CAUSE NO: G2024-0050

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

EDGEWATER DEVELOPMENT LTD

Plaintiff

-and-

NYAMI NYAMI LTD

Defendant

Appearances:	**Mr Rupert Wheeler and Keith Doyle of KSG for the Plaintiff** **Mr Ian Lambert and Tania Meyerhoff of Broadhurst LLC for the Defendant**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**2 and 3 October 2024**
Ex tempore judgment delivered:	**4 October 2024**
Finalised judgment Approved:	**14 October 2024**

Contracts—implied terms—whether to imply term that parties obliged to cooperate to appoint adjudicator—whether claim to adjudicator is time barred

Arbitration Act 2012, section 9—whether claim before Grand Court commenced in breach of Arbitration Act

JUDGMENT

1. This is my judgment on the trial of the originating summons filed in this matter on 26 January 2024. As an originating summons procedure, there has been no live evidence and I have decided this matter on the basis of the documentary evidence and affidavits that have been filed on behalf of the parties.

2. Mr Rupert Wheeler appeared for the plaintiff and Mr Ian Lambert for the defendant. I am grateful to both counsel for their helpful submissions, which enabled me to give judgment in this matter promptly.

A. Introduction

3. The plaintiff and the defendant are the parties to a building contract which was concluded in October 2015 for the construction of a house in South Sound, Grand Cayman. The plaintiff in this action is the contractor and the defendant is the employer under that building contract. In short, the plaintiff / contractor seeks a declaration that the defendant / employer is time barred from pursuing its intended claims against the contractor arising out of the building contract.

4. On 11 June 2024, I ordered the following issues to be tried namely:

   4.1. Does Mr McKenney [who was the individual appointed by the Royal Institute of Chartered Surveyors to act as adjudicator], another adjudicator and/or the tribunal (as defined at W1.3(2) of the contract between the parties dated 16 October 2015) have jurisdiction to adjudicate upon the dispute between the parties forming the substance of the claim in cause G2023-0234?

   4.2. If not, can the Defendant pursue its claim in cause G2023-0234 or is it barred from doing so?

B. Chronology

5. I will start with a brief chronology. The relevant facts in this case are within a very narrow compass, which has made my task much easier than in some other cases. I can summarise the relevant events as follows.

6. First, as regards formation of the relevant contract, on 16 October 2015, the parties entered into a contract on the NEC3 standard form of building contact, Option D with dispute resolution clause W1 to be applied.

7. On 19 December 2017, before the building project had completed, the plaintiff / contractor gave notice to terminate on multiple grounds, including in particular, non-payment of sums due under the contract. The effective date of termination is agreed between the parties.

8. Next of relevance, on 20 July 2022, Nelsons, the attorneys acting for the employer at that time, sent a without prejudice letter. The letter was marked *"without prejudice"*, but both parties have been happy to put that letter in front of me and to the extent that there may be any privilege in the letter, I consider it has been waived by the parties. Essentially, the letter recorded that there were ongoing disputes between the parties about the cost and work that was required to complete the building contract and invited a discussion between principals in order to try to resolve that dispute. I do not need to quote from that letter in more detail than that brief summary.

9. On 25 October 2022, KSG, who have acted for the plaintiff contractor at all times, responded. Having made various comments on the content of Nelsons' letter, at the end of their letter they concluded:

> *"Finally, we note that your client has missed the deadline for any referral of this dispute to the Adjudicator (as defined in the contract) and as such your client's claim will be defended both on the merits and on the basis that it is time barred."*

It is therefore fairly clear that from at least October 2022, the contractor was making the point that the time bar was an issue that was going to be raised by the contractor.

10. On 20 March 2023, Nelsons on behalf of the employer wrote to KSG. They expressly referred to the terms of the contract. They set out a number of clauses and focused on Option W1:

> *"Option W1 is provided for at page 42 and the subparagraphs set out therein are self-explanatory. W1.2(1) provides for an adjudicator to be appointed by the parties. W1.2(3) provides that if an adjudicator is not identified, then the parties should do so jointly. If the parties do not [do] so, either party may ask the Adjudication nominating body to choose an adjudicator."*

11. The letter then goes on to recite that

> *"According to the first page of Section 3 of the Contract, 'Contract Data Part one – Data provided by the Employer', it is provided in the general provisions that '*The Adjudicator *is Not Applicable'. It follows therefrom that there is no adjudicator presently nominated, and the procedure as set out in the Contract needs to be followed. In the absence of agreement as to the adjudicator, the second page of Contract Data Part one provides that the nominating body is the Royal Institution of Chartered Surveyors.*
>
> *For completeness we would add pursuant to W1.4, at page 44 of the Contract, the parties may refer the adjudicator's decision to a tribunal. In this case, the tribunal is defined at page 2 of 'Contract Data Part one' as arbitration. Page 3 sets out that the arbitration procedure is that of the Royal Institution of Chartered Surveyors and the seat of arbitration is the Cayman Islands."*

12. The letter then quotes the last paragraph from KSG's letter of 25 October 2022, which I read a moment ago and responds:

> *"Plainly, this position is misconceived in circumstances where no adjudicator has been appointed by the parties. We refer you generally to the helpful table at page 43, which sets out the procedure for referring disputes to adjudicators.*
>
> *If your client does not agree to engage and make our [client] whole for the losses sustained, then we invite your client to nominate an adjudicator for our client's consideration. If your client fails to do so, or if agreement cannot be reached within 14 days from the date hereof, we will unilaterally seek appointment of an adjudicator from the Royal Institution of Chartered Surveyors, as provided for under the contract."*

13. I pause there just to say that it is clear from the terms of this letter that Nelsons were fully aware of the contract terms in Option W1 concerning the mechanism that the parties needed to go through in order to refer a dispute to an adjudicator, and in due course to pass that matter on to an arbitration if that became necessary.

14. There was no response on behalf of the contractor. The next letter I was shown was dated 5 September 2023, some 6 months later, from Nelsons which says:

> *"We refer to the above matter and previous correspondence herein, resting with our letter of 20 March 2023. …*
>
> *In the absence of a response on behalf of your client or nomination of an adjudicator, our client hereby nominates Mr Simon McKenny as adjudicator. Mr McKenny's details have been [provided] by the Royal Institution of Chartered Surveyors and he has confirmed his availability to accept instructions."*

Nelsons stated that they included a copy of Mr McKenny's CV and continued:

> *"We request confirmation, by close business on Friday, 8 September 2023 that your client agrees to the appointment of Mr McKenny as adjudicator, as provided for under the Contract, so the matter can be dealt with forthwith and without any further delay."*

15. Again, there was again no response on behalf of the contractor.

16. Nelsons wrote on 2 October 2023:

> *"You will recall our letter of 5 September 2023 proposed the nomination of Mr Simon McKinny as adjudicator, in circumstances where the NEC3 contract dated 16 October 2015 … between our respective clients is silent as to the identity of the adjudicator (as defined in the Contract). We have attempted in both our letter of 5 September 2023 and our earlier letter of 20 March 2023 to afford your Client an opportunity to agree an Adjudicator, however your Client has failed to engage in this process. Until an Adjudicator is appointed, this matter is unable to move forward with the dispute resolution mechanisms as provided for in the Contract. We therefore have no option but to proceed, as per the Contract, to have the Royal Institution of Chartered Surveyors to appoint an Adjudicator."*

The letter then continues to set out the particular matters that the employer intended to refer to adjudication.

17. Following up on that indication, on 4 October 2023, Nelsons wrote by email to the Royal Institution of Chartered Surveyors (RICS) sending a completed nomination form and asking for a nomination to be made, and also including a notice of adjudication.

18. On 5 October 2023 the RICS responded nominating Mr McKenny as adjudicator for the purposes of the contract. Thus, the RICS responded within approximately 24 hours or perhaps 48 hours at the absolute maximum.

19. Finally of relevance, on 30 November 2023 the employer issued a writ in Cause G2023-0234, which the defendant employer says was to preserve the limitation position regarding any claim that it needed to pursue against the contractor by way of legal proceedings.

C. Contract Terms

20. Mr Wheeler's argument, with which Mr Lambert did not dissent, was that the 20 March 2023 letter from Nelsons was, at the very latest, a notification of a dispute by the employer to the contractor. That that must be right, and therefore 20 March 2023 is the trigger date for the various steps set out in Clause W1 of the NEC 3 contract.

21. It is appropriate for me now to set out some of the relevant terms of the NEC3 contract in order to make my analysis understandable.

22. I start with the foreword to the NEC contract, which sets out some useful background to the preparation and purposes of the NEC3 suite of contracts. The first paragraph records:

> *"NEC is a division of Thomas Telford Ltd, which is a wholly owned subsidiary of the Institution of Civil Engineers, the owner and developer of the NEC.*
>
> *The NEC is a family of standard contracts, each of which has these characteristics:*
>
> - *Its use stimulates good management of the relationship between the two parties to the contract, and hence, of the work included in the contract.*
> - *It can be used in a wide variety of commercial situations, for a wide variety of types of work and in any location.*
> - *It is a clear and simple document – using language and a structure which are straightforward and easily understood."*

23. The introductory information indicates that a consultative edition of the NEC3 contract form was first published in 1991. It appears that that consultation process took around two years to complete, so that the first edition of the NEC Series of Contracts was published in 1993, and the second edition in 1995.

It was amended in November 1995. A corrected version was reprinted in May 1998. The third edition was published in June 2005. It was reprinted with amendments in June 2006, reprinted at various times thereafter and was most recently amended in 2013. It can be seen from this that it is a form of contract which has a long history and goes back over a number of years. Further, as I raised in the course of argument, it was developed by an independent professional body operating within the construction industry. It seems to me that at least part of the purpose of the NEC3 form of contract was to strike a fair balance between the interests of contractors and of employers, subcontractors and other professionals working within the construction industry.

24. The second thing to mention is that the acknowledgments page in the contract records that the responsibility for drafting the NEC series of contracts was through the NEC working group set up by the Institution of Civil Engineers in the United Kingdom. The names of the members of the NEC panel from time to time are set out and one can see from the identities of the individuals that they are all highly qualified professionals working within civil engineering and/or other aspects of construction industry.

25. With that introduction, I will now look at the specific terms of the contract that was concluded between the parties. It is useful to start with the contract data. The first bullet point records that the contract form is main Option D, dispute resolution option W1, and a number of other options which must be selected have been identified within the contract data.

26. The contract data sets out the location where the construction project is to take place; the identity of the employer; it records the project manager is Michael Thomas, of JEC Property Consultants Ltd, who is also nominated as the Supervisor. As recorded in the letter from Nelsons, *the Adjudicator* is stated to be "Not Applicable". In other words, there is no pre-selected adjudicator. Details of other consultants are set out.

27. Under section 2, the contract data records that the law of the contract is the law of the Cayman Islands. The *Adjudicator nominating body* is the Royal Institution of Chartered Surveyors. For the purposes of the contract, the term *tribunal* means arbitration.

28. On page 3 of the contract data, the heading reads, *"If the* tribunal *is arbitration"* and then there are a number of bullet points that provide: the arbitration procedure is the Royal Institution of Chartered Surveyors; the place where arbitration is to be held is the Cayman Islands; the person or organisation who will choose an arbitrator, and there are 2 sub-bullets: if the parties cannot agree a choice, or if

the arbitration procedure does not state who selects an arbitrator, then it is the Royal Institution of Chartered Surveyors. In other words, it is open to the parties to agree a choice of arbitrator. But if they do not do that, then the Royal Institution of Surveyors will nominate an arbitrator for that purpose.

29. This dispute focuses and has focused almost exclusively on the provisions of option W1 in the contract. I will read those so that they are recorded in this judgment:

29.1. Clause W1.1 records that:

> *"W1.1 A dispute arising under or in connection with this contract is referred to and decided by the* Adjudicator*."*

29.2. W1.2 deals with the adjudicator and sets out in subparagraph (1):

> *"W1.2(1) The Parties appoint the* Adjudicator *under the NEC Adjudicator's Contract current at the starting date."*

That is another form of contract within the NEC3 suite of contracts.

29.3. W1.2(2) records that the Adjudicator acts impartially, etc.

29.4. And then the crucial clause for the purpose of this case is sub-clause 3.

> *"W1.2(3) If the* Adjudicator *is not identified in the Contract Data, or if the* Adjudicator *resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen an adjudicator, either Party may ask the* Adjudicator nominating body *to choose one. The* Adjudicator nominating body *chooses an adjudicator within 4 days of the request. The chosen adjudicator becomes the* Adjudicator*."*

29.5. I do not need to read sub-paragraphs (4) and (5).

29.6. Moving on to clause W1.3(1), this reads:

> *"W1.3(1) Disputes are notified and referred to the* Adjudicator *in accordance with the Adjudication Table."*

29.7. The Adjudication Table identifies four types of dispute. It sets out in relation to each type of dispute which party may refer it to the *Adjudicator* and in relation to each type of dispute, when may it be referred to the *Adjudicator*.

29.8. It is common ground between the parties that in this case the applicable type of dispute was *"Any other matter"*. For a dispute of that kind, the Adjudication Table provides that either party may refer it to the *Adjudicator*. So far as timing is concerned, the Adjudication Table records that the dispute may be referred between two and four weeks after notification to the other party and the project manager.

29.9. W1.3(2) then reads:

> *"W1.3(2) The times for notifying and referring a dispute may be extended by the* Project Manager *if the* Contractor *and the* Project Manager *agree to the extension before the notice or referral is due. The* Project Manager *notifies the extension that has been agreed to the* Contractor. *If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the* Adjudicator *or the* tribunal*."*

29.10. That is then followed up in clause W1.4(1):

> *"W1.4(1) A Party does not refer any dispute under or in connection with this contract to the* tribunal *unless it has first been referred to the* Adjudicator *in accordance with this contract".*

30. Mr Wheeler relied on a number of authorities to support his argument that clause W1.3(2) should be construed as being a condition precedent. It seems to me that the intended effect of this clause is clear from the wording, and it is not necessary to look further into what does or does not constitute a condition precedent.

31. Taken at face value and applying the plain meaning of the words in the contract, it seems to me that the effect of clause W1 and the Adjudication Table as regards the parties is that:

31.1. a dispute has arisen or had arisen under Clause W1.1;

31.2. the dispute was notified to the contractor by the employer by 20 March 2023 at the very latest;

31.3. under clause W1.2(3), no *Adjudicator* had been appointed, so it was for the parties to agree the identity of an adjudicator or for one party to request the RICS to appoint an adjudicator, and in that event, the RICS was required by the terms of option W1 to nominate an adjudicator within 4 days of receipt of the request;

31.4. pursuant to the Adjudication Table the dispute had to be referred to the Adjudicator no sooner than 2 weeks and not more than 4 weeks after notification, so, in this case, the referral window was from 4 April 2023 until no later than 18 April 2023.

32. On a plain reading of clause W1.2(3), the employer could have requested an appointment by RICS of an adjudicator at any time until 14 April 2023 and could still have been sure that the referral would be made within the time limit specified in the Adjudication Table.

33. It is common ground that the employer did not make a referral within that period. Further, there was no request for an extension made under clause W1.3(2).

34. On a plain reading of clauses W1.3(2) and W1.4, the employer is therefore barred from advancing any claim to a tribunal because of the failure to refer it to adjudication within time.

35. In order to displace that apparent effect of clauses W1.3(2) and W1.4, the employer raises two arguments. The first is that there should be an implied term read into the Adjudication Table, such that time does not start to run until an adjudicator has been appointed. Secondly, the employer argues that there is an implied term in W1.2(3), alternatively a duty, that the contractor will cooperate with the employer to agree an appointment of an adjudicator, and that the contractor's breach of that implied term or duty has the result that the referral in October 2023 should be deemed to be in time.

36. In addition to these two points, the employer set out a third argument in its skeleton argument, namely, that the employer is entitled to an extension of time to refer the dispute to arbitration. However, Mr Lambert abandoned this argument at the commencement of his oral submissions. His stated reason for doing so was to save time and costs. Mr Wheeler responded that the argument was hopeless in any event, because such an application for an extension of time should have been brought as an arbitration application within GCR O.73 and should have been raised by a separate summons. I agree with Mr Wheeler on this. However, I note that the matters in issue on this originating summons also fall within the definition of an arbitration application in GCR 73, r.2(1)(d) and should also more properly have been brought in that form. However, nothing seems to me to turn on that as regards the outcome of this case. Therefore, to the extent that there is any irregularity in the form of these proceedings, it seems to me that it is appropriate to waive it under GCR O.2, r.1.

D. Time does not start to run until an adjudicator has been appointed

37. I now consider Mr Lambert's two arguments on the interpretation and effect of the contract. The first one is that time does not start to run until an adjudicator has been appointed. Mr Lambert's submission is that after the words *"between two and four weeks after notification of the dispute"* in the Adjudication Table, the words, *"or if later, the appointment of the* Adjudicator*"* should be added.

38. I was referred, in particular, to a recent unreported judgment of Doyle J in *Re Tyr Capital Partners SPC Ltd* (unreported, 21/06/24) on contractual interpretation in which the learned judge sets out his typical broad survey of the relevant law. It is sufficient for present purposes to focus on his summary of general principles set out in paragraphs [14]-[18] of his judgment, to which I have added some minor grammatical changes:

> *"14. The construction of a contractual provision involves identifying what the parties had meant through the eyes of a reasonable reader and, save in a very unusual case, that meaning [is] most obviously to be gleaned from the language of the provision. Although the less clear the relevant words [are], the more the court [can] properly depart from their natural meaning, it [is] not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning. Commercial commonsense [is] relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract [was] made. Moreover, since the purpose of contractual construction [is] to identify what the parties … agreed, not what the court thought that they should have agreed, it [is] not the function of a court to relieve a party from the consequences of imprudence or poor advice.*
>
> *15. The court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'. It does so by focusing on the meaning of the relevant words, in their documentary, factual and commercial context. That meaning is to be assessed in the light of:*
>
> *(i) the natural and ordinary meaning of the clause,*
>
> *(ii) any other relevant provisions of the contract,*
>
> *(iii) the overall purpose of the clause and the contract,*
>
> *(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and*
>
> *(v) commercial commonsense, but*
>
> *(vi) disregarding subjective evidence of any party's intentions.*
>
> *If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business commonsense and to reject the other. Each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated. There must be a basis in the words used and the factual matrix for identifying a rival meaning* (Arnold v Britton *[2015] UK.SC 36; [2015] AC 1619 at paragraphs 15-20, 23, 66, 76-77 applying dicta of Lord Hoffmann in* Chartbrook v Persimmon Homes Limited *[2009] 1 AC 1101 at paragraph 15 and of Lord Clarke in* Rainy Sky SA v Kookmin Bank *[2011] 1 WLR 2900 at paragraph 21). Where the parties have used unambiguous language, the court must apply it (Lord Clarke in* Rainy Sky *at paragraph [23]).*"

39. I pause there to record that it is important to bear in mind that it is only in cases where there is genuine ambiguity in the meaning of a contractual clause that the court embarks on this process at all.

40. Continuing in Doyle J's judgment:

> *"16. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and equality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning* (Wood v Capita Insurance Services Ltd *[2017] UKSC 24; [2017] AC 1173,* Rainy Sky *and* Arnold v Britton *explained).*
>
> *17. Contractual construction has been described as a unitary exercise which involves an iterative process which, where there are genuinely rival meanings, involves checking them against the provisions of the contract and testing the commercial consequences (Lord Mance in* In re Sigma Finance Corp *[2009] UKSC 2, [2010] 1 ALL ER 571 at paragraph [12]).*

> *18. Where the iterative process of construction produces a clear answer the court must be very wary of assuming that it knows what is or is not commercially sensible (Lewison LJ in* Napier Park European Credit Opportunities Fund Limited v Harbourmaster Pro-rata Clo 2BV *[2014] EWCA Civ 984 at [37]).”*

41. I do not consider there is any ambiguity in the meaning of the contractual terms in issue such that it is necessary to embark on a complicated exercise in contractual construction. Nevertheless, in deference to Mr Lambert’s arguments, I consider them and express my conclusions on them. In doing so, I focus on the five factors identified by Doyle J in *Tyr Capital Partners* from the authorities that were cited to him in that case.

42. The first one is the natural and ordinary meaning of the clause. Mr Lambert relies on two matters to support his argument as to the existence of an implied term in the Adjudication Table, and that its implication is necessary. First, he refers me to the heading of the third column in the Adjudication Table: *“When may it be referred?”* He points out that *“may”* is permissive. It does not say *“must”* or *“shall”*. His argument is that, as a result, referral within two to four weeks is not a mandatory requirement.

43. Mr Wheeler’s response is that the reason that *“may”* is used is that it reflects the principle that the dispute could be resolved between the parties by agreement, without any need for a referral for adjudication. He says that if the heading of the adjudication table said *“must”*, then it would remove that ability for the parties to resolve disputes between themselves. It seems to me that that must be right. In addition, as I put to Mr Lambert in the course of argument, treating the time limit as being advisory rather than mandatory would render the ability to obtain an extension of time in Clause W1.3(2) entirely redundant. The fact that Mr Lambert’s construction would have that effect seems to me to be a strong pointer that it is not a valid interpretation of the clause, or, to put it another way, that the implication of that term is not necessary.

44. Secondly, Mr Lambert relies on the specific words of the provision regarding when the dispute could be referred to adjudication, namely *“after notification of the dispute to the other party and the project manager”*. Mr Lambert’s argument is that there is no evidence that the *Project Manager* had ceased to act, but it is common ground that the *Project Manager* was not notified and therefore Mr Lambert says that time never started to run at all.

45. It seems to me that there is more mileage in this argument and in other circumstances, I may well have entertained it. However, as Mr Wheeler points out, it is a point that was only raised in the course

of argument; it was not relied on before or mentioned in correspondence, and therefore the contractor has not produced evidence to show whether or not the *Project Manager* was still in post in 2023. Thus, essentially, Mr Wheeler says it is unfair to allow the employer to raise it at this very late stage. I think there is a considerable force in that submission.

46. In addition, it is extremely unlikely, given that the contract was terminated in December 2017, that the *Project Manager* somehow still remained in post in March 2023. Further, the employer has never suggested that its notification in October 2023 was invalid, notwithstanding that it did not take any steps to notify the *Project Manager* during 2023 of the dispute or of the notification of the referral to adjudication. The employer has treated, and indeed still seems to treat, those notifications as being valid. In those circumstances, it is simply not right to allow the contractor now to say that, in fact, the notifications were not valid because they were not sent to the *Project Manager* and therefore time has not started to run. However, it does seem to me that in any other case, where the *Project Manager* is still in post, that notification of *"any other matter"* under the terms of the Adjudication Table would require notification to the *Project Manager* bearing in mind the clear wording of the contract.

47. So that is sufficient, it seems to me, to dispose of Mr Lambert's argument for an implied term to be read into the Adjudication Table, at least as regards the natural and ordinary meaning of the clause.

48. I now turn briefly to the impact of any other relevant provisions of the contract on the proposed implied term. Mr Lambert relies on clause W1.2(3) and says that the obligation of the parties is to choose a new *Adjudicator* jointly. He argues that the power for one party unilaterally to request RICS to appoint an adjudicator only became operative when the parties were unable to agree. I cannot accept that argument. The wording of the clause, as I put to him during argument on several occasions, does not say anything at all about *"unable"*. In my judgment, the plain wording of clause W1.2(3) is that there are two alternative routes to appointment of an adjudicator, which are both available in parallel with each other:

    48.1. The first is that the parties can agree an adjudicator. It is worth noting at this stage that, in accordance with the overall objectives of the NEC3 suite of contracts, the parties may still be trying to work together despite the occurrence of a dispute between them during the course of the building contract, and they may well consider it is in their mutual interests to agree an adjudicator, so that they both have confidence in that adjudicator and have control over the identity of the appointee.

48.2. The second limb of clause W1.2(3) allows unilateral appointment of an adjudicator where there is no agreement for whatever reason. The clause does not say *"unable"*. It simply says, *"if the parties have not chosen"* which is entirely neutral. It gives each party unilaterally, in the factual situation that no adjudicator has been chosen, the ability to request an appointment by RICS. That does not seem to me to support the implication of the requested term in the adjudication table.

49. The third consideration is the overall purpose of the clause and the contract. Mr Lambert again relies on the use of *"may"* in the heading to the Adjudication Table. In my judgment, the relevant overarching purpose of the clause within the context of the building contract as a whole is to achieve speedy resolution of disputes during the course of the building contract, enabling the parties to continue to move the project towards completion, with the ability at a later stage to refer a dispute to arbitration if they are unhappy with the outcome of the adjudication process and taking into account the overall outturn of the project. It is not unknown in building projects for people to be dissatisfied with the outcome of a specific adjudication during the course of the project but at the end of the project to decide not to take that point because the overall result is one that they are content with. To the extent that there is any ambiguity in the contract, it seems to me it should therefore be construed in favour of requiring prompt notification and resolution of disputes by adjudication and it should not be construed so as to enable a prolongation to the overall process.

50. I also bear in mind that the time limits in NEC3 contract, like all limitation or time bar provisions, are designed to be fair between the parties in the circumstances. It is important to bear in mind that in construction contracts, the interests of employers and contractors point quite strongly in favour of short timelines so that disputes are resolved while matters are still fresh, and parties can then close the door and move on, without leaving long-tail liabilities behind them relating to building projects that may have been completed many years earlier.

51. It is also worth mentioning that the overall purpose of the NEC3 suite of contracts is to provide industry standard forms of contract, as I mentioned at the outset of this judgment. This form of contract was designed and produced in the United Kingdom, but it can be adopted globally as appropriate, with a view to giving certainty to the contracting parties. Contracts on the NEC3 form are regularly being construed and administered, not just in the Cayman Islands, but in multiple other jurisdictions globally. There is an established body of case law on interpretation of the NEC3 form of contracts developed by, in particular, the Technology and Construction Court in England & Wales. I

was referred to some decisions from that Court in the course of argument, which I have not found it necessary expressly to refer to at this stage of my judgment. It is important, as I said a moment ago, that there is as much certainty for contracting parties as possible. The difficulty with implication of terms is that, by their nature, they tend to make the contract less certain in its operation and application. These features of the NEC3 suite of contracts are a strong pointer against the implication of terms outside the words of the standard form, unless a very strong case is made out for their implication.

52. The fourth factor is the facts and circumstances known or assumed by the parties at the time the document was executed. Mr Lambert relied on the fact that the parties did not negotiate the terms of the contract. However, against that, it is relevant that the NEC3 form was devised by the Institution of Civil Engineers, an independent body, and intended to be fair as between all parties to construction contracts. In those circumstances, it is not really possible to say that the contract was drafted in favour of one side or another as between the contractor and the employer, or that there is an inequality of bargaining power, which are the normal features relied upon to justify the Court taking into account facts and circumstances related to the drafting of a contract.

53. Mr Lambert also relies on the fact that the individuals behind the contracting corporate entities were on friendly terms. There are two issues with this: first of all, there is no evidence before me as to the nature of the relationship between the individuals behind the contracting entities; but in any event, it seems to me whether or not they had a friendly relationship is completely irrelevant to how I should go about interpreting the terms of this particular contract.

54. Finally in relation to the term which Mr Lambert argues should be implied into the Adjudication Table is the question of commercial commonsense. I do not consider that the implication of the additional words that Mr Lambert contends for is necessary in order that the contract should make commercial commonsense. In my judgment, the way that I have indicated the clause should be construed and its purpose within the overall NEC3 contract makes perfect commercial commonsense in. So, for all of these reasons, I reject Mr Lambert's argument that additional words should be read into the last box of the Adjudication Table. It seems to me that there is no ambiguity about the meaning of the relevant clauses and there is no necessity for adding anything to them.

E. Implied term in W1.2(3) / duty to cooperate

55. I can now turn to the question whether an implied term is to be read into clause W1.2(3), or whether there is a self-standing duty on the parties, to cooperate with each other in the appointment of an adjudicator. If there is, then Mr Lambert says it was breached by the contractor, with the result that the referral should be deemed to have been made in time. Mr Lambert relies, in particular on *Mackay v Dick* (1881) 6 App. Cas. 251 and two Australian cases to support his case.

56. In *Mackay v Dick*, the key passage is at page 263, where Lord Blackman said:

> *"I think I may safely say, as a general rule, that where in a written contract, it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."*

57. I do not find that the Australian cases that Mr Lambert took me provide any additional assistance over and above what was said in *Mackay v Dick*. It is important to focus on what Lord Blackburn said. The requirement is that the act cannot effectually be done unless both concur in doing it. It is only in those circumstances that the duty of cooperation arises. On a proper construction of clause W1.2(3), the appointment of an adjudicator *"cannot only effectually be done if both concur in doing it"* because clause W1.2(3) provides that each party has a unilateral power to apply to RICS to appoint an adjudicator. For that reason, whilst *Mackay v Dick* may well be important in other contractual situations, it is not relevant and is not applicable in the context of clause W1.2(3) of the NEC3 form of contract.

58. For that reason, the short answer to the argument that there is an implied term to cooperate or duty to cooperate is that it is simply not necessary to make the contract work, to give it business efficacy etc and so I also reject that argument.

F. Conclusion in construction of the contractual provisions

59. My overall conclusion is that the mechanism for dispute resolution set out in clause W1 of the NEC3 contract is clear, and it clearly sets out the steps that have to be taken and the timeline for doing so.

The defendant employer did not comply with those requirements within the time permitted.

60. The contract provides expressly that if either party fails to do so, then they lose their right to pursue complaints.

61. That may seem tough on the employer, given the apparent lack of engagement by the contractor, but the remedy was in the employer's hands at all times. It simply had to operate the contractual mechanism and do so within the time limits provided in the contract.

G. Application of section 9 of the Arbitration Act

62. The second aspect that this judgment needs to address is the question whether the employer should be permitted to pursue its claims in Cause G2023-0234. The contractor's position is, first of all, that the dispute between the parties clearly falls within the scope of section 9(1) of the Arbitration Act 2012:

> *"9.(1) Where a party to an arbitration agreement institutes proceedings in a court against another party to that agreement in respect of any matter which is the subject of the agreement, either party to the agreement may, at any time after the acknowledgement of service and before delivering any pleading or taking any step in proceedings to answer the substantive claim, apply to a court to stay the proceedings so far as the proceedings relate to that matter."*

63. Section 9(2) provides:

> *"(2) The court to which an application has been made in accordance with subsection (1) shall grant a stay unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

64. The general endorsement on the writ in Cause 2023-0234 makes clear that the claim that the employer wishes to make arises from the building contract. It is therefore caught by clause W1.1 of the contract, being *"a dispute arising under or in connection with this contract"*. The contract consequently requires that it has to be referred to and decided by the *Adjudicator* and may be referred on to arbitration if either party is dissatisfied with the outcome of the adjudication.

65. Thus, s.9(1) of the Arbitration Act directly applies. The result is that the court *"shall"* stay the proceedings unless one of the three grounds in subsection 9(2) is established, namely the arbitration agreement:

65.1. is null and void;

65.2. is inoperable; or

65.3. is incapable of being performed.

66. Before going into more detail on this point, there are two decisions cited to me by Mr Wheeler in support of his arguments, which I should address. The first is *Bankamerica Trust and Banking Corporation (Cayman) Ltd v Trans-world Telecom Holdings Ltd* [1999] CILR 110, a decision of Smellie CJ. At page 119 in the report, Smellie CJ summarily set out the legal principles as follows:

> *"The governing principle is that the court will not ordinarily intervene to try a dispute which is one provided by the agreement between the parties to be resolved by reference to arbitration. This principle applies* a fortiori *where the contract provides exclusively for arbitration, as it does in this case. The rationale is straightforward: the parties, when they made their bargain, included as a part of it the provision for arbitration, and so should ordinarily be required to stick to their bargain."*

67. A more recent case in the Grand Court, a decision of Doyle J in *Ren Ci v Nebula (Cayman) Ltd* (unreported 16/02/23), endorsed the Chief Justice's approach. Justice Doyle, having quoted from Smellie CJ's judgment in *Bankamerica Trust*, referred to Foxton J's judgment in *NDK Limited v HUO Holdings Limited* [2022] EWHC 1682 (Comm), where Foxton J made statements to the same effect. Justice Doyle then referred to Males LJ in *Bridgehouse (Bradford No.2) Ltd v BAE Systems plc* [2020] EWHC Civ 759 and more importantly and more relevantly to the decision of the Cayman Islands Court of Appeal in *McAlpine Limited v Butterfield Bank (Cayman) Limited* (unreported 21/11/19). At paragraph 30 of that judgment, the President, with whom the other members of the Court of Appeal agreed, quoted with approval from paragraph 13 of Lord Hoffman's speech in *Fiona Trust v Privalov* [2007] UKHL 40:

> *"13. 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. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked at para 17: 'if any businessman did want to exclude disputes about the validity of a contract, it would have been comparatively easy to say so'."*

68. Mr Wheeler's argument is that none of the factors in s.9(2) of the Arbitration Act applies, and therefore I should order a mandatory stay of Cause G2023-0234. He anticipates the potential argument that clause W1 may not amount to an arbitration clause because it includes provisions for adjudication by relying on the judgment of Coulson J in *Costain Ltd v Tarmac Holdings* [2017] EWHC 319 (TCC.). He took me to paragraphs 54 and 59, but it seems to me there is a more useful passage and more detailed analysis in Coulson J's judgment at paragraphs 32 to 54, in particular paragraphs 34 and 36, which I will read:

> *"34. The claimant contended that, when read together, the provisions allowed the parties either to adjudicate, or to arbitrate, or to litigate, depending on which forum was thought to be the*

> *most suitable for the particular dispute which had arisen. Mr Wilkin QC said that, because of the 'mutual trust' provision at clause 10.1 of both the Framework Contract and the Supply Contract, it was envisaged that, when a dispute arose, the parties would liaise between themselves and agree which of the three possible dispute resolution routes should be adopted for that particular dispute.*
>
> *35. Mr Turner QC maintained that, although there was only one overall sub-contract here, the existence of two separate sets of contract conditions, relating to the two separate aspects of the relationship between the parties, meant that* Trust Risk Group *was directly in point. He said that a dispute between the parties under the Framework Contract (which would relate to the seeking the quotation and the provision of the quotation) would be governed by clause Z6, whereas any dispute as to the supply of the concrete itself would be governed by the specific adjudication / arbitration clause 93 of the Supply Contract."*

69. I pause to record that clause 93 is in materially identical terms to clause W1 in the NEC3 contract before me. Continuing in paragraph 35:

> *"He said this gave proper meaning and effect to the subcontract agreement that the parties had reached, and meant that no part of the subcontract was rendered redundant, or otiose.*
>
> *36. I have reached the firm conclusion that the defendant's interpretation of the contract* [in other words, Mr Turner's interpretation] *is the correct one, and in accordance with the principles explained in* Arnold v Britton*, whilst the claimant's construction is impractical, uncertain and commercially unworkable."*

70. Mr Justice Coulson then set out in the following paragraphs in more detail his reasons for reaching those conclusions. I recap here that his overall conclusion is that the inclusion of an adjudication provision within clause 93 of that contract, equivalent to clause W1 in this contract, did not have the result that the overall dispute resolution provision was not an arbitration provision within the meaning of s.9 of the English Arbitration Act 1996, which is in materially identical terms to s.9 of the Arbitration Act 2012.

71. Mr Lambert's argument is that the arbitration agreement is *"incapable of being performed"* within the meaning of section 9(2) of the Arbitration Act, and so I should not order a stay of Cause 2023-0234. He says the arbitration agreement is incapable of being performed because of the lack of cooperation on the part of the contractor. The answer to that, very shortly is, the arbitration agreement was not incapable of being performed – it could easily have been performed simply by the employer unilaterally exercising its power to appoint an adjudicator.

72. Secondly, Mr Lambert seems to say that the arbitration agreement is incapable of being performed because of the time bar provision in clause W1.3(1) and the Adjudication Table being unreasonably restrictive. The answer to that is, that was what the parties agreed. It was certainly possible for them to operate within that two to four week timeframe, and anecdotally it is complied with in many other building contracts based on NEC3, so that is not an argument that really goes anywhere. The

contractor's failure to engage with the employer in response to the correspondence during 2022 and 2023 is not sufficient to justify avoiding the mandatory stay under s.9(1) of the Arbitration Act.

73. The NEC3 contract does provide remedies that are available to the employer. First of all, the employer could unilaterally exercise its power to appoint an adjudicator. The adjudicator would then make a decision, whether or not the contractor participates. Failure of the contractor to make submissions to the adjudicator does not justify an adjudicator delaying in making a decision, and indeed one hears regularly about parties who simply choose not to participate in the process.

74. Under the contractual terms, if there was no challenge to the decision of the adjudicator by the contractor within 4 weeks, the adjudicator's decision would stand and would be enforceable contractually by the employer. This is provided for in W1.4(2) and W1,3(10).

75. In other words, the result of the contractor's non-engagement was that the employer could quite easily have made a unilateral referral to adjudication, obtained a decision from the adjudicator which was contractually enforceable, and the employer could immediately have brought proceedings against the contractor for breach of contract, claiming all sums ordered in its favour by the adjudicator.

76. On the other hand, if the contractor had challenged the decision of the adjudicator within the four weeks required under the contract, then the dispute would have been referred to arbitration. Again, the arbitration would have taken place whether or not the contractor participated in that arbitration, and at the end of the arbitration process, the employer could and would have been entitled to enforce the resulting arbitration award in the normal way.

77. Thus, the contractor's lack of engagement does not mean that the employer's ability to obtain redress is frustrated or is not incapable of being performed as a result of the operation of clause W1. In fact, there was a clear and easy route for the employer quickly to reach an endpoint in its favour, notwithstanding any failure to engage by the contractor.

78. My conclusion is that the dispute resolution provisions, including the arbitration clause, are completely capable of being performed. They have been performed, and, in fact, it is the performance of these provisions which leads to the time bar.

79. There is, in my judgment, no reason why s.9(1) of the Arbitration Act should not apply. Therefore, the employer cannot properly pursue its complaints within the context of Cause G2023-0234. It seems

to me that to allow it to do so would permit the employer to circumvent the clear terms of the contract to which it agreed. So, in due course, on an application to be made in Cause G2023-0234, I would either continue the stay or dismiss the claim as an abusive of process.

80. As regards these proceedings, I make the declaration sought by the Plaintiff and order that the Defendant will pay the Plaintiff's costs, to be taxed on the standard basis if not agreed.

Dated 4 October 2024

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT