Neutral Citation Number: [2022] EWHC 496 (Ch)

APPEAL NO: CH-2021-BHM-000003
Case No: PT-2020-BHM-000063

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE ORDER OF DDJ CAUN DATED 23 AUGUST 2021
BUSINESS AND PROPERTY COURTS SITTING IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST (Ch. D.)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 28 February 2022

Before :

HHJ RICHARD WILLIAMS
(sitting as a judge of the High Court)

- -

Between :

Fairpark Estates Limited (1)
Mr Simon Harvey (2)
Mr Henry Wilson (3)

Appellants

- and –

Heals Property Developments Limited

Respondent

- -
- -

Gavin McLeod (instructed by Bartons Solicitors) for the Appellants
Clifford Darton QC (instructed by Edward Harte Solicitors) for the Respondent

Hearing date: 16 December 2021

- -

(draft judgment circulated to the parties by email sent on 23 February 2022)

HHJ Richard Williams:

Introduction

1. The Appellants appeal (with permission to appeal having been granted on 18 October 2021) the order of Deputy District Judge Caun ("***the Judge***") dated 23 August 2021 by which the Judge dismissed the Appellants' application dated 19 May 2021 for an order staying the proceedings brought against them by the Respondent on the ground that the claims were covered by an arbitration agreement made between the 1st and 2nd Appellants and the Respondent. In doing so, the Judge held that, by entering into a Consent Order dated 24 September 2020 ("***the Consent Order***") and/or thereafter agreeing a further extension of time for filing their defence and counterclaim, the 1st and 2nd Appellants had within the meaning of s.9 of the Arbitration Act 1996 ("***the 1996 Act***") taken steps in the proceedings to answer the substantive claims such that they were now prevented from making their application for a stay. In summary, the Appellants submit that the Judge failed to apply correctly or at all the requisite steps which, on authority, must be met before any act of an arbitral party will be held to have debarred them from obtaining a compulsory stay.

2. In ***Patel v Patel*** [2000] QB 551 at 556, Lord Woolf observed that the 1996 Act:

> "was intended to make the law of arbitration clear and more straightforward. Furthermore, the Act makes the law less technical than it has been hitherto."

Having regard to the extent of the technical arguments deployed by both sides on this appeal and before the Judge it does not appear that the goal of achieving greater clarity has been met at least in so far as applying the words under s.9(3) of the 1996 Act and determining the question of whether or not a defendant "has taken any step in [the] proceedings to answer the substantive claim." In ***Bilta (UK) Ltd v Nazir*** [2010] EWHC 1086 (Ch), Sales J observed that, in the absence of binding authority, he would have been inclined to say that the relevant step in the proceedings to answer the substantive claim was simply service of a defence. However, in ***Capital Trust Investments Ltd v Radio Design TJ AB*** [2002] EWCA Civ 135, the Court of Appeal held that what counted as a step in the proceedings to answer the substantive claim continues to be governed by the old case law. As a consequence, in the present case each side placed significant reliance upon authorities from as long ago as the 19th century.

Background

<u>Joint venture</u>

3. The 2nd and 3rd Appellants are directors and shareholders of the 1st Appellant, which was struck off the Companies Register by the time of the hearing before the Judge, but then restored by the time of this appeal. By order dated 8 October 2021, the 1st Appellant was added as a party to the appeal.

4. The 1st and 2nd Appellants entered into a joint venture agreement dated 14 July 2017 ("***the JVA***") with the Respondent to develop land on the east side of

Beaufit Lane, Pinxton, Derbyshire ("***the Site***"). By the terms of the JVA it was agreed that:

i) The 1st Appellant shall, in the event of purchasing the Site, undertake the works required to develop 14 plots for residential and storage use by showmen in accordance with the planning permission already granted for such use ("***the Works***"); and

ii) The Respondent shall purchase from the 1st Appellant 5 of the 14 plots at a total price of £361,900 simultaneously with the 1st Appellant's purchase of the Site.

5. The JVA provided that:

> "11.2 In the event of any dispute or difference arising between the parties as to the construction of this agreement, or any matter or thing of whatsoever nature arising or in connection with it, the following provisions apply:
>
> 11.2.1 The dispute or difference shall be referred to arbitration".

6. By a deed dated 30 January 2019, the JVA was varied to provide that:

i) The 1st Appellant shall transfer to the Respondent the remainder of the Site in return for the payment of the sum of £40,000;

ii) The Respondent shall complete the Works; and

iii) Upon completion of the Works –

a) The Respondent shall be entitled to the proceeds of sale of plots 1 - 5 and 12 – 14,

b) The 1st Appellant shall be entitled to the proceeds of sale of plots 6 – 11 after deduction by the Respondent of the sum of £65,000 for each plot.

There is no dispute that the deed of variation had no effect upon the arbitration agreement under the JVA.

<u>Underlying dispute</u>

7. The Respondent contracted a Mr Andrew George to complete the Works, but thereafter a dispute arose whereby the Respondent alleged that:

i) Mr George was dismissed in March 2019 as a result of defective workmanship. The Respondent elected to treat the contract as at an end and then took steps to secure the Site;

ii) However, on or about 13 June 2020, Mr George unlawfully occupied the Site to recommence the Works and notwithstanding his previous dismissal;

iii) Mr George claimed that he was entitled to occupy the Site and recommence the Works under instructions and/or permissions given to him by the Appellants; and

iv) Such instructions/permissions were in breach of the terms of the JVA as amended by the deed of variation.

8. On 17 July 2020, the Respondent issued proceedings against the Appellants and Mr George (named as the Fourth Defendant) together with an application for an urgent interim injunction to recover and secure the Site. In the Particulars of Claim dated 13 July 2020, the Respondent claimed the following as against the Appellants:

i) Possession and injunctive relief to recover and secure the Site; and

ii) Damages –

a) from all the Appellants in relation to the work that had been done by Mr George since his return to the Site; and

b) from the 1st and 2nd Appellants for breach of the JVA as amended by the deed of variation.

Conduct of the parties after the issue of the claim and prior to the Consent Order

9. On 31 July 2020 the Appellants' solicitors wrote to the Respondent's solicitors as follows:

"……

Pre-Action Protocol

We refer to your letter dated 17 June 2020 which, as far as we are instructed is the only substantive letter you have sent to our clients. Your client has then thought it necessary to issue a claim valued at up to £100,000 (although we note a bulk of the claim is against the 4th Defendant who we do not currently represent), in addition to injunctive proceedings without any further notification of the same. This includes any correspondence with us, acting at all times on behalf of the Second Defendant, prior to the proceedings being issued.

It is apparent your client has made no attempt whatsoever to engage with the Pre-Action Protocol and we note that even your letter of 17 June 2020 does not profess to do so, presumably because it does not. However, we also note your proceedings allege it was a Letter Before Claim. We do not consider it is a protocol compliant Letter of Claim and it is apparent you/your client have simply ignored the Pre-Action Protocol.

Your client has instead taken the highly adversarial step of issuing these proceedings which are going to cause substantial wasted costs for all parties involved. We note that the claim against the Fourth Defendant should clearly be subject to the Construction Pre-Action Protocol and we assume

this has also not been complied with. We also question why [our] clients are party to the construction dispute against the Fourth Defendant and request you clarify the same.

With this in mind we invite you by return to confirm that your client will agree to stay the proceedings for a period of 3 months pending completion of the Pre-Action steps.

We also note there has been no reference from you to any form of ADR. With this in mind our client would invite your client to take part in a form of without prejudice meeting in order to save the parties all substantive legal fees. A stay would allow such a sensible step (as would complying with the protocol as highlighted above).

Law and Jurisdiction

The Joint Venture Agreement, on which your client's claim is based, states at Clause 11.2.1 that any dispute shall be referred to arbitration. To date you/your client have not sought such a referral.

Thus, we fail to see how you consider the Court has the jurisdiction for this claim in any event. Please confirm this position by return as it appears, on the face of the agreement your client is pursuing our clients for breaching, that this dispute should have been dealt with by arbitration.

Please confirm your client's position by return, and in any event by 4pm on 4 August 2020. The immediacy of this deadline is necessitated by your client's issuing of proceedings.

Works on Site

We are instructed that no works are continuing on site and our Clients are not authorising any ongoing work. Thus the substantive part of the injunctive claim is wholly unnecessary (as would have become apparent had your client complied with the Pre-Action Protocol).

Further our Clients have no belongings/items on site.

Counterclaim

It is clear that our clients have a substantial Counterclaim against your client for breaches of its terms under the Joint Venture Agreement. It was hoped these could be set out without the need to issue proceedings but if you do not agree to the stay set out above then our clients will have no alternative but to bring these by way of a Counterclaim.

It is your client's precipitous actions that have made this necessary.

Next Steps

Due to the immediacy of our clients' requirement to reply to the claim, challenging jurisdiction and seeking a stay as necessary, please provide a

response…..by 4pm on 4 August 2020 confirming you agree for a stay of 3 months to allow the parties to:

1. Deal with the dispute through arbitration pursuant to the clauses within the JVA; and/or

2. To adequately comply with the Pre-Action Protocol.

Should the stay not be agreed we anticipate being instructed to challenge the jurisdiction and to seek recovery of our clients' costs for doing the same. We reserve the right to bring this correspondence to the attention of the court and any other relevant body in relation to the wasted costs incurred.

We await your response."

10. By letter dated 5 August 2020, the Respondent's solicitors responded as follows:

"…..

Pre-Action Protocol

As you are aware our client wrote to your clients and the other Defendants on the 17 June 2020 having been informed that the previous contractor who had been removed from the land had returned to site with equipment on your client's request, which is contrary to the agreement dated 30 January 2019.

Having written to your clients and the Fourth Defendant setting out that any contractor on site at your clients' request must leave site by the 18 June 2020 or our client would seek an injunction to remove any contractors, materials and equipment on site we failed to receive any response from your clients. You wrote to us requesting an additional 14 days for a response although a response has still not been received nor was there any request for any further time to provide a response.

In light of the above and correspondence received from Mr Andrew George (the Fourth Defendant) stating that he would not leave site unless instructed to do so by your clients directly, our client had no choice but to pursue injunctive proceedings.

In order to apply for an emergency injunctive order, our client was required to issue its claim form either with the application or to undertake to do so immediately thereafter. In such circumstances there is insufficient time to follow the Pre-Action Protocol as to do so would inevitably cause further prejudice to our client.

As the nature of the injunction is urgent, our client has not made reference to any form of ADR. Our previous correspondence to your clients has gone unanswered and the Fourth Defendant has refused to cease works and leave our client[']s land unless instructed to do so by your clients. Therefore, the only reasonable step our client could take was to issue its application.

Law and Jurisdiction

It is agreed that the Joint Venture Agreement states at Clause 11.2.1 that any dispute shall be referred to arbitration. However, our client's application and claim is made on the basis that it is seeking an interim injunction rather than the settlement of a dispute of which such relief cannot be granted within arbitration proceedings.

If your clients are willing to agree to the terms of our proposed Order then we shall of course be willing to deal with the matter of damages through arbitration rather than legal proceedings. Any work that you have already completed in relation to responding to our client's claim shall still be relevant within any arbitration proceedings.

Works on Site

The position set out in your letter is contrary to that which our client has been made aware of and the position of the Fourth Defendant in his previous correspondence to us.

If any costs have been wasted as a result of the application for an injunction it is as a result of your clients having failed to respond to the correspondence previously sent to them, in which we advised that we would be applying for an emergency Order.

However, your letter does little to evidence your clients' position.

Next Steps

We would suggest that the most sensible way forward would be as follows:

1. For your clients to agree to the terms of the proposed Order and instruct the Fourth Defendant to cease work on our client's land and remove any plant or materials with such confirmation provided to our client in writing so that they may take back possession of the land.

2. That the matter of our client's claim for damages be dealt with by way of arbitration.

3. That costs in relation to our client's application be dealt with following receipt of your response."

11. The Appellants filed Acknowledgments of Service dated 7 August 2020 indicating that they intended (i) to defend all of the claim and (ii) to contest jurisdiction.

12. In their letter dated 13 August 2020, the Respondent's solicitors stated:

"We are in receipt of your Acknowledgments of Service…..

…….

Law and jurisdiction

We have already made clear our clients' position. As only two of the Defendants are party to the arbitration clause, the Claimant's commencement of an arbitration would not have secured it all the relief that it seeks and in particular the recovery of possession of the site before much further damage is done by the Fourth Defendant. Furthermore, our client could and still can seek an injunction against the First and Second Defendants in support of any arbitration proceedings. The outcome would therefore be the same.

……

Next Steps

As previously mentioned above, our clients propose providing further detailed particulars of their claims against all parties and are content to a stay of the proceedings for the purposes of complying with the Protocol or, as regards the claim against the First and Second Claimants, a reference to arbitration. The current and urgent focus however is recovery and possession of their land.

We therefore propose the following:

Undertakings

1. Your clients provide formal undertakings which can be embodied in any order in the usual way……..

…..

Subsequent stay

3. A stay of the substantive proceedings as against all Defendants once the above Order is in place for a period of 6 months to allow completion of the Pre-action Protocol.

   The stay with regard to your clients will commence as soon as terms are agreed in relation to the injunction order as we can consent to the same..."

13. In their letter dated 19 August 2020, the Appellants' solicitors responded as follows:

"We refer to your letter of 13 August of which we have taken our clients' instructions.

Our clients are not opposed to agreeing the Order although, as you allude to in your letter, the wording will need to be amended.

We intend to provide you with suggested wording in the coming days but would be grateful if in the meantime, to save the parties incurring the

substantial costs of the Defence and Counterclaim, if you could confirm that your client agrees to granting our clients a 28 day extension for filing of their Defence and Counterclaim. This will be from 21 August 2020 until 18 September 2020. Please confirm the same by return.

You will appreciate if this confirmation is not received by close of business on 20 August our clients will have to apply to the Court seeking the extension and reserve their position in relation to the wasted costs in regard to the same. We trust this will not be necessary and look forward to your confirmation shortly at which point we will send you the wording we suggest for the Order to be agreed."

Consent Order

14. Before the Respondent's application for an interim injunction was listed for a hearing, the Appellants and the Respondent were able to agree settlement terms, which were incorporated into a draft consent order filed at court on 18 September 2020 and approved on 24 September 2020. The Consent Order provided:

"BEFORE District Judge Kelly

And **UPON** the parties agreeing to settle this matter on the terms set out in this Order

IT IS ORDERED THAT:

1. The above claim be stayed for a period of six months to allow the parties to complete the Pre-Action Protocol. The parties be at liberty to apply to lift the stay at any point.

2. The period for the First, Second and Third Defendants to file any Defence and Counterclaim be extended until 28 days after the lifting of the stay.

3. The Second and Third Defendants give the following undertakings (including in their roles as Directors of the First Defendant):

3.1. The First, Second and Third Defendant shall not carry out, contract with, or engage or otherwise howsoever cause or permit others to commence or continue any work whatsoever on the Site or any part thereof unless agreed with the Claimant in writing or by determination of a court (through any form of order including enforcement of such an order) or other Judicial body.

3.2. The First, Second and Third Defendants shall not occupy either by themselves or by their servants or agents or otherwise howsoever the Site unless subsequently agreed between the parties in writing or authorised by the court (through any form of order including enforcement of such an order) or other Judicial body.

3.3. The First, Second and Third Defendants confirm that any licence or permission that they have granted the Fourth Defendant to occupy

the Site and to carry out work on the Site is unequivocally and irrevocably withdrawn and agree to provide reasonable assistance and authority to the Claimant in its pursuit of possession against the Fourth Defendant.

4. Costs in the case."

Conduct of the parties after the Consent Order

15. On 25 September 2020, the Respondent's application for an interim injunction against Mr George was listed for hearing on 30 November 2020 before HHJ Cooke, who made an order prohibiting Mr George until final judgment or further order from working on/occupying the Site. Mr George attended that hearing unrepresented, but thereafter has taken no active part in these proceedings.

16. The Respondent and the Appellants complied with the Pre-Action Protocol by way of exchanges of solicitors' letters. It does not appear that copies of all those letters are included in the hearing bundle, although copies of letters dated 8 December 2020, 28 January 2021 and 26 February 2021 are included.

17. In response to a letter of counterclaim dated 5 November 2020, the Respondent's solicitors wrote in their letter dated 8 December 2020:

> "……..Firstly, and in so far as your reference to reserving your clients' position in the ongoing claim, it would be helpful if you could clarify whether your clients agree that if resolution cannot be reached the parties continue to progress with the current Court action rather than to begin afresh with an arbitration under the terms of the JVA which binds the Claimant and the 1st and 2nd Defendants."

18. In their letter dated 28 January 2021, the Appellants' solicitors responded:

> "…….
>
> **Court Proceedings or Arbitration**
>
> You asked our clients to clarify whether they agree that if a resolution cannot be reached the matter is to continue by way of the Court Proceedings already instigated by your client rather than afresh with Arbitration pursuant to the clause of the JVA.
>
> In order to respond to this point fully it would be helpful for our client to have an understanding as to why your client brought this matter through a Court action rather than through Arbitration under the JVA as it is clear much of the claim could be dealt with through Arbitration. Our clients' position in relation to the costs of this action are fully reserved on this basis.
>
> It is apparent that now the action has been issued by your client, which includes a claim against the fourth defendant, [it] may have substantial costs consequences for all parties involved.

…….

Next Steps

The stay in these proceedings ends on 24 March 2021. It is clear that if no agreement is reached by that period then our clients will need to prepare a Defence and Counterclaim. Of course such steps will cause substantial costs to be incurred by all parties.

Thus we await your client's immediate proposals in order to settle this matter or else we will need to consider either seeking the stay being lifted or prepare for the subsequent proceedings in any event. We do not consider this is in the interest of the parties involved but will be left with no alternative given your client's conduct in these proceedings and that they have made no proposal to resolve the same."

19. In their letter dated 26 February 2021, the Respondent's solicitors responded:

"…….

Court Proceedings or Arbitration

"You already have our response to the query raised within our previous correspondence. To summarise however proceedings were brought so as to ensure injunctive relief could be obtained as soon as possible against the Defendants. Further, two of the Defendants are not parties to the Agreement which includes the Arbitration clause. You currently act for one of those individuals (Mr Wilson) who is not a party to the Joint Venture Agreement. It would seem therefore that the balance of convenience lies in progressing the litigation if resolution cannot be found. Keeping the dispute within one forum will allow for some consistency and thereby save costs from being incurred in two forums**."**

20. On 22 March 2021, the Respondent's solicitors wrote to the court to confirm that the Appellants and the Respondents had agreed a further 28 day extension for the filing of any Defence and Counterclaim to 19 May 2021.

21. No Defence or Counterclaim was filed, but rather, on 19 May 2021, the Appellants made their application for (i) a stay of the whole of the proceedings or (ii) all monetary claims arising in the proceedings.

Arbitration Act 1996 ("the 1996 Act")

22. Section 9 of the 1996 Act provides that:

"**Stay of legal proceedings.**

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the

proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

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

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

There is no dispute that the claims made in these proceedings against the 1st and 2nd Appellants are matters that fall within the arbitration agreement under the JVA to which they were parties such that the 1st and 2nd Appellants are entitled to a stay unless they took any step in the proceedings to answer those claims within the meaning of s.9(3) of the 1996 Act. The 3rd Appellant was not a party to the JVA. However, he sought a stay of the claims made against him under the court's inherent jurisdiction, and in the event that the 1st and 2nd Appellants were successful on their own application under s.9 of the 1996, in order to avoid duplicity of proceedings and reduce expense.

23. The primary issue, therefore, to be determined by the Judge on the Appellants' application for a stay was whether or not the 1st and 2nd Appellants had taken a step in the proceedings to answer the substantive claim such that they were prevented from making that application. In ***Capital Trust Investments Ltd***, the Court of Appeal approved the following principles to be applied in determining whether or not a step taken in proceedings nullifies the jurisdiction of the court to grant a stay:

i) "in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration": ***Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd*** [l978] 1 Lloyd's Rep 357: [56];

ii) Three requirements must be satisfied [57] –

a) First, "the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed" **- *Mustill & Boyd, Commercial Arbitration*** (2nd edition, 1989);

b) Second, "the act in question must have the effect of invoking the jurisdiction of the court" - ***Mustill & Boyd, Commercial Arbitration*** (2nd edition, 1989); and

c) Third, an act "which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay" - ***Merkin, Arbitration Law***.

The judgment under appeal

24. Having set out in some detail the history of the case, the Judge gave the following reasons for dismissing the Appellants' application:

> "103. Dealing first of all with the first argued step in the action which is the giving of the undertaking, one has to observe that the correspondence preceding that undertaking and order was not unequivocal in any direction because what happened first of all was that after the commencement of the proceedings and the ensuing correspondence, the defendants' solicitors who obviously were attuned immediately to the existence of the arbitration clause, on 31 July 2020 asked for the three months stay: "To deal with the dispute through arbitration and/or adequately comply with the protocol."
>
> 104. That of course was put forward as an alternative, and then they went on to say: "If the stay was not agreed they would challenge jurisdiction and seek the recovery of costs." But the response to that (by the claimant) which has been relied on particularly by the defendant was – and I quote again: "If your clients are willing to agree to the terms of our proposed order, then we shall be of course willing to deal with the matter of damages through arbitration rather than legal proceedings."
>
> 105. It was an equivocal response because it was suggesting two things. One is that the defendant should agree to the terms of the proposed order, and then the claimant would be prepared to deal with damages through arbitration; in other words what the claimant was saying was we want you to submit yourself to the court in relation to the terms of our order, and then deal with the matter of damages through arbitration.
>
> 106. I think one of the submissions of Mr Darton QC was that the wording of the Arbitration Act in section 9 was binary. You cannot have both court acting in exercising its jurisdiction to apply that jurisdiction to a contract, and also have an arbitration.
>
> 107. What was being proposed, therefore, by the claimant, it seems to me, on reading that correspondence, was that exactly what I have described as not permitted by the Act, it is a binary provision. Either the court stays the whole proceedings in favour of arbitration or it acts under the court's own jurisdiction.
>
> 108. Mr McLeod's position on that is that, well, this was a representation effectively by the claimant that it would be prepared to act under the

arbitration clause, and that the response from Edward Harte, he argues – and I quote from Edward Harte's letter: "Our clients are content with a stay of proceedings for the purpose of complying with protocol, or as regards the first and second claimants [sic], a reference to arbitration", then subsequently asks for the stay for six months to allow completion of the pre-action protocol.

109. But they did not – and I sympathise with them to some extent – because of course unless one is as astute a lawyer as Mr Darton or Mr McLeod, you might not recognise the nuances in the analysis which I have just given to that proposal from Edward Harte to agree to an order on the one hand, and on the other hand, deal with damages through arbitration. In other words, splitting the arbitration away from dealing with the terms of the proposed order.

110. When one then looks at the order itself from DJ Kelly, the striking thing about that is first of all that the undertakings were given under the court's jurisdiction. There can be no doubt about that, even ignoring the penal notice by which the court is exercising its power par excellence, it is per se an exercise of the court's jurisdiction.

111. When you look at the actual terms of the undertaking, there is almost an express submission of the first, second and third defendants to the jurisdiction of the court where it says in particular at paragraph 3.2: "The first, second and third defendant shall not occupy the site unless" – and one of the conditions is – "authorised by the court" and there would only really be one court, or it says: "or other judicial body", but it seems to me it was an express recognition that the court was exercising here a jurisdiction and would continue to do so in the event of any requirement to vary the terms of the undertaking.

112. I do not think it is sufficient to say well, there was no admission here that they had done anything: that does not answer the question of jurisdiction. It may well answer the question of fact as to whether they had perpetrated the acts complained of, but it does not undermine the impression one has from that act of submitting itself to the court's jurisdiction as being an unequivocal election to abandon its right to a stay in favour of court proceedings.

113. Does it matter that they might have been under a misapprehension that the claimant was agreeing to a wholesale submission of the claim to arbitration? I do not think it does, one has to look at this objectively, and looking at it objectively, as I say, the proposal by the claimants to deal with the order separately from the claim for damages was outside the terms of the arbitration agreement altogether, it was effectively a proposal for a different form of agreement from the JVA.

114. The subsequent actions of the defendants in correspondence do not do anything to detract from that conclusion. In the letter of 5 November 2020 where the defendants' solicitors set out in considerable detail the counterclaim which they were proposing to put in, one noteworthy thing is

that there is no mention at all in the letter to arbitration, and they demanded at the end of the letter that there should be a response within 14 days and: "Should your client not seek to settle the claim, we anticipate being instructed to add this counterclaim to the above proceedings or bring a new claim as necessary". When referring to: "The above proceedings" they were talking about these proceedings because at the top of the letter, the number of the proceedings is typed out.

115. Their subsequent actions about this asking for extra time for the defence and counterclaim, by that time of course we were talking of some – a period of seven months by 22 March - six months plus a bit – after the consent order had been made, by which time one might have thought that the defendants would have had plenty of time to consider whether to exercise their right to a stay.

116. They instead asked for extra time beyond the extra time already given in the consent order for 28 days, and there was no indication in the intervening period or in any correspondence that they were still contemplating at that point applying to stay the whole proceedings.

117. So my conclusions in summary are these. That first of all the defendants submitting of themselves to the order of DJ Kelly in the terms that the order was made, was clearly a step in the substantive action, and just to re-enforce the point, half the claim was about ensuring that the fourth defendant got off the site and that the first, second and third defendants would take all the steps necessary to revoke any authority. So that half of the proceedings was effectively concluded by these undertakings, all that remained was the right to damages – whether there is a breach or not – and the quantum of those damages. So effectively that order had dealt with it.

118. Secondly, even if I am wrong about that first conclusion, by the time it came to the response under the protocol – and incidentally I agree with Mr Darton that the reference to a pre-action protocol only applies to anticipated actions, and this was done post event too, so combining the two considerations, it seems to me that itself too was a clear submission to the jurisdiction of the court, but when one then looks at the subsequent actions of the defendants, then it seems to me their subsequent conduct clearly demonstrated an election to abandon their right to a stay.

119. In dealing in such length with the answer to the claim in that correspondence and then asking for further time to file the defence and counterclaim without reference at all to their right to a stay, then it seems to me that that was a clear election and the act in asking for further time for the defence and counterclaim to which the claimants had responded, that itself, too, was a step in the substantive action.

120. I have not overlooked the fact that there was a request during this period by the defendants' solicitors to ask for clarification [by way] of [their] 28 January 2021 letter at page 174. I go to the heading: "Court proceedings or arbitration. You asked our clients to clarify whether they agree that if resolution cannot be reached, the matter is to continue by way

of court proceedings already instigated by your client rather than afresh with arbitration pursuant to the clause of the JVA. In order to respond to this point fully, it would be helpful for our client to have an understanding why your clients support the matter."

121. That is a question they had already asked right at the beginning, and the answer to that clearly given right at the beginning before DJ Kelly's order was made, was that they had to bring the injunction proceedings as a matter of some urgency and that was not provided for in the JVA agreement. Now, of course again, with the benefit of hindsight, it is easy to say that this should have been the action, but what should have happened at that point was that the defendants should have taken a clear stance on it. Either they did not comply with the request for an undertaking or other order of the court and immediately apply to stay the proceedings, or they agreed to (as they did) comply with that request.

122. It is easy to say this now, of course with hindsight, and with the benefit of the clarity of thought which both counsel before me have applied, but it is apparent that that was the stark choice which they had back at that time.

123. What could not happen was the intermediate position being suggested which was to comply with an order on the one hand, and on the other hand referring the damages aspect to the arbitrator.

124. Of course, the response to that (the clarification sought on 28th January) from the claimant was to repeat again why it had brought the proceedings rather than go to arbitration.

125. So at the end of the day, my clear conclusion on the facts for the reasons I have given, is that the application for a stay on the basis of the Arbitration Act should be dismissed.

126. There is then the application in the alternative that I should exercise the discretion under the inherent jurisdiction. Whilst I do not entirely agree with Mr. Darton that the matters have to be exceptional for the court to make an order of this sort, it must depend upon what the overall circumstances were in deciding whether to make an order, staying proceedings.

127. If I thought that the defendants had been hard done by because they walked into a trap or something of that sort by agreeing to the undertaking on terms that the matter could then be further considered, then I might be sympathetic to the idea that the proceedings should be stayed.

128. I think primarily this was a fallback position put forward by the defendants, and particularly to deal with the scenario that if I had acceded to the stay application then of course one would have to still consider the third defendant's position, and in those circumstances one could see that an exercise of the inherent jurisdiction was justified as regards the third defendant because you do not want multiplicity of proceedings about the same matter.

129. I am not persuaded that there was any such unfair conduct, and indeed if there is unfairness, it seems to me that having told the claimant by correspondence that they wanted extra time for the defence and counterclaim, they did not in any way attempt to use that for that purpose, instead right at the end of that extra time on 19 May they applied for the stay of proceedings without any forewarning, and it does not seem to me that any of that attracts any sympathy on the part of the court or indeed gives rise to grounds by which the court could properly exercise its inherent jurisdiction as a case management power to stay the proceedings.

130. There is no opposition to the permission for the first or second defendants to file a defence and counterclaim. The first defendant, of course, currently is out of the picture, and it may be that that is a matter which might justify a slightly longer period - I do not know how long - and I will hear from Mr McLeod about this - given the time it might take for the company to be restored to the register, but it might justify a slightly longer period in order for the defence and counterclaim to be filed inclusive of the first defendant's position.

131. It may be that I cannot really deal with that until the first defendant is restored to the register, but in principle they should have time to file a defence and counterclaim. 14 days is asked for, and I will hear from Mr McLeod whether any more is asked for.

132. I think that deals with the application as a whole. There is obviously the matter of costs to be dealt with now."

The step of agreeing the Consent Order

Submissions on behalf of the Appellants

First requirement - election

25. The question of what a relevant election is has been explained in the authorities. It may be understood in these ways:

i) Asking for consequential directions is not necessarily a requisite step in the action; and its "ambivalence", in any particular case, could then mean that there is "no sign of election"- ***Patel***, per Lord Woolf (referred to in ***Nokia Corporation v. HTC Corporation*** [2012] EWHC 3199 (Pat.), at [18], per Floyd J);

ii) In order to be an act of election and to invoke the jurisdiction of the court in the requisite fashion, the application for, or agreement to, a court order has to be "an unequivocal acceptance of the fact that the court [is] to decide all the issues which might foreseeably arise in the action": ***Nokia***, at [26]. As to assessing whether there has been such "unequivocal acceptance", the quality of the action taken has to "be judged objectively in the light of the whole context known to both parties" - ***Bilta***, per Sales J;

iii) Further, it is not necessary that any reservation of rights as regards seeking an arbitration and/or an accompanying stay be indicated to the court. It is enough that a "clear indication" of such reservation has been given to the other side. In those circumstances, "that will be sufficient to prevent [the] act … in taking some procedural step[,] such as asking the court for more time to put in a defence[,] from qualifying": ***Bilta***, at [30];

iv) Ultimately, the situation must be such that a defendant has "expressly or impliedly represented that he does not intend to refer the issues in dispute to arbitration. The matter is determined by the usual rules applicable to estoppel, i.e. has the defendant unequivocally represented that there will be no reference to arbitration, and has the [claimant] conducted his affairs on the basis that the matter will be determined by the court, in reliance on that representation?" – ***Patel*** at 558, per Otton LJ.

26. As the Judge rightly observed, the correspondence leading up to the making of the Consent Order was not unequivocal (and hence no election by the Appellants); it is impossible to say that, merely implementing the agreement within that correspondence by the terms of the Consent Order, the Appellants thereby made an election.

27. Any suggestion of election in the fact that the Consent Order was agreed to and made is plainly wrong and when judged objectively in the light of the whole context known to the parties. The whole context of the acceptance of the Consent Order was one in which the Appellants had:

i) marked their Acknowledgments of Service saying that they intended to dispute jurisdiction;

ii) referred in the letter of 31 July to how they had an intention to "deal with the dispute through arbitration";

iii) received a letter from the Respondent's solicitors, dated 5 August, to the effect that, if they were "willing to agree to the terms of the proposed Order[,] then we [the Respondent] shall of course be willing to deal with the matter of damages through arbitration", and which letter had proposed as a next step, after the Appellants' agreement to the order, that: "the matter of our client's [Respondent's] claim for damages be dealt with by way of arbitration";

iv) received by way of further letter from the Respondent's solicitors, dated 13 August (including proposed draft terms of the order), observations that the Respondent was "content to [agree] a stay of the proceedings for the purposes of complying with the Pre-Action Protocol or, as regards the claim against the First and Second Claimants [sic.], a reference to arbitration";

v) said to the Respondent on 19 August, in light of all of this correspondence, that the form of order proposed by the Respondent was not objected to in principle; and

vi) agreed a revised form of order, after some changes were made to it.

There was (hence) no unequivocal representation of an acceptance of the court's role for the entire life of the dispute – quite the opposite.

28. Moreover, the very terms of the Consent Order itself show exactly how no such election was being made. The restrictions on the Appellants' conduct were to endure (as the order provides, at paragraphs 3.1 – 3.2) unless otherwise agreed with the Respondent, or else until the Appellants' acts were to be authorised by, or their correctness determined by, a court, "or other Judicial body". Such can only mean, in context, an arbitral tribunal, having authority to make judicial decisions. Hence, on the very terms of the order itself (which the Judge particularly examined), it can be seen that there was no requisite election.

Second requirement – invoking the jurisdiction of the court

29. As to the undertakings having been given, there is no necessary (certainly no sufficient) invocation of jurisdiction in making promises, unrelated to any concession or finding of liability; and which promises are made on a voluntary basis as a means of compromising an application. The Judge was wrong to conclude to the contrary. Crucially, the fact of undertakings being given is entirely neutral. This neutrality is unaffected by the fact that the courts could enforce the promise made to it (a point the Judge was persuaded by). That has no bearing whatever on whether the courts were conceded by the Appellants as the proper forum for the determination of their case on the substance of the claim made against them.

30. There is authority for the proposition that a party does not invoke the jurisdiction of the court, in the requisite sense, in contesting (and thereby, necessarily, responding to) an interim injunction application. ***Russell on Arbitration*** at [7-028], citing ***Roussel-Uclaf v. GD Searle & Co Ltd.*** [1978] FSR 95. Graham J remarked (at 105 – not overturned on this point) that the "statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction". (This was cited to the Judge, but his judgment does not refer to it). It is difficult to understand how resisting such an application in court, which will involve the court's hearing time, and which will lead to the court making an order on that application, is not to be seen as a requisite invocation, but the mere settlement of such an application by undertakings, not involving hearing time nor, in fact, the court making an order against the promisor, is such an invocation. In truth, this outcome simply does not follow either sensibly or logically; and it further demonstrates the wrongness of the Judge's conclusion.

31. The court agreed with Mr Darton that a stay for the purposes of compliance with the Pre-Action Protocol was a definitive accession to jurisdiction. Mr Darton sought to justify this bold submission on the basis that the Practice Direction - Pre-Action Conduct and Protocols ("***the PD***") has provisions which speak of potential costs consequences in litigation if the PD is not followed. This, he submitted, meant that the court must have been what the Appellants were

invoking or choosing. This simply does not follow. Indeed, it is perverse. In particular:

i) In agreeing with this the Judge, again, overlooked the context in which reference to the Pre-Action Protocol came to be made in the order. It shows how the reference was set against a background whereby it was appreciated that the parties might well instead choose to refer the dispute to arbitration (at least as regards the 1st and 2nd Appellants);

ii) In any event, the Pre-Action Protocol reference was relevant to the interests of the 3rd Appellant as a non-arbitral party. This point was made in submission, but was overlooked entirely in the judgment;

iii) Moreover, and crucially, the PD exists to try and prevent the making or continuation of court proceedings, so far as possible. The idea that references to it mean that the parties are necessarily accepting the court's jurisdiction makes no sense at all when the objectives of the PD, and its very content, are considered. As to this, the PD provides that:

   a) The objective is for the parties to have exchanged sufficient information before proceedings to have, inter alia, "consider[ed] a form of Alternative Dispute Resolution to assist with settlement" (paragraph 3); and

   b) "As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing [or, here, continuing] proceedings … Parties may negotiate to settle a dispute or may use a form of ADR including … arbitration…" (paragraphs 8 – 10).

iv) Quite obviously, therefore, it is inexplicable to deprive an arbitral party of his right to arbitration because of his agreement to a form of order which stayed proceedings against him in order to enable compliance with the PD; but when that very PD, in being complied with, might very well lead to him going to arbitration. It amounts to a conclusion that a party loses a right to arbitration because of choosing to follow a PD which, on its very terms, suggests that that party might properly go to arbitration.

32. Furthermore, the Judge considered that the fact that the Consent Order contained a – actually, entirely dependent on choice – reference to an extension of time for any Defence meant that there had been a requisite step taken in the proceedings. In so doing, the Judge seemingly accepted the submission of Mr Darton that this was a "step", per ***Ford's Hotel Co Ltd. v. Bartlett*** [1896] AC 1. (The first point of note about this is that the defendant in that case issued the application unilaterally and argued it, whereas this was a consent application of both parties. Such seems a distinguishing feature of relevance). However, it may be noted in any event that Mr Darton accepted (rightly) that the mere asking of the court for extra time for a Defence was not itself a requisite step unless there was also an election. Moreover, ***Ford's Hotel*** was specifically distinguished in

Bilta (a case which was before the court and which the Judge largely quoted from). As detailed by Sales J (at [38]), a mere procedural step of seeking the court's sanction for an extension of time is not to be understood as a debarring act where the context shows that it was no election nor waiver; and when it could not be "construed as an unequivocal representation that [the arbitral party] did not intend to contest the jurisdiction" at some time thereafter, i.e. instead of filing any such Defence.

Third requirement – otherwise debarring acts capable of being excused

33. The Judge paid no regard to this requirement. He specifically indicated that the 1st and 2nd Appellants had debarred themselves essentially by mistake, under a misapprehension of what the consequence of their agreement to the Consent Order was. If this is right, it surely follows that their error is capable of being excused when it is perfectly apparent from the correspondence which preceded the order that they intended to have an arbitration of the financial elements; or, at the very least, when it was quite obvious that they had not foregone their rights to an arbitration. Indeed, the Respondent had presented the draft consent order, with its assurances to the Appellants, because of and further to what the Appellants had said to the Respondent in this respect. In these circumstances, if there was an accidental debarring act, the third requirement is clearly thrown into issue.

Submissions on behalf of the Respondent

34. Following service of the proceedings, the Appellants' solicitors sent the letter dated 31 July 2020. On the plain and ordinary meaning of this letter, the Respondents were not signalling that they required the dispute to be referred to arbitration in accordance with the JVA but to the contrary that they were content with the proceedings continuing provided that the Pre-Action Protocol was complied with and a stay was agreed.

35. On 13 August 2020 the Respondent's solicitors wrote in relation to the terms of a proposed consent order. Under the heading *"*Next Steps*"* the letter stated "...our clients …are content for a stay of the proceedings for the purposes of complying with the Protocol or, as regards the claim against the First and Second Claimants, a reference to arbitration.*"* Under the later heading "Subsequent stay" the letter also stated:

> "A stay of the substantive proceedings as against all Defendants once the above Order is in place for a period of 6 months to allow completion of the Pre-action Protocol……The stay with regard to your clients will commence as soon as terms are agreed in relation to the injunction order as we can consent to the same. As against the 4th Defendant unless agreed sooner by him a request for a stay will be made at the injunction hearing. Completion of Protocol*"*

The letter made clear that the Respondent would agree to (i) completion of the Pre-Action Protocol and (ii) a stay if the Appellants elected to pursue their counterclaim for damages and their defence to the action within the existing proceedings. If accepted the offer would involve the Respondent incurring

further legal costs within the proceedings and was predicated on the basis that the Appellants would not seek to refer the existing dispute or their proposed counterclaim to arbitration. Were the position to have been otherwise, the Respondent would have wasted legal costs in complying with the Protocol in the event that the dispute(s) was/were referred to arbitration.

36. As the PD makes clear, its provisions are only intended to dictate *"*the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims"*;* see White Book 2021 Vol.1 at C1-001 (page 2663). The Pre-Action Protocol is an integral and highly important part of court-based litigation and can have serious legal consequences; see ***Jet 2 Holidays Ltd v Hughes*** [2019] EWCA Civ 1858 at [36] – [43] (Master of the Rolls).

37. The Appellants' solicitors then replied on 19 August 2020 in the following terms:

> *"*Our clients are not opposed to agreeing the Order although, as you allude to in your letter, the wording will need to be amended.
>
> We intend to provide you with the suggested wording in the coming days but would be grateful in the meantime, to save the parties incurring the substantial costs of the Defence and Counterclaim, if you could confirm your client agrees to granting our clients a 28 extension for filing of their Defence and Counterclaim. This will be from 21 August 2020 until 18 September 2020. Please confirm the same by return.
>
> You will appreciate if this confirmation is not received by close of business on 20 August our clients will have to apply to the Court seeking the extension and reserve their position in relation to the wasted costs in regard to the same.*"*

The letter can only be read as containing an election by the Appellants to litigate the parties' disputes in the courts.

38. These terms were then subsequently adopted in the Consent Order, which not only included final undertakings which disposed of the claim for an injunction against all the Appellants but also contained the following (agreed) directions:

> *"*1. The above claim be stayed for a period of six months to allow the parties to complete the Pre-Action Protocol. The parties be at liberty to apply to lift the stay at any point.
>
> 2. The period for the First, Second and Third Defendants to file any Defence and Counterclaim be extended until 28 days after the lifting of the stay."

As the order recorded, these terms had not only been agreed by these parties but formed part of a settlement under which the Respondent had accepted an order for *"*costs in the case*"* and so provided consideration for the agreement. The settlement clearly included the Appellants' submission to the jurisdiction of the courts, indeed it adopted the terms that the Appellants had previously requested

as the price for this submission in their letter of 31 July 2020 namely (i) a stay and (ii) completion of the Pre-Action Protocol.

39. In the case of the undertakings contained in the Consent Order, the Appellants were agreeing to the making of final orders under the court's jurisdiction and not pursuant to section 44 of the 1996 Act. Contrary to the Appellants' submission all three of them gave undertakings as is clear from the wording of paragraph 3 of this order. The 1st Appellant simply acted through its directors, the 2nd and 3rd Appellant.

40. The position is not therefore comparable with the interim undertakings that were given in the case now cited by the Appellants of ***Brighton Marine Co v Woodhouse*** [1893] 2 Ch. 486. Indeed section 44 of the 1996 Act contains no power for the making of final injunctions. Furthermore, the undertakings that were given by the 2nd and 3rd Appellants could only be discharged by an order of the Court even if such an order was made as a consequence of the parties' prior agreement. As the 2nd and 3rd Appellants were the shareholders and directors of the 1st Appellant, their undertakings bound their company.

41. By the terms of the Consent Order that they had helped draft the Appellants had therefore:

    i) conceded the claim for an injunction;

    ii) secured a stay to comply with the Pre-Action Protocol; and

    iii) obtained an extension of time to file their Defence and Counterclaim.

42. As the Appellants' solicitors' preceding correspondence had made clear these "steps" were taken in the alternative to a reference to arbitration and on the basis that the Appellants would contest the claim for damages and file a counterclaim in the event that a settlement was not achieved during the course of the Pre-Action Protocol process. Following the making of the Consent Order the Appellants and the Respondent subsequently pursued the Pre-Action Protocol, which they would not have been obliged to do had the matter been referred to arbitration and which incurred the Respondent in further legal costs.

First requirement - election

43. The test is whether a defendant "took any step to answer the substantive claim"; see White Book Vol.2 at 2E-111 (page 766). As previous case law has established that agreeing directions and obtaining an extension of time to plead a case as part of these directions can constitute a step (see ***Nokia***) it must follow that the Consent Order was a step for the purposes of section 9(3) of the 1996 Act. The Consent Order (i) directed the parties to complete the Pre-Action Protocol and (ii) extended time for the service of the Defence and Counterclaim.

44. The Pre-Action Protocol is only applicable if a dispute is to be determined by the courts rather than by arbitration. As stated in ***Jet 2 Holidays Ltd*** the Pre-Action Protocol is fully integrated into the framework of litigation; and see White Book 2021 Vol.1 at C1A-003. Under paragraph 3 of the Pre-Action

Protocol, the Appellants and the Respondent were expressly obliged to answer the others' substantive claim. Under paragraph 1 of the Consent Order the stay would only be lifted once the Pre-Action Protocol was completed. By agreeing to this provision, the Appellants therefore took a step for the purposes of section 9(3) of the 1996 Act.

45. Although the issuing of an application for an extension of time does not amount to a step (see ***Patel*** and ***Bilta***) it will do so once the Court makes an order on this application; see ***Ford's Hotel*** and the notes referring to this case at 2E-111 of the White Book 2021 Vol.2. The distinction is clear and arises out of the fact that where an order is actually made the defendant has secured further time to answer the substantive claim. Here, an order was made and so a step was taken by the Appellants.

46. Furthermore, the undertakings given by the Appellants under the terms of the Consent Order were final undertakings unlike the case of ***Brighton Marine*** that is now cited by the Appellants. These undertakings disposed of the claims for injunctive relief that were brought against the Appellants and so were very definitely an "answer" to this claim.

Second requirement – invoking the jurisdiction of the court

47. The Consent Order clearly involved the Court's jurisdiction as it had to be made (approved) by District Judge Kelly.

Third requirement – otherwise debarring acts capable of being excused

48. This last requirement is not engaged in this case as the Appellants never said that they intended to seek a stay under the 1996 Act before they actually issued the application. To the contrary, their solicitors' correspondence made clear that they were content for the proceedings to proceed provided that the Respondent agreed to a stay and the completion of the Pre-Action Protocol. To reserve their position under the Act, the Appellants should have issued the Application prior to the Consent Order or, at the very least, unequivocally stated that this is what they intended to do; see White Book 2021 Vol.2 at 2E-111 and ***Capital Trust Investments Ltd v. Radio Design*** [2002] CLC 787 at [24] (Jacob J).

49. As a consequence of the Consent Order, the Respondent subsequently took steps within this litigation and incurred costs that it would not otherwise have done had the Appellants issued the application prior to the making of the Consent Order or stated that they would be doing so. Having taken the benefit of the Consent Order in terms of securing (i) an agreement to pursue the Pre-Action Protocol (ii) a stay and an extension of time to file their Defence and Counterclaim and (iii) an order for costs in the case, the Appellants cannot now resile from the election that they made.

<u>Analysis and conclusions</u>

Undertakings

50. As already noted, there were two distinct parts to the claims being advanced against the Appellants - (i) possession and injunctive relief to recover and secure the Site, and (ii) damages. I consider that the Judge was right to conclude that, at least in so far as the proprietary claims were concerned, the giving of the undertakings provided in the Consent Order demonstrated (i) an election on the part of the 1st and 2nd Appellants to abandon their right to a stay and (ii) had the effect of invoking the jurisdiction of the court. Whilst the Appellants rely upon authority that responding to an application for an interim injunction does not amount to a step in the proceedings, the Consent Order had the effect of finally disposing of the proprietary claims against the Appellants. The essential basis of those claims was that Mr George had asserted that he was entitled to occupy the Site and recommence the Works under instructions and/or permissions given to him by the Appellants. By their undertakings the Appellants under the court's jurisdiction confirmed that "any license or permission that they have granted" Mr George "is unequivocally and irrevocably withdrawn". Further the Appellants agreed "to provide reasonable assistance and authority" to the Respondent in its pursuit of possession against" Mr George.

Binary election

51. The Judge noted that in their solicitors' letter dated 5 August 2020 the Respondent confirmed that "If your clients are willing to agree to the terms of our proposed order, then we shall be of course willing to deal with the matter of damages through arbitration rather than legal proceedings.". The Judge concluded that:

> "105. It was an equivocal response because it was suggesting two things. One is that the defendant should agree to the terms of the proposed order, and then the claimant would be prepared to deal with damages through arbitration, in other words what the claimant was saying was we want you to submit yourself to the court in relation to the terms of our order, and then deal with the matter of damages through arbitration.
>
> 106. I think one of the submissions of Mr Darton QC was that the wording of the Arbitration Act in section 9 was binary. You cannot have both court acting in exercising its jurisdiction to apply that jurisdiction to a contract, and also have an arbitration.
>
> 107. What was being proposed, therefore, by the claimant, it seems to me, on reading that correspondence, was that exactly what I have described as not permitted by the Act, it is a binary provision. Either the court stays the whole proceedings in favour of arbitration or it acts under the court's own jurisdiction.
>
> ……
>
> 113. Does it matter that they might have been under a misapprehension that the claimant was agreeing to a wholesale submission of the claim to arbitration? I do not think it does, one has to look at this objectively, and looking at it objectively, as I say, the proposal by the claimant to deal with

the order separately from the claim from damages was outside the terms of the arbitration agreement altogether, it was effectively a proposal for a different form of agreement from the JVA."

52. It is submitted on behalf of the Appellants that the Judge was wrong to so conclude in that there is no authority for the proposition that a stay of part only of the proceedings cannot be awarded. Indeed, ***Russell on Arbitration*** has, at paragraph [7-025], a section entitled "stay of part only of legal proceedings". In reliance upon that paragraph, an application to stay outstanding parts of the claim against the 1st and 2nd Appellants was made in the alternative. In ***The Republic of Mozambique v Credit Suisse International and others*** [2020] EWHC 2012, Waksman J held that "the mandatory stay imposed by s9(4) can be applied *pro tanto"*. There is no reason, in principle, why a party may not (assuming he has debarred himself as respects one element of the claim) seek a stay under s.9 as regards the other elements. If he does so, he should be entitled to a stay for the part which he has not lost the right to seek a stay for. To construe the 1996 Act, without clear authority requiring this, in contrary manner (as the Judge did), is to fail to give effect to the "spirit of the Act", its "ethos", and to the fact that "Parliament did not intend that rights to seek to refer disputes to arbitration should be lost with undue ease": ***Bilta***, at [24], per Sales J. Such would represent a limited reading of the ***Russell*** commentary and a means of stymieing the rights of arbitrating parties on unduly technical grounds.

53. It is submitted on behalf of the Respondent that the full quote from ***Russell*** is that "An application may be made to stay some part of legal proceedings, even where other parts are not subject to an agreement to arbitrate." The dispute in ***The Republic of Mozambique*** was whether or not as a matter of construction certain claims fell within the ambit of the arbitration agreement. Waksman J further observed in that case that "It may be found that Claim A in the case is caught by the clause while Claim B is not. If so, only Claim A is stayed, and the question will then arise as to whether Claim B should be the subject of a case management stay pending the arbitration." There is no authority that only part of a case be stayed where the whole of the case is caught by the arbitration agreement. The Judge was right to conclude that the election was binary.

54. In my judgment, the Judge was wrong for the following reasons to conclude that any election must be binary:

i) Arbitrations governed by the 1996 Act are subject to 3 general principles, which are set out in section 1 –

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 be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest",

c) "…. the court should not intervene except as provided by [the 1996 Act];

ii) In accordance with the principle of contractual freedom, there is no reason why parties should not be free to agree that some elements of their dispute that would otherwise be covered by an arbitration agreement be resolved through court proceedings whilst other elements of their dispute be resolved by arbitration;

iii) Whilst Clause 11 of the JVA provided that "any dispute arising between the parties…as to any matter…arising or in connection with it….shall be referred to arbitration", Clause 9.4 of the JVA provided that "No variation of this agreement shall be effective unless agreed in writing by each of the parties, or on its behalf by a duly authorised representative". Therefore, in practice, it was permissible for the parties' solicitors to agree in writing that the proprietary claims be resolved separately by court proceedings and the Judge was wrong to have concluded that "the proposal by the [Respondent] to deal with the order separately from the claim from damages was outside the terms of the arbitration agreement altogether"; and

iv) I agree with Counsel for the Appellants that there is no reason in principle why the Appellants having debarred themselves in respect of the proprietary claims could not seek a stay under s.9 of the 1996 Act in respect of the monetary claims (assuming that they had not also debarred themselves in respect of those elements of the claim).

Monetary claims

55. In the event that the Judge was wrong about the binary nature of an election, he further held in the alternative that:

i) "[118]…. incidentally I agree with Mr Darton that the reference to a pre-action protocol only applies to anticipated actions, and……..it seems to me that itself too was a clear submission to the jurisdiction of the court"; and

ii) The fact that there was a provision made, at paragraph 2 of the Consent Order, for an extension of time for "any Defence and Counterclaim" until 28 days after the expiration of the stay, was, itself – particularly in the absence of any specific reference to arbitration – a demonstration of "an express recognition that the court would have jurisdiction". It was representative of an "unequivocal intention to abandon a stay in favour of court proceedings". [There is no reference to this reasoning in the approved transcript of the judgment, but it is quoted in the Appellants' skeleton argument. I proceed on the basis that this reasoning was contained within the Judge's remarks when dismissing the application for permission to appeal.]

56. In my judgment and for the following reasons the Judge was wrong to conclude that the "reference to a pre-action protocol" in the Consent Order "was a clear submission to the jurisdiction of the court":

i) The objectives of the Pre-Action Protocol are stated in the PD to be the exchange of sufficient information before commencement of proceedings to enable the parties to –

a) understand each other's position;

b) make decisions about how to proceed;

c) try to settle the issues without proceedings;

d) consider a form of Alternative Dispute Resolution to assist with settlement;

e) support the efficient management of those proceedings; and

f) reduce the cost of resolving the dispute.

ii) The PD later states that "Information on mediation and other forms of ADR is available in the ***Jackson ADR Handbook***".

iii) The ***Jackson ADR Handbook*** [Chapter 2] sets out the range of ADR options, which includes arbitration. The key elements of arbitration are then covered in Chapter 25.

iv) The proceedings were issued on short notice to the Appellants because "In order to apply for an emergency injunctive order, our client was required to issue its claim form either with the application or to undertake to do so immediately thereafter. In such circumstances there is insufficient time to follow the Pre-Action Protocol as to do so would inevitably cause further prejudice to our client…….As the nature of the injunction is urgent, our client has not made reference to any form of ADR."

v) The objectives of the Pre-Action Protocol are to secure the early exchange of sufficient information to enable the parties to make informed decisions about how to proceed and in particular to consider ADR as an alternative to court proceedings. It makes no sense that a commitment to engage with a process primarily designed to avoid court proceedings should have the effect of invoking the jurisdiction of the court.

57. In my judgment and for the following reasons the Judge was wrong to conclude that agreeing by way of the Consent Order to an extension of time for any Defence and Counterclaim demonstrated an election by the 1st and 2nd Appellants to abandon their right to a stay of the monetary claims, in favour of allowing those elements of the action to proceed:

i) The Respondent places particular reliance upon ***Ford's Hotel*** in which the House of Lords held that, by applying for and obtaining a court order extending time for service of their defence, the defendants had taken "a step in the proceedings". It is submitted on behalf of the Respondent that this decision is binding authority upon both the Judge and myself.

However, I agree with the submission made on behalf of the Appellants that the mere asking of the court for extra time for a defence is not itself a requisite step unless there is also an election. In ***Bilta*** Sales J held [31]:

> "……..If both parties are aware that a procedural step such as seeking an extension of time to put in a defence is being taken in a context where the party taking that step is still considering whether or not to apply for a stay under section 9 of the 1996 Act, there can be no good grounds for the other party to think that the party taking the procedural step has made an outright election in favour of allowing the court proceedings to proceed such as to waive his rights under the arbitration agreement between them and section 9 to seek a stay. Nor in such a case can there be any grounds for the other party to construe what is done as an implied representation that the party taking the procedural step did not intend to refer the issues in dispute to arbitration. In my view, where some procedural step is taken in the proceedings, the quality of that step for the purposes of application of section 9(3) has to be judged objectively in the light of the whole context known to both parties."

(That proposition was endorsed by Floyd J in ***Nokia***, which incidentally is an authority relied upon by the Respondent). Sales J then rejected the claimant's submission that, in reliance upon the decision in ***Ford's Hotel***, the defendant had taken a step in the proceedings by making an application to the court seeking an extension of time in which to put in its defence. In doing so, Sales J further held that [38]:

> "……..It was entirely legitimate for [the defendant] to ask for more information about the claim before deciding whether to submit to the court proceedings or to seek to rely upon the arbitration agreement it maintained was in place. It was sensible to seek an extension of time for service of the defence in order to allow time for [the defendant] to receive and consider such further information. In the light of MacFarlanes' letter of 15 December 2009 and the following correspondence, the issuing of the application on 20 January 2010 seeking an extension of time for service of the defence could not objectively be construed as indicating an election by [the defendant] to waive any right it might have to seek a stay for the dispute to be referred to arbitration; nor could it be construed as an unequivocal representation that [the defendant] did not intend to contest the jurisdiction of the court. The making of the application was equally consistent with a desire to postpone any obligation to serve a defence until after [the defendant] had had a reasonable opportunity to decide whether or not to waive its rights to rely upon what it maintained was a binding arbitration agreement……. It was clear as between the parties that the application was made to enable [the defendant] to have more time to consider the case to be put against it and to decide what position to adopt as regards court proceedings or arbitration. This was

not a feature of the case in ***Ford's Hotel Company***, which is therefore to be distinguished on the facts.

ii) In ***Nokia*** Floyd J held that the defendant had taken a step in the proceedings by agreeing to an order that provided for service of their defences by a specific date. However, in my judgment that case can be distinguished on the facts. The order made there was in the context of "a case management conference" dealing "with all the issues which foreseeably arise. It is not equivocal in any way. It makes plain that disclosure will have to be given in relation to the issues."

iii) The Judge found that the inter partes correspondence leading up to the making of the Consent Order was equivocal, which finding is not appealed. I agree with Counsel for the Appellants that the Judge erred by failing to assess the quality of the step of agreeing to an extension of time for any Defence and Counterclaim in the light of the whole of that context, which included –

a) By letter dated 31 July the Appellants' solicitors complained that the Respondent had issued proceedings without engaging with the Pre-Action Protocol and in breach of the arbitration agreement under the JVA. Under the heading "*Next Steps*" the Appellants' solicitors proposed:

> "Due to the immediacy of our clients' requirement to reply to the claim, challenging jurisdiction and seeking a stay as necessary, please provide a response by 4pm on 4 August 2020 confirming you agree for a stay of 3 months to allow the parties to:
>
> 1. Deal with the dispute through arbitration pursuant to the clauses within the JVA; and/or
>
> 2.To adequately comply with the Pre-Action Protocol."

b) The Respondent's solicitors explained by their letter dated 5 August 2020 that such conduct was reasonably required/justified because the Appellants needed to secure emergency injunctive relief to remove Mr George and secure the Site. They further stated that if the Appellants agreed to the terms of the proposed injunction then "we shall of course be willing to deal with the matter of damages through arbitration rather than legal proceedings." Later in the letter the Respondent's solicitors proposed that "your clients agree to the terms of the proposed Order" and "That the matter of our client's claim for damages be dealt with by way of arbitration."

c) Following service of the Appellants' Acknowledgments of Service expressly disputing jurisdiction, the Respondent's solicitors stated in their letter dated 13 August 2020 that "once

our clients have suitable undertakings and/or an Order fully protecting their position they will gladly agree a stay of proceedings to enable the Protocol to be followed." They further stated under the heading "Next Steps" that "…our clients…..are content to a stay of the proceedings for the purposes of complying with Protocol or, as regards the claim against [the 1st and 2nd Appellants], a reference to arbitration. The current and urgent focus however is recovery and possession of their land."

d) By letter dated 19 August 2020 the Appellants' solicitors confirmed that their "clients are not opposed to agreeing the Order although…the wording will need to be amended. We intend to provide you with suggested wording in the coming days but would be grateful if in the meantime, to save the parties incurring substantial cost of the Defence and Counterclaim, if you could confirm that your client agrees to granting our clients a 28 day extension for filing of their Defence and Counterclaim…from 21 August 2020".

e) In their Pre-Action Protocol letter dated 8 December 2020, the Respondent's solicitors stated that "in so far as your reference to reserving your clients' position in the ongoing claim, it would be helpful if you could clarify whether your clients agree that if resolution cannot be reached the parties continue to progress with the current Court action rather than to begin afresh with an arbitration under the terms of the JVA which binds the [Respondent and 1st and 2nd Appellants]." There would of course have been no need for the Respondent's solicitors to seek such clarification if the 1st and 2nd Appellants had already unequivocally represented that there would be no reference to arbitration in respect of these remaining elements of the dispute.

iv) Objectively assessed in the context of that correspondence the intended purpose of the Consent Order was (i) to dispose urgently of the proprietary claims, which at that time were the primary focus and (ii) to stay the monetary claims/agree an extension of time for any Defence and Counterclaim in order to enable the parties to engage with the Pre-Action Protocol. It was clear as between the parties that this was done to allow for the proper exchange of information regarding the monetary claims/counterclaims. It was entirely legitimate for the Appellants to seek an extension of time for service of the Defence and Counterclaim to consider that information and, in the absence of settlement, make a decision upon the remaining monetary claims whether to submit to the court proceedings or to seek to rely upon the arbitration agreement. Having already disposed without any admissions of liability of the proprietary claims by way of the Consent Order, there was no risk of there being inconsistent findings in the event that the monetary claims progressed by way of arbitration. In those circumstances, I do not consider that seeking an extension of time for filing any Defence and Counterclaim could objectively be construed as indicating an election by

the 1st and 2nd Appellants to waive their right to seek a stay for the monetary claims to be dealt with by way of arbitration.

58. In conclusion, I find that the Judge was wrong to conclude that the Consent Order was a debarring act in so far as depriving the 1st and 2nd Appellants of their right to a stay for the remainder of the dispute (the monetary claims) to be dealt with by way of arbitration.

Step of agreeing further extension of time for filing any Defence and Counterclaim

59. On 22 March 2021, the Respondent's solicitors wrote to the court to confirm that the Appellants and the Respondents had agreed a further 28 day extension for the filing of any Defence and Counterclaim to 19 May 2021.

60. The Judge held that, if he was wrong that the Consent Order was a debarring act, then in the alternative the 1st and 2nd Appellants' by "asking for further time to file the defence and counterclaim without reference at all to their right to a stay" had made "a clear election and the act in asking for further time for the defence and counterclaim to which the claimant had responded, that itself, too, was a step in the substantive action."

Submissions on behalf of the Appellants

61. The request for further time to file any Defence and Counterclaim was readily capable of being explained as not in fact being any election. But, more fundamentally than this, it was simply not capable of amounting to an act which invoked the court's jurisdiction. This latter point is basic, and decisive, since the necessary requirements are cumulative such that detailed analysis of whether these actions (whether singularly or together) amounted to an election is academic if they did not in fact invoke the jurisdiction of the court in the requisite sense.

62. As regards the request for an extension of time for filing any Defence, the Judge erroneously concluded:

    i) That the fact that the Respondent had notified the court of this agreed extension was somehow in the manner of a "request to the court"; or else was a "notification" to it which, under CPR r.2.11, was somehow "subject to the court's approval"; and/or

    ii) After hearing Mr Darton, and in refusing the Appellants' permission to appeal, that because the agreement reached was within CPR r.2.11, this was, therefore, itself, an "invocation of the court's jurisdiction[,] in that r.2.11 was a rule of the court".

    These contentions are unsupportable on their own terms, and also in light of authority.

63. As to their own terms:

    i) Assuming there was anything in the idea of a notification sent to the court, it was one sent by the Respondent, and not the Appellants;

ii) More basically, nothing done between the parties under CPR 2.11 is subject to the court's approval. There is not even, under that rule, a requirement of notification (let alone approval). It is true that, under CPR 15.5, an agreement to extend time for a defence is notifiable – by the defendant, and not (as was done here) by the claimant. But that, in terms, is a requirement which relates to an extension of time when the period for extension is calculable by reference to the timescales provided for in CPR 15.4. None of those timescales was applicable here. In that sense, there was no notification requirement at all. The Respondent cannot rely on such a non-existent requirement;

iii) In any event, any notification requirement is not in any sense there because the court must "approv[e]" the extension. The court's role is entirely passive. The court does nothing, and its only right is to be told what the parties have privately agreed; and

iv) It cannot be that, merely because of the fact that a particular action is consistent with, or even undertaken pursuant to, a rule of court, that this means that the court's jurisdiction has been invoked in the requisite sense. As the authorities amply make clear, the mere fact that something has been done in court does not ipso facto mean that the court's jurisdiction is invoked thereby (and certainly not in the necessary sense). All the more so is the court's jurisdiction not invoked when the court is not involved, and when the action is simply in furtherance of something the rules of the court have allowed the parties to do before taking any step of invoking the court's jurisdiction.

64. On authority, it is clear from the White Book commentary (Vol. 2 (2021 ed.) at [2E-111]), which the Judge was referred to by Mr Darton (albeit not this particular passage) that:

> "Where the defendant gave notice demanding particulars of case, that was held to be no step in the claim … and the same where the defendant before defence wrote to [the] claimant under the former Ord.3, r.5 for further time to plead[,] and obtained it (***Brighton Marine Co v. Woodhouse*** [1893] 2 Ch. 486) …
>
> The distinction seems to be that negotiation or correspondence between parties or their solicitors does not constitute a step in the claim, but an application, or the service of a pleading, does".

65. ***Brighton Marine*** is exactly on point. In that case, undertakings were given by the defendant in response to an injunction application – as here. That was no requisite step. Moreover, at a later stage a request was made under the then rules of court for the plaintiff to agree an extension of time for the defence. This was agreed to. The agreeing plaintiff then sought to say that the request was an act debarring arbitration. North J rejected this argument wholesale. As he said:

> "What is relied on as steps taken by the Defendant is, that his solicitors wrote on two occasions asking for further time to put in a defence, which applications were acceded to. In my opinion, asking for time by letter is not

> taking a step in the action; it is taking a step outside the action altogether. The application was under a rule which provides for enlargement of time without taking any step in the action, the very object of the rule being to enable the parties, without the expense of applying in the action, to enlarge the time. If the other side did not agree to enlarge the time, the party wishing further time would have to take a step in the action. I am of opinion that this is settled by decision, that obtaining time by agreement is not a step in the action".

This is the clearest authority of all for the idea that there was no requisite debarring action, on any view, after 24 September. It plainly illustrates what the notion of 'invocation of the jurisdiction of the court' really means in this situation. It is but reinforced by the fact that, in the ***Ford's Hotel*** case on which Mr Darton heavily relied, three agreed extensions of time were no steps in the action, but only the fourth (obtained by order upon the taking out of a summons by the defendant, and which summons the defendant had "support[ed] before the master": at 6, per Lord Shand).

Submissions on behalf of the Respondent

66. In their protocol response letter dated 28 January 2021 the Appellants' solicitors concluded by stating:

> *"The stay in the proceedings ends on 24 March 2021. It is therefore clear that if no agreement is reached by that period then our clients will need to prepare a Defence and Counterclaim. Of course such steps will cause substantial costs to be incurred by all parties."*

67. Subsequent to this letter, the Appellants and Respondent then agreed in correspondence to a further extension of time for the filing of a Defence and Counterclaim to 19 May 2021 and the Respondent then wrote to the Court in appropriate terms.

68. It is conceded that a private agreement as between parties does not invoke the jurisdiction of the Court. However, the parties' agreement for a further extension to the time stated at paragraph 2 of the Consent Order was of a different quality to an agreement to simply extend time for the filing of a defence where:

    i) there is no existing court order in relation to that pleading. The Appellants and the Respondent were only able to agree this extension as consequence of CPR 2.11; and

    ii) as the Judge observed in argument, their letter to the Court should have resulted in the making of a formal order by the Court.

    For the purposes of section 9(3) of the Act the agreement was indistinguishable from an order extending time and this does constitute a step under the dicta in ***Nokia*** and ***Ford's Hotel***.

Analysis and conclusion

First requirement - election

69. In my judgment, the Judge was right to conclude that, by requesting a further extension of time for any Defence and Counterclaim, the 1st and 2nd Appellants demonstrated an election to abandon their contractual right to a stay, and when that conduct is objectively assessed in light of the context then known to the parties:

i) The original stay and extension had been agreed to enable the parties to comply with the Pre-Action Protocol and, in the absence of settlement, to enable the 1st and 2nd Appellants to make an informed decision about how best to progress the matter by either continuing with the court proceedings or by relying upon the arbitration agreement;

ii) The parties complied with the Pre-Action Protocol through the exchange of correspondence over several months from 5 November 2020 to 26 February 2021, which correspondence set out in detail the parties' respective positions regarding the monetary claims and counterclaims;

iii) In their letter dated 8 December 2020, the Respondent's solicitors expressly asked that the Appellants clarify whether, if resolution could not be reached, the matter continue by way of court proceedings or by arbitration. In their response dated 28 January 2021, the Appellants' solicitors stated that in order to respond fully it would be helpful for the Appellants to understand why the court proceedings had been brought in the first place rather than dealing with the dispute by way of the arbitration agreement. The Respondent's solicitors had, however, already answered that question in correspondence pre-dating the Consent Order, but they nevertheless repeated in their letter dated 26 February 2021 that the reason was the need to secure urgent injunctive relief;

iv) As a result of the parties engaging with the Pre-Action Protocol, the 1st and 2nd Appellants had by the time of their solicitors' letter dated 28 January 2021 more than sufficient information available for them then to decide whether or not to waive their rights to rely upon the arbitration agreement under the JVA. That letter concluded under the heading "Next Steps" -

> "The stay in these proceedings ends on 24 March 2021. It is clear that if no agreement is reached by that period then our clients will need to prepare a Defence and Counterclaim…
>
> Thus we await your client's immediate proposals in order to settle this matter or else we will need to consider either seeking the stay being lifted or prepare for the subsequent proceedings in any event."

v) Having requested the further extension to enable them to put in their Defence and Counterclaim, the Appellants chose not to do so, but rather on the very day that the further extension was due to expire made their application for a stay. The application was made some 8 months after

> the Consent Order. That conduct was wholly contrary to the overriding objective of arbitration being (with my emphasis added) "the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."

This context was very different to the context in which the Consent Order was agreed.

Second requirement – invoking the jurisdiction of the court

70. Contrary to the submission made on behalf of the Respondent, I do not consider that there was any requirement for the agreed extension to be incorporated into a court order. CPR 2.11 is an enabling provision, which only requires that any variation be agreed in writing between the parties. It would defeat the whole purpose of CPR 2.11 if the parties were also required to file with the court a consent order embodying that agreement.

71. Paragraph 17.61 of the Chancery Guide, under the heading "**ALTERATIONS TO THE DATES IN THE ORDER FOR DIRECTIONS**", provides as follows [with my emphasis added]:

> "It is common for the timetable set in the orders for directions to need minor adjustments and the order usually provides that the parties may, where CPR rule 2.11 applies, agree to extend any time period to which the proceedings may be subject for a period or periods of up to 28 days in total without reference to the court, provided that this does not affect the date given for any case or costs management conference or pre-trial review or the date of the trial. The parties must notify the court in writing of the expiry date of any such extension."

However, Chapter 17 of the Chancery Guide deals with "CASE AND COSTS MANAGEMENT" arising "after statements of case have been exchanged, at which point the issues for the court to determine will be clear." Therefore, I agree with counsel for the Appellants that there was no requirement to notify the court of the agreed extension of time for any Defence and Counterclaim, although it was good practice for the Respondent to have done so particularly bearing in mind that the court may pursuant to CPR r.3.1 contact the parties to monitor compliance with court directions.

72. However, I do not agree with the Appellants' submission that the court's role upon being notified of any agreed extension is necessarily entirely passive. The overriding objective of dealing with cases justly and at proportionate cost includes ensuring that, once issued, proceedings are dealt with expeditiously. Under CPR r.1.4 the court must further the overriding objective by actively managing cases, which includes fixing timetables or otherwise controlling the progress of the case. Para 6 of the PD to CPR r.59 provides that, upon receiving notification, the Circuit Commercial Court may make an order overriding an agreement by the parties varying a time limit pursuant to CPR r.2.11. Whilst there is no similar provision governing proceedings in the Chancery Division, the court nevertheless retains very wide powers of case management under CPR r.3.1, which include shortening the time for compliance with any court order. In

exercising those powers the court may pursuant to CPR r.3.3 make an order of its own initiative. Therefore, the court is not merely a passive observer, but is in a position to maintain oversight and ensure that proceedings do not stagnate notwithstanding any extensions agreed between the parties pursuant to CPR r.2.11.

73. As noted by the Judge, the reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. At one end of the spectrum there is a case where a defendant applies for and obtains a court order extending the time for filing their defence, which is taken (subject to the question of election) to be a step in the proceedings - ***Ford's Hotel***. At the other end of the spectrum is an agreement made in correspondence between the parties for an extension of time for filing a defence, which is taken not to be a step in the proceedings - ***Brighton Marine***. In my judgment, the Judge was not wrong to conclude that the present case more properly falls within the reasoning in ***Ford's Hotel*** rather than ***Brighton Marine***:

    i) This was not simply a private agreement made by the parties that did not involve the court such that the parties were taking a step altogether outside the action;

    ii) The parties were agreeing to a variation to the timetable to progress the case – a timetable that had already been incorporated into an order of the court. The Consent Order clearly invoked the Court's jurisdiction as it had to be made (approved) by District Judge Kelly;

    iii) Whilst I accept it would be unusual for the court to seek to override an agreement made by the parties pursuant to CPR r.2.11, the court nevertheless retained control over the proceedings and the timetable for progressing the case; and

    iv) The Appellants must be treated as having accepted that the court retained jurisdiction such that it was a step taken in the proceedings.

Third requirement – otherwise debarring acts capable of being excused

74. The Appellants were asked specifically to clarify their position as to whether the matter should continue by way of court proceedings or by way of arbitration and in the event that settlement was not achieved. In response, the Appellants' solicitors did not state in their letter dated 28 January 2021 that they intended to apply for a further stay of the court proceedings for arbitration. Rather, the Appellants' solicitors stated that, in the event that settlement was not achieved by the time the stay expired, then the Appellants "will need to prepare a Defence and Counterclaim". Therefore, I do not consider that this requirement is engaged.

Overall conclusion

75. The Consent Order:

i) The appeal is dismissed in that the Judge was right to have concluded that agreeing to the undertakings in the Consent Order was a requisite step depriving the 1st and 2nd Appellants of their right to a stay for arbitration of the proprietary claims; and

ii) The appeal is allowed in that the Judge was wrong to have decided that agreeing the terms of the Consent Order was a requisite step depriving the 1st and 2nd Appellants of their right to a stay for arbitration of the remaining elements of the action being the monetary claims.

76. The agreed further extension for filing any Defence and Counterclaim: The appeal is dismissed, since the Judge was right, in the alternative, to have concluded that this was a requisite step depriving the 1st and 2nd Appellants of their right to a stay for arbitration of the monetary claims.

77. Net effect: The Appellants' application dated 19 May 2021 remains dismissed.