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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **17/06/14**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

FERMANAGH DISTRICT COUNCIL

Respondent/Applicant

and

GIBSON (BANBRIDGE) LIMITED

Appellant/Respondent

Before: MORGAN LCJ, GIRVAN LJ and WEIR J

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This is an appeal brought with the leave of Weatherup J from his decision made on 19 December 2013 whereby he extended time until 3 February 2013 for the notice of intention to refer a construction dispute to arbitration and he deemed the respondent's notice served on that date to be a requisite notice of intention for the purposes of the relevant contract between the parties.

[2] Mr Simpson QC appeared for the appellant ("Gibson") which was the respondent in the court below. Mr Humphreys QC appeared for the respondent which was the applicant in the court below ("Fermanagh"). The court is grateful to counsel for their clear and well-presented written and oral submissions.

Background to the application

[3] Fermanagh entered into a contract with Gibson in March 2005 for the construction of a waste management facility. The form of the contract was the NEC2 Engineering and Target Contract along with Activity Schedule ("the NEC contract"). The contract was substantially completed.

[4] Application for payment number 14 submitted in October 2011 resulted in a referral to adjudication. On 23 October 2012 the adjudicator decided that Fermanagh should pay Gibson £2,126,390.29 together with VAT and interest. Fermanagh, however, subsequently calculated the amount due as £302,156.61 plus VAT and declined to pay the amount the adjudicator assessed as due.

[5] Gibson issued proceedings in the Queen's Bench Division (Commercial) claiming the adjudicated sum. Fermanagh resisted an Order 14 application brought by Gibson contending, firstly, that the adjudicator had no jurisdiction since no dispute had existed and, secondly, that the adjudicator had failed to comply with the rules of natural justice by not affording Fermanagh sufficient time to respond. By a decision on 4 February 2013 Weatherup J rejected both challenges and entered judgment in the sum assessed by the adjudicator together with further interest, adjudicator's expenses and costs.

[6] In his decision the adjudicator concluded that there had been a failure by the project manager to assess the application for payment or provide them with details as required by Clause 50.4 of the contract. The adjudicator stated that:-

> "To say that there is not a dispute in such circumstances is plainly wrong for the reason I indicated in correspondence: it implies that Fermanagh can avoid liability by the simple expedient of not carrying out their contractual duty to assess the application until the limitation period expires."

[7] Weatherup J accepted the adjudicator's conclusion that there was a dispute. At paragraph [20] of his judgment at [2013] NIQB 16 he stated:-

> "[20] Initially there was a long delay after the application for payment was made. Then the matter moved to the inspection phase. I am satisfied that reasonable time was afforded to the project manager to make the assessment after the inspections had taken place between June and September 2012. A dispute had crystallised by 20 September 2012 when the plaintiff's consultant notified the defendant's consultant of the dispute and the proposed reference to adjudication. It is

> sufficient for present purposes that the dispute had arisen by that date and the notice of adjudication having issued on 25 September 2012 the adjudicator had jurisdiction to hear the dispute."

[8] The judge also rejected Fermanagh's contention that the adjudicator had breached procedural fairness. He considered that the issue was whether or not the procedures adopted by the adjudicator were materially unfair. Fermanagh had been afforded a reasonable time to make a response having regard to the opportunity which existed before the notice of adjudication for Fermanagh to address the application for payment.

[9] In paragraph [27] of his judgment Weatherup J provided a useful analysis of the rationale behind the adjudication system.

> "In general it can be stated that the courts strive to preserve the integrity of the adjudication process. The approach to enforcement of adjudicators' decisions has been described as robust. It is robust to the extent that a demonstrably erroneous decision by an adjudicator has been upheld for the purposes of enforcement. Why has this happened? When an error, if it occurs, is regarded as an exclusive risk of a speedy process there is considered to be a greater public interest in an adjudication system designed to achieve a speedy resolution of disputes on a temporary basis to enable a payment to be made and thereby to assist liquidity in the construction industry pending a final determination of matters in dispute. A summary and objective view is to be taken of a dispute by the appointment of an industry professional to act as adjudicator. That a substantial claim is made does not undermine the need to observe the essential nature of the speedy summary objective process for cash flow management. If the interim award should happen to result in overpayment to a contractor the money will be returned to the employer. If the prospect of repayment were thought to be in jeopardy because of the contractor's financial circumstances then arrangements will be made by the court to secure the repayment. That is not an issue in the present case."

[10] At paragraph [18] of his judgment Weatherup J stated:-

> "The present exercise concerned the final account. Nevertheless the detailed scrutiny of the final account

> will be part of the final agreement or arbitration or litigation as may be necessary to conclude the matter."

The judge's comment was, of course, premised on the supposition that Fermanagh would continue to dispute the adjudicator's award. In fact it is clear that it did.

The issue of adjudication proceedings

[11] The contract provides for a reference of a dispute to arbitration within four weeks of the adjudicator's decision. On 5 February 2013 Fermanagh served a notice described as a notice of arbitration. An arbitrator was appointed. A time bar point having been taken, the arbitrator stayed proceedings pending an application to the court to extend time. By an application dated 22 April 2013 Fermanagh applied under section 12 of the Arbitration Act 1996 ("the 1996 Act") for an extension of time to 6 February 2013 to refer to arbitration the dispute which had arisen under the contract.

The contractual provisions

[12] Clause 90.1 of the NEC terms provides that:-

> "Any dispute arising under or in connection with this contract is submitted to and settled by the *Adjudicator* within the timeframe (set out in the Adjudication Table)."

Clause 90.2 provides:-

> "The *Adjudicator* settles the dispute by notifying the parties and the *project manager* of his decision together with his reasons within the time allowed by this contract. Unless and until there is a settlement, the Parties and the *Project Manager* proceed as if the action, inaction or other matter disputed were not disputed. The decision is final and binding unless and until revised by the *tribunal*."

[13] Clause 92 provides:-

> "92.1 The *Adjudicator* settles the dispute as independent adjudicator and not as arbitrator. His decision is enforceable as a matter of contractual provision between the parties and not as an arbitral award. The *Adjudicator*'s powers include the power to review and revise any action or inaction of the *Project Manager* or *Supervisor* related to the dispute. Any communication between a party and the *Adjudicator* is communicated also to the other party. If

the *Adjudicator's* decision includes assessment of additional cost or delay caused to the *Contractor* he makes his assessment in the same way as a compensation event is assessed."

[14] Clause 93 provides:-

> "93.1 If after the *Adjudicator:-*
>
> - notifies his decision or
> - fails to do so
>
> within the time provided by this contract a Party is dissatisfied, that Party notifies the other party of his intention to refer the matter which he disputes to the *tribunal.* It is not referable to the *tribunal* unless the dissatisfied party notifies his intention within four weeks of:-
>
> - notification of the *Adjudicator's* decision or
> - the time provided by this contract for this notification, if the *Adjudicator* fails to notify his decision within that time
>
> whichever is the earlier. The *tribunal* proceedings are not started before completion of the whole of the works or earlier termination.
>
> 93.2 The *tribunal* settles the dispute referred to it. Its powers include the power to review and revise any decision of the Adjudicator and any action or inaction of the project manager or the supervisor related to the dispute. A party is not limited in the tribunal proceedings to the information, evidence or arguments put to the adjudicator."

[15] The arbitration agreement is found in Part 9 of the Contract Data Part 1. It states that "The *tribunal* is arbitration." The arbitration procedure is the Institute of Civil Engineers Arbitration Procedure 1997 or any amendment or modification to it in force when the arbitrator is appointed. Under the procedure arbitration is begun by one party "serving a notice to refer" on the other party. Rules 2.1 and 2.2 of the ICE Arbitration Procedure provide:-

> "2.1. Unless otherwise provided in the Contract a dispute shall be deemed to arise when a claim or

assertion made by one party is rejected by the Other Party and either that rejection is not accepted or no response thereto is received within a period of 28 days. Subject only to the due observance of any condition precedent in the contract or the arbitration agreement either party may then invoke arbitration by serving a notice to refer on the other party.

2.2 The notice to refer shall be in writing and shall list the matters which the issuing party wishes to be referred to arbitration. Nothing stated in the notice shall restrict that party as to the manner in which he subsequently presents his case."

The statutory power to extend time

[16] Section 12 of the Arbitration Act 1996 so far as material provides:-

"(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step:

(a) to begin arbitral proceedings, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun,

the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (on notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall make an order only if satisfied –

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

(4) The court may extend the time for such period and on such terms as it thinks fit and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired."

The judge's conclusions

[17] The first issue was whether the giving of a notice of intention to refer was a step to begin arbitration for the purpose of section 12 of the 1996 Act. The judge held that it was and rejected Gibson's argument that a notice of intention to refer was not a step to begin arbitration proceedings for the purposes of the section and thus out-with the statutory power to extend time. In his view, the notice of intention was "sufficiently imbedded in the arbitral process to represent a step to begin the arbitration and not to amount to merely a condition precedent to arbitration." The second issue was whether Fermanagh could rely on the first part of section 12(3)(a). The judge held that in circumstances where the jurisdiction of the adjudicator was in issue and the question of the adjudicator's jurisdiction was to be considered by the High Court before the substantive dispute was considered by an arbitrator, the parties would have contemplated that the time provision might not apply. He concluded that section 12(3) applied, subject to the question whether it would be just to extend time. The third issue was whether it would be just to extend time. The judge concluded that the overall process anticipated that ultimately there would be a substantive assessment of the final value of the contract, whether achieved by arbitration litigation or agreement. A substantive hearing had not occurred in respect of the disputed value of the final work. The judge held that it would be just to extend the time to allow the substance of the matter to be considered by arbitration. In this appeal Gibson challenges the judge's conclusion on each of those three issues.

[18] For the reasons set out below we conclude that the judge was in error in deciding the second issue in favour of Fermanagh. We shall deal with the second issue first since our conclusion on that issue determines the outcome of the appeal.

The second issue

Counsel's submissions

[19] Mr Simpson argued that under section 12 the court's power to extend time is subject to the obligatory conditions in section 12(3). Under section 12(3)(a) the court must be satisfied of two distinct matters. Firstly, the circumstances must be such as

to be outside the contemplation of the parties when they agreed the contractual provision. Secondly, it must be just to extend the time. Extensions nowadays will be exceptional (Cathiship SA v Allansons (the "Catherine Helen) [1998] 2 LR 511. If the circumstance is one which is not unlikely to occur then the test will probably not be satisfied (SOS Corporacion Alementaria SA v Inerco Trade SA [2010] EWHC 162 per Hamlin J). The approach is to start with the assumption that when the parties agreed the time bar they must be taken to have contemplated that if there were any omission to comply with the provisions in not unusual circumstances arising in the ordinary course of business the claim will be time barred unless the conduct of the other party makes it unjust that it should be under section 12(3)(b). Counsel argued that it is always reasonably foreseeable and thus within the contemplation of the parties that disputes will arise involving the necessity for adjudication. It must be within the parties' reasonable contemplation that a party may challenge the jurisdiction of the adjudicator. Challenge to the jurisdiction of the adjudicator on the basis of lack of dispute is a regular challenge to an adjudicator's jurisdiction. Mr Simpson contended that if the officious bystander had asked the parties "If you dispute the jurisdiction of the adjudicator do you require to serve notification of intention to refer within the contractual time?" the answer would have been clearly "Yes, if only to protect and preserve your rights."

[21] Mr Humphreys contended that Fermanagh's case was that if there was no crystallised dispute between the parties the adjudicator had no jurisdiction to make an award. If that assertion was accepted the decision of the adjudicator would have been a nullity. It would have been illogical and inconsistent for Fermanagh to have served a notice of intention to refer a dispute to arbitration since that would have amounted to recognising that there is a valid decision of the adjudicator while at the same time contending in the High Court that the adjudicator had no jurisdiction. Since Fermanagh was disputing the jurisdiction of the adjudicator in High Court proceedings it could have no intention to refer the dispute to arbitration and thus could not serve a notice of intention to refer the dispute to arbitration. Had the question been posed "In the event that one of the parties disputes the jurisdiction of the adjudicator and claims that this decision is a nullity would the notice of intention to refer still have to be served within four weeks of the disputed decision?" The answer to that must be no or, at least, maybe not. Either of those would satisfy the test in section 12(3)(a) as explained by Waller LJ in Harbour and General Works v Environmental Agency [2000] 1 WLR 950 at 960.

Conclusion on the issue

[22] Section 12 of the 1996 Act changed the law and practice relating to the extension of time for commencement of an arbitration beyond agreed time bar provisions. Under the previous section 27 of the Arbitration Act 1950 ("the 1950 Act") the court had given the words "if (the court) is of opinion that in the circumstances of the case undue hardship would otherwise be caused" a relatively benevolent application. The court approached the concept of undue hardship by

reference to such factors as the size and strength of the claim; the extent of the claimant's fault; the pendency of negotiations between the parties; whether the respondent had been obstructive; the extent to which the respondent would suffer prejudice in addition to the loss of its time bar defence if time were extended and, generally, whether the hardship was not only excessive but undeserved. Paragraphs 69 and 70 of the Departmental Advisory Committee Report on the Arbitration Act (1996) under the Chairmanship of Saville LJ explained the change in the wording of section 12 as being intended to reflect the underlying philosophy of the Act namely party autonomy. Any power given to the court to override the bargain that the parties had made must be fully justified. The idea of the court having a general supervisory jurisdiction over arbitration was abandoned. The court's power of extension is confined to two cases covered by section 12(3)(a) and (b). Section 12(3)(a) relates to circumstances beyond the reasonable contemplation of the parties when the agreement was made *and* when it would be just to extend the time and section 12(3)(b) arises where the respondent's conduct makes it unjust to enforce the time limit. The latter provision is of no relevance in the present case and the question which arises in the present appeal at this stage is whether the matter falls within the first part of paragraph [a]. Both provisions are related to a party autonomy and are conceptually different from the undue hardship approach under the previous legislation.

[23] At first instance in Harbour and General Works Ltd v Environment Agency [1999] 1 All ER (Comm) 953 Colman J stated:

> "The approach to the construction of section 12 has, in my judgment, to start from the assumption that when the parties agreed the time bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in the ordinary course of business, the claim would be time barred unless the conduct of the other party made it unjust that it should."

Colman J's approach was accepted as correct by the Court of Appeal (see Waller LJ at [2000] 1 WLR 950 at 960B.)

[24] Counsel referred to Waller LJ at 960 where he said:

> "The subsection is concerned with party autonomy. Its aim seems to me to be to allow the court to consider an extension in relation to circumstances where the parties would not reasonably have contemplated them as being ones where the time bar would apply or to put it the other way around, the section is concerned not to allow the court to interfere with the contractual bargain unless the

> circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply – it then being for the court to finally rule as to whether justice required an extension of time to be given."

Mr Humphreys sought to rely on this passage as indicating that the court's approach should be that in a given situation the court had jurisdiction to extend time if it was possible that the parties might not have agreed on the time bar applying and if it was just to do so. However, Waller LJ's earlier acceptance of Colman J's approach as being the correct one indicates that what he had in mind was a situation of unusual circumstances unforeseen by the parties at the time when they entered into the time bar agreement. If a situation arises which is unusual, out of the ordinary and unpredictable at the time the original time bar term was agreed and it was such that the parties might not have been ad item on whether the time bar should apply in such circumstances, then an extension might be appropriate if it is just to extend time.

[25] In Cathiship SA v Allanasons Ltd (the Catherine Helen) [1998] 3 All ER 714 Geoffrey Brice QC sitting as a Deputy Judge of the High Court provides a helpful analysis of the correct approach to Section 12 at 726:

> "The expression 'the circumstances are such' does not define or delimit the circumstances: "circumstances" must be all those placed before the court, the court having to consider these circumstances as a whole and focussing on those which appear particularly relevant.
>
> (2) The circumstances must be "outside the reasonable contemplation of the parties when they agreed the provision in question." Thus -
>
> (a) the relevant time is restricted to the time when the parties agreed the arbitration clause and not at some later time e.g. then or after the dispute arose;
>
> (b) the persons whose reasonable contemplation is relevant are "the parties" i.e. both parties and not merely one party;
>
> (c) the circumstances must be outside the reasonable contemplation of those parties at that time. Thus the court is concerned not

> only with what the parties actually contemplated at the time but what they reasonably would have contemplated. This must involve a consideration of the relevant transaction of ordinary practices within that type of transaction and was the reasonable expectations of parties involved in such a transaction.
>
> (3) The court is finally concerned to determine whether it would be just to extend the time. Again there is no delimitation as to the relevant circumstances to be considered in this regard."

The deputy judge went on to cite with approval Merkin *Arbitration Law* 1991 paragraph 11.43:

> "What is required … is the occurrence of an event in respect of which the parties could not reasonably have made provision when the agreement was entered into. One can think of examples which are fortuitous such as the lawyer handling the claim suffering a heart attack just before serving notice of the claim, or the vehicle transporting the written claim which was to be served being involved in a serious accident."

The deputy judge did not think that a fortuity such as that was a necessary pre-requisite as a matter of law but each case would depend on its facts. In a common commercial transaction such as arose in the case before the deputy judge and in relation to operations under or in respect of it, the parties should reasonably have in contemplation the type of events which experience has demonstrated are prone if not certain to occur.

[26] Having set out the relevant principles and the proper approach we can now turn to the relevant context and the relevant circumstances. When the adjudicator gave his decision on 25 September 2012 it was clear to Fermanagh that the adjudicator had reached a decision with which it did not agree. Fermanagh considered that a very much smaller sum was due to Gibson as compared to the adjudicator's assessment. There was thus clearly a serious dispute between the parties. If the adjudicator was acting within jurisdiction the contract provided only one way to challenge its effect, namely by arbitration. That brought into play the provisions of Clause 93.1. As a party dissatisfied after the adjudicator had notified his decision, Fermanagh had to notify Gibson of its intention to refer the matter disputed to the "tribunal" (that is to say, in this case, to arbitration). Clause 93.1 required notification to be effected within four weeks of the notification of the

adjudication decision. In the arbitration the arbitrator has full power to review and revise any decision of the adjudicator. The arbitrator under his powers set out in Clause 7.2 of the ICE arbitration procedure has power to rule on "(c) whether there is a dispute or difference capable of being referred to arbitration." Fermanagh disputed the issue whether there was a dispute for the purposes of the adjudication process. The adjudicator having determined that there was a dispute Fermanagh contested the outcome of the adjudication decision both on that issue and on the adjudicator's assessment of the amount payable to Gibson. There being undoubtedly a referable dispute between the parties, if not properly referred to arbitration, Fermanagh was going to be bound by the adjudicator's decision unless the High Court ruled that he was acting without jurisdiction which was by no means a certainty.

[27] Having decided to reject the adjudicator's decision on the ground that he had no jurisdiction because there was no dispute fit to go to adjudication, Fermanagh adopted a high risk strategy of ignoring the adjudicator's assessment, contesting Gibson's claim to enforce the adjudicator's settlement figure in the High Court proceedings and not serving a notice of intention to refer to arbitration under the agreed terms of contract notwithstanding that the contract spelt out clearly that an adjudicator's decision stands as binding unless taken to arbitration in a manner procedurally satisfying the contractual provisions. As Weatherup J's judgment in [2013] NIQB 16 established, Fermanagh's rejection of the jurisdiction of the adjudicator was misconceived. The adjudicator had concluded that Fermanagh was plainly wrong in its assertion that there was no dispute. Weatherup J upheld that conclusion, deciding that a dispute had indeed crystallised by the time the matter went to adjudication.

[28] Disagreements about whether there has been a dispute which falls to go to adjudication are not an uncommon feature of construction contracts. They are prone to happen. Adjudicators regularly have to resolve those questions as best they can. If an adjudicator is plainly wrong in deciding that there is a dispute he will have exceeded his jurisdiction if he proceeds to assess a sum to be paid to a contractor. It is entirely open to a party in an arbitration under the NEC contract to challenge the validity of the adjudicator's conclusion and, in any event, the arbitrator is in no way bound by the adjudicator's assessment. All this is known to or should reasonably be appreciated by parties when they enter into the NEC contract. The question which arises in the present case is whether, in a case where the employer under the contract disputes the right of the adjudicator to carry out the adjudication because it asserts that a dispute has not arisen, the employer was not or might not be bound to comply with the notification requirements in Clause 93.1 of the contract.

[29] What are the relevant circumstances to which regard should be had in answering the question? Firstly, as of 25 September 2012, the outcome of the adjudication gave rise to a major dispute between the parties. The adjudicator's assessed figure and Fermanagh's view as to the extent of the liability were miles

apart. Secondly, Fermanagh was contesting the adjudicator's right to adjudicate. It was disputing whether there was a dispute. Both the issue of quantum and the question of the adjudicator's right to assess the figure fell within the remit of the arbitrator. Thirdly, Fermanagh was going to resist payment of the adjudicator's assessed sum. Fourthly, the giving of a notice of intention to refer the matter in dispute to arbitration could in no way amount to a waiver of Fermanagh's claim that the adjudicator had no jurisdiction. Indeed it would be entirely consistent with its argument. Compliance with Clause 93.1 would not have prejudiced, either in proceedings or in arbitration, Fermanagh's contention that the adjudicator had no jurisdiction. Fifthly, the contention that the adjudicator did not have jurisdiction was in fact misconceived and had no basis in fact, as determined by Weatherup J in the commercial proceedings. A reasonable party properly advised should reasonably have concluded that in order to protect its position it should notify the other party of its intention to refer the matter in dispute to arbitration. When Clause 93.1 was agreed as a term of the contract it should reasonably have been in contemplation of the parties that a situation might arise where one party's claim might be upheld by an adjudicator in circumstances disputed by the other both as to quantum and as to whether the adjudicator should proceed to adjudicate in the circumstances. Since arbitration was the agreed mechanism for resolution of the dispute and since the arbitrator could revisit the adjudicator's assessment and hear different evidence and arguments there is no reason to think that the parties intended anything other than that the procedural step in clause 93.1 should be taken within the agreed timeframe. Accordingly, we must allow the appeal on that basis.

Is a notice of intention to refer a step to begin arbitration?

[30] Having regard to our conclusion on the second issue, it is not necessary to decide the first issue. That issue was hotly contested and the finely balanced arguments demonstrated that it is not an easy question to resolve. Out of deference to counsel's arguments we will express our tentative conclusions on the point while recognising that the issue may have benefitted from further argument in relation to the relationship between clause 93.1 and paragraph 2.1 in the ICE procedures which do not sit easily together. Those involved in the drafting of contracts and those deciding on whether to incorporate the NEC conditions and at the same time the ICE procedures might usefully consider whether the wording of the documents read together is as clear as it should be or might benefit from some modification.

[31] Mr Simpson argued that what Clause 93 provides for if a party is dissatisfied with the decision of an adjudicator he must notify the other party of his intention to refer the matter which he disputes to the tribunal. This is a notification of intention to refer a matter in dispute and not a referral to arbitration. A notification under Clause 13.7 of the NEC contract is defined as a notification which falls to be communicated separately from other communications. The ICE Rules governing arbitration procedure incorporated into the contract included by paragraph 2.1 require due observance of any condition precedent. The Institution Rules called for

the service of a notice to refer in order to commence arbitration proceedings (ICE Rule 2.2). The contractual step beginning arbitral proceedings is thus the notice to refer. If the service of a notice of intention to refer is a step to anything it is a step to protect a future right to refer a dispute to arbitration. If it is not served the adjudicator's decision becomes formally binding on the dissatisfied party who loses the right to refer the dispute to arbitration. Counsel, referring to *Russell on Arbitration* at paragraph 7.074, contended that the step of serving a notice of intention is a condition precedent to the beginning of arbitration proceedings and not a step to begin them. Section 12 does not give the court jurisdiction to extend the time for such a step to be taken.

[32] Mr Humphreys countered Mr Simpson's argument by comparing the narrow provisions of section 27 of the 1950 Act with the provisions of section 12 of the 1996 Act. He argued that the court can now extend time in a case where the claim is extinguished as well as where the arbitration right is barred and where the time limit relates to the commencement of some other dispute resolution procedure. Under Clause 93 the reference to arbitration and to the notification of an intention to refer are intimately and inextricably linked. One cannot follow without the other. Counsel contended that the judge rightly distinguished between "*to begin*" and "*to take some step to begin*". He submitted that this encompassed precisely the sort of procedural step as the notice of intention to refer required by Clause 93 of NEC3. Since this form of NEC contract is very commonly used in public sector contracts Gibson's argument, if correct, would have serious repercussions in situations where for justifiable and unforeseeable circumstances a party delayed the service of a notice of intention to begin arbitration proceedings. On Gibson's argument the court would have no power to extend even if the case fell within section 12(3)(b) where the conduct of the other party would otherwise make it unjust to hold the other party to the strict terms of Clause 93.1

[33] Under the earlier provisions of section 27 of the 1950 Act where any claim was barred "unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence proceedings is taken within a time fixed by the Agreement" the court was given power to extend time if "undue hardship" would otherwise be caused. Case law established that a step to commence proceedings should not be given an over wide interpretation. In Babanaft International v Avant Petroleum [1992] 1 WLR 871 the contract provided that if ship owners were to make a claim against charterers they had to present a claim in writing with all available supporting documentation within 90 days of completion of discharge. Having failed to do that the owners had no claim on which they could base a claim for arbitration. The Court of Appeal held that the presenting of a claim and supporting documentation was not in itself a step to commence arbitration. The presentation of a claim did not necessarily lead to arbitration. By the same reasoning a landlord's notice to increase rent as a result of which, if rejected, arbitration proceedings could be commenced was not a step to commence the arbitration. It was a preliminary

step which could lead to a dispute that could be taken to arbitration (see Richhurst Ltd v Pimanta [1993] 2 All ER 559.)

[34] In the present instance the requirement to serve a notice of intention to refer the matter to arbitration is clearly something which must be done if there is to be a dispute that can go to arbitration. It is in that sense the first thing that must be done to claim arbitration. It is interesting to note that in Babanaft, Donaldson LJ at 885d-e said:

> "The concept of 'claiming arbitration' is well known in the commodity trades. Telex messages fly to and fro and at some stage one party or the other says "we claim arbitration". The arbitration rules of the trade concerned then provide the steps to be taken by each party. I would therefore accept that in such cases "claiming arbitration" may be regarded as a step to commence arbitration proceedings within the meaning of Section 27."

[35] It seems to us that Clause 93.1 set in its context equates to the concept of "claiming arbitration" in the field of commodity trades. The rejection of the adjudicator's assessment triggered a right to claim arbitration by way of the giving of a notice of intention to refer the matter to arbitration. It was in effect the first step to begin the arbitration which could not proceed to hearing until after completion of the works.

The third issue:

[36] The judge exercised his discretion under Section 12(3)(a) following his decision that the matter fell within the first part of Section 12(3)(a). In the light of our conclusion that it did not, no question of an exercise of discretion arises.

Disposal of the Appeal

[37] For the reasons set out above we allow the appeal and will hear counsel on the question of costs.