JUDGMENT : The Hon. Mr Justice Ramsey : TCC. 17th April 2008

1. This is an application under Sections 32 and 45 of the Arbitration Act 1996 to determine a preliminary point of law and jurisdiction in relation to arbitral proceedings between the Claimant, Taylor Woodrow Construction Limited ("TWC") and the Defendant, RMD Kwikform Limited ("RMD").

2. The underlying sub-contract between TWC and RMD was entered into in October 2000 and related to the design, supply and erection of scaffolding works at Fanum House, 140 Queen Street, Cardiff. On 13 December 2000 there was a collapse of scaffolding into adjoining roads and onto a railway line.

3. This led to a claim by TWC against RMD for some £600,000 and to the conviction of RMD at Cardiff Crown Court in relation to offences concerning the state of the scaffolding. In turn, RMD claims from TWC about £180,000 as sums due under the sub-contract.

4. In 2002 there was correspondence between Kennedys (solicitors for TWC), the group insurance manager of Interserve PLC acting on behalf of RMD and loss adjusters, concerning the claim and potential claims from third parties such as Railtrack and local businesses who had been affected by the closure of the railway line and local roads as a result of the collapse.

5. On 17 January 2003 Kennedys wrote a letter to the Finance Director of RMD. That letter is now relied up by TWC as being a notice which commenced arbitration proceedings. It reads as follows:

   "*We write further to your letter of the 21st February 2002, and subsequent correspondence with Mr O'Donnell of Interserve and Mr Damsell of loss adjusters PCS. A copy of our latest letter to Mr O'Donnell is attached.*

   We have tried to avoid the need to litigate, but our approaches have been rebuffed. We therefore enclose a draft Particulars of Claim, which will be served in due course. Kindly advise us as to whether you want us to continue to communicate with Interserve, otherwise communications will henceforth be directed just to RMD's registered office. If it is intended that Solicitors be instructed, kindly advise us as to contact details.

   Taylor Woodrow's Standard Conditions of Sub-Contract were incorporated into the contract and Paragraph 26 provides that disputes should be referred to Arbitration. Please confirm whether you wish to rely on Paragraph 26 and insist on proceedings by way of arbitration, or would be agreeable to the matter being litigated.

   Kindly note that we are advising our client as to the prospects for including the cost of the fine and our costs of the HSE prosecution as a head of loss."

6. As indicated, a letter was also sent on the same day to Mr O'Donnell, the Group Insurance Manager at Interserve PLC who acknowledged receipt on 26 February 2003. There then followed without prejudice discussions between the relevant parties.

7. On 12 December 2006 TWC commenced High Court proceedings against RMD which were then served on RMD under cover of Kennedys' letter of 5 April 2007. It is to be noted that the claim form was issued just within the 6 year limitation period from the date of the collapse.

8. On 25 April 2007, following service of the High Court proceedings, RMD applied to stay those proceedings to arbitration under Section 9 of the Arbitration Act 1996.This led to correspondence between the legal department of Interserve PLC and Kennedys in which Kennedys initially opposed the stay.

9. In Kennedys' letter of 8 May 2007 they said:

   "*If you generally prefer that we should arbitrate, and agree not to take any point on limitation but accept your service of proceedings as an affective Notice of Commencement of Arbitration, we could take instructions.*"

10. On 18 May 2007 Kennedys applied to the Chartered Institute of Arbitrators for the unilateral appointment of an arbitrator by the President. RMD became aware of this on 24 May 2007 when IDRS Limited, acting on behalf of the Chartered Institute of Arbitrators acknowledged receipt of the application to RMD. On 29 May 2007 the legal department of Interserve PLC wrote to Kennedys to say:

    "*Your client has not served upon us a Notice of Arbitration in accordance with clause 26.1 of the contract. Nor has your client asked us to agree to the appointment of an Arbitrator as required by Clause 26.1.*"

11. Kennedys responded on 31 May 2007 and relied on the letter of 17 January 2003 as fulfilling the purposes of a notice to commence a claim under Clause 26.1 of the sub-contract.

12. On 19 June 2007 IDRS Limited advised the parties that Dr M.L. Standinger had been appointed as Arbitrator. There then followed correspondence between the parties and Dr Standinger which culminated in an agreement between the parties that the Court should determine the following questions pursuant to sections 32 and 45 of the Arbitration Act 1996:

    (1) Whether Mr. Standinger has been properly appointed in accordance with the arbitration agreement.

    (2) For the purposes of Section 14 of the Act, the date at which arbitral proceedings are regarded as having been commenced (if at all)

13. On 26 November 2007 TWC commenced this arbitration claim in the Commercial Court. By Order dated 5 March 2008 it was transferred to the Technology and Construction Court and directions were given leading to this hearing.

The Issues

14. On the hearing of this application there were essentially two issues which have to be determined to answer the questions posed. First, there is an issue whether Section 14(1) or Section 14(4) of the Arbitration Act 1996 applies

to this case. Section 14 deals with the commencement of arbitral proceedings. Section 14(1) provides: "*The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.*"

15. Then Section 14(2) provides that: "*If there is no such agreement the following provisions apply*", referring to Sections 14(3) to (5). Section 14(4) provides:

"*Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.*"

16. The issue in this case is whether by the terms of Clause 26 the parties agreed when arbitral proceedings were to be regarded as commenced for the purposes of the Arbitration and Limitation Acts. If they did then Section 14(1) applies. If they did not then Section 14(4) applies.

17. The second issue is whether the letter of 17 January 2003 is a sufficient notice to commence arbitration under either Section 14(1) or Section 14(4) of the 1996 Act.

18. I now turn to consider those two issues.

Clause 26 and Section 14 of the Arbitration Act 1996

19. Clause 26.1 provides:

"*If any dispute question or difference arises between the Contractor and Sub-Contractor in connection with or arising out of the Sub-Contract or the Sub-Contract Works, it shall, subject to the provisions of this clause, be referred to the arbitration and final decision of a person to be agreed between the parties or failing such agreement within a period of 14 days of one party giving to the other notice in writing of such dispute question or difference, a person appointed upon the application of either of the parties by the President for the time being of the Chartered Institute of Arbitrators.*"

20. Mr Andrew Bartlett QC, on behalf of TWC, submits that Clause 26.1 contains an agreement of when arbitral proceedings are deemed to be commenced. He submits that Clause 26.1 provides that disputes shall be referred to arbitration and prescribes the three steps which apply in order to commence and progress the arbitration. The steps are:

(1) That one party must give notice in writing of the dispute to the other party;

(2) That after such notice the parties may agree on the person to act as arbitrator;

(3) That, if there is no such agreement within 14 days after the notice, then either party may apply to the President of the Chartered Institute of Arbitration for the appointment of an arbitrator.

21. Mr Bartlett submits that clause 26.1 amounts to an agreement under section 14(1) of the Arbitration Act 1996 as to when arbitral proceedings are to be regarded as commenced for the purposes of the Arbitration and Limitation Acts. He submits that under clause 26.1 it is agreed that an arbitration commences when one party gives the other party "notice in writing of such dispute question or difference". That, he submits is a sufficient agreement for the purposes of section 14(1).

22. He relies upon the judgment of Thomas J (as he then was) in ***Seabridge Shipping AB v AC Orssleff's Eftf's S/A*** [1999] 2 Lloyd's Rep. 685 at 689 to 690 as showing that Section 14 is to interpreted broadly and flexibly.

23. Mr Bartlett also refers to Section 13(1) of the Arbitration Act which provides that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings. He points out that under the Limitation Acts the relevant provisions for claims in contract and tort provide time limits for bringing actions and state that actions "*shall not be brought*" outside those limitation periods. He submits that the equivalent step of bringing actions in the case of arbitrations is the commencement of the arbitration proceedings.

24. For there to be an agreement for the purposes of the Limitation Acts, Mr Bartlett submits that all that is required is that there should be an agreement of when an arbitration is commenced. There is, he contends, no requirement to refer explicitly to the Limitation Acts.

25. Mr David Thomas QC, on behalf of RMS, submits that Clause 26.1 does not contain an agreement as to when arbitral proceedings are to be regarded as commenced for the purposes of the Arbitration Act or the Limitation Acts. He says that there are simply no express words to enable a court to hold when commencement of the arbitration is to be regarded as taking place.

26. Mr Thomas refers to passages in ***Merkin on Arbitration Law*** at paragraphs 13.6 and 13.29 as showing that it is rare for the parties to agree when arbitration is to be regarded as commenced for the particular purposes set out in Section 14(1) of the 1996 Act. He submits that there is no basis for construing Section 14(1) to permit an inferred or implied agreement but rather the provisions in Sections 14(3) to 14(5) apply where a party has not made an agreement. The case therefore falls within section 14(4) of the 1996 Act which applies where the arbitrator is to be appointed by the parties, as is the primary mechanism in Clause 26.1 of the sub-contract.

27. I now consider those submissions. It is evident that Section 14(1) applies where the parties have agreed when arbitral proceedings are to be regarded as commenced. A provision such as that in Article 4.2 of the ICC Rules would evidently come within Section 14(1). That rule provides that "*the date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings.*"

28. If however the parties agree in a simpler form, for example, if they agree that arbitral proceedings shall be commenced on receipt by the other party of a notice referring disputes to arbitration, is that sufficient to be an agreement under Section 14(1)? In my judgment it is. First, by stating that arbitral proceedings shall be commenced by a particular action, the provision would be stating when arbitral proceedings were to be regarded as commenced.

29. Secondly, so far as the requirement that the agreement must relate to commencement "*for the purposes of this Part and for the purposes of the Limitation Acts*", I do not consider that there need to be an express reference to those purposes. In relation to the Limitation Acts, I accept Mr Bartlett's submission that the commencement of arbitral proceedings is the equivalent to the bringing of an action in litigation for the purposes of the Limitation Acts. This is confirmed by reference in Section 13(2) to the commencement of arbitration or arbitral proceedings in the context of limitation periods. Equally, under Part 1 of the Arbitration Act the commencement of the arbitral proceedings is all that is required for the purposes of that part of the statute.

30. In essence what is required is an agreement as to when arbitration proceedings are to be regarded as commenced.

31. In the present case, does Clause 26.1 amount to such an agreement? I do not consider that it does. Clause 26.1 makes no mention of when arbitration proceedings are to be regarded as commenced. It merely states that any dispute, question or difference shall be referred to arbitration and contains a provision that the arbitrator is to be agreed, with a default position if there is no agreement. Whilst Clause 26.1 provides for agreement of the arbitrator "*within a period of 14 days of one party giving to the other notice in writing of such dispute question or difference*" it does not state when arbitral proceedings are commenced or are to be regarded as commenced.

32. There is no agreement that the notice is the commencement or to be regarded as the commencement of arbitral proceedings. I do not consider that such an agreement can in some way be inferred or implied from Clause 26.1 in the absence of some express words. It would be possible for the agreement of an arbitrator or the appointment of an arbitrator to be the commencement of arbitral proceedings. I do not derive assistance from the fact that the parties have included a provision for a "*notice in writing of such dispute question or difference*" in Clause 26.1 rather than the more familiar wording in JCT forms of a "*written request to concur in the appointment of an arbitrator*." The parties agreed a different procedure leading to the appointment of an arbitrator but did not agree that a particular step in the different procedure was to be regarded as commencement of arbitral proceedings.

33. Rather, in the absence of any agreement as to when arbitral proceedings are to be regarded as commenced, Section 14(2) of the Arbitration Act 1996 provides for that situation. In this case, the primary method of appointment is for the arbitrator to be appointed by the parties and therefore Section 14(4) is the appropriate provision in this situation. It provides that in such circumstances, "*arbitral proceedings are commenced …when one party serves on the other party … notice in writing requiring him… to agree to the appointment of an arbitrator….*" The fact that there is a secondary mechanism which, in itself, would engage Section 14(5) does not, in my judgment, affect the position.

The letter of 17 January 2003

34. Was the letter of 17 January 2003 sufficient to commence arbitral proceedings under Section 14(4) of the Arbitration Act 1996? Mr Bartlett again submits that in approaching the question of whether the letter of 17 January 2003 amounts to a notice as required by Section 14(4), the Court should interpret the provision broadly and flexibly. He relies on the judgment of Thomas J in ***Seabridge Shipping*** where he said:

    (1) at p 690: "*…the Courts' task in this case is to examine the specific document to see whether the requirements of s. 14(4) are satisfied. Section 14 should, in my view, be interpreted broadly and flexibly. A strict and technical approach to this section has no place in the scheme of the 1996 Act. Notices are given by international traders and businessmen who often use shorthand expressions or ways of doing things, which are objectively clear in giving notice to the other party of a reference and of the requirement to appoint an arbitrator.*"

    (2) at 691: "*However, it seems that in cases where a party has given a notice to the other party, making it clear objectively that it is a reference of the matter to arbitration, that it is likely that these will be met by the construction of s. 14 which is broad enough to include and implied request to appoint an arbitrator.*"

35. In addition Mr Bartlett places reliance on the decision of Moore-Bick J (as he then was) ***in Atlanska Plovidba v. Consignaciones Asturianas SA (The "Lapad")*** [2004] 2 Lloyd's Rep. 109 at 113 where he said:

    "*Section 16 refers simply to a "request in writing to do so", that is to join in the appointment of an arbitrator, and similar language is to be found in s.14 of the Act which deals with the commencement of arbitration. Although the parties are free to agree when arbitral proceedings are to be regarded as having been commenced, and therefore what formalities are to be observed for that purpose, in the absence of any such agreement all that is required in a case such as the present is a notice in writing requiring the other party to agree to the appointment of an arbitrator in respect of the matter in dispute: see s.14. Arbitration is widely used by commercial parties, often acting without the benefit of legal advice, and there are good reasons therefore, for concentrating on the substance of their communications rather than the form. If a notice of arbitration is to be effective, it must identify the dispute to which it relates with sufficient particularity and must also make it clear that the person giving it is intending to refer the dispute to arbitration, not merely threatening to do so if their demands are not met. Apart from that however, I see no need for any further requirements. Whether any particular document meets those requirements will depend on its*

terms which must be understood in the context in which it was written. The weight of authority supports a broad and flexible approach to this question."

36. Mr Bartlett also relies on a pre-1996 Act case, ***Nea Agrex SA v. Baltic Shipping (The "Agios Lazaros")*** [1996] 2 Lloyd's Rep. 47 at 51 in which Lord Denning said the following about commencement of arbitration at 51:

"*In order to commence the arbitration, there must, I think, be a notice in writing served by one party on the other party. This notice must contain a requirement. It must require the other party to do one or other of two things: (1) Either "to appoint an arbitrator" or (2) " to agree to the appointment of an arbitrator".*

…

The Second Alternative (2) is appropriate when the reference is to be to a single arbitrator. In such a case the arbitration is deemed to commence when the one party, expressly or by implication, says: "The time has come when we must submit the difference to arbitration in accordance with our agreement. I must ask you to agree to the appointment of an arbitrator". Now he cannot compel the other party to agree, or even to reply to the requirement. It seems to me that a notice which says: "I require the difference between us to be submitted to arbitration" is sufficient to commence the arbitration: because it is by implication a request to agree to the appointment of an arbitrator.

So in any case a simple notice in writing requiring the difference to be submitted to arbitration is deemed to be a commencement of the arbitration."

37. Mr Bartlett submits that, on the basis of the approach derived from those cases, the letter of 17 January 2003 should be construed as being sufficient notice to commence the arbitration either expressly or by implication. He submits that the letter gives notice of the dispute and refers to the arbitration provisions in clause 26.1 in a manner which is sufficient to provide notice under section 14(4) of the Arbitration Act 1996.

38. Mr Thomas submits that the letter of 17 January 2003 is not, in the words of Thomas J in ***Seabridge,*** objectively clear in giving notice to the other party of a reference and of the requirement to appoint an arbitrator. He submits that the letter gives notice that TWC is preparing to litigate and is seeking to know whether RMD will insist on arbitration. He refers to the passage in ***The Lapad*** at 113 which states that the notice of arbitration "must also make it clear that the person giving it is intending to refer the dispute to arbitration, not merely threatening to do so if his demands are not met."

39. I consider that Mr Thomas is correct in his analysis. The letter of 17 January 2003 does not make it objectively clear that TWC was referring the dispute to arbitration or that, by implication or otherwise, TWC was requesting RMD to commence the process of agreement of an arbitrator.

40. In my judgment the reference to Clause 26.1 in that letter was made in the context of seeing whether RMD would insist on arbitration, not in the context of TWC intending, by that letter, to start the process of arbitration. On an objective analysis of that letter I do not consider that it was clear that TWC was intending to refer the dispute to arbitration or that it could be implied that the process of agreeing the appointment of an arbitrator had commenced. The letter was a precursor to the commencement of litigation and enquired whether RMD would insist on arbitration. It called for an answer to that enquiry. The reference to Clause 26 cannot be construed as constituting an intention in that letter to refer the dispute to arbitration. At most, as Mr Bartlett submits the letter implicitly acknowledged that the parties were bound by Clause 26.1 to proceed with arbitration. That is not sufficient to commence that process.

41. I do not accept that, as Mr Bartlett contends, the letter can be read as a request for the difference to be submitted to arbitration unless litigation is the agreed route. In this way it was not like the letter in ***The Agios Lazaros*** which stated "*Please advise your proposals in Order to settle this matter or name your arbitrators*". Goff LJ (as he then was) construed that wording as meaning "*unless you are prepared to make proposals for settlement, you must take this letter as requiring you to appoint your arbitrators.*". There was nothing in this case which in my judgment, comes close to the position in that case.

42. Therefore I have come to the conclusion that the letter of 17 January 2003 cannot be construed as being sufficient to commence arbitration proceedings.

Position if Section 14(1) applied

43. I should add that even if I had found that Clause 26.1 could have been construed as an agreement of when arbitration proceedings are to be regarded as commenced, I do not consider that the position would have been different. If in that case the "notice in writing of such dispute question or difference" in Clause 26.1 were to be regarded as commencing arbitration then I do not consider that the letter of 17 January 2003 would have been a sufficient notice.

44. Any notice, in my view, would have to indicate that the dispute, question or difference was being referred to arbitration. Otherwise a notice given for other purposes, such as in pursuance of a claim or seeking adjudication of the dispute could be argued to be sufficient to commence arbitration proceedings and would introduce great uncertainty. Indeed as Mr Bartlett accepted in argument an earlier letter written in February 2002 as part of a pre-action protocol process might be regarded as sufficient notice on that basis. As stated in ***Seabridge*** the notice must be objectively clear in giving notice to the other party of a reference to arbitration or as stated in ***The Lapad*** the notice must make it clear that the person giving it is intending to refer the dispute to arbitration.

45. In this case the letter of 17 January 2003 referred to litigation and enclosed draft particulars of claim. It did not make it clear that it was intending to refer the dispute to arbitration. Objectively construed I do not consider that

the letter would have been sufficient to be notice in writing for the purpose of referring the dispute to arbitration under clause 26.1.

Abandonment

46. In the circumstances I do not need to deal with the submissions made by Mr Thomas as to whether there was abandonment of the arbitration commenced by the letter of 17 January 2003 because of the issue and service of the Court proceedings and because of matters raised in subsequent correspondence. If the matter had been relevant, I should have required further submissions from Mr Bartlett before I could deal with the argument which was only raised in RMD's skeleton argument.

Conclusion

47. Accordingly I find that the letter of 17 January 2003 was not sufficient to commence arbitration proceedings under s 14 of the Arbitration Act 1996. The application to the President of the Chartered Institute of Arbitrators by TWC dated 18 May 2007 was therefore not a valid application because the 14 day period for agreement of an arbitrator had not come into effect or expired under Clause 26.1 so as to lead to an appointment in default of agreement. In the result, the appointment of Dr Standinger made on 19 June 2007 was not a valid appointment.

48. I invite further submissions on the form of the declarations and any ancillary matters.

Mr Andrew Bartlett QC (instructed by Kennedys) for the Claimant
Mr David Thomas QC (instructed by Interserve PLC) for the Defendant