Neutral Citation Number: [2024] EWHC 2318 (Ch)

Case No: PT-2024-000225

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

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

Date: 10 September 2024

Before :

MASTER BRIGHTWELL

- -

Between :

DANDARA SOUTH EAST LIMITED	**Claimant**
- and -	
(1) MEDWAY PRESERVATION LIMITED	**Defendants**
(2) MEDWAY PRESERVATION & DEVELOPMENT LIMITED	

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Greville Healey (instructed by **Wedlake Bell**) for the **Claimant**
Dalton Hale (instructed by **Warners Law LLP**) for the **Defendants**

Hearing date: 24 July 2024

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Tuesday 10 September 2024

Master Brightwell :

1. This is an application by the defendants for a stay to enable the dispute between the parties to be determined by an expert determination procedure provided for in a contract dated 30 June 2022 ("the Contract"), by which the first defendant as seller agreed to sell land at Commissioner's Road, Strood, Kent ("the Land") to the claimant as buyer. The second defendant was named in the contract as contractor.

2. The claimant claims that it was entitled to terminate, and has terminated, the Contract by a Termination Notice served on 3 December 2023 in accordance with clause 8, and claims the repayment of its deposit. The defendants dispute the jurisdiction of the court and contend that the Contract provides for mandatory expert determination, and seek a stay accordingly.

3. The claimant responds to the application with three points:

    i) It contends that, on its true construction, the expert determination provision does not extend to the present dispute.

    ii) It also contends that the Contract has now come to an end, and the expert determination provision in the Contract is not separable from it.

    iii) Regardless of the separability of the expert determination provision, the claimant also argues that it is plainly unsuitable for the resolution of the dispute between the parties and contends therefore that the court should refuse to grant a stay as a matter of discretion.

4. There would appear to be no decided authority on the question whether an expert determination clause can be separable from the underlying agreement, in the way that an arbitration clause is so separable unless the parties have otherwise agreed.

The relevant provisions of the Contract

5. By clause 2, the Contract came into force on the date it was made, but the provisions for sale and completion of the sale of the Land were subject to what are defined as two conditions precedent. One of the said conditions (clause 7) was that the second defendant would carry out certain earthworks on the Land, 'to import inert waste to the Property in order to create the engineered development platform to facilitate the development of the Property' in accordance with planning permission which had been granted for 123 dwellings upon the Land. The specification for the earth filling works is contained at Annex A to the Contract. It was dated July 2018 and prepared by the Employer's Agent, SLR Consulting Ltd ("SLR").

6. The Contract contains provision for the issuance of a Practical Completion Statement, being a written statement from the Employer's Agent that practical completion of the Earthworks has occurred. Clause 7 includes the following sub-clauses, the effect of which is in dispute between the parties:

> '7.14 The Seller and the Contractor shall instruct the Employer's Agent to give to the Buyer not less than ten (10) Working Days' notice (an Inspection Notice) of each of the dates upon which he intends to inspect the Earthworks with a view to issuing the Practical Completion Statement.
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> 7.15 The Buyer and the Buyer's surveyor will be entitled to accompany the Employer's Agent on each such inspection and the Seller and the Contractor shall instruct the Employer's Agent to allow the Buyer and the Buyer's surveyor to make representations at such inspection as to why in the view of the Buyer or the Buyer's surveyor the Practical Completion Certificate should not be issued and the Buyer shall confirm the representations in writing to the Seller within five (5) Working Days of the inspection and the Seller will procure that the Employer's Agent shall have due regard to the same but the issue or non-issue of the Practical Completion certificate will be in the sole professional discretion of the Employer's Agent.
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> 7.16 If the Employer's Agent decides (having taken into account any such representations) not to issue the Practical Completion Certificate then he shall subsequently give to the Buyer not less than five (5) Working Days' notice of the date upon which he intends to re-inspect the Earthworks with a view to issuing the Practical Completion Certificate and this procedure will be repeated in each case as often as may be necessary.
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> 7.17 Subject to the foregoing provisions of this clause having been observed by the Seller the Practical Completion Statement will be conclusive evidence binding on the parties hereto (save in the case of manifest error) of the Practical Completion Statement that the Earthworks have been practically completed for the purpose of this contract.
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> 7.18 Forthwith following the issue of the Practical Completion Certificate the Seller shall procure that the Employer's Agent to issue a copy of it to the Buyer and to the Buyer's Conveyancer. […]".'

7. The Contract provides for it to become unconditional on the Unconditional Date, being the date when the condition precedents are satisfied. By clause 8, if the Unconditional Date is not satisfied by the Long Stop Date (defined as 2 December 2023) the buyer is given the right in its absolute discretion at any time after that date to give written notice to the seller to determine the Contract. If that right is exercised, the Contract ceases to have effect but

without prejudice to any rights which either party may have against the other in respect of prior breaches, and the seller is forthwith to return the deposit to the buyer together with any interest accrued on it.

8. Clause 28 of the Contract provides as follows:

> '28. Disputes
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> 28.1 Any dispute or difference between the parties as to any matter under or in connection with this contract shall be submitted for the determination of an expert (the Expert) and the following provisions of this clause 28 shall apply to any submission and to any other matter required to be dealt with by the Expert.
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> 28.2 The Expert shall be appointed by the parties jointly, or in default of agreement within ten (10) Working Days after either party has given to the other a written request requiring the appointment of an Expert, by (depending on the nature of the dispute or difference) the President of the Royal Institute of Chartered Surveyors or the President of the Law Society or their respective nominees (and so that if the parties cannot agree as to which type of Expert is appropriate this shall be decided by a person nominated by the President of the Law Society or his nominee on the application of either party) on the request of either party who shall appoint an independent chartered surveyor or (as the case may be) a solicitor with appropriate experience of dealing with matters of the type which are the subject of the dispute between the parties;
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> 28.3 The Expert so appointed:
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> (a) must act as an expert and not as an arbitrator;
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> (b) must afford the parties the opportunity within reasonable time limits to make representations to him (verbal and/or written as such party may elect);
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> (c) must inform each party of the representations of the other;
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> (d) must afford each party the opportunity within reasonable time limits to make submissions to him (verbal and/or written as such party may elect) on the representations of the other;
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> (e) must notify the parties in writing of his decision with reasons as quickly as practicable, and,
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> (f) may take whatever independent advice he considers necessary.

> 28.4 The fees and expenses of the Expert including the cost of his nomination and appointment shall (unless he otherwise directs) be borne equally by the parties;
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> 28.5 The Experts determination is to be conclusive and binding on the parties save in the case of manifest error or omission; and
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> 28.6 Either party may pay the share of the Expert's fees and expenses due from the other on behalf of the other if such share is not paid by the due date for payment in which case the amount so paid plus all incidental expenses shall become a debt due and immediately payable to the paying party from the other.
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> 28.7 The Expert is to consider written and/or verbal representations received from the Seller and the Buyer within 15 Working Days of his appointment and any written and/or verbal counter representations by either party received by the Expert within 10 Working Days of a copy of the initial written representations or details of verbal representations made by one party being provided to the other.
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> 28.8 The parties are to instruct the Expert to issue a decision within 30 Working Days of his appointment.
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> 28.9 The Expert may be discharged and another appointed in their place by or on behalf of the relevant President if:
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> (a) he dies or becomes unwilling to act or incapable of acting; or
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> (b) he fails to make and publish his determination within two months of his appointment (or a longer period agreed in writing by the Seller and the Buyer); or
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> (c) for any reason the President or his nominee thinks fit.'

9. The parties also make reference to clause 31, which provides that, 'Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this contract or its subject matter or formation (including non-contractual disputes or claims).'

10. The claimant contends that, as a matter of construction or by virtue of an implied term, no valid or binding Practical Completion Statement can be given without the seller and the contractor having instructed the Employer's Agent to give to the buyer an Inspection Notice of each of the dates upon which it intends to inspect the Earthworks with a view to issuing the Practical Completion Statement, and without the buyer having an opportunity to attend

the inspection, and make representations as to why a Practical Completion Certificate should not be issued, which are then to be taken into account.

11. A dispute arose in the present case following the service by the claimant of a (disputed) termination notice. This was preceded by an indication from the defendants' solicitors that the Earthworks Condition was satisfied following the issuing of a certificate by SLR and dated 12 November 2023 and relied on as a Practical Completion Statement. The claimants' position was and is that a Practical Completion Statement cannot be issued until there has been compliance with the notification and representation provisions of clauses 7.14 and 7.15 of the Contract, and that these provisions were not followed by the defendants. The defendants' solicitors sent an email on 23 November 2023, later confirmed to be intended to be an Inspection Notice, and the parties agreed to arrange an inspection for 8 December 2023, the claimant reserving the right to terminate the Contract after the Long Stop Date, which right it then purported to exercise before the arranged inspection took place.

12. The claimant contends that the 12 November 2023 statement was not a Practical Completion Statement, for a number of reasons based on the construction of the Contract, and/or that it is invalid on its face.

13. The claimant also relies on a report produced on 25 September 2023 by RSK Environment Ltd trading as Leap Environmental ("LEAP") (it having also produced two earlier reports). This states that it was obtained by the claimant to provide information on the geotechnical quality of the raised levels on the site, as well as to provide an updated gas risk assessment following the raising of levels. Paragraph 17 of the particulars of claim says as follows:

> '17. The September 2023 LEAP Report referred to the prior reports, and to further testing carried out by LEAP, which had revealed localised low strength zones which merited further testing, and elevated methane levels indicating that unacceptable concentrations of ground gases are being generated onsite from the fill material that was bought in to raise levels, concluding:
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> "Dynamic probing across the site has indicated that further investigation is required, due to the extensive soft/loose areas encountered. Additional probes on proposed plot corners are recommended to help determine possible foundation options for the site. The gas monitoring undertaken to date is very limited, but has recorded elevated and apparently increasing levels of methane. It is recommended that at least 6 months of continuous gas monitoring is undertaken to capture worst case scenario conditions (low and falling pressure). The additional monitoring data is required to determine the gas regime at the site and will inform recommendations any

> gas protection measures or further monitoring/assessments necessary for the development."'

14. Whilst no defence has been filed, given the nature of the defendants' application contesting jurisdiction, the claimant argues that it is clear that the defendants will rely not only on matters concerning the construction of the Contract, but also on complex matters of fact. They have alleged in correspondence that if the inspection on 8 December 2023 had gone ahead, 'SLR would most likely, following representations from your client, [have stood] by its original opinion that practical completion had already been achieved prior to 2 December 2023'. Subject to the interpretation of the Contract and as to the parties' respective rights and obligations under it, accordingly, it appears that the defendants will contend that as a matter of fact the Earthworks Condition was satisfied and that the 12 November 2023 certificate was valid as a Practical Completion Certificate even if there had been a failure by the defendants and/or the Employer's Agent to comply with the procedural provisions of clause 7. The claimant argues that the factual questions which would be raised by such a contention are complex and would not be suitable for resolution by an expert in accordance with clause 28.

Construction and separability

15. A question arises both as to the scope of clause 28, and as to whether it is separable from the Contract as a whole.

16. In relation to arbitration agreements, the principle of separability is enshrined in statute. Section 7 of the Arbitration Act 1996 states that:

> 'Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.'

17. The defendants argue that the principle applies also to expert determination clauses or, in any event, to clause 28 of the Contract. The claimant disputes this proposition. It was common ground between the parties that there is no authority directly on point.

18. Before the 1996 Act was passed, it had been decided that an arbitration clause was usually a self-contained collateral agreement, which fell to be construed in accordance with its terms and with regard to the relevant factual situation: *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 at 711, Ralph Gibson LJ. In the present case, both parties'

submissions proceeded on the basis that it was a matter of construction whether or not clause 28 of the Contract is a self-contained agreement.

19. Both parties also relied on the decision of the Court of Appeal in *Barclays Bank plc v Nylon Capital LLP* [2012] Bus LR 542, where the similarities and distinctions between arbitration and expert determination clauses were explored, although the question of separability did not arise there. The case involved a provision under a limited liability partnership agreement for an expert to determine any dispute regarding either the profit and loss allocation among the members or any payment due to an outgoing member. The question for the court was whether the appointed expert himself was to have jurisdiction to determine the scope of his own jurisdiction, or whether there was a condition precedent to the existence of such jurisdiction that an allocation of profits between the members had already been made. The court determined that this was a condition precedent, such that the expert determination clause had never come into effect.

20. Thomas LJ set out the key distinction between an arbitration and an expert determination clause in this way, at [25]–[28]:

> ‘25 It was submitted by Mr Tozzi that a generous construction should be given to the jurisdiction conferred on the expert by the expert determination clause as an expert determination clause in this respect should be treated no differently to an arbitration clause. It was established in *Fiona Trust and Holding Corpn v Privalov* [2007] Bus LR 1719 that an approach to the construction of an arbitration clause by drawing a fine distinction between words such as “arising under” or “in relation to” (as had been drawn in the earlier cases) should no longer be made. The approach a court should take was that set out at para 13 of the speech of Lord Hoffmann where he made clear that the construction of an arbitration clause should start on the assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship into which they had entered should be decided by the same tribunal. An arbitration clause should therefore be construed in accordance with that presumption, unless the language made it clear that certain questions were to be excluded from the arbitrator’s jurisdiction.
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> 26 It is also clear that where parties have made an agreement for a particular form of dispute resolution, then they should be held to that agreement as Lord Mustill explained in his speech in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 353:
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> > “Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must

> show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point."

27 However, although parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which must now be taken to an arbitration clause. The rationale for the approach in the *Fiona Trust* case is that parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes. As arbitration will usually be an alternative to a court for the resolution of all the disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court.

28 In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of the *Fiona Trust* case does not therefore apply, as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement. The LLP agreement illustrates this: the parties agreed by clause 26.2 to submit to the exclusive jurisdiction of the English courts, but reserved specific disputes under clause 26.1 to the expert. They carved out of the exclusive jurisdiction of the English courts, to which they had submitted all disputes between the parties, a limited class of dispute. Therefore, quite unlike the position under agreements with arbitration clauses (as exemplified by the *Fiona Trust* case), the parties have chosen two alternative forms of dispute resolution. There is, therefore, no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert conferred by the expert determination clause as the reasoning in the *Fiona Trust* case is inapplicable. The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way.'

21. In stating that expert determination clauses generally anticipate some disputes being resolved by an expert and some disputes by the court, the one-stop

principle applicable to arbitration clauses does not generally apply. Mr Healey submitted that separability and the one-stop principle are bound together, such that neither apply to expert determination clauses. In doing so, he relied on *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] 3 All ER 580. After saying, at [74], that the separability principle (i.e., in arbitration) means that the question of contract formation must be asked twice, once in relation to the main agreement and again in relation to the arbitration agreement, Males LJ said, at [75]:

> '75 I do not accept that the approach which I have set out is (as Mr Young submitted) 'antithetical to the modern "one-stop" dispute resolution presumption in contractual interpretation'. That presumption is concerned with the interpretation of dispute resolution clauses, as made clear in *Fiona Trust*. But there is no issue about the interpretation of the arbitration clause in this case….One-stop shopping is all very well, but if the parties have not entered into an arbitration agreement, the shop is not open for business in the first place.'

22. Mr Hale submits that the ordinary principles of contractual construction apply to the construction of clause 28. Males LJ referred in the *DHL Project & Chartering* case to the interpretation of dispute resolution clauses, and not only to the interpretation of arbitration clauses, with reference to *Fiona Trust*. I consider that the principles as discussed by the House of Lords in the latter case inform the objective assessment of the meaning of a commercial agreement between business people. I also note that Males LJ said, with reference to the separability principle, 'It is an important concept for arbitration lawyers, although it may be questioned how many business people who include an arbitration clause in their contracts are aware that it exists' (at [43]). This reinforces the fact that the purpose of construction is to ascertain what the parties intended objectively.

23. The principles of construction referred to by Males LJ were set out in the following way by Lord Hoffman, in *Fiona Trust*:

> '5 ….Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

> 6 In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
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> 7 If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.
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> 8 A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so.'

24. Lord Hoffman went on at [13] to say that, 'In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal'. That assumption cannot, of course, apply generally to expert determination clauses, for the reasons explained by the Court of Appeal in *Nylon Capital*.

25. The interpretation of clause 28 so as to identify its scope is, of course, a logically prior question to that of whether it is separable from the Contract. As Lord Hoffman said, one must turn first to the Contract itself. It provides that clause 28 applies to 'any dispute or difference between the parties as to any matter under or in connection with' the Contract. It is now clear in the arbitration context that distinctions based on the linguistic niceties of disputes arising 'under' or 'out of' an agreement (etc.) have been swept away. It was not suggested to me that they should be introduced in the context of expert determination clauses.

26. On the face of it, I consider clause 28 to be an all-embracing provision, requiring all disputes concerning the Contract to be subject to expert determination. The natural reading of the clause is that any dispute concerning the Contract will be so subject. This would include a dispute as to whether the Contract had been validly terminated, or whether one party was in continuing breach. It may be less obvious on its face that it would include a dispute about whether the Contract was never validly made in the first place.

27. Mr Healey suggests that the following factors point against such a construction, as unduly literalistic:

    i) This is not a case where the expert determination clause is carved out of the jurisdiction provision, as in *Secretary of State for Transport v Stagecoach South Western Trains Ltd* [2009] EWHC 2431 (Comm).

    ii) Clauses 28 and 31 are in tension with one another. Clause 28 is not given priority over clause 31. Real substance must be given to the irrevocable agreement to confer exclusive jurisdiction on the courts of England and Wales to resolve any disputes between the parties.

28. The claimant contends that the tension between the two clauses should be resolved by construing clause 28 (or implying a term) such that it applies only to disputes arising under or in relation to the Contract which are suitable for expert determination either by a single lawyer, or a single surveyor, in a 30-day working period. Mr Healey submits that this would recognise the primacy of the jurisdiction of the court, but also give substantial effect to clause 28.

29. The wording of clause 28.1, in providing for submission to expert determination any dispute as to any matter under or in connection with the Contract, mirrors the breadth of disputes generally subject to an arbitration clause. I consider that the parties, as business people operating in property development, are objectively to be taken to know that the wording employed is apt, as in an arbitration clause, to cover all disputes arising in relation to the agreement.

30. As Thomas LJ explained in *Nylon Capital*, this is unusual as expert determination clauses are generally limited to certain matters, which are particularly considered to be suitable for resolution by such a method. The question posed by Lord Hoffman in *Fiona Trust* at [6] and [7] must, therefore, be viewed in the context of the above considerations. Parties choosing expert determination within a maximum of 30 days, rather than arbitration, may be taken to be more concerned about speed than privacy. Whether or not that is so, what Lord Hoffman said at [6] is valid in this context, 'they want a quick and efficient adjudication and do not want to take the risks of delay'. While he made this comment in the context of international contracts and arbitration, these considerations may be particularly apt in the case of a contract for the sale of land where conditions are required to be satisfied within a stated period.

31. If that is so, the question naturally arises whether it will objectively have been intended by the parties that some questions would be determined by the expert and some by the courts? Mr Healey does not directly suggest that there was any obvious basis upon which rational business people might have wished for such a bifurcation. He does submit that expert determination is inappropriate for the dispute that has arisen in this case, thus indirectly suggesting that a rationale person would not have agreed to all disputes under the Contract being subject to expert determination.

32. Mr Healey's proposed construction as to the scope of clause 28 seeks, in his submission, to give effect to the existence of clause 31. But, in my judgment, it would do violence to the broad and mandatory provisions of clause 28.1 by introducing a distinction not justified either by recourse to any identified commercial rationale or to any wording that is contained within the Contract. By the lack of commercial rationale, I mean that it is not immediately apparent how a party agreeing to this method of resolving "any dispute" as to "any matter" in order to have a quick and efficient method of adjudication can be taken to have had a commercial objective which would limit the application of this agreement. Furthermore, the limitation contended for would very probably lead to preliminary disputes about the scope of the clause, thus rendering a quick and efficient adjudication improbable. I do not consider that a rational business person would intend to introduce such difficulties.

33. An expert determination provision is generally expressly limited on its face, so that there are two types of dispute resolution procedure for disputes which might arise under the agreement. This often manifests itself by the expert determination process being carved out of the primary jurisdiction given to the court. This was so in *Nylon Capital* (see at [28]), and in *Stagecoach South Western Trains*, where only some disputes were agreed to be submitted to arbitration (see at [29]: the one-shop principle accordingly did not apply).

Thomas LJ explained that it was the existence of a carve out in *Nylon Capital* that meant that there was no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert.

34. I therefore consider, contrary to the claimant's submission, that the fact that the expert determination procedure is not carved out of the court's jurisdiction is a factor favouring a one-stop construction of clause 28. The fact that clause 28 comes before clause 31, conferring exclusive jurisdiction on the English courts, does not suggest that clause 31 is the primary provision concerning the resolution of disputes with clause 28 to apply only in suitable circumstances.

35. Mr Healey submits that the correct construction is that a dispute is to be resolved under clause 28 only where it is suitable for one surveyor or one solicitor. Clause 28.2 provides a mechanism for when the parties cannot agree whether a surveyor or a solicitor is the appropriate person to appoint. This does not point towards a restriction that the dispute must be suitable only for a single surveyor or for a single solicitor. The parties expressly envisaged that it might not be immediately apparent which of the two was most appropriate and that, in such a case, a method would be needed to resolve the issue. This seems to me to explain why the appointed expert may take whatever independent advice he or she considers necessary (clause 28.3(f)). The dispute may well raise issues outside their professional expertise. It is also quite possible, as Mr Hale submitted, for a dual-qualified expert to be appointed and the person nominated to make the selection may well consider it appropriate to attempt such an appointment. I also agree with Mr Hale that the parties can be taken to be aware of the adjudication procedure applicable to construction contracts, found in section 108 of the Housing Grants, Construction and Regeneration Act 1996. This provides for any difference arising between parties to a construction contract to be referred for adjudication within 28 days, with the parties being able (but not required) to agree that the decision of the adjudicator shall finally determine the dispute.

36. The construction of clause 28 as a one-stop shop does not denude clause 31 of all effect. As Mr Hale submits, the expert can make a determination of what one party to the Contract is required to do, as a resolution of the dispute between the parties. If that party fails to comply with the determination, the other(s) can apply to court for an order to enforce it. The Contract provides at clause 28.5 that the Expert's Determination is conclusive and binding on the parties save in the case of manifest error or omission.

37. The decision of the Court of Appeal in *Nylon Capital* also explains the role of the court in relation to an expert's determination. As Lord Neuberger of Abbotsbury MR said, at [69]:

> '69 Accordingly, it seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. As Hoffmann LJ said in [*Mercury Communications Ltd v Director General of Telecommunications*] [1994] CLC 1125, 1140,
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> > "The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority …"
>
> and it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision.'

38. When it comes to the issue of separability, the claimant argues that clause 28 is not separable from the Contract, by reference to the same arguments made as to the construction of the clause and also as a matter of principle. I agree with Mr Healey that the authorities support the view that there is a strong connection between the one-stop principle and separability. He relies on *DHL Project & Chartering Ltd* at [75], cited above. But, it seems to me, once it is established that a party to an agreement intends for all disputes relating to it to be subject to a prescribed form of dispute resolution, the burden is on the party arguing that such resolution procedures are not separable from the agreement to explain why the parties would objectively have intended some disputes nonetheless to be resolved by the courts. The claimant did not put forward any such objective explanation why the parties would have so intended.

39. On the matter of principle, there may be no authority holding that an expert determination clause can be separable but it must be a matter of contractual construction, so the parties' objective intentions matter. In circumstances where, as I have found it, they have created a one-stop shop in the form of clause 28, I consider there to be a presumption of separability as there is with arbitration clauses. As I have noted above, Males LJ in *DHL Project & Chartering Ltd* talked of the presumptions applicable to dispute resolution clauses, not merely to arbitration clauses.

40. There is no reason in principle why an expert determination clause cannot be separable from the contract in which it is found, the question being dependent on the parties' intentions. It is established that an arbitration clause is a separate agreement from the main contract, in order to give effect to the parties' presumed intentions (and they can always expressly agree otherwise). Rix J was prepared to assume that an exclusive jurisdiction clause was

separable, like an arbitration clause, in *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261 at 280.

41. Furthermore, the question for present purposes is whether clause 28 is separable, in relation to a dispute whether the Contract has been terminated by notice or whether (as the defendants contend) the claimant is in repudiatory breach of it. Before it was established that it was presumed that an arbitration clause was separable in relation to all forms of dispute, it was considered that it would be presumed to be separable in relation to supervening events: see *Heyman v Darwins* [1942] AC 356 at 360, Viscount Simon LC. The allegation here is that the Contract was terminated by a supervening event and not that there was never a binding contract between the parties. I do not need to determine whether clause 28 is separable in relation to the latter type of dispute.

42. I accordingly consider that clause 28 is the contractually agreed method for the resolution of all disputes in relation to the Contract, and not to be limited in the way contended for by the claimant. I also consider clause 28 to be separable from the Contract, at least for the purposes of determining a dispute as to whether it has been terminated by a supervening event.

Suitability of clause 28

43. In the alternative, the claimant argues that a stay should be refused as a matter of discretion. It relies on the decision of HHJ Hegarty QC, sitting as a High Court Judge, in *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540, a case where an expert had been appointed pursuant to an agreement for the bottling and packaging of soft drinks. A dispute had arisen between the parties as to whether the minimum obligations on both sides had been complied with and an expert was appointed pursuant to the agreement by the Director General of the British Soft Drinks Association, which expert had no experience of dispute resolution.

44. The judge cited the decision of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334. He summarised it, at 547, by saying that 'Lord Mustill took the view that, generally, the courts would require the parties to pursue the alternative dispute resolution to which they had bound themselves by the terms of their contract. That is, I think, the explanation of his use of the word "presumption" (see [1993] AC 334 at 353)'.

45. In *Cott*, a stay for expert determination was refused, a number of fundamental difficulties with the expert determination clause in that case being identified. In particular, the appointed expert had no relevant experience, the expert determination clause incorporated no rules or principles, and the British Soft Drinks Association had no rules concerning dispute resolution. Accordingly, if

one party did not agree to the expert obtaining advice, there would be no way in which the determination could proceed.

46. Mr Healey accepted that, if I was against him on the construction of clause 28, there would be a heavy burden on the claimant in resisting a stay. He also accepted that the points of construction raised by the particulars of claim would be eminently suitable for determination by an expert. His objection is founded on the points taken by the defendant in correspondence, and summarised at [13]–[14] above. Rhetorically, he asked how an expert (and, especially, if a solicitor) could determine within 30 days whether a Practical Completion Statement was properly able to be issued before 3 December 2023. Particular reference was made to the issues identified in the LEAP report, which recommended investigations to consider whether there were low-strength zones in the filled land, and a substantial period of monitoring in order to determine whether gas protection measures were required.

47. Mr Healey did not suggest that the procedural scheme constituted by clause 28 suffered from the flaws of the relevant clause in *Cott*, or that it was in any way an unconventional form of expert determination clause, but rather that it was unsuited to a dispute of fact. In those circumstances, I do not consider that the claimant seriously sought to discharge the heavy burden on it. In particular, the claimant filed no evidence in response to the application, and the details of its arguments on the point emerged entirely in oral submissions. The skeleton argument said without particulars only that a number of the *Cott* factors are present in the case.

48. I do not consider the claimant to have established any of the, admittedly unusual, *Cott* factors to be present in the case. Parties to construction contracts regularly agree that disputes of fact will be resolved by an expert in a short period of time, without disclosure of the kind that would be ordered in court proceedings. The claimant's assertion that the dispute in this case would be just too complex for an expert was maintained only at a high level. The complaint that there is no provision for a hearing with expert evidence seems to me to be essentially a circular one. It is not to my mind self-evident that the points summarised in the conclusion of the (relatively short) LEAP report would be outwith the capability of an expert, especially one with the benefit of independent advice. There is also the possibility of a dual-qualified expert, as I have noted above. Indeed, a determination of whether the issues in the LEAP report had been sufficiently addressed so as to enable practical completion of the Contract to take place might seem to be precisely the sort of point an expert would be well placed to determine (and on which expert evidence would be required if the matter were to be determined instead by a court). I was provided with no substantial reason to be persuaded that clause 28 is unsuitable for determination of the dispute.

Conclusion

49. For the reasons set out above, the defendants' application is granted. I will make an order staying the claim to enable the parties' compliance with clause 28 of the Contract.