Neutral Citation Number: [2022] EWHC 1595 (TCC)

Case No: HT-2021-000499

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 22/6/2022

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

CHILDREN'S ARK PARTNERSHIPS LIMITED

Claimant

- and -

(1) KAJIMA CONSTRUCTION EUROPE (UK) LIMITED
(2) KAJIMA EUROPE LIMITED

Defendants

- -
- -

William Webb (instructed by **Bevan Brittan LLP**) for the **Claimant**
Simon Hargreaves QC and Samar Abbas Kazmi (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing date: 28 April 2022

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FINAL 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.

Covid-19 Protocol: This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and released to The National Archive. The date for hand-down is deemed to be 22 June 2022.

Mrs Justice Joanna Smith:

1. This is a novel application by the Defendants (together "**Kajima**") to strike out or set aside a Claim Form on grounds of failure to comply with a contractual ADR provision, said by Kajima to be a condition precedent to the commencement of proceedings (the "**Kajima Application**"). The real significance of the Kajima Application lies in the fact that the limitation period for the claim by the Claimant ("**CAP**"), as extended pursuant to a series of standstill agreements, expired on 29 December 2021, just over a week after issue of the Claim Form. Kajima contend that by initiating these proceedings on 21 December 2021, CAP has deprived it of the limitation defence that would have been available had CAP complied with its contractual obligations.

2. The Kajima Application is brought under CPR 11(1) on the grounds that the Court has no jurisdiction over Kajima or should not exercise any jurisdiction that it may have and alternatively under CPR 3.4(2)(a) and/or CPR 3.4(2)(b) on the basis that there are no reasonable grounds for bringing the claim and that it is an abuse of the Court's process.

THE CONTRACTUAL BACKGROUND

3. On 10 June 2004, CAP entered into an agreement (the "**Project Agreement**") with the Brighton and Sussex University Hospital NHS Trust (the "**Trust**") pursuant to which CAP undertook to design, build and finance the redevelopment of the Royal Alexandra Hospital for Sick Children in Brighton (the "**Hospital**").

4. On the same date, CAP and the First Defendant ("**Kajima Construction**") entered into a contract (the "**Construction Contract**") pursuant to which Kajima Construction was appointed to design, construct and commission the Hospital (the "**Works**"). Clause 9.7 of the Construction Contract provides that no claim, action or proceedings shall be commenced against Kajima Construction after the expiry of twelve years from the Actual Completion Date of the Works.

5. On 17 October 2013, CAP and the Second Defendant ("**Kajima Europe**"), parent company to Kajima Construction, entered into a deed of guarantee (the "**Guarantee**") 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 or in connection with the Construction Contract. Pursuant to clause 12.2 of the Guarantee, Kajima Europe's liability under the Guarantee also expired 12 years after the Actual Completion Date of the Works – i.e., at the same time as the expiry of Kajima Construction's liability under the Construction Contract.

6. Kajima Construction carried out the Works between 2004 and 2007. The Actual Completion Date of the Hospital was 2 April 2007.

7. The Trust is entitled to make deductions from CAP under the Project Agreement ("**Deductions**") in respect of service failures arising from defects and Kajima Construction is liable to reimburse those Deductions under the terms of the Construction Contract.

The Dispute Resolution Procedure

8. The Construction Contract contains agreed contractual machinery for the resolution of disputes (the "**Dispute Resolution Procedure**" or "**DRP**"). It is Kajima's case that, properly interpreted, this machinery gives rise to a condition precedent to the right to bring an action; in other words, there can be no right to commence proceedings (and thus no jurisdiction to hear the proceedings) unless the parties to the Construction Contract have operated and concluded the DRP.

9. The key provisions on which Kajima relies are as follows:

   Clause 56 provides 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)".

10. There is no suggestion that the saving in the first few words of this clause is engaged or relevant to this hearing. It is therefore common ground that the effect of clause 56 is that Schedule 26 is the only contractually agreed route for dispute resolution.

11. Clause 68 is entitled "*Governing Law and Jurisdiction*". Clause 68.2 provides 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" (**emphasis added**).

12. Schedule 26 is entitled "*Dispute Resolution Procedure"*. Having set out some defined terms, it provides 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 pre-condition 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."

13. The narrow exceptions created by paragraph 2 do not include reference to the need to commence proceedings in order to protect against the expiry of a limitation period.

14. Schedule 26 goes on to make provision for the referral of disputes to a Liaison Committee, as follows:

> *"Liaison Committee*
>
> 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".

15. Paragraphs 2 (to which I have already referred) and 6 (a fast track dispute resolution procedure) are not relevant here. It is common ground that this claim is a "Construction Dispute" for the purposes of paragraph 3.2.

16. Schedule 26 then provides that the parties "may" refer a Dispute to Mediation (paragraph 4) and Adjudication (paragraphs 5 and 6) before dealing with "*Court Proceedings*":

> "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."

17. Schedule 26 does not define "Liaison Committee", which is instead defined in Schedule 1 of the Construction Contract as "…the committee referred to in clause 12 (Liaison Committee) of the Project Agreement". Key provisions of clause 12 of the Project Agreement (which itself cross refers to the Dispute Resolution Procedure in Schedule 26 of the Project Agreement) are as follows (with references to "Project Co" being references to CAP):

> "*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…

12.12 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"

(emphasis added).

18. A curiosity of these contractual provisions, insofar as they relate to the DRP under the Construction Contract (and not under the Project Agreement) is that they provide for the Liaison Committee to comprise only representatives from the Trust and from CAP, albeit that there is provision for others to be invited to attend. Kajima has no representation on the committee. Only members of the Liaison Committee are entitled to vote and the minutes are open to inspection only by the parties to the Project Agreement. In so far as paragraph 3.1 to the Construction Contract provides that "[a]ny decision of the Liaison Committee shall be final and binding unless the parties otherwise agree", that decision would be made by the Trust and CAP; it would not involve Kajima. Mr Hargreaves QC, on behalf of Kajima, accepted during the hearing that, in the circumstances, any such decision could not possibly be binding on Kajima.

19. I shall return to this point in due course, but for present purposes I agree with the submissions made by Mr Webb, on behalf of CAP, that 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.

THE BACKGROUND TO THESE PROCEEDINGS

20. In about September 2018, concerns around cladding and fire-stopping issues were notified to Kajima Construction, which agreed to carry out remedial works at its own cost on a without prejudice basis. 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.

21. Pursuant to the Construction Contract, the limitation period would have expired on 2 April 2019. However, due to the ongoing remedial works, the parties agreed to a standstill agreement dated 29 March 2019, which was subsequently varied on four occasions (on 7 April 2020, 29 March 2021, 28 June 2021 and 27 September 2021) (the "**Standstill Agreement**") to protect their mutual positions. The last variation lapsed on 29 December 2021, thereby bringing the extended limitation period to an end on that date. The provisions of the Standstill Agreement made clear that it did not preclude (i) steps being taken under the Dispute Resolution Procedure in the Construction Contract, or (ii) the issue and service of proceedings in relation to the dispute between the parties, during the standstill period.

22. It is common ground that on four occasions in 2019 and once in 2020, the Liaison Committee convened to discuss the ongoing remedial works. Kajima was invited to these meetings and generally attended. However, it is Kajima's case that none of these meetings amounted to a referral of a dispute for resolution, as required by paragraph 3.1 of Schedule 26 to the Construction Contract. CAP maintains that the majority of issues arising in the claim against Kajima Construction were considered in detail by the Liaison Committee during the course of these meetings but it accepts that there was never an express referral of Kajima Construction's liability for Deductions.

23. On 30 November 2021, Kajima Construction informed CAP that since its remedial works had now been largely completed with "*a very limited number*" of outstanding matters, it considered that it had reasonably met all possible liabilities that could arise

from the design and construction of the Hospital and that therefore, it no longer wished to extend the standstill period beyond 29 December 2021.

24. Kajima says that CAP was thereby put on notice that the limitation period would be coming to an end within 29 days and that, if it desired to issue proceedings before or by that date, the onus was on it to take appropriate steps under the DRP in the Construction Contract.

25. In the first couple of weeks of December 2021, there ensued further correspondence between the parties, before CAP issued its Claim Form on 21 December 2021.

26. The Claim Form alleges that the Trust has informed CAP that the Works contain "certain design and/or construction defects". These are identified as:

> "the presence of Polysiocyanurate (PIR) behind the cedar wood cladding and in voids behind the cheeks of the south back lines and along the external walls at level 10; the absence of cavity barriers behind Kingspan KS1000 metal composite panels; the absence of fire protection to steelwork; cedar cladding failing the surface spread of flame test (does not attain class 0); non-compliant softwood cladding to the hospital exterior (does not attain class 0), non-compliant composite cladding to the hospital exterior, the presence of unprotected openings (including non-fire rated windows); the absence of 1,000m lateral protection at junctions between internal compartment walls and external walls of the hospital; windows installed within the zone of the 1m wide vertical strips where compartmentation meets the external wall; the absence of 1,000mm lateral protection at junctions between the internal compartment walls and the wall enclosing the atrium ("the Defects")."

27. It is alleged that the Trust has required CAP to remedy the Defects and that it intends to pursue CAP for further sums arising out of the Defects, such as "contractual Deductions for the Works not being available for use". CAP asserts that the Defects arose from the failure on the part of Kajima Construction to comply with its obligations under the Construction Contract and/or breach of its tortious duty and it seeks "damages" and/or "sums due" pursuant to the terms of the Construction Contract or in tort. The Claim Form also alleges that Kajima Europe is liable under the terms of the Guarantee. The amount claimed is "to be ascertained, but in excess of £300,000".

28. Pausing there, Kajima contends that it is clear that, as at the date of the Claim Form, CAP did not know the nature of the claim it wanted to bring against Kajima, the type of relief sought or even a rough ballpark figure of the value of any such claim. It says that Kajima could not sensibly respond to such a claim, which has been brought solely to protect the limitation position. This forms the basis for an allegation of abuse of process to which I shall return but which is unrelated to any issue arising in respect of the DRP and did not form part of the original Kajima Application.

29. Upon learning that the Claim Form had been issued, on 12 January 2022, Kajima requested that it be served. In response, CAP sought Kajima's consent to a stay of the proceedings in order to pursue the DRP, pointing out in a letter dated 26 January 2022 that "the Liaison Committee is a mandatory part of the dispute resolution process agreed".

30. On 3 February 2022, CAP issued an application (the "**Stay Application**") seeking a two month stay. On the same day, Kajima issued the Kajima Application. The Stay Application was supported by a first witness statement from Mr William Cursham, CAP's solicitor, expressly confirming that the stay was required (i) to "try and resolve the dispute via without prejudice discussions and/or contractually agreed ADR mechanism"; (ii) to "obtain details of the claim being made against [CAP] by its 'upstream claimant'; and (iii) to "go through the Pre-Action process".

31. Mr Cursham explained in his first statement that the bulk of the claim involved effectively passing on to Kajima any liability that CAP is found to have to the Trust, together with a claim for CAP's own losses, including professional and expert fees incurred in investigating the Defects. He noted that Kajima had issued its own claim against one of its sub-contractors, English Architectural Glazing Limited ("**EAGL**"), a claim which included a claim for its losses together with an indemnity in respect of any claim by CAP against Kajima. He went on to confirm that the Claim Form was issued to protect CAP's position. In so far as the DRP is concerned, Mr Cursham stated that the parties had a contractual obligation to pursue that procedure.

32. The Kajima Application was supported by the first witness statement of Mr Jonathan Tattersall, Kajima's solicitor. Mr Tattersall confirmed that, for the purposes of the Kajima Application, the position of Kajima Construction and Kajima Europe is identical and he set out Kajima's grounds for submitting that the court does not have jurisdiction to try the claim, alternatively that it should not exercise any jurisdiction. In addition, Mr Tattersall said that the Claim Form discloses no reasonable grounds for bringing the claim and/or is an abuse of the court's process, although he did not identify the grounds for this alternative assertion.

33. The applications were considered on paper by O'Farrell J on 7 February 2022. She ordered that the time for service of CAP's Particulars of Claim be extended to 8 April 2022, made provision for the service of further evidence in the Kajima Application and listed that application for hearing.

34. On 18 March 2022 CAP wrote to Kajima Construction stating that it was "hereby [referring] this matter to the Liaison Committee for resolution" and proposing dates for a meeting of the Liaison Committee. In its response of 23 March 2022, Kajima contended that it had no clarity over the nature of any dispute and pointed out that, in any event, the limitation period had now expired such that there was now no point in referring the dispute to the Liaison Committee.

35. Nevertheless the Liaison Committee met on 11 April 2022. No representative from Kajima was in attendance. It is CAP's case that, at this meeting, Kajima Construction's liability for Deductions was "discussed and recorded".

36. CAP served evidence in response to the Kajima Application in the form of a second statement from Mr Cursham on 6 April 2022. Amongst other things Mr Cursham points out that the proceedings against EAGL have been compromised by CAP. He also confirms CAP's understanding that "the usual resolution where a party commences proceedings before the contractual or pre-action dispute resolution process has run its course is to stay the proceedings". He points out that not only is this acceptable to CAP but that it has applied for, and obtained, such a stay of its own volition. In response, Kajima served a second statement from Mr Tattersall dated 19

April 2022, pointing out, amongst other things, that CAP has not in fact obtained a stay of the proceedings (merely an extension of time) and that it has no extant application for a stay before the Court at this hearing. Mr Tattersall also made the point that Kajima's supply chain litigation involved two other parties in addition to EAGL.

37. CAP served its Particulars of Claim on 6 April 2022. These set out the Defects identified in the Claim Form in more detail, alleging breach of contract against Kajima Construction. Paragraph 51 of the Particulars of Claim acknowledges that Kajima Construction has carried out remedial works, which were completed in or around March 2022. Losses suffered by CAP are alleged to fall into two categories: first, liability for Deductions levied or to be levied by the Trust under the Project Agreement (said by the Trust to be "a little under £14 million if the remedial works had completed by 30 September 2020", a sum which is disputed by CAP), and second, CAP's own costs of investigating and dealing with the defects (said to total £352,305 to the end of December 2021). Kajima Europe is said to be liable under the Guarantee insofar as Kajima Construction is found liable to CAP.

38. In acknowledging service on 14 April 2022, Kajima identified that it intended to contest jurisdiction.

THE APPLICABLE LAW

39. The parties referred me to a number of authorities in which the courts have considered the effect of a contractual agreement to refer a dispute to ADR. In the most recent, *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] BLR 576, O'Farrell J derived the following principles from the authorities dealing with the circumstances in which the court may stay proceedings where a party seeks to enforce an alternative dispute resolution provision:

> "(i) The Agreement must create an enforceable obligation requiring the Parties to engage in alternative dispute resolution.
>
> (ii) **The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.**
>
> (iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the Parties.
>
> (iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the court will have regard to the public policy interest in upholding the Parties' commercial agreement and furthering the overriding objective in assisting the Parties to resolve their disputes".
>
> **(emphasis added)**

40. O'Farrell J accepted (at [52]-[54]) that the ADR provision at issue in that case did in fact operate as a condition precedent to the commencement of legal proceedings and she stayed the proceedings to permit mediation to take place.

41. Principles (i), (iii) and (iv) identified by O'Farrell J were not in issue before me and I shall need to return to them in due course. However, Mr Webb argued that in referring at (ii) to the need for the obligation to be expressed clearly as a condition precedent to court proceedings or arbitration, O'Farrell J went beyond the guidance in the authorities to which she had referred. In his submission, those authorities (and other authorities to which the judge had not referred) evidence a well-established approach to dealing with the existence of a mandatory dispute resolution clause which does not involve seeking to determine whether it is also a condition precedent.

42. In *Channel Tunnel v Balfour Beatty Ltd* [1993] AC 334, the relevant clause of the contract provided for initial reference of disputes to a panel of experts and thereafter provided for final settlement by arbitration. The House of Lords held that a court has inherent power to stay proceedings brought before it in breach of such an agreement. The clause in question was plainly a mandatory provision, negotiated at arms' length by commercial parties such that there was a presumption that "those who make agreements for the resolution of disputes must show good reasons for departing from them" (per Lord Mustill at 353A-D). However, there was no suggestion that the clause created a contractual condition precedent (or that such was necessary prior to the grant of a stay). On the subject of the court's jurisdiction, Lord Mustill said this at p.362D-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. Moreover even if the court does choose to grant a stay, the court retains its jurisdiction over the dispute. If all goes well this jurisdiction will never be exercised, but if the arbitration breaks down the court is entitled to resume seizing of the dispute and carry it forward to judgment."

43. *Channel Tunnel* was applied in *DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd* [2008] Bus LR 132, a case in which the relevant clause provided that "Any dispute, question or difference arising under or in connection with the subcontract shall, in the first instance, be submitted to adjudication…and thereafter to the exclusive jurisdiction of the English courts". Judge Coulson QC, as he then was, identified the relevant principles of law in [5]-[9] of his judgment and reiterated the court's inherent jurisdiction to stay proceedings brought in breach of a contractually agreed dispute resolution procedure. It does not appear to have been argued that the clause in this case was a condition precedent and nor does the Judge suggest that such was required if the court was to exercise its discretion to stay the proceedings.

44. As for the authorities on which O'Farrell J relied at paragraphs [28]-[31] of her judgment in *Ohpen*, only one, *Cable & Wireless Plc v IBM UK Ltd* [2003] BLR 89, is concerned with the power to stay court proceedings pending compliance with contractual machinery for ADR. In the judgment of Colman J, the focus was very firmly on the mandatory nature of the relevant clause; there is no mention of any requirement that such clause should be a condition precedent and indeed the issue of

whether the ADR provision was a condition precedent did not directly arise. Colman J emphasised the importance of giving effect to the parties' chosen dispute resolution method (which he described at page 96 as "a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings") and he observed that "strong cause would have to be shown before a court could be justified in declining to enforce such agreement".

45. All of the other judgments on which O'Farrell J relies are judgments in which there appears to have been little or no dispute over whether the relevant provisions for dispute resolution were conditions precedent to referral to arbitration:

    i) *Holloway v Chancery Mead Ltd* [2007] 117 ConLR 30, concerned a provision that expressly required a particular form of dispute resolution to be a condition precedent to arbitration. Much of Ramsay J's judgment focusses on the enforceability of dispute resolution procedures, an issue to which I shall return. At [79]-[80] he looked in particular at the issue of certainty, referring to the test of certainty identified by Einstein J sitting in the Supreme Court of *New South Wales in Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996, including that the requirement for sufficient certainty would be met if the obligation was in *Scott v Avery* form "so that completion of mediation is a condition precedent to court proceedings". However that test was not adopted by Ramsey J in his formulation of the principles at [81] and at [85] he expressly said that, on the facts, the clause with which he was concerned "imposed a requirement or condition precedent" requiring the parties to go through the dispute resolution procedure before arbitrating.

    ii) *Tang v Grant Thornton International Ltd* [2013] 1 ALL ER (Comm) 1226, included the question of whether pre-arbitration conciliation steps were conditions precedent to an arbitral reference. There seems to have been no dispute over whether the relevant provision was capable of being a condition precedent – the dispute turned on whether the provision was sufficiently precise or certain to be contractually binding.

    iii) *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145 concerned the question of whether what appears to have been an accepted condition precedent was unenforceable as a mere agreement to negotiate. Teare J appears to have had no difficulty in accepting that the mandatory requirement for "friendly discussions" to resolve the claim was a condition precedent to the right to refer the claim to arbitration. He emphasised the public interest in giving effect to such clauses (at [50]) and he upheld the clause in that case as sufficiently certain. On the facts, he found that the requirements of the clause had been satisfied and so "The arbitrators have jurisdiction to decide the dispute between [the parties] because the condition precedent to arbitration, although enforceable, was satisfied".

46. In short notes provided after the hearing, both counsel cautioned against placing significance upon cases concerning ADR provisions prior to arbitration. Arbitration is a consensual process having a contractual basis, whereas the right to litigate arises as a matter of general law. Mr Hargreaves expressly recognised in a footnote to his skeleton argument that, in the arbitration context, "there now exists a considerable amount of

debate as to whether such questions are questions of jurisdiction or admissibility". Accordingly he accepted that "those authorities which turn on principles of arbitration law are not of direct application here". This point is amply borne out by a reading of *NWA v NVF* [2021] EWHC 2666 (Comm) per Calver J at [31]-[60], including (at [59]) criticism of *Emirates Trading* for dealing with the issue at stake as a matter of jurisdiction.

47. Stripping out the cases dealing with ADR provisions prior to arbitration, I am inclined to agree with Mr Webb that (at least in this jurisdiction) the courts do not appear to have distinguished between mandatory obligations and conditions precedent for the purposes of deciding whether to enforce dispute resolution clauses prior to the commencement of litigation in court. In both *Channel Tunnel* and *Cable & Wireless* the focus was purely on the mandatory nature of the clauses and there was no suggestion that the relevant ADR provision either fell within the category of a condition precedent, or needed to fall within that category for the purposes of enforcement.

48. Thus, in so far as O'Farrell J observes in *Ohpen* that the obligation must be expressed clearly as a condition precedent to court proceedings before the court will order that the proceedings be stayed, I respectfully disagree. O'Farrell J does not appear to have received submissions as to the significance or otherwise of the "arbitration" cases and it is plain that authorities decided since *Ohpen* have raised question marks about aspects of the approach taken in (at least) *Emirates Trading* and *Tang.* In my judgment the relevant authorities dealing with court proceedings support the proposition that the court has an inherent jurisdiction to stay such proceedings for the enforcement of an alternative dispute resolution provision where the clause creates a mandatory obligation and where it is enforceable (i.e. where it satisfies the other requirements identified by O'Farrell J).

THE JURISDICTIONAL CHALLENGE

49. Insofar as material, CPR 11 provides 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."

50. The concept of jurisdiction in CPR 11 is concerned not with the court's territorial jurisdiction, but with the court's power or authority to try a claim (see *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203 per Dyson LJ at [23]).

51. It appears to be common ground, that CPR 11 consolidates two logically and juridically separate types of challenge (see *IMS SA v Capital Oil and Gas Industries Ltd* [2016] EWHC 1956 (Comm) per Popplewell J at [27] and [34]). First, a complaint that the court's jurisdiction has not been successfully invoked (for example by reason of defective service); second an assertion that the court should decline to exercise its discretion (for example on grounds of *forum non conveniens*). At [28] Popplewell J said this:

> "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."

52. Thus in cases where the parties have contracted out of the English courts, there is a discretion to stay proceedings (see *The Pioneer Container* [1994] 2 AC 324 at 347F).

The Issues:

53. The Kajima Application raises two main issues under CPR 11: the first is the effect of the alleged failure to comply with the DRP and, in particular, whether such failure has the effect of ousting the jurisdiction of the court; the second is whether, even if the court has jurisdiction, it should nevertheless decline to exercise it in the circumstances of this case.

54. The parties identified the questions falling within these two main issues in slightly different ways, but in my judgment, the two main issues referred to above require consideration of the following questions:

    i) whether the DRP gives rise to a condition precedent, as Kajima contends, or whether it is a mandatory jurisdiction provision as CAP contends;

    ii) whether the provisions of the DRP are enforceable;

    iii) whether, if enforceable, the provisions of the DRP were complied with by CAP in advance of the issue of the Claim Form;

    iv) whether either CPR 11(1)(a) or (b) is engaged;

    v) if CPR 11(1)(b) is engaged, how the court should exercise its discretion in the circumstances of this case.

Condition Precedent or Mandatory provision?

55. It is an important part of Kajima's case in its written submissions that the DRP is a condition precedent, essentially because it contends that the court's jurisdiction is expressly subject to compliance with that condition precedent. Kajima relies for this contention on *Scott v Avery* (1856) 5 HL Cas 811. It says that, in the circumstances, the right to bring a claim had not arisen as at the date the Claim Form was issued. As I

understood its case, this is Kajima's route in to engaging CPR 11.1(a), although as became clear during the hearing, that route was not open to Kajima in light of the authorities.

56. Perhaps of more significance, is Kajima's argument that the existence of a condition precedent to litigation gives rise to a jurisdictional issue which will engage the provisions of CPR 11(1)(b), such that there is scope for the court to consider (in the exercise of its discretion) the expanded menu of options for relief provided pursuant to CPR 11(6). This menu features remedies which go far beyond merely staying the proceedings. This could be of particular significance in the context of a situation in which legal proceedings have been commenced shortly before expiry of the limitation period and in circumstances where an ADR provision which is a condition precedent to the commencement of such proceedings has not been complied with.

57. Mr Webb acknowledges that the DRP creates a mandatory requirement but says that it does not create a condition precedent. However, he says that even if the DRP is properly to be viewed as a condition precedent, that should make no difference because ADR clauses do not have the effect of ousting the jurisdiction of the court. Mr Webb points out that he is unaware of any authority in which a claim has been struck out or set aside for failure to comply with a contractual ADR provision.

58. On analysis it seems to me that the DRP, in so far as it concerns the requirement to refer disputes to the Liaison Committee under paragraph 3 of Schedule 26 to the Construction Contract, is properly to be interpreted as a condition precedent to the commencement of litigation. My reasons are as follows:

    i) The court's task in interpreting the Construction Contract is to apply the ordinary and well known principles of contractual interpretation, i.e. to ascertain the objective meaning of the language used by the parties to express their agreement (see the succinct summary of these principles in *Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Limited* [2018] EWHC 163 (Comm) per Popplewell J at [8]).

    ii) It is not necessary for the words "condition precedent" to be used, as long as "the words used are clear that the right to commence proceedings is subject to the failure of the dispute resolution procedure" (see *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] BLR 576, per O'Farrell J at [53]). It is necessary to have more than a mere statement that compliance with the dispute resolution procedure is mandatory;

    iii) The wording of clause 56 of the Construction Contract does no more than require a dispute to be resolved in accordance with the DRP in Schedule 26 – as Mr Webb submitted, this is not enough in itself to give rise to a condition precedent.

    iv) However, on the interpretation for which Mr Hargreaves contends, clause 68.2 of the Construction Contract ("Subject to the provisions of the Dispute Resolution Procedure…") anticipates that the right to commence court proceedings is subject to compliance with the DRP. When viewed together with the other provisions to which Mr Hargreaves drew my attention, I agree with him that the obvious purpose of the relevant provisions in the DRP (objectively construed) is to require

the mandatory referral to the Liaison Committee for resolution before the parties become entitled to institute proceedings.

v) The key provisions which support this interpretation and which evidence a clear chronological sequence in the operation of the contractual machinery are: (a) paragraph 2 of Schedule 26, which appears to anticipate the existence of pre-conditions to the commencement of proceedings by reason of the creation of express exceptions; (b) paragraph 3.1 of Schedule 26 which expressly provides that "all Disputes **shall first** be referred to the Liaison Committee for resolution" (**emphasis added**); (c) paragraph 3.2 of Schedule 26 which envisages that in the case of a Construction Dispute the Liaison Committee will convene and seek to resolve the Dispute within 10 days of referral; and (d) paragraph 7.1 of Schedule 26 which expressly provides that all disputes shall be referred to the High Court "**to the extent not finally resolved** pursuant to the [DRP in Schedule 26]" (**emphasis added**).

vi) I agree with Mr Hargreaves that the wording of the relevant clause in *Ohpen* ("[i]f a Dispute is not resolved in accordance with the Dispute Procedure, then such Dispute can be submitted…to the exclusive jurisdiction of the English courts") is similar to the wording of the various clauses in this case which provide for Disputes "first" to be referred to the Liaison Committee and then "to the extent not finally resolved" to the High Court. Both clauses provide for a sequence which must be followed before legal proceedings can be commenced.

vii) Mr Webb suggested that an alternative interpretation of clause 68.2 is that the court has exclusive jurisdiction to resolve disputes but that such exclusivity is subject to the provisions of the DRP which provide for jurisdiction to be exercised elsewhere – i.e. by an adjudicator. In other words that the true purpose of the opening words of clause 68.2 is to save the adjudication provisions in the DRP from being overridden by the exclusive jurisdiction clause. However, when 68.2 is read together with the other provisions to which I have referred above, I do not consider that Mr Webb's alternative interpretation accurately reflects the parties' intentions, objectively construed.

Is the Dispute Resolution Procedure enforceable?

59. It was common ground at the hearing that, if it is to be enforceable, the DRP must be "sufficiently clear and certain by reference to objective criteria…" (*Ohpen* at [32(iii)]).

60. This overarching requirement is derived from the requirements identified in *Holloway* 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."

and also (albeit put slightly differently) in *Tang* at [60]:

> "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."

61. In my judgment, paragraph 3 of Schedule 26 of the Construction Contract, when read together with clause 12 of the Project Agreement, does not comply with these requirements for the following reasons:

    i) There is no meaningful description of the process to be followed. Clause 12.5 of the Project Agreement provides that the Liaison Committee can make its own rules and procedures. These are not anywhere identified in the Project Agreement (and there is no evidence that the Liaison Committee has identified any rules and procedures to apply to dispute resolution in the context of the Construction Contract). Accordingly it is unclear how the Liaison Committee will "seek to resolve the Dispute". One might ask how it will identify the dispute in the absence of one of the parties to the Construction Contract? Will it invite the attendance of representatives from Kajima at a meeting? What if Kajima refuses to attend? Kajima's attendance would require agreement and any failure to attend could not be in breach of contract given that there is no contractual obligation on the part of Kajima to attend the Liaison Committee. Furthermore, there is no obligation on the Trust (which is represented on the Liaison Committee) to play its part in any particular way. Indeed, it is unclear what its role may be in the context of a dispute between CAP and Kajima (and the evidence of Mr Tattersall indicates that throughout the remedial works the Trust has in fact been concerned only with its contractual dealings with CAP and that Kajima has attended meetings only to report on remedial works, albeit this is obviously not relevant to the issue of interpretation).

    ii) There is therefore no unequivocal commitment to engage in any particular ADR procedure (see for example *Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyds LR 275 at [27] – the decision of Cooke J in this case was upheld by the Court of Appeal). In circumstances where Kajima is not obliged to take part in the process (and has no right to do so), it is impossible to see how the process can be said to "provide a means of **resolving** disputes or disagreements between the parties **amicably**" (**emphasis added**). Whilst the word "resolution" in the context of court proceedings means a final determination, it seems to me that it has a rather different meaning in the context of a dispute resolution process which is intended to achieve an amicable outcome. I cannot see how it is possible to "resolve" a dispute between two parties amicably when one is not involved in the process. "The parties" referred to in clause 12 of the Project Agreement are the Trust and CAP. There is no procedure that would enable disputes as between CAP and Kajima to be resolved

"amicably". This appears to me to give rise to an obvious lack of certainty, not least because a court would have "insufficient objective criteria to decide whether one or both parties were in compliance or breach" (see Colman J in *Cable & Wireless* at [23]).

iii) Further, it is unclear how a dispute between CAP and Kajima should be referred to the Liaison Committee. This element of uncertainty has led to disagreement between the parties at this hearing over whether the dispute in issue has in fact been referred to the Liaison Committee or not. Clause 12.2 of the Project Agreement identifies various functions of the Liaison Committee without providing any clarity or certainty as to the circumstances in which the Liaison Committee will be deemed to be "providing a means of resolving disputes or disagreements".

iv) It is unclear what impact any decision of the Liaison Committee has on Kajima. Pursuant to paragraph 3.1 of Schedule 26 to the Construction Contract, "Any decision of the Liaison Committee shall be final and binding unless the parties otherwise agree". Mr Hargreaves contends that the reference to "the parties" here must be a reference to the Trust and CAP. If he is right about that, then this process has no final or binding effect on Kajima and so is rendered pointless; the Liaison Committee involving the Trust and CAP can make a decision that will have no impact on Kajima. If, in fact, the parties to the Construction Contract intended the reference in paragraph 3.1 to be a reference to themselves, then the result is no less puzzling; it would subject Kajima to a final and binding decision from a committee of which it is not a member, save where Kajima has agreed otherwise with CAP. Once again, it is difficult to see how this could possibly be an amicable resolution of the dispute.

v) It is not clear when the process of referral to the Liaison Committee comes to an end such that the dispute is "not finally resolved" for the purposes of paragraph 7.1 of Schedule 26 to the Construction Contract, i.e. it is unclear when the condition precedent is satisfied. 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. Paragraph 3.2 requires the Liaison Committee to "seek to resolve" the dispute within 10 days of referral, but if there is no committee meeting in that time or if the initial committee meeting decides that further information is required or that for some other reason a second meeting must be convened, it is unclear whether litigation may nevertheless be commenced. Mr Hargreaves argued that litigation was possible once the 10 day period identified in paragraph 3.2 had expired, but I do not consider that is clear from the wording. The words "to the extent not finally resolved" in paragraph 7.1 might be said to import an understanding that a proper opportunity will have been given to the Liaison Committee to arrive at a final resolution. Deciding when the dispute has not been "finally resolved" and thus when legal proceedings might be commenced does not seem to me to be straightforward or certain.

62. Of course, the court should be slow to deny enforceability and it is clear from *Tang* at [59] (applying amongst others, the Court of Appeal's decision in *Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 and *Cable & Wireless*) that the court must be "astute to consider each case on its own terms. The test

is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative instructions it imposes are sufficiently clear and certain to be given legal effect".

63. However, in all the circumstances identified above, I consider that the relevant provisions in this case are not apt to create an enforceable obligation to commence or participate in a dispute resolution process designed amicably to resolve the dispute between the parties to the Construction Contract.

64. Mr Hargreaves accepted during his oral submissions that the DRP in the Construction Contract is "slightly unusual and surprising" but he maintained that it was sufficiently certain to be enforceable and he pointed to correspondence from CAP's solicitors insisting on the need to undertake the mandatory DRP, a stance that was echoed in Mr Cursham's evidence. Mr Hargreaves cautioned the court against substituting its own views as to the utility or otherwise of the process. At one point he observed that the court should be slow to find clauses in a relational contract to be unenforceable although he accepted that the fact that the Construction Contract may be a relational contract does not in any way impact upon the exercise that I must undertake for these purposes.

65. I agree with Mr Hargreaves that the DRP is both unusual and surprising. The fact that CAP's solicitors have previously taken the view that it is a mandatory requirement does not appear to me to take matters further. In my judgment, for the reasons I have identified, the DRP is neither clear nor certain. It does not include a sufficiently defined mutual obligation upon the parties in respect of the referral to the Liaison Committee and the process that will then ensue and it therefore creates an obvious difficulty in determining whether either CAP or Kajima has acted in breach.

66. In the circumstances, I find that, although expressed as a condition precedent, the obligation to refer disputes to the Liaison Committee is not defined with sufficient clarity and certainty and therefore cannot constitute a legally effective precondition to the commencement of proceedings. Accordingly, the commencement by CAP of legal proceedings on 21 December 2021 neither merits a stay of the proceedings on conventional principles nor a refusal on the part of the court to exercise jurisdiction under CPR 11(1)(b). For this reason alone, I dismiss the jurisdictional challenge.

Have the provisions of the Dispute Resolution Procedure been complied with in advance of the issue of proceedings?

67. In light of my decision as to enforceability, this issue is not determinative. However, I shall deal with it briefly on the basis of the evidence available.

68. Mr Webb submitted by reference to the minutes of Liaison Committee meetings that cladding defects at the Hospital, together with Kajima Construction's responsibility for these defects, were discussed as early as 24 April 2019. He also submitted that at subsequent meetings the nature and extent of the remedial works to be carried out by Kajima was discussed. He was not able to show me an express "referral" of the dispute between CAP and Kajima to the Liaison Committee and he frankly acknowledged that there had been no express referral of Kajima's liability for Deductions. Nevertheless he submitted that paragraph 3 of Schedule 26 was materially complied with by CAP before commencing the proceedings.

69. I disagree. There is no suggestion in the minutes of the meetings held in 2019 and 2020 that they were anything other than meetings held under clause 12.2(a) of the Project Agreement and there is no record of any discussion around the need to resolve a dispute between CAP and Kajima under Schedule 26 to the Construction Contract. There is no evidence indicating that the dispute between CAP and Kajima was formally referred to the Liaison Committee pursuant to paragraph 3.2 of Schedule 26 to the Construction Contract. Indeed Mr Tattersall's evidence is to the effect that he has been told by Mr Taylor (of Kajima) that the meetings did not go into the details of matters such as commercial discussions around settlement or Deductions and that there was no referral of this dispute to the Liaison Committee. CAP has not sought to gainsay this evidence.

70. In my judgment there is a distinction between the forum in which parties discuss events as they unfold (which provides a means, in the wording of clause 12.2 of the Project Agreement, "for the joint review of issues relating to all day to day aspects" of performance of the contract) and an ADR process involving a referral for the purposes of resolving disputes or disagreements. I agree with Mr Hargreaves that the mere fact that a Liaison Committee meeting was held to discuss day to day issues does not mean that it was discussing (much less seeking to resolve) a particular dispute or disagreement.

71. In this context it also appears to me to be of some significance that CAP itself appears to have taken the firm view (reflected in *inter partes* correspondence and in its evidence) that it remained necessary to refer the dispute to the Liaison Committee and that such referral had not happened prior to the commencement of the proceedings. Thus in his first statement of 3 February 2022, Mr Cursham expressed the view that "the dispute needs to be referred to the Liaison Committee procedure" on the grounds that such referral was a "mandatory part of the dispute resolution procedure in both the Project Agreement and the Construction Contract".

72. The first evidence of any attempt to refer the matter to the Liaison Committee comes in the form of the letter of 18 March 2022, but even then, it is not at all clear from a reading of the minutes of the Liaison Committee meeting (which then took place on 11 April 2022) that the dispute between CAP and Kajima was in fact referred to the committee with a view to seeking to resolve the matter. During the course of his oral submissions, even Mr Webb conceded that the most recent meeting was "not a very good attempt to get to [the] substance of it". One reason for this may well be the lack of clarity around what is required by the DRP.

73. In all the circumstances, I consider that the dispute between the parties to the litigation was not referred to the Liaison Committee prior to the issue of the proceedings.

Is CPR 11(1)(a), alternatively CPR 11(1)(b) engaged?

74. Given my finding as to the lack of enforceability of the DRP, it is not strictly necessary to consider these issues. However, assuming for present purposes that the relevant provisions of the DRP are enforceable, and in circumstances where the matter has been argued before me, I address each of these issues in turn.

75. During his oral submissions, Mr Hargreaves very fairly acknowledged that the authorities to which I have already referred placed him in significant difficulties in contending that (assuming non-compliance with a condition precedent) the court has no

jurisdiction, and he ultimately accepted that the "main thrust" of his submissions was not directed at CPR 11(1)(a). Indeed it seems to me that *IMS* renders it impossible for him to contend that the circumstances of this case engage the provisions of CPR 11.1(a), which appears to be confined to cases where there is a technical issue around the commencement of the claim. Mr Hargreaves relied upon *Hoddinott*, but the facts of that case concerned extensions of time in relation to the service of a claim form. It is clearly a case falling within CPR 11.1(a), but it does not assist Kajima to establish that the facts of this case also fall within that provision.

76. As the House of Lords made clear in *Channel Tunnel*, the presence of a mandatory ADR provision does not deprive the court of jurisdiction. As to whether a clause expressed as a condition precedent (or, as Mr Hargreaves put it, a *Scott v Avery* clause) could shift the dial, both parties also drew my attention to the following passage from Mustill & Boyd, The Law and Practice of Commercial Arbitration in England, 2nd Edition at page 161-162:

> "The practical effect of [*Scott v Avery* clauses] is that unless both parties consent to have the claim tried in the High Court, it must be referred to arbitration. It might well be thought that this amounts to an ouster of the jurisdiction, since in the absence of consent or waiver an action brought in defiance of the clause must inevitably fail. This is not, however, the position in law. A *Scott v Avery* clause does not prevent the parties from bringing an action in the High Court. A writ issued in respect of a matter falling within the clause is not irregular, or a nullity; and if, for example, a defendant waives the right to insist on an award, the action proceeds in the normal way. The effect of the clause is not to invalidate the action, but to provide a defence."

77. It is abundantly clear from this passage that Mustill & Boyd do not consider a *Scott v Avery* clause to have the effect of ousting the court's jurisdiction. Mr Hargreaves did not show me any authority which suggested otherwise.

78. In all the circumstances I find that CPR 11(1)(a) is not engaged on the facts of this case.

79. As for CPR 11.1(b), the key question for the court is whether my finding that the DRP is a condition precedent to litigation (always assuming enforceability) gives rise to a jurisdictional issue. In my judgment, it does. As the cases demonstrate, aside from the public interest in giving effect to dispute resolution clauses, it is important that the courts should seek to give effect to bargains struck by commercial parties (see *Emirates Trading* at [50] and *Ohpen* at [58]). Here the parties agreed that the referral to the Liaison Committee to enable it to seek to resolve the dispute was a condition precedent to the commencement of litigation. Whilst it is clear on the authorities that a mandatory ADR provision has no jurisdictional effect (see *Channel Tunnel*), I presently see no reason why an enforceable ADR provision expressed as a condition precedent should not engage CPR 11(1)(b). I have been shown no authority to contradict such a finding.

80. I note that in *Ohpen*, O'Farrell J chose to exercise her discretion under section 49(3) of the Senior Court's Act and/or her inherent jurisdiction to grant a stay, but she did not suggest that she could not also have exercised her discretion under CPR 11(1)(b),

which had been put in issue before her, or that that provision was not engaged in the circumstances of that case.

The Exercise of the Court's Discretion

81. The novel point to which the case gives rise concerning the expiry of the limitation period arises only in the context of the exercise of the court's discretion. However, in light of my decision as to lack of enforceability, CPR 11(1) is not engaged. This is not an appropriate case for the intervention of the court. Nevertheless, in the event that I am wrong on the issue of enforceability, I must set out my views on the exercise of the court's discretion.

82. Assuming for these purposes that CPR 11(1)(b) is engaged, it is clear from the authorities to which I was referred that even in cases where claims are commenced in breach of a mandatory jurisdiction provision, the default remedy under CPR 11(6) is a stay, with the remedy of setting aside a claim form being reserved for cases where proceedings have not been validly served (see *IMS*). Accordingly, in cases involving an ADR clause which is an enforceable condition precedent to litigation, there may often be no difference between the approach that the court will take in refusing to exercise its jurisdiction under CPR 11(1)(b) and granting a stay and the approach it will take in exercising its discretion to determine whether to stay proceedings under section 49(3) of the Senior Courts Act 1981 or pursuant to its inherent jurisdiction (see *Ohpen* at [57]). I understood Mr Hargreaves to accept this in his reply submissions, pointing out, however, that the additional relief available under CPR 11(6) might come into sharper relief in a case involving limitation.

83. Of course, the court will need to consider, in any given case, whether the circumstances of the case merit more stringent relief. Mr Webb very properly drew my attention to the case of *Snookes v Jani-King (GB) Ltd* [2006] ILPr 19, the only case he had been able to find in which a validly issued claim form was set aside as a result of a contractual jurisdiction clause, namely a clause requiring court proceedings to be commenced in London (and not Swansea, as occurred).

84. The facts of *Snookes* are very different from the facts with which I am concerned, although they do involve a limitation issue. Silber J considered that assistance could be gained from the principles applied by the courts in cases where "a claimant sues in this country in breach of an agreement to refer the relevant disputes to a foreign court", pointing out that in such situations, a stay of proceedings should be granted "unless a strong case for not doing so is shown" (at [67]-[68]). With reference to cases involving contractual jurisdiction clauses, Silber J decided that the question to be determined was whether the claimant acted reasonably in not issuing proceedings in London to protect his position prior to the expiry of the primary limitation period. Having decided that the claimant could not show that he had acted reasonably, the Judge set aside the claim form.

85. I agree with Mr Webb that it would be difficult to extend *Snookes* into cases involving a failure to comply with a mandatory ADR provision without cutting across the guidance given in the cases to which I have referred which demonstrate that a stay is the appropriate or default remedy. However, I see no reason why, in a case which engages CPR 11(1)(b), the court could not determine that a different form of relief was appropriate having regard to the particular facts.

86. In the circumstances of this case, where I have found that the DRP creates a condition precedent to litigation, and where the issue of limitation arises, Mr Hargreaves invites me to exercise my discretion to set aside the claim form. He says that in circumstances where the dispute has not been referred to the Liaison Committee, there is, and was at the date of issue of the proceedings, no right to bring proceedings. A stay would run contrary to the interests of justice and the overriding objective because Kajima will always have a defence to these proceedings, namely that they are proceedings commenced at a time when there was no entitlement to do so.

87. Mr Hargreaves points out that it is of course open to CAP to comply with the provisions of the Construction Contract, operate and conclude the ADR process and then, when CAP's right to issue proceedings in respect of the cause of action underlying the Dispute has arisen, to issue proceedings. However, Kajima would then say that any such claim is time barred and that CAP has only itself to blame.

88. Mr Webb says that a decision to set aside the claim form (as opposed to merely staying the proceedings) would be a draconian remedy, wholly unsuitable for the circumstances of this case. On balance, and notwithstanding Mr Hargreaves' persuasive arguments, I consider that on the facts of this case Mr Webb is right, essentially for the following reasons:

    i) Although the provisions of the Standstill Agreement expressly provided that CAP and Kajima Construction were not prevented from taking any step pursuant to Schedule 26 of the Construction Contract during the standstill period, CAP was not in a position to refer (at least) the specific issue of Deductions to the Liaison Committee prior to expiry of the limitation period. As Mr Cursham explains in his first statement, the Trust had intimated a claim against CAP in meetings but "has not formalised the claim or quantum, despite repeated requests from [CAP]". He also confirms that "[t]he bulk of [CAP's] claim against [Kajima] will effectively be passing on to [Kajima] any liability [CAP] is found to have to the Trust".

    ii) Mr Cursham's evidence is to the effect that CAP had initial discussions with the Trust during the first standstill period but that thereafter Kajima asked CAP not to progress negotiations because "although [Kajima] had commenced the remedial works it still had a great deal to do and was not certain as to the total extent of the remedial works". Mr Cursham says that this pause in negotiations was acceptable to the Trust and that it was agreed that negotiations between the Trust and CAP should recommence when the remedial works had been completed. Mr Cursham confirms in his first statement that, as at 3 February 2022 (i.e. after the expiry of the limitation period), remedial works were not yet complete but that a constructive meeting had taken place with the Trust in January 2022 to discuss its claim against CAP. As Mr Webb submitted, it appears to have been Kajima's choice to carry out the remedial works before engaging in any discussions. This evidence was not disputed by Mr Tattersall.

    iii) In his second statement of 6 April 2022, Mr Cursham states that "the Trust has only to date provided high level statements of the sum being claimed by way of Deductions, with little by way of explanation or calculation. The Trust's position has been that those Deductions continue to accrue until the remedial works are complete. The Deductions calculation is a very complex one and the Trust needs

to establish, for example, exactly which rooms and/or areas were made unavailable during the remedial works and for how long. It is understood that the Trust will shortly be able to provide more complete information now that remedial works have finished". Again he emphasises that "The quantum of the Claimant's claim against the Defendants was not discussed at the Liaison Committee prior to the commencement of the claim because the Claimants did not have a figure from the Trust for the level of deductions which it would seek to make. A key reason for this was that the Defendants had not yet completed their remedial works…The reason that the Liaison Committee has not to date been able to resolve the dispute is because the value of the Trust's claim against the Claimant has not been determined."

iv) Whilst Kajima gave notice in its letter of 30 November 2021 that it would refuse any further extension to the Standstill Agreement and thereafter, in a letter of 10 December 2021, reserved its position as to any failure on the part of CAP to take "the necessary pre-action steps" in advance of the issue of proceedings, thereby arguably alerting CAP to the need to comply with the DRP, Mr Cursham's evidence is that achieving a settlement with the Trust in that period of time was unrealistic, particularly as the Trust was in the midst of dealing with the latest developments in the COVID pandemic. In a letter dated 16 December 2021, CAP informed Kajima that any settlement discussion must involve the Trust and that the Trust would not begin such discussions until remedial works at the Hospital had been completed (which did not occur until after expiry of the limitation period). The Liaison Committee could not have been convened without the attendance of the Trust. I note that the 16 December 2021 letter also observes that CAP has encouraged Kajima to engage with it in proposing a reasonable settlement figure to be put to the Trust but that Kajima "has provided nothing to date".

v) Although Mr Tattersall takes issue with the date of completion of the remedial works saying that "the bulk" of those works has been substantially complete for some time (hence Kajima's letter of 30 November 2021), paragraph 5 of the Particulars of Claim confirms that the remedial works were finished "around March 2022". Furthermore, the contemporaneous correspondence between the parties appears to confirm that remedial works were not finally completed as at December 2021 and that the Trust was not therefore prepared to meet (i.e. there could be no Liaison Committee meeting) before January 2022. CAP's letter of 16 December 2021 says "…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". CAP's letter of 18 January 2022 says this:

> "Our client has made repeated attempts to engage with the Trust in respect of its claim against our client. The Trust were reluctant to meet with our client until the works had been completed. Now that the works are substantially completed, the Trust has finally agreed to meet with our client on 26 January 2022 on a without prejudice basis."

vi) Furthermore, it is also clear from the correspondence (see for example letters of 6 December 2021 and 16 December 2021), that CAP consistently requested a further extension of the Standstill Agreement to permit more time for meetings to

take place with the Trust – which CAP also pointed out would be unlikely to affect Kajima's position in its supply chain litigation.

vii) Whilst Mr Tattersall also questions the complexity of the Deductions calculation, it does not seem to me that I am in a position to determine this particular issue. Even assuming he is right that the Deductions calculation is relatively straightforward, the fact remains that the Trust was not prepared to take part in any meeting prior to completion of the remedial works, and that did not take place until after the expiry of the limitation period.

viii) Finally, this is not a claim in which the lack of ADR means that Kajima does not understand the claim it must meet or was not expecting it. Kajima has been aware of the potential for a claim for some considerable time. It carried out remedial works in response to complaints about defects and it took steps to protect its position by commencing separate TCC proceedings against its sub-contractors in respect of the defects. It chose to enter into a commercial settlement in relation to those proceedings.

89. In all the circumstances, I consider 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 represents an entirely sensible approach. Although not directly on point, paragraph 12 of the Pre-Action Protocol for Construction and Engineering Disputes expressly envisages that if compliance with the protocol may result in a claim being time barred then "the Claimant may commence proceedings without complying with this Protocol". Upon the issue of proceedings it is standard procedure for the court to consider staying the whole or part of those proceedings pending compliance with the protocol.

90. Furthermore, I consider that cases such as this, where quantum information is not finalised (for whatever reason) when the limitation period expires are common in the TCC. Whilst the court will always be concerned to understand why this has occurred, in my judgment it is better that the parties issue proceedings on time and engage in ADR in a meaningful way at a later date when ready to do so than that they are rushed into pointless compliance with an ADR provision which will never bear fruit.

91. In this case, if and insofar as the correct test is whether CAP acted reasonably in not referring the dispute to the Liaison Committee in advance of the commencement of proceedings (*Snookes*), I consider that in the circumstances set out above, it did. Kajima requested that negotiations with the Trust be put on hold pending completion of the remedial works and the Trust was not prepared to meet prior to expiry of the limitation period; further and in any event CAP did not have information as to the Deductions which it could have referred to the Liaison Committee in any event. I accept that at all times CAP was acting in good faith in commencing proceedings with a view, thereafter, to completing what it understood to be the mandatory requirements of the Dispute Resolution Procedure. That this is so is borne out by its correspondence after the issue of proceedings and its Stay Application on 3 February 2022. In my judgment it would neither be consistent with the interests of justice nor the overriding objective to set aside the claim form on the facts of this case.

92. Even if the DRP had been enforceable, I would not have been prepared to exercise my discretion under CPR 11(1)(b) and 11(6) to do anything more than stay the

proceedings. In the event, and given that the relevant provisions of the DRP are not enforceable, I am not prepared to make any order in favour of Kajima on its application.

THE STRIKE OUT APPLICATION

93. The strike out application is made pursuant to CPR 3.4(2)(a) and (b), on the grounds that CAP's statement of case discloses no reasonable grounds of success and/or that it is an abuse of the court's process.

94. In light of my decision as to the enforceability of the DRP, it is not necessary to deal with the arguments under CPR 3.4(2)(a) in any detail. It follows from my decision that the DRP is unclear, uncertain and unenforceable, that CAP has a real prospect of advancing its claim at trial and the strike out application under CPR 3.4(2)(a) accordingly fails.

95. As for the application under CPR 3.4(2)(b), I need deal with the arguments on this application only briefly.

96. In its application notice, Kajima provided no clue as to the grounds for its contention that CAP's claim is abusive. The supporting witness statement of Mr Tattersall focused on the failure to comply with the DRP (i.e the arguments it makes in support of the jurisdictional challenge). However, for all the reasons I have given, CAP's claim is plainly not abusive on these grounds. Mr Hargreaves recognised in his oral submissions that if he could not persuade me of the existence of an enforceable condition precedent, then he could not succeed on this aspect of the application.

97. However, for the first time in his skeleton argument for the hearing, Mr Hargreaves made submissions by reference to *Nomura v Granada* [2008] Bus LR 1 on the grounds that, as at the date of issue of the proceedings, CAP had no idea as to whether any claim from the Trust would ever be issued against it, did not know what any such claim would consist of and also did not know what its loss would be, but nevertheless commenced the claim solely for the purposes of protecting itself against the expiry of the limitation period. Mr Hargreaves said that these propositions were made out on the existing evidence from CAP in the form of Mr Cursham's witness statements and so there could be no proper objection to the point not having been raised previously.

98. In *Nomura*, Cooke J observed at [37] that:

> "…the key question must always be whether or not, at the time of issuing a writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshall what it knew, to formulate particulars of claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even

> in a rudimentary way, a claimant has no business to issue a claim form at all 'in the hope that something may turn up'. The effect of issuing a writ or claim form in such circumstances is, so the plaintiff/claimant hopes, to stop the limitation period running and thus deprive the defendant of a potential limitation defence. The plaintiff/claimant thus, unilaterally, by its own action, seeks to achieve for itself an extension of the time allowed by statute for the commencement of an action, even though it is in no position properly to formulate a claim against the relevant defendant. That must, in my judgment, be an abuse of process and one for which there can be no remedy save that of striking out the proceedings so as to deprive the claimant of its putative advantage. The illegitimate benefit hopefully achieved can only be nullified by this means. Whatever powers may be available to the court for other abuses, if this is an abuse, there is only one suitable sanction."

99. I reject the submission that at the time of issuing the proceedings in this case CAP was not in a position to formulate the cause of action complained of and, given time, to formulate particulars of that claim. In my judgment, the facts of this case are not analogous with the facts of *Nomura*. In this case, CAP knew the nature of the defects about which the Trust was complaining and the cause of action to which those defects gave rise. CAP's letter of 16 December 2021 clearly sets out its understanding of the Trust's complaint. The claim form sets out the nature of the defects in some detail. The fact that the claim form refers to a failure by Kajima to comply with its obligations under the Construction Contract and/or breach of its duty of care in tort does not, to my mind, undermine this position.

100. Whilst it is true that CAP was not in a position to identify the full extent of its loss at the time of issue of the proceedings (and Mr Cursham's evidence frankly acknowledges that), I do not regard that as in any way unusual in proceedings in this court and I note that *Nomura* does not suggest that a failure clearly to identify the heads of loss being claimed, and/or the sums claimed in respect of those heads of loss is, in itself, sufficient to amount to an abuse. If every case in which the claimant is unable clearly to identify its heads of loss at the time of issue of proceedings were an abuse, then many, if not most, of the cases that come before this court would be liable to be struck out. Equally, if cases were liable to be struck out merely because a claimant is not in a position to say whether a claim will certainly be made "up the line", again that would no doubt affect a substantial number of cases in this division. Kajima itself brought a claim against its supply chain in circumstances where it (presumably) was not in a position to identify the full extent of its claim, or even whether proceedings would ultimately be commenced against it by CAP.

101. A claim must be clearly shown to be an abuse before it can be struck out (see *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110 at [45] per Coulson LJ). Abuse of process was defined in *Attorney General v Barker* [2000] 1 FLR 759 at [19] as "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

102. At [62] in *Cable*, Coulson LJ went on to say this:

> "If the defendant is seeking to prevent a valid claim from going further, then no matter the mechanism by which that debate comes before the court,

> the judge must grapple with the central dispute: should the claim be allowed to proceed, or should it be struck out? That issue will be informed (but not decided) by the answer to the prior question: has there been an abuse of process?"

103. The answer to that question in this case, in my judgment, is that there has been no abuse of process; CAP has not sought to use the court process in a way which is significantly different from the ordinary and proper use of the court process. In the exercise of my discretion I am not prepared to strike out the claim.

104. By way of postscript I observe that it is not satisfactory for a *Nomura* type application (which will usually be premised on the knowledge of the claimant as at the date of commencement of the claim) to be made at the eleventh hour in court. The consequences of such an application could well be extremely serious for a claimant and it should be given every opportunity to file evidence in opposition to the application. It is not consistent with the overriding objective or the interests of justice for a claimant to be "bounced" into dealing with such an application at court, even if the defendant considers the application to be justified by reference to existing evidence. The claimant is entitled to know and understand the precise nature of the application that is being made and have an opportunity to file responsive evidence designed to address that application.

The Position of Kajima Europe

105. For completeness I note that it is Kajima's case that the position of Kajima Construction and Kajima Europe is, for the purposes of this application, identical. Mr Webb disputed this, contending, in summary, that the provisions in the Construction Contract are not found in the Guarantee and that a successful application to strike out the claim as against Kajima Construction would not provide a basis for an application to strike out the claim as against Kajima Europe.

106. In circumstances where I have determined that Kajima's application should be dismissed, I need not determine this point.

CONCLUSION ON THE KAJIMA APPLICATION

107. The Kajima Application is dismissed.