Neutral Citation Number: [2024] EWHC 37 (TCC)

Claim No. HT-2021-000325

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 12 January 2024

Before :

MR ALEXANDER NISSEN KC

- -

Between :

LANCASHIRE SCHOOLS SPC PHASE 2 LIMITED
(formerly CATALYST EDUCATION (LANCASHIRE) PHASE 2 LIMITED)

Claimant/Respondent

-and-

(1) LENDLEASE CONSTRUCTION (EUROPE) LIMITED
(formerly BOVIS LEND LEASE LIMITED)

(2) LENDLEASE CONSTRUCTION HOLDINGS (EUROPE) LIMITED
(formerly BOVIS LEND LEASE HOLDINGS LIMITED)

(3) EQUANS BUILDINGS LIMITED
(formerly VITA LEND LEASE LIMITED)

Defendants

-and-

(4) LANCASHIRE COUNTY COUNCIL

Defendant/Applicant

Mr Adrian Williamson KC and Mr Ryan Turner (instructed by **Ward Hadaway LLP)** for the **Fourth Defendant (Applicant)**

Mr Mark Chennells KC and Mr Mischa Balen (instructed by **Macfarlanes LLP)** for the **Claimant (Respondent)**

Hearing date: 21 November 2023

APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 12 January 2024 at 10.30am.

Introduction

1. By an application dated 27 July 2023, the Fourth Defendant ("the Authority") applies for an order against the Claimant ("Project Co") pursuant to CPR 11(1)(b) and CPR 11(6)(b), to set aside service of the Claim Form against it; alternatively for an order striking out the claim pursuant to CPR 3.4(2)(a). In essence, the Authority contends that the Court should exercise its discretion by declining jurisdiction to entertain the claim (or by striking it out) which, it says, has been brought in breach of a contractual requirement that all disputes must first be determined by adjudication.

2. I say at the outset that I am grateful to counsel and their instructing solicitors for the helpful way in which this application was prepared and presented, both in writing and orally.

The contractual structure

3. The Authority is a children's services authority with duties and powers to provide primary and secondary education under the Education Acts. As part of the Building Schools for the Future programme, the Authority engaged Project Co to deliver the Project, namely the provision of serviced accommodation at a School known as Sir John Thursby & Ridgewood including the carrying out of Works and the provision of Services thereto. The engagement was in the form of a conventional PFI Project Agreement dated 14 December 2007. Project Co's name has changed in the meantime but nothing turns on that.

4. The Project Agreement is the "Phase 2 Project Agreement". Other Project Agreements were entered into with the Authority in respect of different Phases. In particular, there is a Phase 1 Project Agreement, a Phase 2A Project Agreement and a Phase 3 Project Agreement. Each of these related to other educational premises and were agreed using a different corporate vehicle than Project Co, though nothing material turns on that. For present purposes it is appropriate to assume that the interests of the each of the project co's, including Project Co, are aligned.

5. As is conventional with a PFI structure of this type, there is a downstream Building Contract between Project Co and a contractor relating to the Works element of the

Project Agreement; and a Facilities Management contract between Project Co and a maintenance contractor relating to the Services element of the Project. It is obvious that these contracts, both of which are dated 13 December 2007, are interlinked with the rights and obligations arising under the Project Agreement. I am told, but have not seen, that there are equivalent Building Contracts and Facilities Management contracts in respect of the Project Agreements on the other phases.

6. In respect of Phase 2 (and, perhaps, other phases), there is also an interface agreement between Project Co, the Building Contractor and the FM Contractor. However, this agreement was not adduced in evidence and neither party sought to rely on its existence, still less its terms.

Parties

7. I have already introduced the Fourth Defendant and the Claimant as, respectively, the Authority and Project Co.

8. For reasons I will explain in due course, the Building Contractor ("Lendlease") in respect of Phase 2 is the First Defendant in these proceedings. The Second Defendant is the parent company of the Building Contractor. The FM Contractor in respect of Phase 2 ("Equans") is the Third Defendant in these proceedings.

9. Neither Lendlease nor Equans was party to, or appeared at the hearing of, the application before the Court.

The litigation history

10. Before turning to the application itself, it is necessary to explain the litigation history in a little further detail. These proceedings are concerned exclusively with Phase 2. However, there are parallel proceedings in play in respect of Phase 1 involving Lendlease. It seems likely that, in due course, they will also involve Equans. As I have said, the bespoke identity of the SPV comprising project co is different but its interests are likely to be equivalent to that of Project Co. The intention is to join the Authority into those Phase 1 proceedings. Further, I am told that the intention of the various

project co's is to seek consolidation of those two proceedings, with the potential for such proceedings as may be issued in respect of other phases to be added also.

11. The Phase 1 litigation was commenced first. It concerns schools known as Burnley Campus, Pendle Vale Campus and Shuttleworth College. Particulars of Claim were issued by the relevant project co on 14 April 2021. Lendlease and its parent company are the defendants. It is unnecessary to spell out the detail of the allegations save to identify broadly that the defect types complained of by project co were acoustic defects, wall tie defects, fire defects, miscellaneous defects, energy defects and render defects. A Defence and a Reply have subsequently been served. The Phase 1 proceedings were stayed on a number of occasions to allow mediation and other discussions to take place. The last stay ended on 30 June 2023.

12. In respect of the Phase 2 litigation, Project Co is the Claimant. The Claim Form was actually issued in August 2021. It named only Lendlease and its parent company as defendants but, before it was served, the Claim Form was amended so as to include claims against Equans and the Authority as, respectively, the Third and Fourth Defendants. The amended Claim Form is dated 30 June 2023. Paragraph 9 of the amended Claim Form states:

> *"The position which has been taken by the Fourth Defendant conflicts with the position taken by the First Defendant and/or the Third Defendant. The position under the Phase 2 Project Agreement should properly be resolved in a manner consistent with the resolution of the position under the Phase 2 Building Contract and/or the Phase 2 FM Agreement, with the Fourth Defendant being bound by the relevant findings of the Court."*

13. Between 2021 and 2023 the Phase 2 proceedings had also been stayed on several occasions. The last stay ended on 30 June 2023.

14. The proceedings concern alleged defects at the School with which Phase 2 is concerned. Again, it is unnecessary to spell out the detail of the allegations save to identify broadly that they include defects of the same or similar type to those in the Phase 1 litigation, namely acoustic defects, wall tie defects, fire defects, architectural, civil and structural defects, M&E defects, energy defects and render defects. The skeleton argument provided by Project Co for this application provided a summary description of these defects with which, for the purposes of this application, the Authority was content to

agree. Project Co seeks damages for breach of the Building Contract and/or other relief against Lendlease, as First Defendant, arising from the alleged defects which are further particularised in extensive schedules. Sums are also claimed against the Second Defendant pursuant to a parent company guarantee.

15. Alternatively, Project Co also claims damages and other relief against Equans for breaches of the FM Agreement. In essence, since Lendlease had contended in pre-action correspondence that many of the alleged defects related to or were the result of maintenance issues, Project Co claims damages for breach of the FM Agreement on that basis[1].

16. No Defences have yet been served by Lendlease, its parent or Equans. On 16 October 2023, this Court ordered by consent that, in light of the present application, the date for service of the respective Defences shall be 28 days after judgment on this application is handed down. Provision was made for Defences to be served by Lendlease, its parent and Equans if the hearing of this application was not effective on its scheduled date. By that provision, the Court and the parties clearly recognised that there is a limit to how long the further period allowed for those Defences should be.

17. Section I of the Particulars of Claim sets out Project Co's claim against the Authority. Paragraphs 244 to 250 recite correspondence in which it says (amongst other things) that the Authority called for the alleged defects to be rectified and indicated its intention to seek retrospective applications of Deductions pursuant to the payment provisions. It pleads that notice of entitlement to withhold Service Performance Deductions was also given by the Authority.

18. Paragraph 251 concludes that the position of the Authority in so claiming conflicts with the position taken by Lendlease and/or Equans and that:

> *"The position under the Phase 2 Project Agreement should properly be resolved in a manner consistent with the resolution of the position under the Phase 2 Building Contract and/or the Phase 2 FM Agreement, with the Authority being bound by the relevant findings of the Court."*

19. Paragraphs 252 to 255 set out the basis for Project Co's claim for declaratory relief. It is asserted that the material provisions of the Phase 2 Building Contract and the Phase

[1] Paragraph 211 of the Particulars of Claim.

2 Project Agreement are 'back to back'. Project Co claims to be entitled to a declaration that:

> *"if and to the extent that [Lendlease] and/or Equans establish that it is not in breach of the Phase 2 Building Contract and/or the Phase 2 FM Agreement and/or that it is not liable to carry out rectification and/or reimburse [Project Co] under the relevant contract(s) or in damages, then the defect or alleged breach in question is of no consequence under the Phase 2 Project Agreement."*

20. Project Co then explains that the effect of its case is that, if in respect of an alleged defect, there is no breach of either the Building Contract, or of the FM Agreement, it cannot be the case that Project Co is in breach of the Project Agreement in that respect and that the alleged defect is not a Defect within the meaning of the Project Agreement. It is said to follow that, in relation to the Areas affected by the alleged defect, those Areas are not by reason of that alleged defect Unavailable or Consequentially Unavailable within the Deductions regime.

21. There is an additional point made in paragraphs 256 to 258, namely that if Lendlease successfully advances a defence of waiver or estoppel in respect of acoustic defects, namely an agreement that all noise related issues had been closed out even if they were higher than specified, this was because Lendlease had been relying on equivalent confirmation from the Authority to this effect. It is said that it would be unconscionable for the Authority to resile from such confirmation.

22. The specific relief sought against the Authority is limited to declaratory relief but there is a generic claim for further or other relief.

23. In summary, the claim against the Authority is an attempt by Project Co to position itself so that no ultimate liability sits with it. If there is no defect, because Lendlease and/or Equans is right, there is no basis for a claim for Deductions by the Authority. If there is a defect giving rise to Deductions, that is either the result of breaches of the Building Contract, or, if Lendlease is right, breaches of the FM Agreement, for which those parties are responsible to Project Co, including liability for Deductions owed to the Authority.

24. I was told by Mr Chennells that the value of the claim in the Phase 2 litigation is about £1.42m. This does not include the sums claimed by the Authority for Deductions, which

as they have been notified to date, amount to about £3m. I was also told by Mr Chennells that the value of the claims in the other Phases is as follows: Phase 1: £5m; Phase 2A: £2.74m; Phase 3: £1.76m. Again, these sums do not include sums claimed for Deductions.

25. Disputes in respect of Phases 2A and 3 are at the pre-action stage. The disputes in respect of those phases also include claims of acoustic defects, miscellaneous architectural, civil and structural engineering defects, energy consumption defects, fire-stopping defects, render defects and wall tie-defects. In other words, the scope appears to be similar to that which arises in the litigation over Phases 1 and 2.

The Application

26. As I have said, the application is issued pursuant to CPR 11(1)(b) and/or CPR 3.4(2)(a). There are three witness statements before the Court. Two from Mr Watt, the in house solicitor for the Authority, and one from Mr Wass, a partner in Macfarlanes instructed by Project Co.

27. To the extent material, CPR Part 11 provides as follows:

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

28. To the extent material, CPR Part 3.4 provides as follows:

"(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;"

29. The basis for the application under both rules is said to be that the provisions of clause 68 of the Project Agreement contain a mandatory requirement for adjudication as a precursor to litigation which, it is accepted, has not taken place. The Authority seeks an order that the Court should decline to exercise any jurisdiction over the claim or strike out the statement of case until there has been compliance with the dispute resolution provisions.

30. There are consequential issues which arise as to the scope of any appropriate relief if the Authority is successful. One is as to whether the proceedings should be struck out rather than merely stayed. If they are to be stayed, should the ambit of the adjudication to be commenced be prescribed and should there be liberty to apply. Another issue is whether a successful outcome under CPR Part 11, if it arises, should result in the Court setting aside the claim form itself or only the service of the claim form.

31. Accordingly, the following issues arise for determination on the application:
    (a) What are the applicable legal authorities?
    (b) On a proper construction of clause 68, is the completion of an adjudication a condition precedent to the right to pursue legal proceedings? If not, is the requirement to adjudicate at least mandatory and enforceable?
    (c) How should the Court exercise its discretion under CPR Part 11?
    (d) Should the Court strike out the proceedings under CPR Part 3.4?
    (e) What orders should be made in either event?

(a) Legal authorities on ADR provisions

32. The first step is to understand and construe the dispute resolution provision itself.

33. In *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC), O'Farrell J set out the following principles in circumstances where one party sought to stay proceedings by reason of an ADR provision:

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

34. In Children's Ark Partnership Ltd v Kajima Construction Europe (UK) Ltd [2022] EWHC 1595; 203 Con LR 91, Joanna Smith J doubted the second of those principles, namely that it was necessary for the provision to have been expressed as a condition precedent. She concluded it was sufficient for the provision to have been mandatory and enforceable (see [48]) although, in that case, she also decided the provision was a condition precedent. There was no cross appeal against that finding: see [2023] EWCA Civ 292 at [29]; 207 Con LJ 10.

35. I propose to follow the combined effect of those two cases.

36. Once the ADR provision has itself been construed, the next step is for the Court to consider the impact of that provision on the Court's jurisdiction. As to that, Joanna Smith J said this in Children's Ark at [79] and [80][2]:

> *"[79] As for CPR 11.1(b), the key question for the court is whether my finding that the DRP is a condition precedent to litigation (always assuming enforceability) gives rise to a jurisdictional issue. In my judgment, it does. As the cases demonstrate, aside from the public interest in giving effect to dispute resolution clauses, it is important that the courts should seek to give effect to bargains struck*

[2] These passages were not the subject of any appeal or cross-appeal: see [32] of the Court of Appeal's judgment [2023] EWCA Civ 292.

by commercial parties (see Emirates Trading at [50] and Ohpen at [58]). Here the parties agreed that the referral to the Liaison Committee to enable it to seek to resolve the dispute was a condition precedent to the commencement of litigation. Whilst it is clear on the authorities that a mandatory ADR provision has no jurisdictional effect (see Channel Tunnel), I presently see no reason why an enforceable ADR provision expressed as a condition precedent should not engage CPR 11(1)(b). I have been shown no authority to contradict such a finding.

[80] I note that in Ohpen, O'Farrell J chose to exercise her discretion under section 49(3) of the Senior Court's Act and/or her inherent jurisdiction to grant a stay, but she did not suggest that she could not also have exercised her discretion under CPR 11(1)(b), which had been put in issue before her, or that that provision was not engaged in the circumstances of that case."

37. It is common ground that the Court is not bound to give effect to a mandatory ADR provision by ousting, or refusing to exercise, its jurisdiction even if that is the intended contractual effect of the provision. Rather, non-compliance with the provision gives rise to a discretion to order a stay of proceedings (or other relief) having regard to, amongst other things, the overriding objective.

38. In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, the House of Lords concluded that the Court had an inherent power to stay any proceedings brought in breach of an agreement to decide disputes by an alternative method. At p.353A to D, Lord Mustill took into account that the parties were large commercial enterprises, negotiating at arms-length with long experience of construction contracts. He identified a presumption that those who make agreements for the resolution of disputes must show good reasons for departing from them. It was beside the point that they later felt that their chosen method was ill-suited for the purpose in respect of the dispute that had arisen.

39. In DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd [2007] EWHC 1584 (TCC); 116 Con LR 118, HHJ Coulson QC, as he then was, concluded at [10]-[11] that it was for the party resisting the stay to demonstrate why it should not be granted. It was in keeping with the Court's general policy of seeking to enforce the terms of an agreement made by the parties. O'Farrell J's point in sub-paragraph (iv) of Ohpen makes the point that there is a:

> *"public policy interest in upholding the Parties' commercial agreement and furthering the overriding objective in assisting the Parties to resolve their disputes".*

40. In the appeal of Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd [2023] EWCA Civ 292, Coulson LJ said at [92] that the usual order which the Court would make when proceedings are started in breach of a mandatory contractual dispute resolution mechanism is a stay of proceedings.

41. In *The Interpretation of Contracts 7th Ed.*, Chapter 18 - Dispute Resolution, Sir Kim Lewison writes:

> *"Section 9. - Alternative Dispute Resolution Clauses*
>
> *Machinery providing for alternative dispute resolution will be upheld where: (a) the process is sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed; (b) the administrative processes for selecting a party to resolve the dispute and to pay that person are defined; and (c) the process or at least a model of the process is set out. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of the agreement."*

42. That passage is consistent with the cases to which I have referred.

43. There are some reported cases in which the exercise of the Court's discretion has been deployed in order to determine whether a dispute should be adjudicated first. I do not need to address all of them. In DGT Steel, the Court considered that the principal disputes arising between the parties were matters of valuation for which a quantity surveyor adjudicator would be better suited, at least in the first instance, rather than a judge: see [42]. HHJ Coulson QC also compared the relative cost of such an adjudication with that of litigation: see [46]. A case going the other way is Ealing Care Alliance Ltd v Ealing London Borough Council [2018] EWHC 2630 (TCC); 181 Con LR 182. In that case, which also concerned a PFI Agreement, Mr Andrew Singer QC sitting as a Deputy Judge of the High Court said, obiter, that the Court would not have granted a stay had the provision for adjudication been applicable, which it was not. At [50], his reasons included that the matter had already been argued before him such that ordering a stay would fly in the face of common sense and proportionality. He also said that it was highly likely that, whatever the result, a notice of dissatisfaction would be sent, leading to the matter ending up in court in any event. There had also been delay.

44. Lastly, one issue that can arise in the context of the exercise of the Court's discretion is the utility, or practical value, of the requirement to follow the dispute resolution process. In the appeal of Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd [2023] EWCA Civ 292, Coulson LJ said, obiter at [107], that if the relevant provision had been enforceable, it would have been pointless to require the particular step to be followed before engaging with the court proceedings since it could have been carried out effectively simultaneously with the court proceedings. The procedure in that case would have been "useless". Similarly, in Halifax Financial Services Ltd v Intuitive Systems Ltd [1999] 1 All ER (Comm) 303, McKinnon J thought that forced negotiations between the parties would be "futile" given that there had already been months of negotiations and correspondence between the parties: see p.312d. See also Ealing Care Alliance Ltd v Ealing London Borough Council [2018] EWHC 2630 (TCC); 181 Con LR 182 at [50] to which I have already referred.

45. Ultimately, beyond the presumption, each case turns on its own facts and the particular features which arise for consideration in the exercise of discretion.

(b) The proper construction of clause 68

46. The first issue is obviously a question of the proper construction of the Project Agreement. The authorities on contractual construction are sufficiently well-known not to require extensive citation. For the purposes of the present application, the parties were agreed that the principles had been appropriately summarised in the following decision of Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune")* [2018] EWHC 163 (Comm); [2018] 2 All ER (Comm) 108:

> *"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and*

the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

47. Clause 68 provides as follows:

68 DISPUTE RESOLUTION

68.1 Disputes

Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this clause save for a dispute relating to the Code which shall be resolved in accordance with Schedule 19.

68.2 Consultation

If a dispute arises in relation to any aspect of this Agreement, the Contractor and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.

68.3 Adjudication

Without prejudice to clause 68.2, either party may give the other notice of its intention to refer the dispute to adjudication ("the Notice of Adjudication"). The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought. The party giving the Notice of Adjudication ("the Referring Party") shall on the same day and by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with clause 68.4 (Identity of Adjudicator).

68.4 Identity of Adjudicator

The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts selected in accordance with the following: …

68.7 Procedure

Subject to clause 68.11, the Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation

within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

68.8 Adjudicator's Decision

In any event, the Adjudicator shall provide to both parties his written decision on the dispute, within twenty eight (28) days after the date of receipt of the Referral Notice (or such other period as the parties may agree). ... Unless and until revised, cancelled or varied by the English courts, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.…

68.14 Reference to the Courts

Either party may (within ninety (90) calendar days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to clause 68.8) give notice to the other party of its intention to refer the dispute to the courts of England and Wales for final determination.

68.16 Similar Disputes

If any dispute arising under this Agreement raises issues which relate to:

68.16.1 *any dispute between the Contractor and the Building Contractor arising under the Building Contract or otherwise affects the relationship or rights of the Contractor and/or the Building Contractor under the Building Contract ("the Building Contract Dispute"); or*

68.16.2 *any dispute between the Contractor and the FM Contractor arising under the FM Agreement or otherwise affects the relationship or rights of the Contractor and/or the FM Contractor under the FM Agreement ("the FM Agreement Dispute"),*

then the Contractor may include as part of its submissions made to the Adjudicator or to the courts submissions made by the Building Contractor or by the FM Contractor as appropriate.

68.17 Jurisdiction over Sub-Contractors

The Adjudicator shall not have jurisdiction to determine the Building Contract Dispute or the FM Agreement Dispute but the decision of the Adjudicator and/or the courts shall, subject to clause 68.14 (Reference to the Courts) be binding on the Contractor and the Building Contractor insofar as it determines the issues relating to the Building Contract Dispute and on the Contractor and the FM Contractor insofar as it determines the issues relating to the FM Agreement Dispute."

48. It is also important to refer to clause 86 which provides as follows:

"86 GOVERNING LAW AND JURISDICTION

> *The Agreement shall be governed by and construed in all respects in the accordance with the laws of England and Wales. Subject to clause 68 (Dispute Resolution), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement."*

49. On behalf of the Authority, Mr Williamson KC, leading Mr Turner, submitted that clause 86 evinced an objective intention that reference to the Court could only occur once compliance with clause 68 had been achieved. Clause 68 itself concerned "any" dispute, which "shall" be resolved in accordance with the clause. The Authority was not contending that there had been a failure to comply with the consultation provision in clause 68.2 but was only relying on the failure to comply with the provision for adjudication in clause 68.3. Clause 68.14 only contemplates the giving of notice of intention to refer disputes to Court in two circumstances: 90 days after an adjudicator's decision or where there has been a failure by an adjudicator to give a decision in circumstances set out in clause 68.8. The procedure in clause 68 is full and clearly enforceable. Even if the clause does not require adjudication as a condition precedent, it is at least a mandatory requirement.

50. On behalf of Project Co, Mr Chennells KC, leading Mr Balen, submitted that clause did not require adjudication as a condition precedent to litigation. Nor did it mandate adjudication. Rather, he emphasised that clause 68.3 provides that either party "may" give notice of adjudication to the other party. It was not obliged to do so. He did not allege any inadequacy or uncertainty in the operation of the adjudication process itself and accepted that the procedure was enforceable.

51. He submitted that the reference to clause 68 in clause 86 was there to carve out jurisdiction for the adjudicator which would otherwise belong exclusively to the Court. Mr Chennells submitted that the words "Subject to" in clause 86 did not, in themselves, suffice to create a mandatory obligation.

52. Mr Chennells drew my attention to Cape Durasteel Ltd v Rosser and Russell Building Services Ltd (1995) 46 Con LR 75 in which HHJ Lloyd QC said, at p.85, that clauses which purport to oust the jurisdiction of the courts are to be construed narrowly. Mr

Chennells also relied on what Coulson LJ said in the appeal in respect of Children's Ark at [37], namely that:

> *"This may be because clear words are needed to oust the jurisdiction of the court, even if only on a temporary basis."*

53. I am not convinced that I particularly need to approach the provisions by construing the words narrowly (that not being an approach identified in Ohpen or Children's Ark) but I do agree that any words which seek to oust the jurisdiction of the court must be clear.

54. On a proper construction of clause 68, I am wholly satisfied that adjudication is a condition precedent to litigation. That is to say that the parties have clearly agreed that, under the Project Agreement, before one party may start legal proceedings against the other, it must first have adjudicated the dispute. I reach that conclusion for the reasons which follow.

55. Clause 86 makes clear that the English Courts have jurisdiction "Subject to" clause 68. The jurisdiction of the Court is therefore to be understood as subject to the provisions for dispute resolution in clause 68. In the context of the expression "Subject to", Mr Chennells referred to Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd [2008] EWHC 1020 (TCC); 119 Con LR 137 at [152] but I did not read the comment by Akenhead J in that case to be a point of general application. It all depends on the context of the words "Subject to". That is demonstrated by the different outcome in Children's Ark at [58(iv)] in respect of the same words, "Subject to", in circumstances rather closer to the present.

56. In the present context, I consider that the words "Subject to" within clause 86 clearly mean that clause 68 is an exception to the position otherwise obtaining that the English Courts have jurisdiction over all disputes arising. That is its plain and clear meaning. I reject Project Co's submission that clause 86 is merely there to carve out jurisdiction for the adjudicator which would otherwise be available to the Court. The jurisdiction of the English Courts is subject to the whole of clause 68 which also includes the consultation provision which applies prior to adjudication.

57. Clause 68.1 is drawn in wide terms which, subject to an immaterial exception, compel any dispute relating to any aspect of the Agreement to resolution in accordance with

clause 68. It is mandatory because it says that the dispute "shall be resolved" in accordance with the remainder of clause 68. Mr Chennells submitted that those words are not enough: see Children's Ark at [58(iii)] in respect of clause 56. He said those words simply direct the reader to the rest of the clause to see what it requires but that they do not have the effect of rendering mandatory that which is not expressed to be mandatory within the rest of that clause. On his case, adjudication is not expressed to be mandatory. In my judgment, these submissions overlook the significance of the word "shall" in this overarching clause when viewed in its wider context. The wider context is that clause 68 is, itself, a carve out from clause 86. That is directly analogous to the approach which was taken by Joanna Smith J in Children's Ark at [58(iv)].

58. Within clause 68, the first step is consultation under clause 68.2. It is expressed in mandatory terms.

59. Clause 68.3 is expressed to be "Without prejudice to clause 68.2". This means that it may be open to a party to give notice of intention to refer a dispute to adjudication even if there has not been consultation in accordance with clause 68.2. But, equally, there is no obligation to give notice of adjudication in respect of a given dispute. A party "may" do so. Project Co relies on the word "may" as permissive. I agree with the Authority that the word "may" is used here to make clear that a party is not obliged to adjudicate if it does not want to. It would be absurd to require a party to advance a claim in adjudication, against its will, simply because the dispute in relation to it had not been resolved during the consultation process. But the mere fact that adjudication is permissive in that sense, rather than mandatory, does not mean that adjudication is not a condition precedent to litigation. As Mr Williamson expressed it, although a party "may" give notice of intention to refer a dispute to adjudication, it all forms part of a mandatory and exclusive framework for the resolution of disputes. In my judgment, the mandatory aspect of this comes from clause 86 and clause 68.1 read together.

60. Once notice has been given under clause 68.3, the following sub-paragraphs are concerned with the process of adjudication which, according to clause 68.8, is intended to yield an adjudicator's decision within the relevant time limit. Clause 68.8 also contemplates the only other relevant outcome, namely that the adjudicator fails to give a decision within the relevant time limit.

61. The parties may choose to accept the adjudicator's decision as finally binding upon them. But if either of them wishes to challenge it, a notice must be given within 90 days. A failure to do so will preclude a right of challenge. The exclusive gateway for a challenge to an adjudicator's decision in legal proceedings is the giving of such notice of intention to refer the dispute to the English Courts pursuant to clause 68.14.

62. Expressed differently, the regime in clause 68 does not contemplate bypassing adjudication entirely and proceeding straight to litigation. That would cut across clause 86. Once in clause 68, it is obvious from the way in which clauses 68.1 and 68.14 are expressed that the only way of having recourse to the Courts is the service of a timely notice referring the dispute which has been the subject of adjudication for final determination by the Courts. Mr Chennells submitted that clause 68.14 was merely saying that, if a dispute has been referred to adjudication, either party must give notice if it does not wish the decision to become finally binding. However, as Mr Williamson submitted, the contractual benefits associated with the strict 90-day time limit in clause 68.14 would be largely redundant if there was no time limit at all imposed upon a party who simply started legal proceedings without having adjudicated first. Although Mr Chennells relied on the word "may" in clause 68.14, I do not consider that to be material. It is obviously right that there should be no obligation to serve a notice if parties are content to accept the adjudicator's decision. It does not assist me in determining whether adjudication itself is a precondition to litigation.

63. Whilst Project Co invited me to contrast clause 68.3ff with the wording of the provisions in Ohpen and Children's Ark, I do not consider that such comparison is of any real assistance. I readily accept (as did Joanna Smith J in Children's Ark at [58(iii)]) that a mere requirement that a dispute be resolved in accordance with a dispute resolution procedure will not be enough to give rise to a condition precedent. But that is not what we have here. Access to the jurisdiction of the English Courts is "Subject to" clause 68. As I have said, the only stated gateway to the Courts within clause 68 is the giving of timely notice which follows an adjudicator's decision or the failure to provide such a decision. Unless clause 68.14 is regarded merely as an optional route to the Court, rather than an exhaustive one, it must follow that adjudication is a necessary

precursor to litigation. Access to the Court by a route other than clause 68.14 is not provided for.

64. It follows from the reasoning above that, in my judgment, adjudication is a condition precedent to the commencement of litigation in respect of any dispute arising in relation to any aspect of the Project Agreement.

65. If I were wrong about that, I am also satisfied that the requirement to adjudicate first is mandatory.

66. The adjudication process itself is clear and certain by reference to objective criteria. As I have said, the contrary was not suggested.

67. None of the issues which arose in respect of the liaison committee in Children's Ark arise here for two reasons. Firstly, because there is no dispute that clause 68.2 was sufficiently complied with on the facts. Secondly, because clause 68.3 is expressed to be without prejudice to clause 68.2. Therefore, a notice under clause 68.3 may be given whether or not clause 68.2 gives rise to an enforceable obligation and whether or not the process in clause 68.2 has in fact been used. Even if clause 68.2 was not enforceable, it would not impact upon clause 68.3: see clause 78.

(c) The exercise of discretion under CPR Part 11

68. I now turn to the exercise of discretion. As identified in the Channel Tunnel case, the presumption is that those who make agreements for the resolution of disputes must show good reasons for departing from them, particularly where, as here, the parties are experienced commercial entities. As explained in DGT Steel, the burden is on Project Co to show why a stay (at least) should not be granted. After all, in this case, the parties to the Project Agreement have agreed that any dispute arising in relation to any aspect of the Agreement should first be decided by an adjudicator.

69. The Authority contends that the subject matter of these proceedings concerns many and varied defects. Mr Williamson said that the issues between Project Co and Lendlease and between Project Co and Equans would be expensive, lengthy and complex to resolve. The Authority has no desire to be dragged into a determination of those issues which did not concern it. The only point with which it was concerned was a contractual

question of whether its obligations were 'back to back' with those arising under the Building Contract and the FM Agreement. In contrast to those complex and lengthy proceedings into which it is being dragged, it had bargained for a two-party 28-day adjudication, with litigation only as a last resort. It was relevant to take into account that the Authority was a public body providing educational facilities. In these straitened times, it should not be financially constrained even further by becoming embroiled in expensive litigation other than as a last resort.

70. The Authority's position that adjudication was appropriate prior to legal proceedings was said to be supported by clauses 68.16 and 68.17 which allow both Lendlease and Equans to make their submissions within the adjudication to which the Authority is a party. The point was made that all four parties (the Authority, Project Co, Lendlease and Equans) had bargained up and down the line to be bound by an adjudication decision reached between Project Co and the Authority. Whatever difficulties Project Co now relied upon, the fact is that these carefully crafted provisions contemplated upstream and downstream disputes with common elements.

71. The Authority also made the point that the Court should support the adjudication process and have regard to the fact that, in most cases, parties take the medicine administered by the adjudicator, rather than engage in subsequent litigation.

72. Project Co submitted that the Court should exercise its discretion by rejecting the application under CPR Part 11. Although the proceedings related exclusively to Phase 2, it submitted that they should not be considered in isolation, including from the Phase 1 litigation in respect of a common set of defects. It was inconceivable that those proceedings would not be consolidated with all the parties before the Court. As such, this application has wider impact than as between Project Co and the Authority. None of the other parties have insisted upon adjudication. Project Co indicated that any form of settlement of the dispute without the Authority's involvement is unrealistic.

73. I accept the submissions of Project Co and, in the exercise of my discretion, consider it inappropriate to make an order staying (or striking out) the proceedings pursuant to CPR Part 11. My reasons now follow.

74. One of the first considerations is the proper characterisation of the nature of the dispute between Project Co and the Authority. That is because, if the Court is to stay (or strike out) the proceedings, it would be to require Project Co to refer to adjudication that dispute which it has pleaded against the Authority.

75. Mr Williamson, for the Authority, characterised it as a straightforward exercise in contractual interpretation concerning the Project Agreement, namely whether the obligations arising thereunder were 'back to back' with those arising under the Building Contract and FM Agreement. Paragraph 252 of the Particulars of Claim pleads the contractual provisions are 'back to back' and might be thought to imply that this is all that matters in the litigation. In any event, Mr Williamson submitted that the Authority is not required to engage in complex, costly and lengthy litigation on various technical issues surrounding alleged defects. On behalf of Project Co, Mr Chennells disputes that characterisation. He submits that the pleaded case is one of substance which goes beyond contractual interpretation and necessarily requires the Authority to engage with the merits of the case surrounding the existence of the alleged defects. In response, Mr Williamson confirmed that the Authority would persist in its application for relief even if the Court concluded that the scope of that which had to be referred to adjudication went beyond a mere question of construction.

76. I am bound to say that I found it difficult, if not impossible, to identify from the surrounding correspondence which preceded the Particulars of Claim, the issue of contractual interpretation to which Mr Williamson referred. I understand that there may be an issue between the parties as to whether the scope of Project Co's liability to the Authority which arises under the Project Agreement is co-extensive with the scope of Lendlease's liability which arises under the Building Contract and/or with that of Equans under the FM Agreement. But I am far from clear that that issue is one of contractual interpretation or, at least, is limited to one of contractual interpretation. There may be circumstances which mean that the respective liabilities under the agreements are factually not co-extensive even if the contractual provisions are 'back to back'.

77. In any event, it is necessary to review the scope of the proceedings in a wider context in order to understand the likely role to be played by the Authority in respect of them.

In identifying a right to claim Deductions, the Authority must be asserting Unavailability by reason of facts which, for their part, Lendlease and/or Equans do not accept or for which they do not accept responsibility. By contrast, at paragraph 197 of the Particulars of Claim, Project Co pleads that the defects will cause Areas of the School to become Unavailable or Consequently Unavailable. It seems to me that all of these points will inevitably have to be tested as part of the proceedings instituted by Project Co. As Mr Chennells submitted, this is a case in which Project Co advances claims against Lendlease and Equans, whose defences are ones which, if valid, could impact upon the Authority's entitlement to Deductions. Although, respectfully, the claim against the Authority is not pleaded as clearly as it might be, it does not seem to be a narrow contractual dispute.

78. In short, I reject the Authority's submission that the proposed adjudication would simply concern a short point of construction. If, contrary to my understanding, that either is the sole or a key issue between the parties, the Authority can in due course apply to the Court for the determination of a preliminary issue within the existing litigation if the Court is persuaded that such an issue is appropriate.

79. I have identified above that the utility of the proposed course of action which the stay is designed to require can be a relevant consideration: see Children's Ark at [107]. Therefore, in my view, it is important for me to consider in the present case what the impact of granting a stay might be.

80. Whilst, in principle, the Authority's points about clauses 68.16 and 68.17 are powerful ones, I consider that they give rise to difficulties of application in the present case. I quite see that in a simple case where there are common issues between the Authority and Project Co under the Project Agreement on the one hand and between, say, Project Co and the Building Contractor under the Building Contract on the other, these contractual provisions would be directly applicable to any adjudication taking place at Project Agreement level. In such a case, all parties have agreed that the adjudicator's decision would be binding on the Building Contractor insofar as it determines the issues under the Building Contract. There is a parallel provision in the Building Contract to that effect: see clause 68.15 and clause 68.16 thereof. On the other hand, this case is

more complicated because it involves two supply chain parties each of whom is likely to be saying the other is responsible.

81. It is very difficult to see how an effective or useful bi-partite adjudication can be referred by Project Co where there appears to be, at least on the material before me, no real issue directly between the Authority and Project Co about the existence of, or responsibility for, the defects. Mr Chennells described it as a largely contingent dispute and I agree with that in the sense that the dispute only arises contingently on the position adopted by Lendlease or Equans. There are contingent matters disputed both by Lendlease and Equans who, in addition, may well hold each other responsible for them. I also cannot see how an effective or useful referral to adjudication can take place in which Project Co can simultaneously provide submissions under both clauses 68.16.1 and 68.16.2. Given the nature of the case pleaded in the legal proceedings, it is difficult to see how the contingent dispute between it and the Authority (i.e., if Lendlease is right) would be characterised by Project Co and what relief would be sought.

82. Mr Chennells was correct to submit that, by reason of clauses 68.16 and 68.17, Lendlease and Equans would probably be drawn into any adjudication commenced by Project Co against the Authority, requiring them to incur irrecoverable expense, despite having both chosen themselves not to insist upon adjudication with Project Co. A powerful reason not to insist upon Project Co first adjudicating against the Authority is that each of Project Co, Lendlease and Equans did not want to become involved in adjudication and yet it seems inevitable that they would become so, whether directly or indirectly. The extent of Project Co's compliance with clauses 68.16.1 and 68.16.2 of the Project Agreement, as reflected in the downstream agreements, may give rise to satellite arguments and disputes. There may also be issues over the effect of clause 68.17.

83. Although it may not be pivotal, and the point was not specifically argued, it may be that the word "or" which divides clauses 68.16.1 and 68.16.2 and which also appears at the end of the penultimate line cannot also mean "and". In other words, these provisions are not intended to operate when the dispute under the Project Agreement raises issues which relate both to a dispute arising under the Building Contract and a dispute arising

under the FM Agreement. At the very least, they would not be easy provisions to operate when there is a four-way dispute.

84. If Lendlease and Equans do not provide submissions within the Project Agreement adjudication, Mr Chennells may be right to say that such an adjudication against the Authority would spawn other satellite adjudications between Project Co, Lendlease and Equans. But it is not possible to speculate too far about that. I am content to accept that things could become complicated.

85. Another consideration in relation to the proposed adjudication is its duration. On the face of it, the timescale provided for in clause 68 is a conventional one requiring a decision within 28 days or 42 days by extension. If I thought that would be the case, it would be another powerful factor in support of the stay, as the period would be of a very short duration and relatively low cost compared with litigation. But given the complex nature of this dispute, the interaction with the other two parties, and the multi-faceted nature of the defects in question, each of which may require expert evidence to support them, it seems to me highly likely that the parties would have to agree to extend the period considerably, thereby rendering it a less attractive and more expensive proposition. Conversely, if this did not happen, such that (for example) Project Co were to insist upon the whole dispute being determined in 28 days I would regard it as even more likely that the losing party would serve a notice requiring the dispute to be finally determined by litigation since they would not regard the adjudication as having been a sufficient investigation into the merits of the dispute.

86. In his argument in reply, Mr Williamson submitted that the concerns set out above about the prospective adjudication were far too negative and that, instead, there was every reason to believe that a clear decision from an adjudicator would enable the parties to the Project Agreement to resolve their differences without having recourse to the Courts. He pointed to the value of the defects on Phase 2 and indicated that this value meant it was ideally suited to adjudication. I accept that this is not a high value claim if viewed in isolation i.e., ignoring Deductions and the equivalent defects on other phases. I agree that, conceptually, adjudication is suitable for disputes relating to defects of this value but that is only part of the story in this multi-party case in which the value of

Deductions is also in play. For that reason, I do not agree that the concerns set out above in respect of adjudication are unduly negative.

87. I should also record Mr Chennells' suggestion that the Authority was always entitled to begin its own adjudication in respect of its own claims, or for its own declaratory relief, if it thought it appropriate to do so. In that light, the consequence of my refusing to stay the proceedings is, perhaps, less significant than first appears since the supposed benefits of an adjudication are said to be open to the Authority even if the litigation continues.

88. The Court must also consider the impact that a stay in respect of the Phase 2 litigation as against the Authority would have on the conduct of those proceedings for other parties. Mr Williamson noted that those proceedings have progressed very slowly and would not be expected to reach a trial until, say, 2025. I agree. But that is a reason why they should not be further delayed without good reason. In my judgment, it is significant that none of the other parties decided to adjudicate their disputes first even though it was open to both of Lendlease and Equans to issue an application analogous to that now made by the Authority. It follows that those three parties were content to proceed directly to litigation. If the action against the Authority were stayed to enable an adjudication to take place, Lendlease and Equans would probably be called upon to serve their Defences in any event. That is certainly the indication given by the consent order to which I have referred. If the adjudication with the Authority did not finally resolve matters, which could take 90 days from the decision to establish, there would be a real mismatch in the state of progress between the claim in court against the Authority and the more advanced claims against those other parties. Inevitably, the timing would later have to be harmonised so that directions for witness statements and expert evidence all occurred together. Ultimately, it would cause delay to the hearing date of the action.

89. I anticipate that a stay for adjudication may also interrupt the Court's ability to case manage the Phase 2 proceedings and the Phase 1 proceedings together. It is not inconceivable that the Court will want to consolidate the actions if the defects are common to both Phases. All of those case management issues will be delayed pending the adjudication.

90. I also consider there is force in Project Co's point that the disputes, including the disputes on other phases, may be difficult to settle without the direct involvement of the Authority. Mr Williamson pointed out that the risk for an entity in the middle, such as Project Co, is entirely routine in PFI projects and does not stop it settling in one direction alone. He asked, rhetorically, why it was not possible for the other parties to settle their dispute without the Authority's input. It may be. However, the Authority seeks to maintain a commercially significant claim for Deductions, including historic Deductions, albeit it has not actually levied any of these Deductions at the moment. Until any necessary remedial works are undertaken, it also seems likely that the claim for further Deductions will continue to accrue at a significant rate. I can see that Project Co and its supply chain may be reluctant to settle with each other without knowing the full extent of any potential claim which the Authority may seek to advance against Project Co, which Project Co would then pass down. A stay which necessitates an adjudication between the Authority and Project Co on just one part of the wider dispute, which does not currently include the Authority's claim for Deductions, is unlikely to be helpful to a settlement in this regard.

91. I reject the Authority's submission that I should pay particular attention to the fact that it is a public authority which, in financially straitened times, does not want to become embroiled in costly litigation unless it has no other option. I doubt that anyone would be enthusiastic about the prospect of becoming involved in costly litigation but there is no special pleading for a public authority in this respect. The point that there is a public policy interest in upholding provisions which enable parties to resolve their disputes (per Ohpen) is no stronger merely because one of those parties is, itself, a public body. Moreover, I do not consider that the Authority's concern to avoid being dragged into litigation can, realistically, be fully allayed by the mere referral of a dispute by Project Co to adjudication. As I have said, I believe the Authority has not sufficiently appreciated the nature and breadth of the issues which arise as against it. Moreover, it positively asserts a right to claim Deductions on an on-going basis.

92. Lastly, the Authority submitted that the refusal of a stay would allow Project Co to benefit from its own breach by not requiring it to take the dispute to adjudication. As already noted, the Court acknowledges the public policy interest in holding parties to

their bargain. However, no specific benefits accruing to Project Co in not doing so were identified. The question is what the Court considers is the most appropriate course in the exercise of its discretion.

93. In summary, whilst acknowledging the burden is on Project Co to show why effect should not be given to the requirement for adjudication, my principal reasons for declining to enforce that provision are:

    (a) In respect of Phase 2 alone, this is essentially a multi-party dispute. I am very doubtful that a bilateral adjudication of the contingent dispute between Project Co and the Authority will satisfactorily resolve matters, even taking into account clauses 68.16 and 68.17. In the present case, those provisions may be particularly difficult to apply and could well lead to procedural complications. Overall, I therefore doubt there is much utility in requiring an adjudication to be conducted. If the Court was to insist upon it, there is a real risk that the adjudication will achieve little. The less satisfactory the adjudication, the more likely any decision in respect of it will be challenged.
    (b) A stay for adjudication would probably interfere with the orderly progress of the Phase 2 litigation and, potentially, the Phase 1 litigation if that is to be consolidated with it. The Phase 2 litigation is already underway against the other defendants. None of the other three parties, including Project Co, was interested in adjudicating the Phase 2 issues first, yet they would each be impacted by such a stay. Overall, the ultimate disposal of those proceedings would probably be delayed. This would be contrary to the overriding objective.
    (c) Project Co has submitted that, if the present application is dismissed, the Authority is free to begin its own adjudication, either now or in the future, if it wishes to. If that is right, the significance of the Court refusing a stay now is less significant than may first appear.
    (d) Multi-party mediation may be impacted by sending the dispute between Project Co and the Authority down a different track.

94. For these reasons, the application under CPR Part 11 fails.

(d) Should the Court strike out the proceedings under CPR Part 3.4?

95. In the alternative to CPR Part 11, the Authority contends that the Court should strike out the claim either on the basis that it discloses no reasonable prospect of success, because its right to commence such proceedings is not engaged, or because it is an abuse of process for the equivalent reasons given in relation to CPR Part 11.

96. The alternative relief under CPR 3.4(2)(a) and (b) was also sought in Children's Ark at first-instance although neither party took me to the passages in that judgment which addressed the issue. CPR 3.4 did not appear to feature at all on appeal. Indeed the Authority did not really identify any circumstances in which there could or should be a different outcome in respect of its application under CPR Part 11 from that arising under CPR 3.4.

97. Although I have concluded that the adjudication provision is a valid condition precedent to the commencement of proceedings in Court, I do not consider that it would be right to characterise Project Co's pleaded claim in these proceedings as disclosing no reasonable grounds for bringing the claim. Importantly, there is no attack by the Authority on the substance of that pleaded case. At most, the effect of clause 68 is that there is a temporary deprivation of Project Co's entitlement to advance that substantive claim pending adjudication. That point does not go to the substance of the pleaded case but to the forum in which it may be determined. It is a jurisdictional point as the application under CPR Part 11 recognises. There are, therefore, reasonable grounds for bringing the substantive claim.

98. In any event, the Court has a discretion whether or not to strike out the claim. I would not regard the existence of a temporary deprivation of Project Co's entitlement to advance its substantive claim pending adjudication as a basis for striking out the claim. That would seem to me to be a draconian remedy or, as expressed by Coulson LJ in Children's Ark at [2] "overkill" (albeit in the context of CPR Part 11). Indeed, in the context of CPR Part 11, the suggestion that I should strike out, rather than stay, the proceedings was only faintly pressed. In Children's Ark at [91], Joanna Smith J considered whether the claimant had acted unreasonably as part of that question (based on the approach in Snookes) but there is no suggestion of unreasonableness here. As to

the distinction between strike out and stay, Coulson LJ said this on appeal in Children's Ark at [92]:

> *"in all of the cases noted above, with the exception of Snookes, where there was an enforceable contractual dispute mechanism, there was a stay of the court proceedings started in breach of the contract. They did not lead to the court proceedings being struck out. Furthermore, whilst most of those cases are concerned with mandatory provisions rather than provisions that are described as conditions precedent, it is right to note that Ohpen was a case involving a breach of the condition precedent. O'Farrell J stayed the proceedings in that case to allow the condition precedent to be fulfilled."*

99. Insofar as the remedy of strike out is discretionary, I refer to the matters set out above in respect of CPR Part 11. Having regard to the overriding objective and those factors earlier described, in my judgment it would not be an appropriate outcome to strike out the claim. It would make no sense to strike out an action so as to require Project Co to commence an adjudication in the circumstances I have outlined.

100. I now turn to the application based on CPR 3.4(b). So far as is relevant to the present context, this part of the application was dealt with succinctly by Joanna Smith J in Children's Ark at [96] as follows:

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

101. Whilst Mr Williamson did not make that concession, I have already said that he advanced no separate grounds for the application based on CPR 3.4(b). For the reasons I have set out above in the context of CPR Part 11, it is not an abuse for Project Co to have started legal proceedings without first adjudicating. Even if it were, I would not strike out the claim in the exercise of my discretion, having regard to the overriding objective and the reasons given in respect of CPR Part 11.

(e) What form of order is appropriate?

102. In light of my conclusions, I dismiss the application under CPR Part 11 and CPR 3.4. I will hear the parties as to the consequences of this judgment. I draw CPR Part 11(7)(b) and (c) to their attention, noting that the current order against the First, Second and Third Defendants is for service of their Defences 28-days from the handing down of this judgment.