Sir Terence Etherton C).

(4) In the exercise of its discretion to grant an injunction, and consistently with the overriding objective, the Court will not grant an injunction where it would be futile or serve no purpose: *Mosley v News Group Newspapers* [2008] EWHC 687 (QB).

(5) A mandatory injunction is less likely to be granted on an interim basis. This is because, where other factors appear to be evenly balanced, the Court "*should take whatever course seems likely to cause the least irremediable prejudice to one party or the other*": *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] 1 WLR 1405 (PC). A mandatory injunction requiring a party to take some positive step at an interlocutory stage will usually carry a greater risk of injustice if it turns out to have been wrongly made. It is therefore legitimate in such cases to require a "*high degree of assurance"* that the interim relief would ultimately be granted at trial: *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 351 (Megarry J).

(6) Furthermore, where the grant of interim relief will have the practical effect of giving the applicant the final relief that it is seeking in the case, the Court will be more reluctant to grant such relief: *Films Rover Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 680.

(7) Where an interim injunction is granted, the usual practice is to make this subject to a condition requiring the applicant to offer a cross-undertaking to pay damages for any losses sustained by reason of the injunction in the event that it transpires that it ought not have been granted.

68. I did not understand this statement of the underlying principles to be seriously challenged.

69. Turning to the application of these principles to the facts of this case, Moneycorp noted that, if I found in its favour on the summary judgment application, then the Injunction Application would fall away. Since I have not so found, this submission in fact falls away itself.

70. In the alternative, Moneycorp submitted that in any event the injunctive relief sought should be refused.

(1) First, it was submitted that the mandatory injunction should be rejected because it would amount to giving the Claimants the full relief that they seek at trial.

(2) Secondly, it was submitted that damages were an adequate remedy, since:

a. The Claimants would still be able to make their arguments as to which documents they required in the context of the proceedings before the Independent Accountant;

b. Moneycorp had confirmed that it either had provided everything it could or would do so, and would assist in obtaining materials from third parties;

c. Moneycorp had already provided a number of documents which would enable the process before the Independent Accountant to be pursued;

d. If Moneycorp were found to have breached paragraph 5, then the decision of the independent expert could be challenged, on the Claimants' case;

e. If the decision of the independent expert could not be challenged, but, as I have held, the provisions of paragraph 5 are a condition precedent to the appointment of an independent expert, then there would be no issue estoppel; and

f. In the event that the Court set aside the expert's determination, it could assess damages as the difference between the amount referable to the Completion Accounts as finalised by the independent expert and the amount which should have flowed from a correct determination.

71. For their part, the Claimants submitted that if the question of whether Moneycorp is in breach of its Paragraph 5 Obligations needed to be decided at trial, it would be just and convenient to grant an interim injunction requiring Moneycorp to provide the documents and information identified in appendix 3 to Mr Thompson's witness statement, less the documents since provided. In doing so the Court would be taking

the course which would be least likely to cause irremediable prejudice to one party or the other (*National Commercial Bank Jamaica Ltd v. Olint* [2009] 1 WLR 1405 at [19]):

(1) There would unquestionably be (at least) a serious issue to be tried as to whether Moneycorp was obliged to provide such documents and information;

(2) Damages would not be an adequate remedy for the alleged breach since absent an interim injunction the Claimants would be left either in limbo without the ability to propose adjustments to the Draft Completion Accounts or safely trigger the Independent Accountant procedure, or unable to make submissions to the Independent Accountant on a properly informed basis and without any basis for formulating a damages claim after the Independent Accountant made his decision;

(3) In contrast, damages would plainly be an adequate remedy for the prejudice that complying with such an interim injunction would cause Moneycorp, and readily capable of assessment (by reference to the cost of providing the required documents and information); and

(4) The balance of convenience favours the grant of the injunction.

72. Applying the above principles to the current case:

(1) I accept that there is clearly a serious issue to be tried as to whether Moneycorp has to supply the various identified documents;

(2) Prior to the trial of this issue, then I take the view that the independent adjudication procedure cannot proceed further, since the question of whether the necessary condition precedent to the reference to the adjudicator has been satisfied has not yet been determined;

(3) That in turn means that there will have to be a determination of whether the documents so far provided satisfy the condition precedent, so as to trigger the right to initiate the independent adjudication procedure;

(4) Prior to the determination of that dispute, then I take the view that it would be wrong to allow the independent adjudication process to go further; but also wrong to prejudge the issue of whether there has in fact been provision of the necessary documents to enable that process to be initiated;

(5) Accordingly, I am prepared to order (if necessary) that the expert adjudication process should be halted. My understanding is that this has been done by consent; but if any further order is required, I am persuaded that I should grant it;

(6) Conversely, I am not prepared to grant a mandatory injunction requiring the delivery up of the various documents requested, since this would be to prejudge the issue of whether those documents are in fact necessary, and would be to give the Claimants at an interlocutory stage what they seek after a final trial.

73. At present, given the degree of cooperation between the parties, I would hope that no further order is in fact necessary; but if it is, then the form of the order will be as above.

Summary of conclusions.

74. I can summarise my conclusions as follows:

(1) In my judgment, the provisions of paragraph 5 of part 1 of Schedule 9 are a condition precedent to a reference pursuant to the independent expert procedure. I will therefore grant the declaration to that effect sought by the Claimants in the Claimants' Summary Judgment Application.

(2) I do not have sufficient material to make a summary determination of the question of whether or not there has been sufficient compliance with the clause. This dispute must therefore proceed to trial. Save as set out in the paragraph immediately above, both applications for summary judgment are therefore refused.

(3) The striking out application should be dealt with by the trial judge or another judge in the light of fuller information.

(4) Pending the resolution of the question of whether the condition precedent to the reference has been satisfied, I would if necessary grant injunctive relief preventing the expert determination procedure going further. At present, this result is being achieved by consent; but if an order is necessary, I would make such an order.

75. I would be grateful if the parties would draw up an order giving effect to this judgment.