IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
TECHNOLOGY & CONSTRUCTION COURT

Before:
HHJ David Grant,
(sitting as a judge of the High Court)

MORRIS HOMES (WEST MIDLANDS) LIMITED Claimant
- and -
ANTONY PAUL KEAY
- and -
JEFFREY DAVID KEAY Defendants

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Judgment handed down on 18.04.13

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1. The application.

By an arbitration claim form issued on 27 November 2012 the claimant applies for leave to appeal the decision of Mr Timothy Elliott QC ("the arbitrator") in his partial award dated 31 October 2012 ("the award"). In support of the application the claimant has filed the witness statement of its solicitor, Peter Gareth Davies, dated 27 November 2012. In answer to the application the defendant has filed the witness statement of its solicitor, Patrick Gerard Moran, dated 7 February 2013.

2. The claimant is represented by John Randall QC and Conrad Rumney: their skeleton argument is also dated 27 November 2012. The defendants are represented by Jeremy Cousins QC and Andrew Charman: their skeleton argument is dated 7 February 2013.

3. In addition to the various authorities to which counsel have referred in their respective skeleton arguments, the claimant's solicitors have provided (under cover of their letter dated 14 February 2013) a copy of the recent decision of Akenhead J in Atkins Ltd V Secretary of State for Transport [2013] EWHC 139 (TCC).

4. The background to the dispute

The dispute concerns the construction of a medical centre at the junction of Warstone Lane and Carver Street in Hockley in Birmingham (see paragraph 3.1 of the award). The core of the dispute arises out of the claimant's decision to suspend construction work from approximately July 2008 to approximately January 2010.

5. Having set out the essential background history in paragraphs 3.1 to 3.31 of the award, at paragraph 3.32 of the arbitrator stated as follows:

"Accordingly, the Morris Group and Morris Homes took the decision in late June or early July 2008 to slow down the development ... By late July 2008 it had been decided to suspend the works ... On 23 July 2008 Mr O'Brien of Morris Homes wrote to the building contractors, O'Donnell ... The letter instructed O'Donnell "to carry out the suspension of the current trade contract". This was to be a gradual process, with elements of the construction work being brought to a certain stage. The site would then effectively be mothballed."

6. At paragraph 3.34 of the award the arbitrator noted that "by the end of November 2008 all work on site had stopped." Thereafter, as explained in paragraph 3.36 of the award, as a result of "an initiative run by the Homes and Communities Agency called 'Kickstart', whereby government funding was available to support the construction of mixed housing sites that were currently stalled", construction work recommenced in or about early January 2010.

7. Then, at paragraph 3.39 of the arbitrator stated as follows:

"Interclass started the fit-out on 11 April 2011, and the work was completed by 1 August 2011. The medical centre was handed over to Dr O'Brien on 8 August 2011, and he started paying rent on 16 August 2011. A different pharmacy company ... had agreed to take a lease of the new pharmacy. The under-lease of the pharmacy was entered into on 11 July 2011. The new pharmacy opened on 19 August 2011."

8. The issues in the arbitration

At paragraph 4.1 of the award the arbitrator summarised the claimant's claims and the issues in the arbitration as follows:

"The claimant's case is that Morris Homes was in breach of clause 3.1 and/or clause 4 of the agreement for lease, in that it failed to progress satisfactorily work on block A, and the shell of the medical centre within it, between 2008 and 2011. They contended that as a result, completion of the medical centre and its occupation was delayed, causing the following losses (which the arbitrator then summarised)"
9. At paragraph 4.2 of the award, the arbitrator recorded 6 principal issues that fell for decision in the arbitration. However, this application concerns only (a) the first of those issues, which the arbitrator defined as "the duty to progress issue", describing it as "the proper construction of the scope of the contractual duties contained in clauses 3.1 and 4 of the agreement for lease"; and (b) one particular aspect of the sixth of those issues, which was "the extent, if any, of the claimant's losses, and causation thereof".

10. The relevant clauses of the agreement
Clause 3.1 of the agreement provided:

"The landlord shall as soon as reasonably practicable commence and thereafter diligently carry out the Works in accordance with the planning permission and all other relevant permissions consents and the documents ... in a good and workmanlike manner with good quality materials ...

Clause 4 of the agreement provided:

"The landlord shall use all reasonable endeavours to ensure that the Works are completed as soon as reasonably practicable as part of the development unless prevented or delayed by any cause or circumstance not within the reasonable control of the landlord, in which case the landlord shall be entitled to an extension of time equal to the period of such delay."

11. The arbitrator's decision on the first of the two key issues
The arbitrator dealt with the first of the two key issues, namely that relating to the proper construction of clauses 3.1 and 4 of the agreement, between paragraphs 5.5 and 5.16 of the award. He stated:

"5.5 Turning to the words in clauses 3.1 and 4, there are in effect three distinct obligations. Firstly, Morris Homes is obliged to commence the works as soon as is reasonably practicable. Secondly, once the works have been commenced, Morris Homes is obliged to carry them out diligently. Thirdly, Morris Homes has to use all reasonable endeavours to ensure that the works are completed as soon as reasonably practicable unless prevented or delayed by a cause or circumstance not within its reasonable control.

5.6 None of these three obligations as expressed to be subject or subsidiary to the others. The agreement must be construed as a whole. However, effect must be given to all three of these obligations."

It is not necessary for present purposes to recite either clause 5.7 or clauses 5.8 and 5.9, where the arbitrator considered what was meant by the phrase 'diligently carry out works'. He continued:

"5.10 Morris Homes ... concentrated on clause 4 and the obligation to use all reasonable endeavours to ensure completion as soon as reasonably practicable. It contended that in the summer of 2008, because of the financial crisis, it was faced with risking commercial suicide if it continued with the Warstone Lane project. It submitted that an obligation to use all reasonable endeavours did not oblige it to risk commercial suicide. It cited in support a number of authorities ...

It is not necessary to recite clause 5.11. He continued:

" 5.12 ... Morris Homes' submissions ... are to the effect that if it can be shown that it was not in breach of clause 4, then it follows that the obligation to execute the works diligently was also satisfied ..."

It is not necessary to recite the remainder of that paragraph, nor paragraphs 5.13 and 5.14. He continued:

"5.15 The construction which Mr Randall asked me to accept has the result that the term requiring Morris homes to carry out the works diligently becomes effectively otiose. On Mr Randall's construction, if Morris Homes was using reasonable endeavours between mid-2008 to January 2010, it was automatically ensuring that the works were being carried out diligently. On this basis there was no need for the inclusion of the obligation to use diligence because it was automatically covered by the obligation to use reasonable endeavours. However the fact is that the parties did include clause 3.1 as a separate obligation, and with wording distinctly different from clause 4. The words of clause 3.1 must be given effect. Clause 3.1 is independent of clause 4."
5.16 What Morris Homes did was to stop carrying out any of the works for well over a year. It may well be arguable that by doing so Morris Homes was using reasonable endeavours to secure its financial future and thereby, in a roundabout route, to preserve the possibility of the works being completed at some future and undetermined date in the future. However, in stopping work in 2008 and not starting again until January 2010, Morris Homes was quite clearly in breach of its obligation to carry out the works diligently once they had been started, regardless of whether or not it was also in breach of clause 4."

12. **The arbitrator's decision on the second of the two key issues**

The arbitrator dealt with the second of the two key issues, namely that relating to the extent if any of the claimant's losses and their causation, between paragraphs 8.49 and 8.63 of the award. He stated:

"8.61 In my view the approach of Morris Homes falls foul of some basic principles of law. Firstly in assessing reasonable damages for breach of contract, the task of the tribunal is to establish what actual losses were caused to the claimant by the defendant's breach. That will involve comparing the position the claimant would have been in, had the breach not occurred, with the position it was in because of the breach. There will be losses and possibly counterbalancing gains which have to be taken into account. Secondly, having established what actual losses have been suffered (after taking into account any gains), the tribunal may have to consider whether they are of a type which were too remote to be recoverable at law. ... The types of losses in this case are diminution in value of the lease, loss of rent, additional cost of development and payments required by Dr O'Brien .... In my view none of these types of loss is too remote ..."

It is not necessary to recite the remainder of that paragraph. He continued:

"8.62 During oral closings, the question of the funding of the development was addressed by both Mr Cousins QC and Mr Randall QC. Mr Cousins stressed that the claimants were separate legal entities from their father. Mr Randall however virtually submitted that I should treat the Keay family as one legal entity ... I can find no legitimate reason for doing as Mr Randall suggested. While it may be obvious, a person (or persons) can arrange his financial affairs in any way he chooses ... The fact that the arrangements may result in Morris Homes paying greater damages than would have been paid in different circumstances is not a valid reason for ignoring these arrangements."

The arbitrator then summarised his findings on damages at paragraph 8.63 of the award.

13. **Section 69 of the Arbitration Act 1996**

Section 69 (3) of the 1996 Act provides:

"Leave to appeal shall be given only if the court is satisfied
(a) that the determination of the question will substantially affect the rights of one or more of the parties,
(b) that the question is one which the tribunal was asked to determine,
(c) that, on the basis of the findings of fact in the award –
(i) the decision of the tribunal on the question was the wrong, or
(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

14. In paragraph 5 of their skeleton argument, Mr Cousins QC and Mr Charman accepted that "It is common ground that the requirements at subparagraphs (a) and (b) are met in relation to each of the two questions raised by Morris Homes", before submitting that "It is disputed that either of the requirements set out in (c) and (d) are met in relation to either of the two questions which are the subject of the application". It follows that the enquiry in this application is to be focused on the
criteria contained in subparagraphs (c) and (d) of section 69 (3).

15. The witness statements
In paragraph 10 of their skeleton argument, Mr Cousins QC and Mr Charman submit that: "Morris Homes' skeleton argument ... refers to paragraphs 1 to 9 of the witness statement of Mr Davies as relevant background. These paragraphs of the statement are not admissible. CPR 62 PD 12.4 provides that written evidence may only be filed to show one of the four things there listed, in so far as the same is not apparent from the award itself. The only one of the four things not apparent from the partial award itself is whether the question is one of public importance. It is only with regard to that question that the evidence of Mr Davies is admissible." In general terms I accept that submission, and have thus had regard to Mr Davies witness statement only in the context of the first element of subsection (c) (ii).

16. The questions of law identified by the claimant
At paragraph 2 of the arbitration claim the claimant set out the first question of law which arises in this application as follows:
" ... whether, in construing ... the agreement the arbitrator was right to decide that the claimant's obligation (under clause 3.1 of the agreement) to "diligently carry out the Works" required the claimant to take steps to carry out the Works is regardless of whether such steps were required under the obligation (in clause 4 of the agreement) to "use all reasonable endeavours to ensure that the Works are completed as soon as reasonably practicable"

The claimants submitted that this question is one of general public importance: see paragraph 7 of the arbitration claim.

17. It follows that there are three issues to be decided in relation to the first question:
(1) Is the question one of general public importance?
(2) Is the decision of the arbitrator at least open to serious doubt?
(3) Despite the agreement of the parties to resolve the matter by arbitration, is it just and proper in all the circumstances of the court to determine the question?

18. At paragraph 11 of the arbitration claim the claimant set out the second question of law as follows:
" ... whether, when assessing the defendant's losses resulting from the said delay to the Works, the arbitrator was right to disregard the monetary benefit obtained as a result of the 77 week 3 day deferral in the expenditure of funds required to acquire and fit out the medical centre, on the basis that it was the defendants' father who enjoyed the financial advantage of retaining such funds for such period, and not the defendants".

19. In relation to the second question of law, the claimant's primary case is that the decision of the arbitrator was obviously wrong: see paragraph 15 of the arbitration claim.

20. It follows that there are two issues to be decided in relation to the claimant's primary case on the second question of law:

(1) Is the decision of the arbitrator obviously wrong?
(2) Despite the agreement of the parties to resolve the matter by arbitration, is it just and proper in all the circumstances of the court to determine the question?

21. As an additional or alternative plea, the claimant also submitted that the second question was one of general public importance: see paragraph 16 of the arbitration claim. It will thus be necessary to consider this additional issue in the context of the claimant's additional or alternative plea on the second question.

22. The nature of the enquiry on an application for leave to appeal
In paragraph 7 of their skeleton argument, Mr Cousins QC and Mr Charman referred to the decision of the Court of Appeal in CMA SA v Beteiligungs KG (MS 'Northern Pioneer') & Ors [2003] 1 WLR 1015. In CMA Lord Phillips MR gave
the judgement of the court (comprising himself Rix and Dyson LJJ), explaining at paragraph 23 that:

"The statutory requirement that applications for permission to appeal should be paper applications unless the court otherwise directs must surely have been intended to simplify the procedure and to save the court's time. That requirement reflects the fact that the criteria for the grant of permission to appeal are clear-cut and easy to apply. They do not require the drawing of fine lines, nor will they usually give much scope for the court to require assistance in the form of submissions or advocacy. ... Any written submissions placed before the court in support of an application for permission to appeal from findings in an arbitral award should normally be capable of being read and digested by the judge within the half-hour that, under the old regime, used to be allotted that such applications.”

23. I construe that passage as explaining that the process whereby the court deals with an application for permission to appeal is essentially summary in nature: hence Lord Phillips' reference to the current practice whereby such applications are dealt with on paper (unless the court otherwise directs) so as to simplify the procedure and thus save the court's time, and to the practice that used to obtain in the Commercial Court whereby such applications were dealt with orally, in half an hour or so. I will return to the last point in a little more detail below.

24. I turn to consider the way in which the criteria for giving leave (which I define as "the threshold test") have to be satisfied on such an application. It is somewhat akin to considering the standard of proof which obtains on such an application. Before the 1996 Act Lord Diplock considered these matters in the well-known case of Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema') [1982] AC 724. He held at page 742:

"Where ... a question of law involved is the construction of a "one-off" clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of any adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance."

He continued at page 743D:
"... rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act ... but leave should not be given even in such a case, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves "one-off" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "one-off" clauses."

Lord Diplock thus explained that for a "one-off" case, it had to be "apparent to the judge on a mere perusal" that "the arbitrator is obviously wrong"; while for a "standard term" case, the test was "rather less strict", but the applicant still had to establish a strong prima facie case "that the arbitrator had been wrong"

25. As Lord Phillips explained in paragraph 10 of his judgement in CMA "section 69 of the 1996 Act has replaced the Nema guidelines with statutory criteria". However, section 69 does not define the way in which the criteria for giving leave have to be satisfied on an application. It simply states that the court is to be "satisfied". In much the same way as the decision of the House of Lords in The Nema gave guidance under the previous Arbitration Acts, the decision of the Court of Appeal in CMA now gives guidance in this respect under the 1996 Act.

26. While the reference to "clear-cut" in paragraph 23 of the judgement in CMA is a reference to the underlying criteria that are engaged on such an application, I shall approach this application on the basis that, in respect of each of the two questions of law identified (the first relating to a question said to be general public interest, and the second not), the applicant has to show that it is "clear-cut" that one or other of the criteria defined in subsection (c) (i) (ii), and indeed that in subsection (d), are made out. Such an approach would be consistent with Lord Diplock's earlier analysis of the threshold test as regards both "one-off" and "standard terms" cases, and Lord Phillips' statement in CMA that the application of the criteria "... do not require the drawing of fine lines", and "... will (not) usually give much scope for the
court to require assistance in the form of submissions or advocacy”.

27. I construe Lord Phillips’ reference to prior practice in the Commercial Court of dealing with such applications in half an hour or so as an indication of the essentially summary nature of the process. However, in a case such as this, it has taken me considerably longer than that; firstly to digest the underlying material in the case, secondly to read the parties’ written submissions and authorities cited, and thirdly to draft this judgement. I am somewhat fortified in this respect by the observation of Akenhead J in *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC) that in that case he initially spent some 4 hours reading the papers: see paragraph 24 of his judgement. I therefore approach the matter in this way: irrespective of the amount of time it in fact takes the judge to read and understand all the relevant underlying material, once the judge has carried out that part of the exercise, the process of determining the application for leave to appeal should be a summary one, and one in which the applicant has to establish that it is clear-cut that the criteria, here those in subsections (c) and (d), are established.

28. Analysis in respect of the first question of law identified: (1) one of general public importance?

There is a measure of common ground between the parties that there is a public interest in the court considering the interrelation of “best endeavours” and “diligence” clauses in a development and/or construction agreements: see the second sentence of paragraph 15 of the claimant's skeleton argument, and the last sentence of paragraph 24 of the defendant's skeleton argument. The defendants also accept that “... as a general proposition ... the inclusion of both an obligation to carry on works with diligence and an obligation to use reasonable endeavours, in agreements relating to development projects, is widespread”: see paragraph 25 of the defendant's skeleton argument.

29. However, the defendants go on to submit as follows:

“... the facts of this case, as found by the arbitrator ... are highly unusual. A particular feature of this case ... was that the parties knew that the medical centre project depended on getting Dr O'Brien signed up and the PCT agreement to fund the rent, and that both these factors required the works to be completed as soon as possible. This very unusual situation is a 'one-off', and any appellate decision based upon it is most unlikely to be of general application.”

30. Such a submission resonates with the last part of the passage of Lord Diplock's speech in *The Nema* at page 743F cited above. To my mind, even if obligations requiring the use or exercise of "best endeavours" and "diligence" are commonly to be found in development and/or construction contracts, "... the events to which (clauses 3.1 and 4 of this contract) fell to be applied were 'one-off' events ...": In those circumstances, I am not satisfied that the first question of law is one of general public importance.

31. As regards paragraphs 30 and 31 of the defendant skeleton argument: I do not regard the fact that another first instance Judge has considered the interrelation of "best endeavours" and "diligence" obligations in a development contract means that, of itself, I could not be satisfied in this case that the first question of law was one of general public importance. There are many decisions of many courts, both at first instance and on appeal, on questions of general public importance.

32. However, in case I am wrong in my conclusion on the first issue to be decided, I now turn to consider the second issue.

33. Analysis in respect of the first question of law identified: (2) at least open to serious doubt?

The arbitrator decided that, in stopping work for over a year, Morris Homes was in breach of its obligations under clause 3 of the agreement to carry out the works “diligently”. He also decided that Morris Homes was in breach of clause 3 regardless of whether or not it was also in breach of clause 4 of the agreement. The arbitrator thus decided two points: (1) that Morris Homes was in breach of clause 3.1 of itself (“the clause 3.1 point”); and (2) that Morris Homes could not avoid liability under clause 3.1 by establishing that it had complied with clause 4 (“the inter-relationship point”).

34. In my judgement the key to this central part of the arbitrator’s decision is that set out in paragraphs 5.5 and 5.6 of the award, to which he made later reference in paragraph 5.12 of the award. He found that there were three distinct obligations: first Morris Homes was obliged to commence the works as soon as is reasonably practicable; secondly, once the works had been commenced, Morris Homes was obliged to carry them out diligently; and thirdly, Morris Homes had to
use all reasonable endeavours to ensure that the works were completed as soon as is reasonably practicable, unless prevented or delayed by a cause or circumstance not within its reasonable control. He also found

that none of those three obligations had been expressed to be subject, or subsidiary, to any of the others, and accordingly that effect had to be given to each one of them disparately from the others.

35. The question that arises on the clause 3.1 point is whether an obligation to carry out works “diligently” in a development or construction contract relates merely to the manner in which the works are carried out (which usually involves an enquiry in relation to such matters as materials and workmanship), or to the time and/or order within which such works are carried out (which often involves an enquiry into matters such as programming and sequence of works). At paragraphs 96 to 98 of his judgement in *Ampurius New Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch) Roth J considered what was meant by the term “diligence” in a development agreement, before going on to consider the interrelation between a term as to “diligence” and a separate term as to “reasonable endeavours” in paragraphs 99 – 102 of his judgement (where he found that the defendant in that case was in breach of both provisions). At paragraph 97 he held:

“… ‘due diligence’ is a familiar concept in construction contracts, and Mr Gaunt QC accepted that it usually connotes both due care and “due assiduity/expedition”. I see no reason to give it here a restricted interpretation. Indeed, it was well known to both parties that the claimant was keen to have delivery of all four blocks as close together in time as possible, and if the exercise of due diligence would have enabled the defendant to complete blocks A and B less than seven months after blocks C and D, I consider that this clause would have obliged it to do so.”

36. It is to be noted that, in chapter 20 of the current 11th edition of ‘Keating on Construction Contracts’, which contains a commentary on the JCT standard form of building contract, 2011 edition, at paragraph 28 – 056 the author comments on clause 2.4 of that standard form, which contains an obligation on a contractor to “… regularly and diligently proceed with (the works)”. He then cites an extract from the judgement of Simon Brown LJ in *West Faulkner Associates v LB of Newham* [1994] 71 BLR 1, where he held:

"Taken together, the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion, substantially in accordance with the contractual requirements as to time, sequence and quality of works …"

I acknowledge that neither party referred to *West Faulkner Associates* in its written submissions; nor does it appear that either party referred to this decision of the Court of Appeal, or to this commentary in Keating in the arbitration.

37. Nonetheless, I have come to the conclusion that the approach of the arbitrator in relation to clause 3.1 of the agreement is at least consistent with that of Simon Brown LJ in *West Faulkner Associates* (albeit of course in relation to a predecessor of a different and standard form of building contract, not nonetheless in relation to an express contractual obligation in a standard form of building contract requiring a contractor to regularly and diligently proceed with the works), and that of Roth J in *Ampurius* (albeit of course in relation to a different, and apparently ‘one-off’ development contract).

38. In the context of the inter-relationship point, at paragraph 6 of the claimant's skeleton argument, Mr Randall QC and Mr Rumney summarised their submissions before the arbitrator, which they described as having been set out in three steps, submitting in paragraph 7 that the arbitrator (a)

recognised their step 1 was arguable; (b) accepted their step 2; and (c) rejected their step 3. In paragraph 14 and 15 of the defendant's skeleton argument Mr Cousins QC and Mr Charman (a) submitted that the arbitrator did not go quite as far as the claimant contended as regards the claimant's step 1, submitting that he only found that it “may well be arguable”; (b) disputed that the arbitrator accepted the claimant's step 2; and (c) disputed the claimant's analysis of the arbitrator's decision in respect of what it had described as its step 3.

39. Then, at paragraph 10 of the claimant's skeleton argument Mr Randall QC and Mr Rumney submitted as follows:
"It is at least open to serious doubt that (as was in effect decided by the arbitrator) the parties had agreed to limit the scope of Morris Homes' obligations to complete the works by reference to "all reasonable endeavours" (by clause 4), and yet had at the same time effectively agreed (by clause 3.1) to require the works to be carried on (and carried on to completion) by endeavours going beyond the "all reasonable endeavours" of clause 4."

However that submission is directed towards an analysis of the terms of the agreement, whereas the gist of the arbitrator's decision was directed towards an analysis of whether the claimant was in breach of clause 3: he found that it was.

40. In paragraph 12 of the claimant's skeleton argument they further submitted:

" … the better proposed construction, and one that at least opens the arbitrator's decision to serious doubt, is that the extent of diligence due under clause 3.1 is not such as to require steps that go beyond "all reasonable endeavours" as agreed by the parties under clause 4."

To put it the other way around: the essence of the claimant's case is that if it was not in breach of clause 4, then it could not also be in breach of clause 3: hence the arbitrator's observations at the beginning of paragraph 5.15 of his decision.

41. At paragraph 18 of the defendant's skeleton argument Mr Cousins QC and Mr Charman made a somewhat different submission as follows:

"The arbitrator reached a different conclusion by a process of reasoning which it is submitted was clearly right. At the end of paragraph 5.11 … he refers to the well-known passage in the speech of Lord Hoffmann in the Investors Compensation Scheme case as to having regard to the background knowledge of the parties. He then sets out the construction contended for by Morris Homes, and observes that if correct, it would mean that Morris Homes was entitled to suspend the project indefinitely by reason of its own financial problems. If its argument were right, Morris Homes could do this without being in breach of contract, and there would be nothing that the Keays could do, however long the suspension of works continued. They would remain bound to take a lease of the completed shell and core whenever it was completed, and to fit it out as a medical centre, whether or not there was by then any doctor willing and able to take an under lease of it."

42. I accept those submissions. In my judgement different considerations arise in connection with a "reasonable endeavours" obligation to complete works, such as contained in clause 4 of this agreement, as compared with a separate obligation to carry out works with diligence, as here contained in clause 3.1. A party in Morris Homes' position could well comply with a reasonable endeavours obligation to complete works, for instance by taking reasonable endeavours to ensure that it has sufficient capital and other management resources available, but yet be in breach of an obligation to carry out the works diligently in the manner explained above, for instance because it failed to carry out the work by using appropriate materials and/or plant in some respect, or by failing to programme the works appropriately.

43. In this regard, the decision of the arbitrator appears to be consistent with the approach of Roth J in paragraph 100 of his judgement in Ampurius.

44. In those circumstances, I am not satisfied that the decision of the arbitrator on either of these two points is at least open to serious doubt. It is to be noted that I have to be satisfied that the decision is open, not just to any doubt, at to serious doubt. Furthermore, I have come to the conclusion that the arguments as formulated by Mr Randall QC and Mr Rumney (in particular as regards the interrelationship point, perhaps encapsulated at paragraph 12 of their written submissions) raise matters that are both subtle and complex in nature; in such circumstances it is difficult for an applicant to establish that it is clear cut that the decision of the arbitrator in that respect is at least open to serious doubt.

45. Analysis in respect of the first question of law identified: (3) just and proper to determine the question?

Mr Randall QC and Mr Rumney did not formulate any specific submission on this aspect of the application in their written
submissions. Mr Cousins QC and Mr Charman dealt with this aspect between paragraphs 32 and 37 of their written submissions.

46. Had I decided (a) that the first question was one of the general public importance; and (b) that the decision of the arbitrator was at least open to serious doubt, I would not have gone on to find that, simply by declining the appointment of a judge as a judicial arbitrator, it would not be just and proper for the court now to determine the question. It is open to one party to make such proposal, and indeed may be very sensible to do so; it is equally open to the other party to decline such a proposal, and indeed there may be reasonable grounds for doing so. If this were a factor to be taken into account, it would not appear to be one which carries much weight.

47. I note that in Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd [2004] EWHC 996 (Ch) Lloyd J found that determination by an arbitrator with particular experience and expertise in the field of practice involved in the arbitration was a relevant factor, as was the presumption of finality of decision which underscores the arbitral process.

48. However, I do not find that there is here either any one reason, or any combination of reasons, why in this case it would not otherwise have been just and proper for the court to determine the first question.

49. Conclusion as regards the first question of law identified.

For the reasons set out above, I decline to give leave to appeal on the first question of law identified.

50. Analysis in respect of the second question of law identified: (1) is the decision obviously wrong?

At paragraph 39 of their skeleton argument, Mr Cousins QC and Mr Charman referred to the decision of the Court of Appeal in HMV UK v Propinvest Fire Limited Partnership [2012] 1 Ll Rep 416 as providing guidance as to what the phrase "obviously wrong" means, citing the judgement of Arden LJ, who held:

"... it is not enough therefore simply to show that there is an arguable error on a point of law. Nor is it enough that the judge to whom the application for leave is made might himself or herself have come to a different answer ... the alleged error must be transparent. It must also, at the least, be clear."

While it is not immediately apparent how the words "transparent" and/or "clear" add to the words "obviously wrong" in the Act, I shall nevertheless approach the matter on the basis that I have to be satisfied that the decision of the arbitrator was obviously wrong, in the sense that the error in question must be transparent and/or clear. The similarity of such language to the phrase "clear-cut" used by Lord Phillips MR in CMA is palpable.

51. The arbitrator dealt with this aspect of the case between paragraphs 8.49 and 8.63 of his award.

52. The essence of the claimant's complaint is that the arbitrator "... disregard(ed) the monetary benefit (which the defendant) obtained as a result of the ... deferral in the expenditure of funds required to acquire and fit out the medical centre, on the basis that it was the defendant's father who enjoyed the financial advantage of retaining such funds for such period and not the defendants": see paragraph 11 of the arbitration claim.

53. In paragraphs 43 and 44 of their written submissions, Mr Cousins QC and Mr Charman submitted:

"43. Determining the actual loss so caused requires the Keays to give credit to the actual benefits they received by reason of the breach, which they would not have received if the breach did not occur. It does not require credit to be given for any benefits not actually received by them. 44. The arbitrator, having decided that as a matter of fact the Keays did not actually receive any financial benefit from the delay, it followed that they were not required to give credit for a financial benefit that they did not actually receive."

54. It is appropriate to set out the relevant parts of the arbitrator's decision which he gave before he came to his conclusion on this issue at paragraphs 8.61 and 8.62 of the decision, which I have already set out. The arbitrator stated as follows:
8.50 In assessing a claim for damages for breach of contract, a tribunal has to determine what actual losses were suffered by a claimant. If the claimants in this arbitration did indeed obtain a monetary benefit from the delay..., then in order to identify their true losses, it is necessary to set off the benefit against monetary losses.

8.51 I have earlier in this award mentioned the slightly unusual arrangements of the Keay family in relation to the medical centre development. Mr Keay's two sons are the two leaseholders, and the landlords of Dr O'Brien and Aldenmat; and of course they are the claimants in this arbitration. However, in practical terms they have played no part in either the development itself or in this arbitration.

8.52 In considering the question of benefit claimed by the claimants from deferred expenditure on the development I have to bear in mind the following:

(1) The claimants in this arbitration are Mr Keay's two sons. Mr Keay is not the claimant.

Page: 14

(2) The expenditure by the claimants on the medical centre totalled £1,994,921. The sources of the funds to meet this cost were as follows. Mr and Mrs Keay by way of gift gave their sons £580,000 towards the £850,000 payable on completion in January 2011. They also paid some professional fees..., again in effect gifts to their sons. The balance of the development costs was paid by the claimants from two sources. Firstly they borrowed £950,000 from Lloyds TSB... secondly they used money from their business current account which was funded from other investments which they owned. The claimants receive no interest from this business current account.

(3) Mr Keay had earmarked £1.75 million to be used on the development but, due to the delays, had diverted these funds to a different investment. Accordingly he arranged his two sons to borrow the £950,000 from Lloyds TSB in 2011...

8.53 On the evidence I have read and heard I am satisfied that, had Morris Homes not been in breach, and had the shell as a result been completed 77 weeks and 3 days earlier, the claimants would not have borrowed £950,000. Mr Keay would have financed the fitting out from his own funds...

8.54 With the £580,000 actually given, and the £1.75 million which would have been used had there been no delays, the claimants would not have needed to borrow from Lloyds TSB or use money from their business account...

8.55 Morris Homes submits that, because payment for the development was deferred, credit should be given by the claimants at a rate of 6% on £2 million for the period of delay, with a reduction to reflect finance available at 2.59% on £950,000...

8.56 Morris Homes' submission however does not reflect reality. The question is what monetary benefit accrued to the claimants (and not to Mr David Keay) as a result of the delay...

8.57 Firstly in respect of money given to them by their parents to meet development costs, the delay in the works yielded no benefit to the claimants at all. The same applies to sums paid by Mr Keay in respect of professional fees. The claimants earned no interest on this money. Nor would they have had to borrow it if the delay had not occurred. Mr and Mrs Keay simply paid it... when it was needed.

8.58 As for the £950,000 borrowed in 2011 onwards from Lloyds TSB, firstly by way of overdraft and then by fixed loan, has the delay... yielded the claimants any monetary benefit in this respect? Again the answer is no...

8.59 As for money paid from their business account, had there been no delay there would have been sufficient funds coming available (from) their parents... to more than cover the expenditure of approximately £2 million. Even if recourse had been necessary to the business account, since it was a non-interest-bearing account, there is no question of delay actually producing interest.

8.60... Morris Homes submits that the fact that money is used to finance the development continued to be held by the claimant's parents prior to being gifted to them should be ignored, because this was a consequence of the claimant's own financial arrangements rather than a natural consequence of the defendant's breach... On the basis of these submissions Morris Homes says, in effect, that I should assume that the

Page: 15

claimants benefited at the rate of 6%, and then 2.59% on deferred payment of £2 million, when in fact the claimants did not receive any such benefit at all."

55. From those passages, it is apparent that the defendant's submissions in this regard are well founded. In my judgement the arbitrator carried out the correct and/or appropriate legal analysis when considering the claimant's submissions in respect of "deferred expenditure".
56. Then, in paragraphs 48 to 52 of their skeleton argument, Mr Cousins QC and Mr Charman advanced a further submission: that, when properly construed, this part of the claimant's application relates to findings of fact by the arbitrator, and not to any identifiable question of law. I accept that further submission.

57. In those circumstances, I am not satisfied that the decision of the arbitrator in respect of the second issue of law as identified is obviously wrong.

58. Analysis in respect of the second question of law identified: (3) just and proper to determine the question?

Neither party formulated any specific submission on this aspect of the application in their written submissions.

59. Had I decided that the decision of the arbitrator on this question was obviously wrong, I would have come to a like a conclusion whether it was just and proper for the court to determine the second question as I had in respect of the first.

60. Analysis in respect of the claimant's alternative case on the second question of law identified: (1) one of general public importance?

This aspect of the case was dealt with only briefly by Mr Randall QC and Mr Rumney; at paragraph 27 of their skeleton argument they identified the question as "... whether damages are properly to be assessed without taking into account a relative monetary benefit that was also obtained by close associate of a claimant", and submitted that such a question was of general public importance "... in order to provide greater legal certainty as to how such monetary benefits are to be treated".

61. Mr Cousins QC and Mr Charman did not formulate any submissions in relation to the claimant's alternative case in their skeleton argument on behalf of the defendants.

62. As I have already observed, the submission of the defendant's that this part of the arbitrator's decision was, on its proper construction, a decision on matters of fact rather than on matters of law, is correct. Further, I do not accept the claimant's submission that a decision on the question as identified is required "... in order to provide greater legal certainty as to how such monetary benefits are to be treated".

There is a high degree of clarity or certainty in the law as regards the appropriate principles that are engaged when considering a question such as this. The issue (if any) in this case is whether or not the arbitrator applied those principles appropriately to the facts of the case. It is thus convenient to turn to consider the second issue that arises on this alternative case.

63. Analysis in respect of the claimant's alternative case on the second question of law identified: (2) at least open to serious doubt?

For the reasons already explained when considering whether the decision was obviously wrong, I am also not satisfied that the arbitrator's decision on the second question of law identified by the claimant is open to serious doubt. As already stated, the arbitrator carried out the correct and/or appropriate legal analysis when considering the claimant's submissions in respect of "deferred expenditure". Any dispute arises out of his decision on the facts, and in this regard the parties are bound by the findings of fact of their chosen tribunal.

64. Analysis in respect of the claimant's alternative case on the second question of law identified: (3) just and proper to determine the question?

A like analysis obtains as set out in paragraphs 45 to 48 above.

65. Conclusion as regards the second question of law identified.

For the reasons set out above, I decline to give leave to appeal on the second question of law identified.

DG

28.03.13
Referring Principles:

IV.6.5 - Best efforts undertakings