Neutral Citation Number:[2010] EWHC 39 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

BIRMINGHAM CIVIL JUSTICE CENTRE
33 BULL STREET
BIRMINGHAM B4 6DS

Dates of hearing: 8 December 2009
Date of draft judgment: 5 January 2010
Date of judgment: 15 January 2010

Before Her Honour Judge Frances Kirkham
sitting as a High Court Judge

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LIDL GMBH

Claimant

and

(1) JUST FITNESS LIMITED

and

(2) BANNATYNE FITNESS LIMITED

Defendants

- - - - - - - - - - - - -

Mr Mark Wonnacott of Counsel (instructed by Clarke Willmott) for the claimant

Mr Duncan Kynoch of Counsel (instructed by Ward Hadaway) for the defendants

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JUDGMENT

1. The claimant ("LIDL") makes this application pursuant to section 32 Arbitration Act 1996. The arbitrator, Mr Cartwright, has given his consent to LIDL's referring this matter to the court. The solicitor for the defendant, Just Fitness Ltd ("JF") has confirmed in a witness statement that JF consent to the court deciding this issue.

2. LIDL has not issued an arbitration claim form. However, proceedings are already under way, and JF make no objection to the procedure which LIDL has used. It seems to me sensible to make use of existing proceedings, thus saving time and expense.

Background

3. LIDL is landlord of commercial premises in Cheltenham. JF is a tenant of those premises, by a 25-year underlease dated November 2001. The second defendant is surety under the underlease.

4. By letter dated 15 July 2008, JF sought consent to assign the underlease. On 17 September 2008 LIDL's solicitors, Clarke Willmott, sent an e-mail to say that LIDL was not prepared to consent to the proposed assignment.

5. By letter dated 28 November 2008, JF's then solicitors, Merritt & Co, wrote to Clarke Willmott, referring to the underlease and stating:

> "It is an express term of the Underlease (clause 3.13.2) that LIDL could not unreasonably withhold its consent to (amongst other things) an assignment of the Underlease. Further and pursuant to section 1(3) and/or section 3 of the Landlord and Tenant Act 1988 LIDL owed our clients a duty not to withhold consent unreasonably to a request to assign.
>
> By a letter dated 15 July 2008 our client sought LIDL's consent to an assignment of the Underlease…and by the end of July 2008 Just Fitness had furnished LIDL with all relevant details and references relating to the proposed Assignee and its Surety that were reasonably required to enable LIDL to consider the request for consent to assign.….LIDL owed a duty to consider the request and give its decision within a reasonable time.. Our client believes that a reasonable time was two weeks.

> On 17 September 2008 you indicated that LIDL was not prepared to consent….
>
> Clearly there is a dispute between our respective clients and accordingly we invite you to let us have a list of not less than three and not more than six single arbitrators who would be acceptable to you. In default of agreement or in the absence of a reply we shall apply to the President of the RICS."

6. On 28 January 2009 the President of the RICS appointed Mr T J Corns as arbitrator to determine the dispute between the parties. On 29 January 2009, Mr Corns wrote to the parties' respective solicitors stating amongst other matters:

> "I propose to convene a preliminary meeting in order for me to be addressed by the parties as to the issues in dispute, so that I can then decide what procedure to adopt … I have already indicated above that I am not in possession of any documentation in connection with this arbitration, other than a copy of Merritt & Co's letter to Willmott of 28 November 2008."

7. Mr Corns held a preliminary meeting on 26 February 2009. It was attended by Mr Hebblethwaite of LIDL and Mr Harrison of Clarke Willmott; Mr Holtham of Merritt and Co participated by telephone. Mr Corns wrote to the parties' respective solicitors by letter dated 5 March 2009, stating, amongst other matters:

> "The principal issue which I believe needs to be resolved are the powers that I have as Arbitrator and what actions I am required to take.
>
> A range of procedural issues were discussed and I believe that these can either be agreed or sorted out relatively easily once the main issues has [sic] been resolved.
>
> I referred, during my conversation with Mr Holtham on the telephone, to his letter of 28 November 2008 … and, in particular, to the three actions he sets out on the second page of his letter as follows:- (1) a mandatory injunction requiring LIDL to give its consent; (2) an order for specific performance pursuant to clause 3.13.2 of the underlease; (3) a declaration that LIDL has unreasonably withheld its consent. ….

During the course of the meeting, Mr Holtham referred to section 48 of the Arbitration Act 1996 setting out the powers of the tribunal available to me in the event that the parties do not agree on such powers.

In order to try and help take matters forward, I confirm that, if the parties agree upon the powers exercisable by me as Arbitrator, I will endeavour to work in accordance with that agreement.

In the event that the parties cannot agree, I am reasonably clear that section 48(3) of the Act provides that I may make a declaration as to any matter to be determined and that I believe that this would cover a declaration that LIDL has or has not unreasonably withheld its consent to an assignment (item 3 above).

I believe that I may have the power under section 48(5) to order a party 'to do or refrain from doing anything' and this may have the same effect as a mandatory injunction as referred to by Mr Holtham.

I am not, however, certain at this stage that I have the power to order specific performance as is referred to under section 48(5)(b) and I would need to seek clarification from a legal perspective as to whether the lease under which the specific performance was being sought is or is not a contract relating to land.

Having said this, however, Mr Harrison did indicate during the meeting that, if I were to make a declaration that LIDL had unreasonably withheld consent, his clients would immediately give such consent and it is possible therefore that if the arbitration would proceed on the basis that I was asked to make a declaration one way or the other on this issue, then in effect it would deal with the principal point in dispute.

Taking Mr Holtham's second issue of loss and damage, I believe I have the power under section 48(4) to order the payment of a sum of money and I believe that this covers this point.

I express these views and set out these thoughts to assist the parties initially, strictly on the basis that I have not taken any legal advice. I am conscious that I am addressing two practising solicitors and in addition, that my duty is to deal with the matter as expeditiously and cost effectively as possible.

Perhaps therefore I should invite both sides to respond to these proposals. If it is possible to agree how I should proceed, it may obviate the necessity of my taking legal advice on these preliminary points."

8. Mr Corns issued written directions dated 15 April 2009.

Paragraph numbered 3 of those directions states: "The issue in dispute is the refusal of the landlord to grant consent for the assignment of the lease held by Just Fitness Ltd following their application by letter, dated 16 July 2008."

Paragraph numbered 4 states: "The parties have agreed that I am required to decide whether the landlord's decision to withhold consent is unreasonable. In the event that I do come to this conclusion, it is further agreed that I shall issue my Award by way of a declaration for specific performance for the landlord to grant such consent. For the avoidance of doubt, it is further agreed by the parties that I am not required to consider the question of any damages arising in the event that I do conclude that such consent was unreasonably withheld."

9. Mr Corns directed that written submissions, then any counter submissions, be delivered and exchanged.

10. I have not been taken to LIDL's or JF's initial submissions. I have, however, been shown LIDL's counter submissions dated 15 April 2009. These were signed by Mr Hebblethwaite. They focused on the question whether consent had been unreasonably withheld. At paragraph 1.4, LIDL submitted:

"1.4 At paragraph B1 the Claimant [ie JF] alleges unreasonable delay in considering the application for consent. It is submitted that such consideration is outside the scope of the agreed terms of reference which are before the Arbitrator. Paragraph 4 of the Directions confirms as follows: *"The parties have agreed that I am required to decide whether the Landlord's decision to withhold consent is unreasonable…"*

1.5 Within the agreed terms of reference of the Arbitrator there is no reference to a decision being required as to whether there was unreasonable delay on the part of the Respondent [LIDL]. The Claimant [JF] therefore requests the Arbitrator to disregard those submissions made by the Claimant

[JF] under section B1 of the Submissions." [Judge's note: paragraph 1.5 must contain a misprint - it must have been intended that this read: "LIDL therefore requests the Arbitrator to disregard those submissions made by JF…" etc]

11. Mr Corns' Award is dated 18 August 2009. It is expressed to be a Final Award. At paragraph 2, Mr Corns stated: "The issue in dispute relates to whether or not the landlord has unreasonably withheld its consent for an assignment by Just Fitness to Top Notch (Cheltenham) Ltd ... supported by the surety of Espree Leisure Ltd … sought by the tenant under the terms of Clause 3.13 of the Lease."

12. The Award includes the following:

> "8.17 A significant part of Mr Holtham's case is that there was an unreasonable delay in responding to the tenant's application for the assignment and that a decision should have been given within two weeks. For completeness, I confirm I have considered this point but it is separate from the substantive issue of whether or not the refusal itself was reasonable. I have noted that after the initial application further references were supplied one by one with Espree's accountant's reference being sent finally on 31st July.
>
> 8.18 I agree with Mr Holtham that in the normal course of events two weeks after receipt of the final reference should be sufficient time to consider the application and that it is not unreasonable for a tenant to expect a decision within this sort of timescale. However, as Mr Hebblethwaite has pointed out this exchange did take place during the holiday months and I consider it reasonable to extend this period somewhat but certainly not as long as it actually took. I agree with Mr Holtham that a decision should have been forthcoming well before Merritt & Co needed to write their letter of 4 September.
>
> 8.19 As a result, if I were required to make a decision on this point I would have said that a formal response either way should have been forthcoming by 17 August as opposed to 17 September, that is to say one month sooner than actually occurred.
>
> 8.20 What the implications might be of such a decision is, I believe, not something I am required to consider as the question of damages is specifically excluded from my jurisdiction."

13. Mr Corns concluded that LIDL's refusal of consent had been reasonable, and in his Award made a declaration accordingly.

14. By letter dated 24 August 2009 JF's current solicitors, Ward Hadaway (WH) notified Clarke Willmott that JF would be proceeding with the assignment. LIDL immediately applied to this court for an injunction to restrain JF from assigning the underlease. An interim injunction was granted without notice. On the return date, a consent order was made, by which the injunction was continued. It contained the following proviso: "For the avoidance of doubt the parties shall be at liberty to refer the action for further direction once the parties have obtained clarification from Mr Corns of his award dated 18 August 2009 as described in the letter from WH to Clarke Willmott dated 1 September 2009 a copy of which is annexed and signed by the parties."

15. The letter from WH dated 1 September 2008 had stated:

> "We are not suggesting that any issue which was before the Arbitrator should be re-opened. The Landlord and Tenant Act 1988 imposed duties on your client first, to give consent, unless it was reasonable to refuse it; and second, to give written notice of its decision within a reasonable time. Your letter repeats the suggestion that both issues were resolved by the Arbitration. With respect, this is simply not so. It is clear from paragraphs 8.17 and 8.19 of the Award that Mr Corns was not asked to deal with the issue of whether your client's refusal was given within a reasonable time, and did not do so. His Award is limited to the issue of whether or not the refusal was itself unreasonable.
>
> As however there is an issue as to this, we suggest that Mr Corns resume the reference to him to determine (or clarify) his Award as follows:
>
> (1) pursuant to section 30(1) Arbitration Act 1996, whether the Award dealt with the issue of your client's refusal of consent being given (or not) within a reasonable time; if Mr Corns decides that it did not deal with that issue,
>
> (2) whether your client's written notice of its decision in your firm's e-mail of 17 September 2008 was given within a reasonable time in accordance with its statutory duty in section 1(3) of the 1988 Act; if Mr Corns awards that it was not,

(3) the consequences [of] that breach of duty."

16. WH wrote to Mr Corns on 4 September 2009. Clarke Willmott wrote to Mr Corns on 17 September 2009, referring to WH's letter of 4 September, and stating: "We agree that the whole dispute between the parties on liability was referred to you as arbitrator (directions 3 and 4). But the parties also agreed, and by consent you ordered, that the only issue which you would be required to decide, in order to resolve that dispute, was whether the decision to withhold consent was unreasonable or not (direction 4)". Clarke Willmott asserted that the whole dispute between the parties on liability had been resolved by Mr Corns' award and could not be reopened, and that Mr Corns was now functus officio.

17. There followed some further correspondence. Mr Corns then wrote to the parties on 22 September 2009. He carefully noted the letters sent to him on this topic, and stated:

> "The question raised by WH … is whether the landlord gave notice of its decision in response to the tenant's application for assignment in reasonable time, in accordance with section 1(3) of the Landlord and Tenant Act 1988.
>
> I would confirm that this was not a matter referred to me as part of the Arbitration and, in accordance with the specific agreement of the parties, the Arbitration was restricted entirely to the issue of reasonableness or otherwise in relation to the landlord's decision to withhold consent. My Award related to that issue only and made no Award on the question of timing of the landlord's response, as set out above.
>
> My Directions in the Arbitration, dated 15 April 2009, were clear on this matter. In particular, Direction 4 confirms the agreement of the parties to limit the Arbitration to the question of reasonableness or otherwise.
>
> The reference in my Award to this matter was only included because Mr Holtham had made significant reference to the timing of the landlord's decision in his submissions and had contended that it had been delayed unnecessarily and unreasonably. I needed to address this point but paragraph 8.17 of my Award deliberately identified that it was a separate matter entirely from the substantive issue that I was required to decide. Similarly, paragraphs 8.19 and 8.20 made it entirely clear that, although I expressed a

view on Mr Holtham's submission, I was not required to and did not make a decision or an award on this point.

I have noted Clarke Willmott's view that the Arbitration has been concluded and that I am functus officio, ie that I no longer have any powers or duties under the reference, save for the assessment of costs and the other points listed in paragraph 2 of their letter.

My preliminary view, therefore, is that, as the question of the timing of the landlord's response was not referred to me as part of the Arbitration by agreement, it is not appropriate for me to reopen the Arbitration and consider this as a fresh and separate matter."

18. LIDL refused to agree that Mr Corns be asked to decide the delay issue. On 25 September 2009 WH applied to the RICS for the appointment of an arbitrator to determine a dispute between JF and LIDL. In completing the RICS form, WH, identified the dispute as follows:

> "The dispute is as to whether [LIDL's] notice of its decision (viz its solicitors' e-mail dated 17 September 2008) was given in accordance with, or in breach of, [LIDL's] statutory duty under section 1(3) of the Landlord and Tenant Act 1988; and, in the event that [LIDL] has breached its statutory duty under the said section 1(3) of the 1988 Act, whether [JF] is free to assign the Lease without breaching its covenant; and the sum which [LIDL] is liable to pay to [JF] as damages for breach of statutory duty."

19. On 9 October 2009, the RICS notified the parties that the President was considering the appointment of Mr D J Cartwright as arbitrator. Clarke Willmott replied that any appointee would not have jurisdiction. On 27 October 2009, the President appointed Mr Cartwright as arbitrator. Mr Cartwright recognised that it was necessary for questions concerning his substantive jurisdiction to be determined. By letter dated November 2009, he gave his permission to LIDL to refer this matter to the court.

The issues

20. LIDL's case is that the terms of reference to Mr Corns included the dispute which JF now seek to refer to Mr Cartwright. There cannot be a second arbitration on the same dispute. Mr Wonnacott, for LIDL, confirmed that he was putting LIDL's case

on that narrow footing. He was not suggesting that LIDL was entitled to rely on an argument that it would be an abuse of process for JF to seek to raise in the second arbitration a matter which could have been raised in the first arbitration.

21. JF's case is that there was an agreement that the delay point not be decided by Mr Corns. JF also argue that it was not abusive to seek to raise the delay point in a second arbitration, but I have already noted Mr Wonnacott's position on this point.

Relevant law

22. In **Purser and Co (Hillingdon) Limited v Jackson and another** [1971] 1 QB 166. Forbes J said, at page 174:

> "Mr Macgregor maintains that arbitrations are concerned with disputes and not with causes of action and he says that within a cause of action there may be many disputes and the arbitrator is only concerned with disputes. He contends boldly, for the view that **Conquer v Boot** [1928] 2 KB 336 has no application at all to arbitrations in general; Mr Dyson says it does, and that seems to be the first point on which the court should give a decision.
>
> I must confess that I would feel very reluctant to extend the draconian doctrine of **Conquer v Boot** into fields to which I am not constrained to extend it and neither counsel has been able to put before me any case which constrains me to do so. There is no authority binding upon me, indeed I think counsel say there is no authority at all, which indicates that the doctrine of **Conquer v Boot** has to be applied in arbitrations. But it seems to me that it is unnecessary to decide this case on this general point, because there are other more particular points which enable the question for the decision of the court to be answered. The first of these arises on Mr Macgregor's next argument: that where you have a previous arbitration **Conquer v Boot** can only apply to the matters which were therein referred to the arbitrator. In other words, you have to look at what was in the terms of reference and if an issue arises on the terms of reference, then there is an estoppel per rem judicatam in so far as the arbitrator has made an award upon that issue. Or indeed, I think Mr Macgregor would go so far as to say, whether or not he has made an award upon that issue. What determines the matter is whether it is included within the terms of reference; as he indicated, the fact is that, although it is within the terms of reference, it does not find its way into the

points of claim, means that to that extent the general doctrine of **Conquer v Boot** applies. You are estopped per rem judicatam even though you did not raise the matter in your points of claim, if the matter clearly lies within the ambit of the terms of reference."

23. At page 176, Forbes J stated that he accepted Mr Macgregor's submission:

> "… the most that can be said for the rule in **Conquer v Boot** in arbitration proceedings is that the terms of reference of the arbitrator are the matters which determined the issues which the arbitrator has to decide. If those terms of reference include a particular issue, then whether or not, in the end, the arbitrator makes an award in relation to that issue, that issue has been raised and an adjudication has been made in this sense: that if nothing is done about the arbitrator's award - and due time for appeals and so on and so forth, referring the matter to the High Court in one way or another, has gone - then it is no good the claimant subsequently saying 'Ah, but the arbitrator did not make an award upon this issue'. The proper remedy would have been to have challenged the award by any of the appropriate methods, and if he does not challenge the award by one of those approved methods, he will find himself estopped per rem judicatam if he seeks to raise such an issue in the subsequent arbitration proceedings."

24. This judgment predates the Arbitration Act 1996 but it seems to me that the passage which I have quoted holds good under the 1996 Act.

Discussion

25. I deal with the following matters:

first, the terms of reference of the dispute referred to Mr Corns and in particular whether the delay point was referred to him;

if so, then, secondly, whether it was agreed that Mr Corns should deal only with the question of unreasonable refusal to consent to the assignment and that JF would be free to pursue the delay issue at a later stage; and

thirdly, the question of equitable relief.

What was the dispute referred to Mr Corns?

26. The covenant at 3.13.2 of the underlease contains the following prohibition on JF: "Not to assign …etc…the Premises as a whole for the whole or any part of the term without the prior consent of [LIDL] granted within the three months immediately prior thereto which consent [LIDL] shall not unreasonably withhold."

27. Merritt & Co's letter of 28 November alleged that LIDL were in breach of its obligations, under the underlease and pursuant to section 3 of the 1988 Act, by unreasonably refusing to consent to the assignment and by failing to give their decision within a reasonable time. As Forbes J set out in **Purser & Co**, the terms of reference of the arbitrator are the matters which determine the issues which the arbitrator has to decide. Here, the letter of 28 November expressly set out the terms of reference and thus identified the dispute to be referred to arbitration, namely whether LIDL had unreasonably withheld consent and whether LIDL had failed to give its decision in a reasonable time. I have no doubt that that was the dispute which was referred to Mr Corns. To test this, it may be helpful to consider what the position would have been had any question arisen as to whether Mr Corns had jurisdiction to determine whether LIDL had given its decision in a reasonable time; the answer would have been that he undoubtedly did have that jurisdiction, as the letter of 28 November had expressly identified that as being within the terms of reference.

28. A number of the extracts from documents which I have quoted above show that there has been some unhelpful muddling of concepts and loose language, with confusion between the terms of reference of the dispute which had been referred to Mr Corns and the issues he had been asked to decide.

29. The dispute which was referred to Mr Corns comprised the two limbs, both unreasonable withholding of consent and delay. Mr Corns was seized of the whole of that dispute. Unless agreement was reached that Mr Corns decide only the unreasonable withholding of consent point and that the delay point be held over then, in my judgment, Mr Cartwright does not have jurisdiction to decide the question of unreasonable delay as that issue had been referred to Mr Corns. JF would thus be prevented from relitigating it by an estoppel per rem judicatam.

Was such agreement reached?

30. I bear in mind that we are dealing with arbitration, not litigation, and that party autonomy is part of the bedrock of arbitration. This is clear, for example, from section 1 Arbitration Act 1996 which provides:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly –
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; …"

31. I also bear in mind that in arbitration, unlike litigation, it is not uncommon for arbitrator and parties to agree that the arbitrator may make more than one award at different times on different aspects of the matters to be determined: see section 47(1).

32. Although both LIDL and JF have provided witness statements in these proceedings, there is no direct evidence with regard to, for example, any discussions between the parties and Mr Corns as to what issues Mr Corns was to deal with; in particular, there is no direct evidence as to what was discussed at the preliminary meeting held on 26 February 2009. The question of the extent of the agreement to limit the issues to be decided by Mr Corns can therefore be answered only by examination of the documents to which I have referred. Given the looseness of language and muddling of concepts to which I have referred, I am cautious when reading the letters and other documents.

33. Is there evidence of an agreement that Mr Corns be asked to deal only with the first limb (unreasonably withholding consent) and that JF be free to proceed later with the second limb (failure by LIDL to make a decision within a reasonable time)? The parties could have agreed that. But I am not persuaded that such agreement was reached.

34. In their letter of 28 November, Merritt & Co had asked for (1) a mandatory injunction requiring LIDL to give consent to the assignment, (2) an order for specific performance under clause 3.13.2 of the underlease and (3) a declaration that LIDL had unreasonably withheld consent. JF also sought compensation for loss and damage including "rent, service charge, rates and other liabilities". In his letter of 5 March addressed to both parties (see paragraph 7 above) Mr Corns dealt principally with the relief which he would be able to give in the event that JF succeeded. He was, understandably, concerned about the powers available to him as arbitrator. He

acknowledged that he was not legally qualified and had not taken legal advice on the matters he had raised; he asked the parties' respective solicitors to respond to his proposals. However, neither side replied.

35. Mr Corns then issued his directions on 15 April. In paragraphs numbered 3 and 4 Mr Corns set out the position as he understood it (see paragraph 8 above). It appears that neither side responded to the directions which Mr Corns had issued. They simply served their submissions then counter submissions.

36. Nowhere does one find any communication between the parties as to what issues Mr Corns was to deal with. It was Mr Corns who initiated the exchanges which led to his deciding only the first limb issue. Understandably from his point of view, he focussed on potential difficulties in relation to the relief which JF sought. LIDL had confirmed that if the arbitrator decided in JF's favour on the first limb then they would immediately consent to the proposed assignment. There is no evidence of any consideration as to what the position would be if Mr Corns decided against JF. There is no acknowledgment by LIDL that, if LIDL succeeded on the first limb, then JF would be free to proceed with the second limb. It appears that the parties simply acquiesced in Mr Corns' suggestions as to how he might deal with the first limb, ie the consent unreasonably withheld point and the relief which JF were seeking.

37. It is difficult for JF to argue that there was in place an agreement that they be free to pursue the delay point later in circumstances where they, themselves, made submissions on that issue in the arbitration before Mr Corns.

38. The parties and Mr Corns agreed that the only issue which he was to decide was whether consent had been unreasonably withheld, and they all then proceeded on that basis. That in my judgment is the extent of the agreement reached. There is no evidence of an express agreement of the sort that would be necessary if JF were to retain the right to pursue the second limb, ie the delay issue, after Mr Corns had published his award. I am not persuaded that the parties agreed that the delay issue would be put on one side and that JF be free to pursue it at a later date, whether before Mr Corns or before another arbitrator.

Is LIDL entitled to equitable relief?

39. Mr Kynoch for JF has concentrated on the question whether it would be an abuse to permit the second arbitration to proceed. He has reminded me of the passages in the

speech of Lord Bingham in **Johnson v Gore Wood** [2002] AC 1 which refer to the public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter.

40. However, Mr Wonnacott has made it clear that no equitable relief is sought. LIDL rely solely on common-law res judicata and are not seeking equitable relief. LIDL do not, for example, challenge JF's submission that they have an arguable case on the delay point.

41. As LIDL are not seeking equitable relief, and JF are not suggesting that equitable principles provide a defence to LIDL's claim, it is not necessary to deal with the question whether it would be an abuse of the process to permit JF to proceed with a second arbitration or the factors which a court would normally take into account when dealing with such issue.

Conclusion

42. There was no agreement between the parties that JF be free to pursue the second limb issue. JF are thus in the position described by Forbes J in **Purser.** The terms of reference in the arbitration before Mr Corns included the delay issue. Even though Mr Corns did not make a decision in relation to that issue, that issue was raised and thus an adjudication was made, in the sense described in **Purser**. Accordingly, in relation to the question whether LIDL responded within a reasonable time to JF's request to assign, JF are estopped per rem judicatam from proceeding with this issue in a subsequent arbitration.

43. Mr Cartwright does not have jurisdiction to determine the dispute which JF have sought to refer to him.