Neutral Citation No. [2002] HWHC 1315 (TCC) IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

TECHNOLOGY AND CONTRUCTION COURT

Case No: HT-02-211

St Dunstan's House 133 – 137 Fetter Lane

London EC4A 3HD

Date: 3 July 2002

Before:

HIS HONOUR JUDGE RICHARD SEYMOURS QC

J T MACKLEY & COMPANY LIMITED Claimant –and-

GOSPORT MARINA LIMITED Defendant

.....

Peter Coulson QC (instructed by Hammond Suddards Edge for the Claimant) Geoffrey Hawker (instructed by Blake Lapthorn for the Defendant)

.....

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

H.H. Judge Richard Seymour Q.C.

Introduction

1. In this action, commenced on behalf of the Claimant, J.T. Mackley & Co. Ltd. ("Mackley ") under the provisions of Part S of the Civil Procedure Rules on 30 May 2002, Mackley seeks a declaration that a document entitled "In the matter of an arbitration between Gosport Marina Limited Issuing Party and JT Mackley & Co. Ltd First Respondent and Posford Haskoning Ltd. Second Respondent Joint Notice to Dispute and Notice to Refer", to which I shall refer in this judgment as "the Notice to Refer" is invalid. Mackley also seeks an order that any arbitration based on the Notice to Refer be stayed.

2. The Defendant in this action is Gosport Marina Ltd. ("Gosport"). The Notice to Refer was given to Mackley on behalf of Gosport by its solicitors Messrs. Blake Lapthorn on 23 April 2002

3. An application has been issued on behalf of Gosport under Part 11 of the Civil Procedure Rules seeking orders that the claim of Mackley in this action be set aside, service of the Claim Form be set aside and the proceedings be stayed. The grounds upon which that application was stated to have been made were that, so it was contended, the effect of Arbitration Act 1996 s 1(c) and s. 32 was that the Court had no jurisdiction to determine the question whether the Notice to Refer was invalid without the agreement in writing of the other parties to the arbitration proceedings which it was contended had been commenced by the giving of the Notice to Refer or without the consent of the arbitrator appointed to decide the issues raised by the Notice to Refer

4. Following the giving of the Notice to Refer Mr. Michael Morris was appointed by the President of the Institution of Civil Engineers on 10 June 2002 as arbitrator in relation to the matters raised in it so far as Mackley is concerned. Mr. Morris has also been appointed by a different appointing body as arbitrator in relation to the disputes between Gosport and Posford Haskoning Ltd.

5. Neither Gosport nor Mr. Morris has in fact consented to the making of the claim made in this action.

6. As an alternative ground for the relief sought by Gosport Mr. Geoffrey Hawker, who appeared on its behalf, submitted that, if, technically, the Court had jurisdiction to make the declaration sought by Mackley, it should not exercise it because the policy of Parliament as indicated by the terms of Arbitration Act s.1(c) and s.32 was that questions as to the jurisdiction of an arbitrator to determine matters in dispute between the parties to an arbitration agreement should be decided by the arbitrator and not by the Court. During the course of the hearing before me, as I shall explain, Mr Hawker indicated that

the sole ground upon which he pursued the Part 11 application on behalf of Gosport was that which originally had been the alternative ground.

7. Logically, if there were an objection that the Court had no jurisdiction which was persisted in, it would be necessary to consider first the objection to the jurisdiction of the Court to decide the issues raised by the Particulars of Claim served on behalf of Mackley in this action and only if that question were resolved against Gosport to proceed then to consider the claim made in this action on its merits. However, as I have indicated, the position ultimately adopted on behalf of Gosport was not that I did not have jurisdiction to entertain the claim of Mackley, but that I should not, in the exercise of my discretion, accede to Mackley's claim. In order to decide whether to entertain the claim of Mackley as a matter of discretion I did hear both the Part 11 application made on behalf of Gosport and the Part 8 claim made on behalf of Mackley. In my judgment it is impossible to consider whether, as a matter of discretion, to entertain the claim of Mackley in this action without an understanding of the nature of, and the alleged justification for, that claim, as well as an understanding of the grounds upon which it was said that I should not exercise my discretion in favour of considering it. It is thus convenient next to explain the basis upon which Mackley claimed to be entitled to the relief sought in the Particulars of Claim.

The Contract

8. By an agreement ("the Contract") in writing, which in the copy put before me was undated but which it was common ground had been made been on 7 February 2000, between Gosport and Mackley Mackley undertook to carry out certain land reclamation works ("the Works") at Gosport Marina, Gosport in Hampshire. The Contract incorporated the standard form "Conditions of Contract 6th Edition (January 1991) and Corrigenda (August 1993) and Guidance Note (March 1995) and Amendments (reference ICE 6th Edition/Tax/February 1998) issued by the Institution of Civil Engineers, the Association of Consulting Engineers and the Federation of Civil Engineering Contractors as applicable to dredging and amended as follows. " In this judgement I shall call the conditions so described "the ICE Conditions". None of the amendments made for the purposes of the particular project are material to any issue now before the Court.

The Arbitration Clause

9. Clause 66 of the ICE Conditions makes provision as to the settlement of disputes. It is not necessary for the purposes of this judgment to set out Clause 66 in its entirety, but the following sub-clauses or parts of sub-clauses are material to the matters which Mackley desires to raise in this action:

"(1) Except as otherwise provided in these Conditions if a dispute of any kind whatsoever arises between the Employer [that is to say, Gosport] and the Contractor [that is to say Mackley] in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion instruction direction certificate or valuation of the Engineer (whether during the progress of the Works or after their completion and whether before or after the determination abandonment or breach of the Contract) it shall be settled in accordance with the following provisions.

(2) For the purpose of sub-clauses (2) to (6) inclusive of this Clause a dispute shall be deemed to arise when one party serves on the Engineer a notice in writing (hereinafter called the Notice of Dispute) stating the nature of the dispute...

(3) Every dispute notified under sub-clause (2) of this Clause shall be settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor within the time limits set out in sub-clause (6) of this Clause.

(4) Unless the Contract has already been determined or abandoned the Contractor shall in every case continue to proceed with the Works with all due diligence and the Contractor and the Employer shall both give effect, forthwith to every such decision of the Engineer. Such decisions shall be final and binding upon the Contractor and the Employer unless and until as hereinafter provided either

(a) the recommendation of a conciliator has been accepted by both parties or:

(b) the decision of the Engineer is revised by an arbitrator and an award made and published...

(6) (a) Where a Certificate of Substantial Completion of the whole of the Works has not been
issued and either:

(i) the Employer or the Contractor is dissatisfied with any decision of the Engineer given under sub-clause (3) of this Clause or:

(ii) the Engineer fails to give such decision for a period of one calendar month after the service of the Notice of Dispute or:

(iii) the Employer or the Contractor is dissatisfied with any recommendation of a conciliator appointed under sub-clause (8) of this Clause then either the Employer or the Contractor may within 3 calendar months

after receiving notice of such decision or within 3 calendar months after the expiry of the said period of one month or within one calendar month of receipt of the conciliator's recommendation (as the case may be) refer the dispute to the arbitration of a person to be agreed upon by the parties by serving on the other party a written Notice to Refer.

a. Where a Certificate of Substantial Completion of the whole of the Works has been issued the foregoing provisions shall apply save that the said period of one calendar month referred to in (a)(ii) above shall be read as 3 calendar months...

(8) (a) Any reference to arbitration under this (clause shall be deemed to be a submission to

arbitration within the meaning of the Arbitration Acts 1950 to 1979 or any statutory re-enactment or amendment thereof for the time being in force. The reference shall be conducted in accordance with the 'Institution of Civil Engineers' Arbitration Procedure (1983) or any amendment or modification thereof being in force at the time of the appointment of the arbitrator. Such arbitrator shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer.

(b) Neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision under sub-clause (3) of this Clause.

(c) The award of the arbitrator shall be binding on all parties...

No provision for adjudication

1. The Contract did not incorporate any provision in relation to adjudication in the event that a dispute arose between Gosport and Mackley in respect of the execution of the Works. Consequently by virtue of the provisions of Housing Grants, Construction and Regeneration Act 1996 s. 108(5), the Scheme for Construction Contracts set out in Part 1 of the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998. SI 1998 No. 649 was applicable.

Substantial Completion of the Works.

11. A Certificate of Substantial Completion of the last part of the Works was issued on 6 March 2001, certifying that Substantial Completion had been achieved on 14 February 2001.

The Adjudications

12. Following the Substantial Completion of the Works two adjudications took place. The first resulted in an award by Mr G. D. G Cottam dated 9 May 2001. The second resulted in an as award by Dr. Roger Maddrell dated 3 December 2001. Both were concerned with the responsibility under the Contract for build up of silt during the execution of the Works and consequent changes to methods of working and delays. The decision of each adjudicator was that the responsibility for these matters under the Contract lay with Gosport

The Reference to the Engineer

13. By a letter dated 4 October 2001 to the Engineer under the Contract Posford Haskoning Ltd., Mackley referred to the Engineer for its decision a dispute its to whether Certificate No. 14 represented a fair and accurate assessment of Mackley's Final Account in respect of the execution of the Works. Posford Haskoning Ltd. made known its decision in respect of the dispute referred by the letter dated 4 October 2001 in letter to Mackley dated 4 January 2002.

14. In a letter dated 23 April 2002 to Posford Haskoning Ltd. Messrs. Blake Lapthorn wrote as follows:

"Gosport Marina Land Reclamation
"We refer to Clause 66(2) of the ICE Conditions of Contract (Sixth Edition) as amended, and to the Schedule of Loss and Expense accompanying the Joint notice of Dispute and Notice to Refer served today on behalf of our Client, Gosport Marina Ltd upon the Contractor J T Mackley & Co. Ltd, and yourselves as Consulting Engineer.
The said Schedules summarises our Client's claims against both the Contractor and Engineer. Some of these claims have already been referred to you as the Engineer pursuant to Clause 66(2) of the ICE Conditions of Contract; others, for example Item 5 in the Schedule, have not.
"Accordingly, and for the avoidance of doubt each and every Item in the Schedule is hereby referred to you as the Engineer pursuant to the said Clause 66(2) insofar as they concern the Contractor. Insofar as they concern yourselves, no such reference is, of

course, necessary. We await your decision(s) in these matters pursuant to clause 66(3) of the ICE Conditions of Contract at your early convenience. Where and to the extent that you may already have given Clause 66(3) decision, please supply copies of the relevant decision letters.

The Notice to Refer

15. The notice to Refer was dated 23 April 2002. The terms of the notice after the heading were these:

"1. On 1 February 2000 the Gosport Marina Limited, the issuing party herein, entered into contract (the "Contract") whereby issued J T Mackley & Co. Ltd (the "Contractor") agreed to carry out land reclamation works for the Gosport Marina Ltd the ("Employer") at its site in Mumby Road, Gosport, Hampshire.

2. The form of that contract was the ICE 6th edition (January 1991) with corrigenda (August 1993) and (guidance Notes (March 1995) and Amendments (reference: ICE 6th edition tax/February 1998).

3. By a Contract made on the 26th June 1998, Posford Haskoning Ltd (then Posford Duvivier) (the "Consulting Engineer") contracted to provide professional services as detailed and described in the Agreement.

4. The Respondents agreed to exercise reasonable skill, care and diligence in the performance of the services set out in their respective agreements.

[sic] This notice, as to the Contractor, is issued under clause 66(2) of the Contract and in accordance with the ICE Arbitration Procedure (1983) as amended, and as to Consulting Engineer under clause 9 of the Association of Consulting Engineers Conditions of Engagement, 1995 and in accordance with the Chartered Institute of Arbitrators rules and procedures.

2. The Contract involved land reclamation using dredged fill. It required programme of controlled and staged filling in 0.5 m layers over soft unstable silt seabed, and the installation of sheet pile walls and wick drains at various stages in that programme. The Consulting Engineer, as part of its professional services, was responsible for the design and construction supervision of, inter alia that area of land reclamation which was to be used for or car parking

3. During the initial phase of reclamation filling significant silt slippage and ground movements occurred within and beyond the toe of the reclamation necessitating

extensive additional dredging works to re-establish water depths. The slippage caused physical damage, delays and consequential losses, and necessitated extensive remedial works. Additional costs were incurred by the Issuing Party as a consequence of the slippage and ground movements

4. The displacement of the very soft unstable silt seabed that occurred during initial placement of Phase 1 reclamation was an inevitable consequence of the design and method of construction of the Consulting Engineer Further this seabed ground failure, which occurred almost from the commencement of the work was known in the Contractor, who despite the failure continued work, without adequate supervision causing the ground failure to worsen over time

5. Insufficient consideration was given by either of the Respondents as to the likely implications of the displacement on the existing Marina facilities, or the need to subsequently remove the material from site, even though the Respondents were aware of the importance of the Marina continuing to function throughout the construction period.

6. The Issuing Party has suffered loss and expense as a consequence of the Respondents' breaches of contract and duties owed full details whereof are set out in the schedule annexed hereto The Issuing Party's claim 2 will also include a claim for interest and costs.

7. Given the complexities of the dispute and the specialised nature of the works, the Issuing Party is of the view that an arbitrator with substantial experience of marine work should be appointed by the appropriate Appointing Authorities.

Mackley's objections to the notice to Refer

16. Mr. Peter Coulson Q.C., who appeared on behalf of Mackley at the hearing before me submitted that the notice to Refer was invalid for essentially three reasons. The first was that, so he contended, the structure of Clause 66(2) of the ICE Conditions required any dispute first to be referred to the Engineer for his decision, with the possibility of arbitration only if a party was aggrieved by the decision of the Engineer in relation to the particular dispute referred to him. Mr. Coulson submitted that the Notice to Refer was invalid because it did not identify any decision of the Engineer with which Gosport was aggrieve. Second, he submitted that on the facts the decision of the Engineer on any dispute between Mackley and Gosport nearest in time before the giving the Notice to Refer was that in respect of which the Engineer gave his decision in the letter dated to January 2002 to which I have necessitating referred, that was more than three calendar months before the giving of the Notice to Refer, no application had been made to extend

the time for commencing arbitration fixed by Clause 66(6) of the 1 ICE Conditions, and so the notice to Refer was invalid as being out of time. Mr. Hawker accepted at the hearing before me that the decision given by the Engineer in the letter dated to January 2002 was too long before the Notice to Refer to be able to be relied upon as justifying the giving of the notice to Refer. He said that Gosport recognised the decision in the letter dated to January 2002 as final and binding. Mr Coulson's third ground of objection to the Notice to Refer was that to was invalid as it attempted to commence as tripartite arbitration involving Posford Haskoning Ltd as well as Mackley and the Contract made no provision for any arbitration involving anyone other than the immediate parties to the Contract.

The relevant provisions of Arbitration Act 1996
17. By Arbitration Act 1996 s.32 it is provided, so far as is presently material, that:

"(1) The Court may, on the application of as party to arbitral proceedings (upon notice to the other parties) determine any question as to the substantive jurisdiction of the tribunal...

(2) An application under this section shall not be considered unless:

a. as it is made with the agreement in writing of all the other parties to the proceedings, or:

(b) it is made with the permission of the tribunal and the court is satisfied

(i) that the determination of the question is likely to produce substantial saving in costs,

(ii) that the application was made without delay, and no that there is good reason why the matter should be decided by the court.

18. Arbitration Act 1996 s 30 is in these terms:

1. Unless otherwise agreed by the parties the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to -

a. whether there is as valid arbitration agreement,

b. Whether be tribunal is properly constituted, and:

c. what matters have been submitted to arbitration in accordance with the arbitration agreement.

2. Any such ruling may be challenged by any available arbitral process of appeal of review or in accordance with the provisions of this Part."

19. Section 1 of Arbitration Act 1996 makes this provision:

"The provisions of this part are founded on the following principles, and shall be constructed accordingly

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense

(b) the parties should he free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters go governed by this Part the court should not intervene except as provided by this Part."

The case on behalf of Gosport as to the jurisdiction of the Court

20. Mr. Hawker submitted that in the circumstances of the present case the conditions for the exercise by the Court of the jurisdiction given by Arbitration Act 1996 s.32 were not satisfied and thus the Court could not exercise its powers under that section. That, I think must be right. Mr. Coulson, however, submitted that the jurisdiction of the Court to grant declarations does not derive from Arbitration Act s.32. In answer to that submission Mr. Hawker submitted, initially, that the general jurisdiction of the Court in respect of the granting of declarations should be treated as excluded in the case of declarations in relation to arbitrations by the provisions of Arbitration Act 1996 s. 1(c), or at least that provision should caution the Court only to intervene if the case were exceptional and there were compelling reasons to invoke as procedure outside Part 1 of Arbitration Act 1996. As I have said, ultimately he only pursued the second of these points.

The case on behalf of Mackley as to the jurisdiction of the Court.

21. Apart from his reliance upon the general jurisdiction of the Court in regard to the grant of declaratory relief, Mr. Coulson sought to rely on the comments of various writers of textbooks that it was appropriate for a party which considered that an arbitrator had no jurisdiction in, a purported reference to seek declaratory relief from the Court. He also

relied on some observations of Thomas 7 in Vale Do Rio Docc Navegacao SA v. Shanghai Bao Steel Ocean Shipping Co. Ltd., [2000] 2 All ER (Corn) 70 ("the Vale Do Rio Docc case") to the effect that Arbitration Act 1996 s.1 (c) did not amount to a mandatory prohibition on the Court granting a declaration of the type sought by Mackley, the word "should" in that section not meaning "shall". Finally, Mr. Coulson submitted that the relief which Mackley sought was in effect the converse of the powers which the Court of Appeal considered in Harbour and General Works Ltd. v. Environment Agency [1999] BLR 409, in which a party sought an extension of time for the commencement of arbitration proceedings under Arbitration Act 1996 s.12 or a declaration that such was not necessary.

Whether a exercise the jurisdiction of the Court

"22. As I have already indicated, I accept the submission of Mr. Hawker that the conditions for the exercise of the Courts jurisdiction under Arbitration Act 1996 s.32 are not satisfied. Mr. Coulson did not dispute that. At one point on the argument before me it appeared that the real issue in relation to the jurisdiction of the Court in respect of the claim of Mackley in the present was whether the effect of Arbitration Act 1996 s.1(c) was to exclude, in respect of questions arising in the context of arbitration and on the facts of this case, the general jurisdiction of the Court to grant declaratory relief. As it proved, the question to which the application on behalf of Gosport gave rise way whether that provision had the effect of imposing a fetter upon the exercise of (11 k7 general jurisdiction of the Court on the circumstances of this case.

23. Mr. Hawker submitted that useful guidance as to the approach which a court should adopt to the question whether it should exercise its general jurisdiction on a case in which there was a pending arbitration was to be derived from the comments of Thomas J. in the Vale Do Rio Doce case. Mr. Hawker drew my attention to the following passage in the judgment of Thomas J:

"44. Section 30 of the 1996 Act provides that the tribunal may rule on its own substantive jurisdiction . It t is clear from the Report of the Departmental Advisory Committee on the Arbitration Bill. February 1996 (D AC Report), that s. 30 was intended is state the doctrine of 'kompetenz-kompetenz". It was the intention that the basic rule was to be that the tribunal would make the rulings on jurisdiction on the first instance rather than recourse being had to the courts.

"45. Section 32 provides an exception to this basic rule; under s. 32(1) the court may determine questions as to the substantive jurisdiction of the tribunal on the application of a party to arbitral proceedings. A restriction on that right is imposed by s. 33(2) ...

Section 32 was therefore intended a provide that an application to the court would only before made in strictly limited circumstances; recourse to the court would before very much the exception. Paragraph 147 of the DAC Report stales:

> "....this Clause provides for exceptional cases only: it is not intended d a detract from the basic rule as set out on Clause 30. Hence the restrictions on Clause 32 (2), and the procedure on Clause 32(3). It will be noted that we have required either the agreement of the parties, or that the Court is satisfied that this is, in effect, the proper course to take. It is anticipated that the Courts will take care to prevent this exceptional provision from becoming the normal route for challenging jurisdiction..."

46. In ABB Lummus Global Ltd. v. Keppel Fells Ltd. (formerly Far East Levington Shipbuilding Ltd.), [1999] 3 Lloyd's Rep 24 Clarke J declined to consider an arbitration application for a declaration that an arbitration application was still on foot because the requirements of s. 32(2) were not satisfied. He observed that the purpose of the Act was to restrict the role of the court at an early stage of the arbitration.

"47. The issue raised by the application to the court in the arbitration claim form in these proceedings is clearly a question as to the substantive jurisdiction of the arbitrators within the meaning of s 30 (see the definition in s 82(1)). If the owners had appointed an arbitrator, it is also clear, as was accepted by the owners, that the court would not have had jurisdiction to determine the issue, as the conditions in s 32(2) were not satisfied. The owners, however, contended that the conditions contained on s 32(2) were not applicable to these proceedings because they have not appointed an arbitrator and they are not to party to arbitral proceedings. They are therefore entitled a bring the arbitration application.

"48. I do not accept the submission. The court is given guidance as a the circumstance in which it should intervene in relation to arbitration by the terms of s 1 in Pt 1 of the 1996 Act. This provides:

"The provisions of this Part are founded on the following principles, and shall before construed accordingly... (c) in matters governed by this Part the of court should not intervene except as provided by this Part"

"49 It is clear from the DAC Report that this principle was included because of international criticism that the courts of England and Wales intervened more than it was thought they should on the arbitral process, and this was a discouragement a the selection of London as a forum for arbitration.

"50. The provisions of Pt 1 of the 1996 Act regulate all matters not only after constitution of the tribunal by the appointment of an arbitrator but prior a that; see for example s 9, s 12 and s 44(5) which all relate to powers that can before exercised prior to the appointment of the arbitral tribunal.

"51. In my view, therefore the present application for the determination of whether there is an arbitral agreement is a matter regulated by Pt 1 of the 1996 Act and on accordance with As (21 (c), the court must approach the application on the: basis it should 1101 intervene except on the c circumstances specified on that part of the 1996 Act.

"52. In accept the owners' submission that the use of the word "should" as opposed to the word "shall" shows that an absolute prohibition on intervention by the court on circumstances other than those specified on Pt 1 was not intended. That submission seems to me to have force as the view is expressed on the DA Report that a mandatory prohibition of intervention in terms similar to act 5 of the United Nations Commission on International Trade Model Law on International Commercial Arbitration (21 June 1985) (the Model Law) was inapposite However, it is clear that the general intention was that the courts should usually not intervene outside the general circumstances specified in Pt 1 of the 1996 Act.

"53. The circumstances in this case which the owners say are ones in which the court should intervene cannot have been unanticipated by the draftsmen of the. 1996 Act. It is very common for a person who is alleged to be party to an arbitration agreement but denies that he is to make his position clear before an arbitrator is appointed by the person contending that there is a binding arbitration agreement. Thus the argument of the owners must be premised on the assumption that the draftsmen of the 1996 Act intended to allow a party to an arbitration agreement recourse to the courts without any conditions, if he took that step prior to the appointment of an arbitrator, but imposed the conditions in s 32 if he had appointed an arbitrator. If the owners are right, then a partly to an arbitration agreement which is disputed can obtain the decision of the courts without being subject to the restrictions by the simple step of not appointing an arbitrator.

"54. I do not consider that this can have been the intention. The 1996 Act sets out in very clear terms the steps that a party who contends that there is another party to an arbitration agreement should take. First, be should appoint an arbitrator. If the other party appoints an arbitrator, then s 31(1) makes it clear that his appointment of an arbitrator does not prevent him challenging the substantive jurisdiction of the tribunal. If the other party does not appoint an arbitrator, then the default provisions (s 17) or failure of appointment procedures (c 18) apply. Once the arbitral tribunal is constituted then in

accordance with the policy of the 1996 Act it is for that tribunal to rule on its own jurisdiction save in the circumstances specified in s 32. Any award made can then be challenged under s 67. The rights of the party who challenges the existence of the arbitration agreement and takes no part are protected by s 72; he is given the right of recourse to the courts in the circumstances set out. Those provisions, in my view, provide a clear and workable set of rules which the owners should have followed in this case. I can see no reason which would justify the court intervening in the circumstances of this particular case, as it is no different from many others.

"55. The owners contended that to would be in the overall interests of justice for the court to hear this application because it would generally be convenient to do so and that the argument over the validity of the arbitration agreement was bound to arise at a later stage. However, This argument fails to take into account one of the underlying principles of the Act, that the parties should resolve their dispute by the methods they have chosen and the court's intervention should be limited."

"47. The issue raised by the application to the court in the arbitration claim form in these proceedings is clearly a question as to the substantive jurisdiction of the arbitrators within the meaning of s 30 (see the definition in s 82(1)). If the owners had appointed an arbitrator, it is also clear, as was accepted by the owners, that the court would not have had jurisdiction to determine the issue, as the conditions in s 32(2) were not satisfied. The owners, however, contended that the conditions contained on s 32(2) were not applicable to these proceedings because they have not appointed an arbitrator and they are not to party to arbitral proceedings. They are therefore entitled a bring the arbitration application.

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"49 It is clear from the DAC Report that this principle was included because of international criticism that the courts of England and Wales intervened more than it was thought they should on the arbitral process, and this was a discouragement a the selection of London as a forum for arbitration.

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"54. I do not consider that this can have been the intention. The 1996 Act sets out in very clear terms the steps that a party who contends that there is another party to an arbitration agreement should take. First, be should appoint an arbitrator. If the other party appoints an arbitrator, then s 31(1) makes it clear that his appointment of an arbitrator does not prevent him challenging the substantive jurisdiction of the tribunal. If the other party does not appoint an arbitrator, then the default provisions (s 17) or failure of appointment procedures (c 18) apply. Once the arbitral tribunal is constituted then in accordance with the policy of the 1996 Act it is for that tribunal to rule on its own

jurisdiction save in the circumstances specified in s 32. Any award made can then be challenged under s 67. The rights of the party who challenges the existence of the arbitration agreement and takes no part are protected by s 72; he is given the right of recourse to the courts in the circumstances set out. Those provisions, in my view, provide a clear and workable set of rules which the owners should have followed in this case. I can see no reason which would justify the court intervening in the circumstances of this particular case, as it is no different from many others.

24. In my judgment Arbitration Act 1996 s. 1 is agreement curious provision. The stated relevance of the particular matters set Out at paragraphs (a), (b) and (c) of that section is simply that they should influence the construction of the provisions of Part of the Act. No question of construction arises in regard to the issue whether the Court should exercise its general jurisdiction to grant declaratory relief. However it is difficult to imagine many circumstances in which the question of the intervention of the Court and the undesirability of such are likely to be of significance to the proper construction of Part 1 of Arbitration Act 1996. Although not very happily phrased, therefore, it seems appropriate to treat Arbitration Act 1996 s.1 (c) as an indication of the wish of Parliament that the Court should be loathe to intervene in cases in which the parties to a dispute have agreed that the dispute should be referred to arbitration.

25. In the present case the arbitration procedure to which the parties agreed involved time limits for the making of claims for arbitration. Arbitration Act 1996, in s.12, makes provision for the Court, and only the Court, in certain circumstances to extend time limits for the commencement of arbitration proceedings. As Mr. Coulson submitted, the decision of the Court of Appeal in Harbour and General Works Ltd v. Environment Agency indicates that at least in relation to questions as to whether arbitration proceedings had been commenced in time it was not inappropriate for the Court to be prepared to adjudicate.

26. Mr. Hawker submitted that, now that Mr. Morris has been appointed as arbitrator and has indicated his willingness to decide on the validity of the Notice to Refer, it is appropriate for the Court to leave the matter to him.

27. I have heard no argument as to the proper construction of Arbitration Act 19915 s.30 and so it is not appropriate for me to express any concluded view about it. However, it does seem to me that it may be arguable whether the jurisdiction of an arbitrator to decide on his substantive jurisdiction extends to any matter not specifically set out to paragraphs (a), (b) and (e,) in s. 30(1), because of the qualification “that is to say" introducing those paragraphs. Why this may matter is because it is not plain beyond argument that agreement power to determine "what matters have been submitted to

arbitration in accordance with the arbitration agreement" necessarily includes a power to decide that nothing has. There maybe agreement difference between deciding what is the scope of agreement valid reference and deciding whether there has been agreement valid reference at all. That is not a conclusion which I imagine any court would be eager to reach but if it were correct it would mean that there was agreement lacuna is Arbitration Act 1996 such that unless the Court could decide whether there had been agreement valid notice of reference treat issue could agreement not be decided at all in the absence of such agreement as is required for agreement reference to the Court under Arbitration Act 1996 s. 32.

28. The procedure for resolution of disputes to which the parties in the present case agreed, as Mr. Coulson reminded me, involved in the first instance, agreement reference to the Engineer for his decision. He submitted that it was agreement condition precedent to the right of agreement party to a contract which incorporated the provisions of Clause as 66 of (b) the ICE Conditions to refer agreement matter to arbitration under Clause 66 (6) that a decision of the Engineer on the matter in question should first have been obtained. As matters turned out, one of the critical differences between the parties proved to be as this submission was well-founded.

29. Mr. Coulson also submitted that the decisions of the Engineer on matters referred to him as final and binding unless challenged in accordance with the provisions of Clause 66(6) of the ICE Conditions Once a decision of the Engineer had became final and binding he said, it could not be challenged in a subsequent arbitration. At the hearing before me to was not altogether clear whether that proposition was in dispute of not. In support of his submission Mr. Coulson drew to my attention the decision of the Court of Appeal in Harbour and General Works Ltd. v. Environment Agency. One of the issues in that case was whether an arbitrator validly appointed under Clause 66(6) of the ICE Conditions had jurisdiction by virtue of Rule 5.2, of the ICE Arbitration Procedure to reopen decisions of the Engineer which were not themselves the subject of the reference to arbitration. Arbitration submission Waller LJ who gave the leading judgment, said at page 419 of the report:

"That rule provides:

"Once his appointment to completed the Arbitrator shall have jurisdiction over any issue connected with and necessary to the determination of any dispute or difference already referred to biro whether or not any condition precedent to referring the matter to arbitration had been complied with.

"The submission of the appellants to that to a matter has been referred to arbitration then it is open to the arbitrator to consider decisions of the Engineer on other matters even if those decisions have been the final and binding became they were not challenged to accordance with the procedure under of Clause 66. So in the instant case after receipt of the final certificate which quantified those claims left unqualified by the Engineers decision the appellants gave notice to the Engineer of a dispute in relation to quantification. The Engineer having resolved that dispute, the appellants then gave notice for an arbitration to take place on those items. It is plain that the object of the appellants in commencing the arbitration was to try and give jurisdiction to the arbitrator to resolve those matters which were previously the subject of the Engineer's de decision and in relation to which Clause 66(4) prima facie applies. The primary submission of Mr Elliott Q.C. to that rule 5.2 does not allow an arbitrator to have jurisdiction over any issue which has been determined by the Engineer and which is final and binding by virtue of the provisions of Clause 66(4). He submits, (and this was a submission accepted by the judge), that once the decision of the Engineer has become final and binding in relation to any matter, there simply is not an "issue" which could be said to be connected with and necessary to the determination of any dispute or difference. Albeit at one time I did wonder whether some assistance was given to Mr. Bowdery by the final sentence of Clause 66(8) in his argument that even decisions of the Engineer unchallenged were reviewable provided they could be said to be "connected with and necessary to the determination of any dispute or difference already referred to (the arbitrator) ", I was very much persuaded by Mr Elliott that there was no force in point. Mr. Elliott pointed out that there are decisions which are taken by the Engineer with a small "d" which are to be distinguished from a decision with a capital “D”. The decisions with a capital "D" being those taken under Clause 66.

It seems to me the construction of rule 5.2 suggested by Elliott is the correct construction and accords with commercial common sense. It seems unlikely that a contract would provide for decisions of the Engineer being “final and binding" and then leave the whole matter uncertain once the final certificate had been produced"

It seems to me that the passage upon which of Mr. Coulson relied does indeed support his submission.

30. In the end Mr. Hawker did not pursue his submission chat the general jurisdiction of the Court to grant to declaratory relief is excluded in matters relating the arbitration by the provisions of Arbitration Act 1996 s. 1(c.). Rather he submitted that the Court should observe the injunction given by that provision to be cautious in exercising its jurisdiction in relation to an arbitration. In other words his ultimate position was that the Court had

jurisdiction in the present case to grant Mackley the relief which to sought, but to should not exercise that jurisdiction because of the policy of Arbitration Act 1996.

31. In order to decide whether to exercise my jurisdiction to was, as I have said, necessary in my judgment to consider what issues were raised by the objections made to the validity of the Notice to Refer. Those issues concerned the proper per construction of Clause 66 of the ICE Conditions and the impact of Housing Grants. Construction and Regeneration Act 1996 on a contract which incorporated the ICE Conditions. The particular questions between the parties were whether it is a condition precedent to the giving of a valid notice of reference to arbitration that the particular dispute which to is desired to refer to arbitration should first have been referred to the Engineer, and whether there is any time limit applicable, or other condition precedent to a reference in arbitration following a decision of an adjudicator under the provisions of Housing Grants Construction and Regeneration Act 1996. Those are questions of general importance and impact directly upon the issue whether there has been a valid reference by Mr Morris of issues between Gosport and Mackley. With some hesitation I have come to the conclusion that the significance generally of the matters to which I have referred, which have been fully argued before me, makes to appropriate for me to exercise my jurisdiction to entertain the Part 8 claim as in this action. However I should make clear my respectful agreement with the observations of Thomas J. in the Vale Do Rio Doce case which I have quoted above as to the approach to be adopted in the ordinary way to claims such as that of Mackley in the action. That is to say, notwithstanding the views of text-book writers, the Court should not customarily be troubled with disputes as to the validity of a reference to arbitration. Any question between parties as to the validity of a reference should in the first instance, at least, be determined by the arbitral tribunal.

The Submissions on behalf of Gosport in relation to the Notice to Refer

32. In relation to the submissions of Mr. Coulson that the Notice to Refer was invalid as it did not contain any reference to any decision of the Engineer with which Gosport was dissatisfied and because to was given more than three months after the latest decision of the Engineer on any dispute, Mr. Hawker submitted in his written skeleton argument that:

"19. Where an Engineer'ss Clause 66(3) Decision has not been sought, it would appear that there be no limit to the time during which a valid Notice to Refer may ho issued. However, if and to the extent that the obtaining of a Clause 66(3) Decision is a condition precedent to arbitration, the proper view to that the arbitration (once commenced) cannot proceed with regard to that dispute until the Engineer has given his Decision or the time for its delivery has expired. Needless to say, other disputes in the same arbitration which are not so caught may proceed, since there to no stay on the arbitration as a whole. Rule

5.2 of the ICE Arbitration Procedure 1997 may here be relevant in that the condition precedent on one issue may be over-ridden provided that that issue to "connected with and necessary to the determination of any dispute or difference already referred to the arbitrator and not so caught.

20. In its unamended form, the I.C.E. Sixth Edition has no provision for adjudication which therefore falls to governed by the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts promulgated thereunder. S 108(3) of the Act provides that:

> "... the decision of the adjudicator is binding until he dispute is fully determined by arbitration..."

but neither in the Act itself nor in the Scheme for Construction Contracts is there any time limit (measured from the date of the adjudicator's decision) within which the relevant dispute must be referred to arbitration. ICE Clause 66(6) does not, therefore apply. Nor can the condition precedent to Clauses 66(2) and (3) affect the position since s. 108(2)(a) of the Act enables a party to give notice at any time of his intention to refer a dispute to adjudication, thereby bypassing the unamended ICE Sixth Edition."

33. In his oral submissions to me Mr. Hawker indicated that Gosport's case was that it was entitled to rely on the notice of dispute given by Messrs Blake Lapthorn to Posford Haskoning Ltd, in the letter dated 23 April 2D02 to which I have referred as justifying the giving of the I Notice to Refer. The effect of giving a notice of dispute at the same time as the Notice to Refer he submitted was simply that the arbitration commenced by the Notice to Refer could not make forward progress until Posford Haskoning Ltd. had dealt with the letter dated 23 April 2002 or the time for doing so had expired. Whether that submission is well-founded seems to me to give rise to an important question of principle.

34. Mr. Hawker submitted that it was a misunderstanding of the Notice to Refer to regard it as an attempt to commence a single set of arbitration proceedings against both Mackley and Posford Haskoning Ltd. Rather as he put it at paragraph 22 of his written skeleton argument:

> "... Gosport did seek the appointment of the same person as Arbitrator in both arbitrations. Faced with two different appointing authorities (Mackley having ignored the Notice to Concur), Gosport Notice issued Notices of Dispute to Refer and to Concur covering both arbitrations in point form so that each appointing authority and both and Posford would know what was afoot. Inevitably these Notices covered issues in both arbitrations and thus were, perforce, generic rather

than specific. Fortunately, Gosport's aim succeeded in that Mr. Morris is now appointed in both arbitrations. However, from here on it is Gosport's intention to keep the two references rigidly separate so far as paperwork is concerned although should both Respondents so agree, Gosport would not oppose joinder..."

The validity of the Notice to Refer

35. Contrary to the submissions of Mr, Hawker, in my judgment a decision of the Engineer is a condition precedent to the entitlement of a party to a contract which in incorporates the ICE Conditions to refer a dispute to arbitration. In the present case there was either no reference of a dispute, or the decision of the Engineer in advance of, as opposed to contemporaneously with, the giving of the Notice to Refer, or the decision of the Engineer was made more than three calendar months before the giving of the Notice to Refer mid was thus out of time.

36. I reject the submission of Mr. Hawker that the requirement for a decision of the Engineer or the time limits in Clause 66(6) of the ICE Conditions somehow do not apply where what it is desired to do is to challenge the decision of Notice adjudicator operating under the Scheme for Construction Contracts. Again, whether the submissions of Mr. Hawker are well-founded seems to me to raise a matter of general importance. It is correct that by Housing Grants, Construction and Regeneration Act 1996 s. 108(2)(a) it is provided that:

"The contract shall –

"(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication,"

but I cannot see what that has to do with am subsequent arbitration in which the correctness of the decision of the adjudicator is to disputed. Contrary to the impression given by Mr. Hawker in written argument, it is not the case that the only permissible remedy of a party to an adjudication who is aggrieved by the outcome is arbitration. What s. 108(3) actually provides is:

"The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

That form of words makes it plain, in my judgment, that arbitration is only available as a means of challenging the decision of an adjudicator if the relevant contract so provides or

an ad hoc arbitration agreement is made. Where it is sought to rely on an arbitration clause in the relevant contract, it seems to me to be obvious that the ability to do so, and the terms upon which such may be done, fall to be determined under the relevant arbitration clause.

37. I reject the submission of Mr. Hawker that the effect of giving a notice to refer a dispute to arbitration under Clause 66 of the ICE Conditions without there having been a reference of a dispute to the Engineer for his decision is simply that the reference is in suspense until such time as the Engineer has made a decision. If that were correct it would make a mockery of the procedure set out in Clause 66. A party to a contract which incorporated the ICE Conditions would be able to prevent the time limits in Clause 66(6) being of any significance by the expedient of giving at the outset of the relevant works a notice of reference to arbitration in anticipation of disputes arising and be able to say that such action was not a nullity because as and when disputes arose and were referred to the Engineer for decision and decided life was infused into it. With great respect to Mr. Hawker that would be palpable nonsense.

38. 1 also reject Mr. Hawker's answer to Mr. Coulson's submission based on the Notice to Refer being invalid as an attempt to commence tripartite arbitration proceedings. It is clear, as to seems to me, that the purpose of the Notice to Refer was to seek to commence tripartite arbitration proceedings. That was not a course permitted by the Contract, and in my judgment the Notice to Refer was also invalid on that account,

Conclusion

39. For the reasons set out earlier in this judgment I find that the Court has jurisdiction to entertain the claim of Mackley in this action that the Court should exercise that jurisdiction, and that the Court should grant to Mackley the declaration which to seeks.