

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

TECHNOLOGY AND CONSTRUCTION COURT

BIRMINGHAM CIVIL JUSTICE CENTRE
33 BULL STREET
BIRMINGHAM B4 6DS

Date of hearing: 30 & 31 July 2003
Date of Draft judgment: 1 September 2003
Date of judgment: 10 September 2003

Before Her Honour Judge Frances Kirkham

VAN OORD ACZ LIMITED AND HARBOUR & GENERAL WORKS LIMITED
JOINT VENTURE

Claimant

and

Defendant

THE PORT OF MOSTYN LIMITED

Mr Andrew Burr of Counsel (instructed by Knowles Solicitors) for the Claimant

Mr Paul Darling QC of Counsel (instructed by Hammonds) for the Defendant

JUDGMENT

1. The Claimant ("JV") is a joint venture, comprising a partnership between Van Oord ACZ Limited ("Van Oord") and Harbour and General Works Limited ("H&G"). The two JV companies entered into an agreement dated 5 December 2000. (Although the JV agreement was not dated until December 2000. I refer to the partnership between the two companies before as well as after December 2000 as the JV.)
2. Van Oord and H & G formed the JV to be the vehicle, as contractor, to carry out works for the defendant ("Mostyn") as employer, at the Port of Mostyn. This was in connection with development of a riverside berth, including construction of a Ro Ro terminal. There were three contracts: the Marine Works contract, the outer channel dredging contract and the terminal works contract. These proceedings relate to the marine works contract, which the parties entered into in about October 2000. The contract between Mostyn and the JV was subject to the ICE conditions of contract, 6th edition, with some amendments and additions, and to the Housing, Grants, Construction and Regeneration Act 1996.
3. Clause 66(7) provided that the decision of the adjudicator be binding until the dispute was finally determined by legal or arbitral proceedings. Clause 66(9)(b) provided that any decision of an adjudicator required to be challenged within three months after delivery of the decision. Clause 68(1) provided "Any notice to be given to the Contractor under the terms of the Contract shall be served in writing at the Contractor's principal place of business (or, in the event of the contractor being a company, to or at its registered office)".
4. Disputes arose between the parties. In November 2002, Professor John Uff QC, CBE, FREng was appointed adjudicator. Professor Uff delivered his decision on 17 January 2002. As a consequence of the adjudicator's decision of 17 January 2002, the Engineer for the project certified to the JV payment of the sum of £1.6m. It appears that that sum has been paid.

5. In April 2003, Mostyn purported to refer the adjudicator's decision to arbitration. The notice to refer took the form of a letter from Mostyn dated 13 April 2003, addressed to "Van Oord ACS/Harbour & General JV" at White Lund, Morecambe, Lancashire LA3 3BY and marked for the attention of Mr O'Donnell. It is common ground that the notice to refer needed to be served by 17 April 2003 and that it had to be served at the JV's principal place of business. It is common ground that the NR was received at the Morecambe office by post on 16 April 2003.
6. The parties did not expressly agree that Newbury was the JV's principal place of business. The JV's case is that the Newbury office was the JV's principal place of business. The NR was not received at the Newbury office until it arrived there by post on 22 April 2003. They contend that Mostyn's letter did not constitute a valid notice to refer the adjudicator's decision to arbitration and that Mostyn is therefore now out of time to challenge the decision. The JV's case is that the notice sent was not sufficient in the context of clause 66(9)(b) in that it did not in fact reach the correct address on or before 17 April 2003. They contend that Mostyn acted in breach of clause 68(1) in failing to deliver the notice to the JV's principal place of business and in addressing it to a non-existent entity.
7. In these proceedings the JV seeks declarations to the effect that the adjudicator's decision is incapable of challenge. The questions for the court are

Whether Mostyn validly served a notice to refer upon the JV.

Whether the JV is estopped by either representation or convention from alleging that the notice to refer was not validly served.

If the answer to both questions is no, whether the Court should extend time pursuant to Section 12 Arbitration Act 1996.

8. I refer to Mostyn's letter of 13 April 2003 as the "NR".
9. The burden of showing that the NR was validly served lies on Mostyn.

Background

10. Van Oord is an English company, a subsidiary of a Dutch company. It has its registered office and only place of business in Newbury. H & G's registered office and principal place of business are at Springwell Road, Springwell Gateshead. H & G also have four regional offices, including an office at Morecambe, Lancashire from which it manages contracts in the north west of England and Wales. The Morecambe office is located within the premises of a subsidiary company. It is occupied by 13 permanent members of H & G's staff who deal with day-to-day management of projects in Wales and the north west of England.
11. Mostyn engaged Mouchel, Consulting Engineers based in Byfleet, Surrey, in connection with the project. Mr. Richard Upton. of Mouchel was the Project Manager and Mr Lohn of Mouchel was the Engineer for the marine works contract. Mr Lohn was involved with the Port of Mostyn project from May 2001.
12. Mott MacDonald were involved with the design of the project.
13. Mr. Pieter van Oord was managing director of Van Oord until July 2001, what Mr J Athmer became managing director of the company. Mr van Oord was at all material times based at the Newbury office. He spoke by telephone to Mr O'Toole, managing director of Mostyn, on a number of occasions before July 2001. During those conversations, Mr van Oord was based mainly at Newbury, as Mr O' Toole knew. Mr M Smith is and at material times was managing director of H & G. His was only a peripheral role in the matters the subject of these proceedings.

14. Mr C O 'Donnell was an employee of H & G. He was appointed the JV's Commercial Manager for the marine works contract. He worked from H & G's Morecambe office. His is a crucial role in relation to the matters I must decide. He did not give evidence at the hearing, although he signed the statement of truth on the JV's claim form.
15. Mr A Barker, an employee of H & G, is identified in the JV agreement (see below) as the JV's Project Manager for the marine works contract. The correspondence indicates that he worked from Morecambe and then, from January 2001, from site.
16. Broadly, Mouchel conducted correspondence on behalf of Mostyn. The contact between the JV and Mouchel before the Mostyn: JV contract in October 2000 was by correspondence with Van Oord from Newbury. Between then and the date when work began on site (January 2001) contact was mainly with the JV from Newbury. After work began on site, almost all of the correspondence was conducted by the JV from the site address, the only exceptions were some banking operations which were carried out from Newbury. After the site was demobilised in May 2002 correspondence was conducted by the JV from the Morecambe address. That correspondence was mainly between the JV and the Engineer. The Engineer copied to Mostyn most of the letters he wrote to the JV and kept Mostyn informed of his correspondence with the JV. I accept the evidence of Mr O'Toole that Mouchel sent him, for example, copies of the Engineer's correspondence with the JV concerning claims. The JV, on the other hand, copied to Mostyn only a few of the many letters they sent from Morecambe to the Engineer

The JV Agreement

17. The JV is one project unincorporated association. The JV agreement in relation to the marine works is dated 5 December 2000. The parties are stated to be Van Oord of the Newbury address and H & G of the Gateshead address. The

agreement made it clear that the relationship of the parties was that of an unincorporated association formed for the purposes of collaborating in respect of the contract. Van Oord is defined as the "Joint Venture Leader" who, it is said, would "provide the corporate aspects such as Employer Liaison, co-ordination, venture management and accounting". The JV Leader's duties and responsibilities are set out. These focus on pre contract award issues; post award, the JV Leader's role is said to be to continue to provide corporate facilities, to participate in the JV and to undertake with H & G the management and supervision of the JV through the process of the Supervisory Board. The Board was to control, manage and supervise the business and affairs of the JV. Subject to review by that Board, the execution and carrying out of the works was to be supervised and co-ordinated by the Project Manager. Van Oord and H & G had equal representation on the Supervisory Board. Decisions had to be unanimous. If unanimity could not be achieved, matters were referred to a dispute resolution mechanism involving two executives and in default an adjudicator. In the event that a decision was "*vital for the progress of the Works*" and therefore had to be made without delay, the Chairman, who was a representative of the JV Leader, had the right to make the decision after consultation with the Project Manager and Construction Managers as he considered to be correct and necessary in order to proceed without delay. There was then a reporting and ratification mechanism.

18. Article 3.6 of the JV agreement prohibited the parties from dealing directly with Mostyn as the Employer or with the Engineer other than through the appointed Project Manager (Mr Barker was appointed fulfil this role). The clause provided for the way in which the Project Manager should so liaise. Article 3.7 provided that when any contractual communication was received from Mostyn or the Engineer, the Project Manager should forthwith pass such contractual communication to the party or parties whose work was directly or indirectly affected by it. If the contractual communication was a matter which could be considered to be of significant importance as a whole, it should be passed to both parties. Article 3.8 required each party to appoint a Construction Manager

19. Clause 3.16 concerned claims. The Project Manager was to facilitate and co-ordinate the preparation of submission of claims by the JV to secure from Mostyn such contractual benefits, if any, as might be claimable in accordance with the contract. The Project Manager had various obligations in relation to the making of claims.
20. Article 19 provided in relation to notices: *"The Parties agree that service of any process notice, claim, demand or other documentation upon any of them, shall be duly effected by posting by prepaid registered mail any such process notice, claim, demand or other document addressed to the respective addressed hereinbefore or subsequently in writing specified of any of the Parties hereto. For the purposes of the Works the Parties agree that the Employer [ie Mostyn] shall be informed that the Site office shall be the address for service of correspondence and other documentation in connection with the Works but all notices shall be served to the registered offices of the Joint Venture Leader."*
21. The JV agreement provided, in broad terms, for the two separate companies to carry out different aspects of the work: Van Oord would carry out the dredging and H & G the construction works. However, Mr Lohn said at trial that he did not see such a precise distinction; in practice the two companies had not split the work so precisely in that way and there was some overlap. In any event, although the JV agreement sets out the two companies' respective responsibilities, in the Mostyn: JV agreement the position is simply that the JV is responsible for the work to be undertaken.
22. I set out below detail of relevant correspondence and other documents.
23. Van Oord expressed an interest in the work to be undertaken in connection with the riverside berth development, on behalf of themselves and H & G. By letter dated 15 May 2000 Van Oord wrote to Mr Upton stating.

"We confirm that Van Oord ACZ Limited are acting as sponsor for all three Contracts. For this reason please forward all correspondence for the Joint Venture to the above [ie Newbury] address."

24. By then, Mr Upton knew that the two companies were proposing to form a joint venture to undertake work. He wrote to the JV at the Newbury address inviting the JV to submit a tender for the marine works contract. Mouchel subsequently sent further tender documents to the Newbury address. On 19 July 2000, Mouchel wrote to the JV at the Newbury address extending time for the return of the tender. The JV returned the form of tender on 24 July 2000. Mr Hume signed this "for and on behalf of" the JV. The address shown on the tender form was the Newbury address. Mr Hume also signed Appendices 1 and 2 to the tender and, again, he signed on behalf of the JV, and the Newbury address was the only address shown.
25. On 25 October 2000, Mouchel on behalf of Mostyn wrote a letter of intent to the JV. It was addressed to the Newbury address. On 30 October 2000, the JV replied by letter, this time sent as from the JV but from H & G's Gateshead address. It confirmed acceptance of the terms of the letter of intent. Mr Pieter van Oord from Newbury wrote on 11 December 2000 to Mr O'Toole suggesting formalities for the contract between the parties.
26. It appears that P&O European Ferries had entered into an agreement with Mostyn. In November 2000, there was correspondence in connection with a payment guarantee between P&O and the JV, and between Mouchel and the JV, at the Newbury address
27. An initial project meeting in respect of the outer channel dredging and marine works contracts was held on 8 November 2000. Representatives of Mostyn, Mouchel and the JV attended. The minutes record as follows.

"5. [Mouchel] will deal with all matters of a contractual or technical nature with

its Resident Engineer kept fully informed. All correspondence to the Engineer shall be marked for the attention of Richard Upton with copies sent to Howard Secker. The Harbour Master at the Port of Mostyn shall be contacted on all issues related to ship movements and navigation. A meeting shall be arranged on site to discuss and confirm arrangements for storm anchorage etc. [Mostyn] stated that its operations shall not be interfered with in any way and the [JV] must work around the activities in the Port.

Letters and faxes etc. addressed to the [JV] shall be made for the attention of the respective project managers for the two contracts, with those items for Andy Barker sent to H & G 's offices in Morecambe until he is located on site. Correspondence on the subject of the payment guarantee shall be addressed to Mr. Pieter van Oord at Van Oord's offices in Newbury. Mostyn's Managing Director asked to be copied only selected items of correspondence that concern him. P&O's Ports Engineer wishes to see all communications incoming and outgoing concerning the contracts. "

28. During late 2000 Mouchel and Van Oord, from Newbury, corresponded about a payment guarantee.
29. In November 2000, the JV, from Morecambe, corresponded with Mott MacDonald and Mouchel concerning technical matters.
30. Work on the project commenced in November 2000 and on site in January 2001. The JV maintained an office on site, housed in portacabins, until the site was demobilised in May 2002. Site meetings habitually took place at the site. The portacabins were cramped so meetings were generally held in Mostyn's offices.
31. By letter dated 7 December 2000, Mr Pieter van Oord, on Van Oord notepaper from Newbury, sent Mostyn a copy of the JV agreement. The letter was marked for the attention of Mr O'Toole. Mr Barker sent Mouchel a copy of the JV agreement on 25 July 2001. Mr O'Toole's evidence (which I accept) was that he asked for a

copy of the JV agreement only because Mostyn's bankers had requested a copy. Mr O'Toole himself did not read the JV agreement. It was not suggested, and it would be far fetched to consider, that Mr O'Toole should have taken notice of the contents of Article 19 of the JV agreement, which dealt with service of notices by one JV member on another.

32. In December 2000, the JV began to send out correspondence from the site. The JV wrote from site to Mouchel on 4 December 2000 concerning the payment guarantee.
33. Someone (it is not clear who) notified the marine work project under the CDM Regulations on 11 December 2000. The document containing that notification identified the principal contractor as the JV, and gave the Newbury address.
34. Articles 3.11 to 3.15 of the JV agreement dealt with the procedure for payment. In short, each party had to submit to the Project Manager a written statement identifying the part of the works package price which that party considered to be due. The Project Manager then made the application. The JV then paid, and the Project Manager issued a certificate of apportionment. In his witness statement Mr Athmer said that Van Oord had full control of the JV bank account. But that was not an accurate description, as he eventually accepted in cross examination. As required by the JV agreement, the JV bank account was controlled by both parties. Payments were made into the JV account, but both parties had to agree how money was to be paid out. Each of Van Oord and H & G paid their own subcontractors and suppliers. The only JV payments, as such, which Mr Athmer could identify were those made to claims consultants and legal advisers (presumably in relation to claims arising under contracts) and none in relation to the work on the contract.
35. The JV made its first application for payment in December 2000. Interim payments were habitually dealt with as follows. The JV sent to Mouchel an application for payment. Both the application and the covering letter were sent from either Morecambe or the site. Mouchel then issued a payment certificate. Those certificates were addressed to the JV at the Newbury address. Mr Upton's evidence,

which was not challenged by the JV, was that the first contract awarded to the JV was the outer channel dredging contract; that contract was let in about October 2000. At that time, Mouchel dealt exclusively with Van Oord personnel, at Newbury. Mouchel addressed certificates for the outer channel dredging contract to Newbury. They appear to have used the certificate in the outer channel dredging contract as a template for the certificate used in the marine works contract. Accordingly, the Newbury address appeared on the certificates issued in the marine works contract. It is not clear whether any thought was given as to what might be the correct address for the certificate in the marine works contract. After Mouchel had issued a certificate, the JV raised an invoice. The address on the invoice was Morecambe. The first two payments went directly to Van Oord's bank account because the JV account had by then not been established. Thereafter monies were paid to the JV account, which was also held at Barclays Bank, Newbury.

36. Barclays Bank Plc issued a bond on 14 December 2000 in favour of Mostyn. In both the text of the bond and the schedule to it the contractor was identified, erroneously, as Van Oor; the Newbury address was shown. There was no evidence as to how that document came to be prepared in that way.
37. The JV prepared a Health & Safety Plan in January 2001. This identified the principal contractor as the JV and gave the Newbury address.
38. In the early months of 2001, the JV wrote from Morecambe to Mouchel concerning soil investigation, including questions concerning the cost of such work.
39. On 5 February 2001 Mr. Smith, writing from the Gateshead address, sent to Mostyn the payment guarantee special conditions signed by Van Oord and H & G. That agreement simply records the respective registered offices for each of Van Oord and H & G.
40. On 10 July 2001, the JV, from the site office, wrote to Mouchel concerning

proposed collateral warranties. They enclosed drafts. These described the JV as being of the Newbury address. There is no evidence as to who drafted these documents.

41. On 20 July 2001, Mr Barker wrote, from site, to Mouchel to give notice under Clause 44, in relation to a claim for an extension of time and the JV's claim for additional payment.
42. On 9 August 2001, Mr Barker wrote, from site, to Mostyn with respect to formalities concerning the contract, and asking Mostyn to sign a contract document which Mr Barker enclosed.
43. By letter dated 4 October 2001, Mr Barker, writing from the Morecambe address, sent to Mouchel a signed Certificate of Indemnity given, by the JV in relation to payment for materials to be supplied for the project. The Certificate of Indemnity itself gives the Newbury and Gateshead addresses as, respectively, the registered offices of Van Oord and H & G, but gives the Morecambe address as the address of the JV.
44. In February 2002, Mr Athmer and Mr O'Toole spoke by telephone about disposal of material. Mr Athmer was at the Newbury office at the time.
45. By letter dated 26 April 2002, from site, Mr Barker wrote to the Engineer to give notice that the work was substantially complete. This was prepared on notepaper of the site office but was sent by fax with a fax cover sheet from the Morecambe address. By letter dated 5 July 2002, the Engineer sent the Certificate of Substantial Completion (as at 28 June 2002) to the JV at the Morecambe address.
46. On 30 April 2002 Mr. Barker wrote from the site office to Mr. O'Toole of Mostyn in relation to recovery of liquidated damages.

47. On 3 May 2002 Mr. Barker wrote from the Morecambe address to the Engineer in relation to settlement to the paved area.
48. The JV gave a number of contractual notifications to Mouchel Initially, and until the site office closed in May 2002, the JV wrote to the Engineer mainly from site. For example, by letters of 17 May, 30 August, 12 September, 5 November and 10 December 2001. Mr Barker as Project Manager for the JV wrote from site to give Mouchel formal notification in relation to various Clause 12 matters (ground conditions) and Mouchel's grant of an extension of time. Mr Barker sent one fax dated 9 August 2001, from the Morecambe office, concerning such matters.
49. The site office closed in May 2002. Thereafter, work was undertaken from Morecambe. From May 2002, Mr Barker wrote to the Engineer from the Morecambe address. The first such letter was dated 15 May 2002. Thereafter, the JV conducted all correspondence concerning claims, including Clause 12 claims, from the Morecambe office. From this time, Mr O'Donnell's involvement increased. He sent out what appears from the correspondence to be substantial paperwork in connection with the JV's claims. As Mr Smith confirmed, and as is clear from the documents, Mr O'Donnell co-ordinated claims under the contract on behalf of the JV. The correspondence regarding such matters which passed through his hands comprised the full range of letters and notices associated with the making notifying and pursuit of claims under the contract and requests for further payment. These included claims for variations, extensions of time and further payment and included correspondence concerning the treatment of claims, quality of work, including remedial work, and the like. The volume of what one might characterise as contractual correspondence from this time until at least April 2003 is substantial Mr O'Donnell conducted all such correspondence on behalf of the JV. He wrote, for example, criticising the Engineer for delay in dealing with the JV's claims. He liaised with James R Knowles, claims consultants in the construction and engineering industries ("JRK") in Liverpool. Mr O'Donnell

conducted all of this correspondence exclusively from the Morecambe office.

50. During this period, the JV also conducted from Morecambe business concerning remedial and defects liability period work. For example, the JV appears to have commissioned a GPR survey from Geotec Surveys Ltd. Their report, dated 13 June 2002, is addressed to the JV at Morecambe. Some details of the contractual correspondence follow.
51. By letter dated 16 May 2002, Mr O'Donnell wrote, from Morecambe, to Mouchel requesting certification of additional money. He sent Mouchel a detailed document setting out various claims by the JV for extension of time and further payment.
52. On 21 May 2002, Mr O'Donnell wrote to Mouchel seeking a variation order in relation to a survey.
53. By a fax dated 27 May 2002, Mr Thornhill of Mouchel (the Engineer's representative) wrote to Mr O'Donnell in Morecambe. The fax was copied to Mr O'Toole, Mr Thornhill stated. *I am aware that four letters dated 24 May 2002 were sent to [Mr] Lohn at [West Byfleet] The letters are on your Mostyn [ie site] office headed paper and signed by C. F. O'Donnell. You did not forward copies to Mouchel at the Mostyn site. Please advise to whom and what address we should be sending any correspondence for the JV. Please ensure that in future all your correspondence is copied to the Mouchel Engineer's Representative who is still resident at the Mostyn site.* Mr O'Donnell replied, from Morecambe, on the same day. He sent his reply to Mouchel both at site and at Mouchel's office at West Byfleet, Stating: *"Thank you for your fax of today's date. We apologise for not copying you the correspondence sent to the Engineer on the 24 May 2002 and enclose, herewith copies for your reference. We will continue to copy letters to Engineer's Representative while you are resident at Mostyn. With regard to correspondence for the JV, would you please, address all future*

correspondence to H & G's regional office at Morecambe and marked for the attention of [Mr O'Donnell]. By a copy of this letter to the Engineer we would also request that any future correspondence to us from his office be addressed accordingly."

54. By letter of 2 July 2002, Mr O'Donnell wrote concerning payment to the JV, the JVs claim for an extension of time, certificate of completion for the work, some remedial work and the JV's request to treat some drainage work as a variation.
55. On 5 July 2002, the Engineer sent to the JV at Morecambe a substantial completion certificate in respect of the marine work contract.
56. On 5 July 2002, Mr Barker for the JV, from Morecambe, sent Mouchel an application by the JV for payment.
57. By letter dated 10 July 2002 to the JV at Morecambe, the Engineer notified his determination of the JV's entitlement to an extension of time for various sections of the work.
58. On 1 August, the Engineer wrote a detailed letter to the JV at Morecambe dealing with a Clause 12 claim.
59. By letter dated 5 August 2002, from the Morecambe address, Mr O'Donnell suggested a meeting with Mr. Lohn at the Engineer's offices in West Byfleet. He was to be accompanied by Mr. Roebuck (H & G) and Mr. Athmer (by then managing director of Van Oord).
60. By letter of 8 August 2002, from Morecambe, Mr. O'Donnell argued the JV's case concerning rules of construction and interpretation of the contract. He criticised the Engineer for his failure to have regard to the House of Lords' decisions in *Investors. Compensation Scheme v West Bromwich Building Society* and in *The Antaios*. He ended his letter by noting that the JV would be

taking "*appropriate action to pursue our entitlements*" in respect of an alleged variation and what Mr O'Donnell referred to as Mostyn's breach of contract.

61. By letter dated 15 August 2002 to the Engineer, writing on site notepaper, but apparently from the Morecambe office, Mr. O'Donnell sought a Clause 66 decision in relation to post tender site investigation and the JV's obligations in relation to the design of permanent and temporary work. This letter was marked as being copied to Mostyn. By a second letter of the same date, again from the site office but apparently from Morecambe, Mr O'Donnell asked the Engineer to review his grant of an extension of time. Mr O'Donnell copied that letter to Mostyn.
62. Mr. O'Donnell sent further claims from the Morecambe office. For example, by letter dated 20 September 2002, Mr O'Donnell sent the Engineer particulars of the JV's extension of time claim, and by letter of 25 September he sent evidence in relation to another of the JV's claims. On 23 September 2002, the Engineer sent the JV, at Morecambe, his Clause 66 Decision on site investigation. The Engineer copied that to Mostyn. Mr O'Donnell replied from Morecambe on 26 September to the Engineer's response of 23 September. The JV sent details to substantiate its claims. The Engineer responded in detail.
63. The Engineer sent interim payment certificate number 35, dated 17 September 2002, to the JV at Morecambe. He copied that to Mostyn.
64. On 14 November 2002, Mr O'Donnell, from Morecambe, sent the Engineer a revision of one of the JV's claims. On 15 November 2002, Mr O'Donnell for the JV wrote to the Engineer from the Morecambe address giving a Notice of Dispute. He did copy that letter to Mostyn. On 21 November Mr O'Donnell wrote, from Morecambe, to the Engineer concerning the issue of a payment certificate.
65. The JV's notice to adjudicate dated 21 November 2002 gave the address of the

JV as the Newbury address. However, Mr O'Donnell wrote to Mouchel from the Morecambe address raising queries as to the effect of the adjudicator's decision.

66. By letter dated 24 January 2003, Mr O'Donnell, from Morecambe, wrote to the Engineer stating that the JV was assembling details of a claim for an extension of time, following the decision of the adjudicator. He copied that letter to Mostyn. Further correspondence ensued, from Morecambe, regarding contractual issues including a payment application, the PV's application for an extension of time, Clause 66 decisions, out work and a survey of the riverside berth. The latest letter I have seen, before the NR, is from the Engineer to the JV at Morecambe dated 27 March 2003, concerning one of the Clause 66 decisions.

Events in April 2003

67. Documents disclosed by direction of the court made on the day of the hearing are revealing. To understand their significance it is necessary to explain that the JV had retained JRK to advise and assist them, apparently (though I have no detail) in connection with adjudication proceedings in the context of the marine contract. The JV instructed Messrs Knowles Solicitors in connection with these proceedings. Messrs Knowles' notepaper describes these as being a solicitors' practice tied to JRK.
68. The events in mid-April 2003 must be examined closely. This was the Easter period: Good Friday fell on Friday 18 April and Easter Monday on 21 April.
69. Messrs Hammonds, Mostyn's solicitors drafted the text of the NR and sent the draft to Mostyn. At trial, Mr O'Toole said that he believed that Hammonds had included the Morecambe address on the draft. However, documents disclosed in submissions after trial suggest that Mr O'Toole was wrong on that point: Hammonds' draft did not contain an address for Mostyn. Hammonds indicated to Mostyn that the NR should be saved at the JV's principal place of business which, Hammonds assumed will be the

Morecambe address". Someone at Mostyn arranged for the letter to be typed on Mostyn headed notepaper and, in doing so, included the Morecambe address. Mr O'Toole was in hospital for about a week from 9 April. He then spent a few days recuperating at home. Mr O'Toole continued to do some work during that time, from hospital and then from home. Mr Owen of Mostyn visited Mr O'Toole in hospital and at home, bringing him papers, dealing with instructions and so on. Over the weekend of 12/13 April, Mr Owen took the NR to Mr O'Toole in hospital so that Mr O'Toole could sign the document. Mr O'Toole noted the incorrect reference to ACS in Van Oord's name, but decided not to correct the letter. He signed it. At some point the NR was put in the post.

70. It is common ground that the NR was received by post at the Morecambe office on Wednesday 16 April 2003. Documents disclosed only at the hearing (and pursuant to court rulings given on the first day of the hearing) give some indication as to what happened within the JV after the NR was received at Morecambe on Wednesday 16 April. The NR was dealt with by Miss S McDaid (Mr O'Donnell's secretary) and Mr Reilly (H & G's area manager). The court heard no evidence from Miss McDaid, Mr O'Donnell or Mr Reilly. In a statement provided to Mostyn and the court on the second day of the hearing, Miss McDaid stated that at 1119 hrs on 16 April, she faxed a copy of the NR to JRK at their office in Warrington.
71. During the morning of 16 April a conference was taking place at Atkin Chambers with Mr Burr of Counsel, who has acted for the JV in connection with the adjudication and in these proceedings. I understand that those attending the conference included Mr Athmer, Mr Clarke (senior consultant at JRK) Mr O'Donnell and Mr Ford; Mr Ford may have been an H & G employee reporting to the H & G construction manager. Mr Athmer's evidence was that he left the conference at Atkins Chambers shortly after 1100 hrs. It is clear from a fax log disclosed at the hearing that a two-page fax was sent to Aden Chambers' fax number at 1124 hrs on 16 April. Miss

McDaid does not say in her statement to whom the fax, sent to Atkins chambers, was addressed, eg whether to (1) Mr Burr or his clerk (2) JRK or (3) an employee or director of either Van Oord or H & G and whether the fax included a copy of the NR. Since the hearing, each party has requested further disclosure of the other. I am told that the fax cover sheet was addressed to Mr Burrows (Mr Burr's clerk) and the document annexed to the cover sheet was the date-stamped NR. Mr Burrows is said to believe that the NR was taken by hand to the conference with Mr Burr. This is said to have happened shortly after Mr Athmer left the conference. I have seen no direct evidence to support these assertions. It appears that the NR was available to the conference: in his closing submission, Mr Burr states that the *"Morecambe office quite properly considered the purported notice to be relevant to a conference which its representatives and JRK were attending at Atkin Chambers on 16 April to obtain advice from Counsel as to the further pursuit of the [JV's] claims– "*

72. (A fax sent from JRK in Warrington to Atkin Chambers at 1209hrs on 16 April is said not to have been a copy of the NR but instead a different document altogether and one in respect of which the JV claim privilege. I have invited the parties to involve the assistance of the court in dealing with any outstanding issue concerning privilege in documents. Neither party has sought assistance from the court)
73. On the morning of 17 April 2003 Mr O'Donnell attended at the Morecambe office for about an hour. The JV revealed that information in response to a request for further information. That admission is one of the elements which cast serious doubt on the veracity of a letter of 22 April 2003 which Mr McDonnell signed, and to which I refer in more detail below.
74. On the afternoon of 17 April, Miss McDaid sent a fax to Mr Smith at H & G in Gateshead, to Mr Athmer at Newbury and to Mr Clarke of JRK at home. The covering fax sheet reads:

"Following draft approval by Andrew Burr earlier this afternoon, please find herewith proposed response to the Port of Mostyn's letter which will be sent by recorded delivery on Tuesday, 22 April 2003"

The fax is signed by Miss McDaid pp for Mr O'Donnell.

75. A draft letter was annexed to that fax. The draft is dated 22 April 2003. It was to be signed by Mr O'Donnell. It reads as follows:

"Following my absence from the office for the second half of last week, I have today returned to find amongst other papers your letter dated 13 April 2003, marked for my attention. My secretary has stamped your letter as received here on 16 April 2003.

I return your letter herewith and do not accept its content as a valid notice to refer the decision of the adjudicator, Professor John Uff CBE QC FR Eng given on 17 January 2003, to arbitration.

My reasons for so doing are as follows:

You have inaccurately addressed your letter to a joint venture which is not the contracting party and, furthermore, does not exist;

In breach of Clause 68 of your contract with the Van Oord ACZ/Harbour and General Joint Venture, you have failed to deliver a written notice to the Contractor's principal place of business, or registered office.

In view of the fact that the adjudication decision was delivered on 17 January 2003 and no valid notice to refer has been received by the Joint Venture within the timescale provided for in Clause 66(9)(b). the adjudication decision is now

final and binding. "

76. That is the text of the letter which was indeed dated 22 April, signed by Mr O'Donnell and posted from Morecambe on 22 April. In the light of the documents disclosed during the hearing, that loner is misleading and untruthful.
77. The first sentence of the letter gives the impression that Mr O'Donnell was not in his office at the end of the previous week (re Ash Wednesday and Maundy Thursday) and returned to his office only on 22 April. Yet he had attended at his office on the Thursday. The letter gives the impression that Mr McDonnell saw or became aware of the NR for the first time on 22 April. That cannot be so. The NR must have been seen by those who were at the conference at the time the fax was delivered to Atkin Chambers. In my judgment, it is inconceivable that Mr O'Donnell did not see it on 16 April when the NR was faxed to Atkan Chambers while he was in conference with Mr Burr. In any event, Mr O'Donnell must have seen it at the latest when he attended at his office on the morning of 17 April.
78. The reply to the NR had been drafted by the afternoon of 17 April, when it was faxed to Gateshead, Newbury and to Mr Clarke of JRK at home. Mr Burr had approved that draft response. Plainly, a response to the NR cannot have been drafted unless the JV knew that the NR had been received and, more significantly, had the text of the NR available.
79. Mr Athmer's evidence was that it was policy that documents between the two JV companies be sent by post. However, on 17 April Miss McDaid faxed to senior JV personnel the draft reply to the NR. It seemed to me inconsistent that although the draft reply had been faxed, the NR itself apparently had not. Mr Athmer's explanation was that only important or urgent documents needed to be faxed. That is wholly inconsistent; if the draft reply to the NR were so urgent as to merit being faxed, then all the more would the NR itself be so important or urgent as to merit being faxed by Morecambe to Newbury. After all, there were significant financial consequences if the adjudicator's decision became binding I simply do not

accept Mr Athmer's evidence on this point.

80. However, and I believe significantly, a copy of the NR appears not to have been faxed from Morecambe to Newbury on 16 or 17 April: there is no record on the Morecambe fax log to suggest that the NR was faxed from Morecambe to Newbury on either of those days. The JV did fax it to JRK in Warrington on 16 April. I have not yet seen any evidence as to whether or not JRK faxed it to Newbury before close of business on 17 April. For the time being, I assume that there is no such evidence and, on that basis, I conclude that the NR was not actually received at Newbury until 22 April.
81. Mr Athmer's evidence is that he had left the conference on 16 April at about 1100, to go shopping; then he returned to Newbury where he went to the dentist; he did not return to his office that day. He said that he was out of his office in Newbury all day 17 April. He did not see the NR nor was he aware of it until he returned to his office on Tuesday, 22 April after the Easter break. Generally, I had little confidence in Mr Athmer's evidence. For example, in his witness statement, he gave a misleading account of the JV banking arrangements. The true picture emerged only during cross examination, and even then he was unwilling to clarify matters. He deposed to the truth of the JV's answers to Mostyn's questions. These answers were not as full and frank as one would expect. Mr Athmer was evasive on the question of e-mails from Newbury (none of which has been disclosed). I did not accept his evidence with respect to the supposed policy for sending documents between the JV partners. He was unable to acknowledge that the letter of 22 April was misleading or untrue in a number of respects, although he must have appreciated, when he looked at the NR and the proposed draft reply when he returned to his office on 22 April, that the 22 April letter was misleading and untrue. Notwithstanding that background, I believe that Mr Athmer probably did not see the NR until 22 April.
82. Although the NR was stamped as received at Morecambe on 16 April, and was posted to Newbury, it did not reach Newbury by post until 22 April. I am told that

Miss McDaid was responsible for posting it. She has not given evidence at court. Her statement does not explain what steps she took to post the document on 16 April. Had the NR been posted to Newbury by first class post on 16 April, the probability is that it would have been received at Newbury on 17 April. Given the JV's behaviour over this matter, in my judgment the inference to be drawn from the evidence is that the JV evolved a strategy whereby they could claim that the NR had not reached Newbury until after 17 April. To effect this, the JV ensured that the NR was not physically received at Newbury until after close of business on 17 April. As Mr Athmer had departed from the conference at Atkin Chambers by 1100, it could be said that he had not seen the NR on 16 April. He was not at Newbury on 17 April. Steps were taken to see that the NR did not catch the post on 16 April, so that it would not be delivered at Newbury until after 17 April. In short, the JV acted deliberately to delay receipt at the Newbury office until after 17 April. I conclude that the NR was not received at Newbury as a result of a deliberate strategy devised to keep the document physically away from Newbury until after time for service had expired.

Where was the JV's principal place of business at material times?

83. The evidence of Mr O'Toole (MD of Mostyn) is that he did not give thought to whether the principal place of business was located at Newbury or Morecambe. That, however, does not assist me. My task is to determine objectively where the principal place of business was in April 2003.
84. The authorities make it clear that the court should give effect to the arrangements which the parties have agreed as to service. *Harbour & General Works Limited v Environmental Agency* [1999] Build LR 409 CA. for example, makes clear that the court must have regard and give effect to party autonomy.
85. The JV relies on a number of factors and documents in support of its contention that the principal place of business was Newbury:

85.1 They rely on the following provisions in the JV agreement, namely that Van Oord was the Joint Venture Leader and Van Oord's address is shown as Newbury. In my judgment neither of these is relevant. Mostyn was not a party to the JV agreement, and as I have found, Mr O'Toole did not read it. However, Mr Athmer's evidence on this point is significant. His evidence was that, as Van Oord was the JV leader, the NR should have been served on Van Oord at Newbury. He said that he felt that the relevant point in time was when he saw the document. Indeed, Mr Athmer appeared to believe that a notice had to come to his attention as managing director of the JV leader. Of course, that was not necessary. What was required was that the NR be served at the JV's principal place of business. It is clear from the JV's submissions and Mr Athmer's evidence that Van Oord considered itself to be the leading partner in the JV; its registered office is at Newbury, so it follows that the JV's principal place of business was Newbury. That, however, does not follow. The question is what, objectively, was the principal place of business of the JV in April 2003.

85.2 The JV rely on the payment guarantee agreement in which Van Oord's Newbury office is shown. However, that document does not assist me, as it also shows H & G with their office in Gateshead.

85.3 The JV rely on the wording in the minutes of the meeting on 8 November 2000 which I have quoted. In my judgment that wording does not assist the JV. The minute in question is not confined to communications between the JV and Mouchel. The wording distinguishes between Mouchel's various roles.

85.4 The JV rely on the fact that its communications with Mostyn were at the latter's registered office. That does not assist me at all. Mostyn had only one office. The JV had no registered office. There is no evidence that Mostyn was informed as Article 19 required. The requirement in Article 19 for notices to be served at Van Oord's registered office (if it is intended that that should apply to notices from Mostyn) is inconsistent with the requirements for service of documents contained in the Mostyn JV contract.

85.5 The JV rely on the facts that their tender and appendices gave the JV address as Newbury; that Mouchel's letter of intent was addressed to the JV at Newbury; that the schedule to the bond of 14 December 2000 showed the Newbury address; that the HSE notification and safety plan showed the principal place of business as Newbury; that the draft collateral warranties identified the contractor's address as Newbury. However, all these communications relate to the early stages of the project. The Mostyn: JV contract does not show the JV principal place of business as Newbury; in that agreement, the Newbury address is shown for Van Oord and the Gateshead address for H & G. The bond does not assist: this document was prepared by a bank and contains a number of errors which lead me to have little confidence in its accuracy.

85.6 The JV rely on the correspondence in November and December 2000; on the proposition that payment applications, claims and clause 66 decisions were to be dealt with between site office and the Engineer; on the fact that it was only after demobilisation of the site office that the JV advised the Engineer (and not Mostyn) that communication would come from Morecambe.

85.7 The JV rely on the interim payment certificates which Mouchel sent to Mostyn and to P&O, who apparently paid them on behalf of Mostyn. These show the Newbury address. In my judgment the certificates must not be considered in isolation from the JV's applications for payment (from site then, after demobilisation of the site office, from Morecambe) and the JV's invoices which were habitually sent from site or Morecambe. I have already set out my findings as to the choice of the Newbury address on the certificates

85.8 The JV rely on the fact that in the adjudication proceedings the Newbury address was shown as the address for the JV. That carries some weight, but against that I note that Mr O'Donnell corresponded with Mouchel about some consequences of the adjudicator's decision.

85.9 Mr O'Toole gave no thought at all to where the JV's principal place of business was.

85.10 The contract required notices to be served at the principal place of business. These comprised notice of dispute (clause 66(3)) notice of conciliation (clause 66(5)) and notice of adjudication (clause 66(6)). Mr Burr submits that a distinction must be made between these and other correspondence. That submission might carry more weight if there had been any evidence of any control from Newbury of legal or administrative matters, between May 2002 and April 2003 there was none.

85.11 The JV did not expressly inform Mostyn that Morecambe was the principal place of business. That is so, but equally the JV did not inform Mostyn that they were to treat Newbury as the principal place of business.

85.12 Even if Morecambe had sent the NR to Newbury, this would not have constituted service of a notice by Mostyn as clause 68(l) requires.

86. Mr Burr submits that, after May 2002, the Morecambe premises were being treated simply as a substitute for the site office which no longer existed, not as a new principal place of business. It is common for businesses to run different aspects of their operations from different offices. Newbury was and remained the principal place of business. Even if all that was undertaken at Newbury was administrative support, the Newbury address nevertheless remained the JV's principal place of business. Mr Burr submits that potential legal problems and major decisions related to the JV business were dealt with at Newbury. Selected other business (eg day-to-day running of the project) was left to the site office, I cannot accept those submissions. They ignore the significance of the work undertaken from the Morecambe office and the fact that there is no evidence of any legal or administrative activity conducted from Newbury between at least May 2002 and April 2003. To ignore such matters would be artificial, in circumstances where, after May 2002 until at least April 2003, so much of the JV's business appears to have been conducted from the

Morecambe office. Mr Burr submits that the site office could never have been the JV's principal place of business, because it was housed in temporary portacabins. I do not see why not. The business from early 2002 until May 2002 was that of undertaking the work the subject of the contract. That was being conducted from site. There is no reason why a principal place of business should be housed in permanent rather than temporary accommodation.

87. Detailed examination of the documents reveals that, initially, Van Oord (from Newbury) were involved with the tender and preparation for the contract. Subsequently, the focus shifted to the site office while work was being undertaken. Finally, the focus shifted to Morecambe from where Mr O'Donnell ran a significant remaining aspect of the JV's business, namely the preparation and pursuit of claims. After demobilisation of the site office in May 2002, the only outstanding matters were the JV claims, maintenance work and work required during the defects liability period. Of these, from the correspondence available to me, it appears that the processing of claims was a substantial and significant part of the JV's activity from May 2002 until at least April 2003. Mostyn was aware of this because Mouchel had kept Mostyn informed, so Mostyn would have observed that all correspondence of a contractual nature emanated from Morecambe. There was nothing to indicate to Mostyn that (as Mr Burr submits) potential legal problems and major decisions were dealt with at Newbury. To the contrary, the clear picture from the correspondence was that such matters were being dealt with from Morecambe. This very strong view is strengthened by the fact that Mr O'Donnell's secretary sent a copy of the NR to JRK and Atkin Chambers shortly after receipt. Had Newbury been the office from which legal and major issues were dealt with, she would no doubt have sent the NR to Newbury for that office to have dealt with. The fact that the JV strategy was devised in Mr Athmer's absence and apparently without his knowledge indicates that it was not necessary that he be involved personally, nor was it necessary for the Newbury office to be involved, in the handling of an issue as important as the question of service of a notice to refer to arbitration

88. Mr Burr draws my attention to *Central Provident Fund Board v Ho Bock Lee* (1981) 17 BLR 28 in which the Court of Appeal approved the judgment in *Eriksson v Whalley* [1971] 1 NSWLR 397, that the stipulation of a method of service was intended for the purpose of avoiding subsidiary disputes between the parties to the contract as to whether the notice was given or received. These two cases, however, concerned the method not place of service. Plainly, certainty is desirable, to help the parties avoid difficulties of the sort which have arisen here. But the difficulty here is in identifying the place for service, not the method by which service is to be effected. Had they wished to do so, the parties could have achieved greater certainty by identifying with more precision which address was to be used for service. Indeed the JV agreement required Mostyn so to be informed. But that was not done.
89. I conclude that, so far as Mostyn were concerned; the JV's principal place of business was initially at Newbury. It then moved to site. Between May 2002 and April 2003, the JV's business consisted mainly of the notification and pursuit of claims; correspondence concerning dealing with defects and maintenance appears to be much less significant. Mr O'Donnell dealt with all contractual matters from Morecambe. The Engineer served his decisions at Morecambe. The JV had not told Mostyn to serve notices at Newbury. In my judgment, after demobilisation of site and until at least April 2003, the JV's principal place of business was Morecambe. Accordingly, Mostyn were not in breach of contract by sending the NR to Morecambe.

The significance of "Van Oord ACS"

90. The second limb of the JV's case is that service was not effected because the NR was incorrectly addressed to "Van Oord ACS/Harbour & General JV" when Van Oord's company name includes the Letters ACZ, not ACS. In evidence, Mr Athmer said that his reaction on seeing the letter on 22 April was one of mild irritation to receive a letter posted at the last minute and which was not served at Newbury where the JV had its business and where it should

have been served on Van Oord as leader of the JV. Mr Athmer's irritation was, I believe, caused largely because, it appears, he had decided to release funds before expiry of the three-month limit, and before the NR was served; and he was also no doubt irritated because he had hoped that the adjudicator's decision would stand as conclusive.

91. It is not suggested that Mr Athmer was confused as to the identity of the companies to which the NR was addressed. It is not suggested that there was another company bearing the name Van Oord ACS with which Van Oord ACZ might be confused. It is not suggested that Mr Athmer did not understand that the NR was intended for the JV
92. It is not, for example, suggested that the NR would be invalid because it had not been addressed to Van Oord ACZ Limited and Harbour & General Works Limited Joint Venture (the full names used by the JV in these proceedings and so one assumes, names which the JV believe to be correct). The only objection is to the use of ACS instead of ACZ.
93. The letters ACZ stand for Aaneemings Combinatie Zinkwerken. Mr Burr suggests that there was room for confusion between the correct name, ACZ, and the name used, ACS. He refers to the existence of companies which have the initials ACS as part of their name, including a company said to be Spain's fourth largest construction company, namely ACS: Actividades de Construction y Servicios SA. Yet there is no suggestion that there was any actual confusion here, nor any possibility of any confusion between Van Oord and a Spanish company. The submission is fanciful.
94. To articulate the point, namely that the notice was invalid because of a mistake in one letter in the name of one of the companies, is to reveal its absurdity. It was not addressed to a 'non-existent' company; there was a one letter mistake in the spelling of the name of the company. The misdescription of the company as ACS not ACZ was wholly immaterial. It

would be absurd to conclude that service had not been effected because of such a misdescription.

Conclusion as to service

95. Mostyn has persuaded me that the NR was validly served on the JV on 16 April 2003 in compliance with clauses 69(l) and 66(9)(b). The NR was served within the three-month time limit as it reached the JV's principal place of business as at April 2003, and the single letter mistake in the name of one of the two JV companies was wholly immaterial.

Estoppel

96. In the circumstances, there is no need for me to deal with the question whether the JV is estopped from denying that the Morecambe office was the principal place of business

Application under s 12 Arbitration Act 1996

97. Although I have concluded that the NR was validly served, it may nevertheless be helpful if deal with Mostyn's application under section 12
98. Section 12(1) Arbitration Act 1996 provides that where an arbitration agreement to refer disputes to arbitration provides that a claim shall be barred or a party's right extinguished unless the party takes some step within a time fixed by the agreement, then the court may extend the time for taking such step. Section 12(3) provides that the court shall make an order extending such time only if satisfied either (a) that the circumstances are such as, were outside then reasonable contemplation of the parties when they agreed the provision in question and that it would be just to extend the time, or (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

99. Mostyn's solicitors drafted the NR for Mostyn to send to the JV. The solicitors draft did not show the address to which the NR was to be sent. The NR was dated 13 April but must have been posted some days later.
100. The JV appear to rely on the fact that Mostyn's solicitors drafted the witness statement for Mr O'Toole. It is not clear to me what conclusions I am to draw from this or how this is relevant to the issues here.
101. Mr O'Toole confirmed in evidence that he was aware that there was a three-month time limit. He had experience of the ICE 6th edition and so must have been aware of the consequences of failing to serve a notice to refer within the time limit. The only explanation as to why Mostyn waited until the last moment to serve the NR was from Mr O'Toole, who said that it was normal procedure to make full use of time. Mr O'Toole confirmed that he had first seen the adjudicator's decision soon after it had been given in January 2003. Yet Mostyn waited until the end of the three-month period before the NR. The JV's case is that Mostyn and / or its advisers are the authors of their misfortune; the time wait was not met by reason of their conduct they left it until the last minute to serve the NR.
102. Although it was open to Mostyn to wait until almost the last minute before service of a notice to refer, by doing so they ran the risk that they would miss the time limit. In *Harbour & General v Environment Agency* Waller LJ quoted a passage fm the judgment of Colman J at first instance, and with which Waller LJ agreed

"Accordingly, the approach to the construction of section 12 has, in my judgment, to start from the assumption that when the parties agreed the time-bar they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in the ordinary course of business the claim would be time-barred unless the conduct of the other party made it unjust that it should. In this connection, it would appear quite impossible to characterise a negligent omission to comply

with the time-bar, however little delay were involved, as without more outside their mutual contemplation. Narrowly overlooking a time-bar due to an administrative oversight is far from being so uncommon as to be treated as beyond the parties' contemplation. The process of identifying and evaluating in the balance the disparity between the prejudice to the claimant on the one hand and the degree of fault on his part on the other will not normally be a relevant exercise in determining whether there were circumstances beyond the contemplation of the parties. The circumstance in question must in each case include those which caused or at least significantly contributed to the claimant's failure to comply with the time-bar. "

103. Mr Burr relies on the following passage in the judgment of Waller LJ in *Harbour & General v Environment Agency*: "Although one could not reasonably have contemplated that the contractor would fail properly to read the provisions of Clause 66, that failure would not trigger an entitlement to extension of time; the object of section 12 (3)(a) is to allow an extension in circumstances when the parties would not reasonably have contemplated them as being acts where the contractual time-bar would apply". It was also found that "the fact[s] that the Employer only informed the contractor that the latter had used the wrong type of notice after the three month period had expired ... were not circumstances triggering the court's power under section 12(3)" *Harbour & General v Environment Agency* is authority for the proposition that there is no obligation whatsoever placed upon a party which is about to gain the benefit of an expiring time limit to draw the attention of his opponent to that fact. Mr Burr submits that, following that case, what is required is something misleading "passing over the line" upon which the opponent is entitled to rely or which is otherwise unfair in a reliance sense. The JV's case is that the circumstances of that case reflect the issues in the current proceedings, so that Mostyn's application under section 12 of the 1996 Act should fail.
- 104 Mr Burr relies also on the commentary on the *Harbour & General v Environment Agency* decision in *The Arbitration Act 1996: A Commentary* by Harris,

Planterose and Tecks (2nd edition), which suggests that where reliance is placed on section 12(3)(b) *"there must be shown some conduct which is proved somehow to have led the claimant to omit to give notice in time. Mere silence on the part of the respondent or failure to alert the claimant to the need to comply with the time-bar cannot make the barring of the claim unjust."* The learned authors refer to *Harbour & General v Environment Agency* as authority for that proposition. It seems to me that the learned authors take too narrow an approach in relation to, section 12 (3)(b). Their commentary suggests that something akin to estoppel is needed. The decision in *Harbour & General v Environment Agency* does not suggest such a restricted reading of the subsection.

- 105 Mr Burr also relies on Mustill and Boyd **Commercial Arbitration 2001 companion Volume** to the **Second Edition** which comments on section 12(3)(b): *"This loosely resembles a test based on promissory estoppel or estoppel by convention, but it is not expressed in the stricter terms applying to either type of estoppel, and would be undesirable to introduce these refinements into the exercise of the court's discretion under this subsection. It is to be observed that injustice alone is not a ground of relief. There must have been conduct on the part of one party which "makes" it unjust to hold the other to the time bar. The conduct in question must, however loosely, be related to the injustice which will arise unless relief is granted. No doubt the looser the connection, the weaker the claim for relief. The concept of injustice, we suggest, is not one-sided. Naturally, any claim for relief will begin with a complaint of injustice to the applicant: but against this must be weighed the powerful consideration that the applicant agreed to a time bar, and that his opponent is prima facie entitled to the benefit of it, unless his conduct has brought about a situation in which there will be greater injustice to the applicant unless relief is granted. It is difficult to avoid taking into account the extent to which the applicant has been at fault when striking this balance."* I respectfully agree with that analysis.
106. I conclude that I must bear in mind the importance of party autonomy and the fact that Mostyn agreed the time limit. Against that background, I must weigh all the

factors on both sides. This includes the fact that Mostyn left service until the end of the three-month limit and has given no good reason for having done so. I must decide whether that is outweighed by the JV's conduct, and the fact that the JV had knowledge of the NR prior to expiry of the time-limit.

107. Both Mr Burr and Mr Darling QC, Counsel for Mostyn, have made submissions with respect to section 12(3)(a). Mr Burr submits that neither of the alternatives in that subsection applies: here, no circumstance has arisen which was outside the reasonable contemplation of the parties when they agreed the three-month time limit, and the JV never intended that Morecambe be the principal place of business.
108. Mr Burr describes the JV's conduct as "commercially savvy". I take that to amount to an acknowledgement by the JV that their conduct in April 2003 is unlikely to be viewed with favour by this court
109. In my judgment this case falls squarely within the provisions of subsection 12(3)(b) given the JV's conduct in April 2003. Before expiry of the three-month limit, the JV knew of the NR. They knew the content. They know the significance of the document. They were in no doubt at all that Mostyn wished to refer matters to arbitration. Senior personnel within the JV knew that a NR had been sent to Morecambe. On 16 April, the NR had been seen at Morecambe, at JRK's office in Warrington and by at least Messrs O'Donnell, Clarke and Ford. By 17 April, when time expired, the fact that the NR had been received at Morecambe on 16 April was known to, at least, Mr O'Donnell, Mr Ford, the JV's legal team and JRK. The text of the NR was available to senior personnel during the morning of 16 April ie a day before expiry of time for service. They had the opportunity to take advice on the document and to prepare a draft response to the NR before time for service had expired. They made a deliberate decision to withhold that response until after time for service had expired. They decided, before expiry of the three-month time limit, to pretend that Mr O'Donnell had not seen the NR until 22 April. The JV caused a response to be sent which was false on its face. The JV took steps to prevent the NR reaching Newbury in normal course. They actively sought to avoid formal service of

a document which they knew had arrived at Morecambe and the text of which they had seen. The JV have not, whether in witness statements or at trial, given a full and frank picture of what happened. They resisted applications for disclosure of documents apparently without having given full consideration to the question whether privilege could be claimed. It was left to Mostyn's legal team to tease out what had happened. The JV have not come to court with open hands. The court can and should take that into account as one of the factors to be weighed in the exercise of the discretion under section 12. In my judgment. It is of relevance when considering whether the JV's "commercially savvy" conduct would make it unjust to hold Mostyn to the strict terms of service of the NR. It is also relevant that while the JV agreement required the JV to notify Mostyn that it required to receive notices at Newbury, the JV failed to give such notification. It would be unfair to allow the JV to take advantage of its own failure. Further, the Morecambe office failed promptly to forward the NR to Newbury, as the JV agreement required. Although it is of course open to the parties to the JV agreement to agree to waive compliance with such obligation, the fact that the JV chose to do so in the circumstances here does them no credit.

110. One purpose of a contractual provision as to service of notices is to ensure that one party knows what the other party wishes to communicate. Here, the day before expiry of the time limit, the JV knew that the NR had arrived and knew its content. The NR had plainly come to the attention of Mr O'Donnell, the very person who was responsible within the JV for service of notices and for dealing with claims and other contractual matters. The NR had come to the attention of the person within the JV who must have had authority to instruct JRK, arrange for the NR to be sent to Mr Burr and to procure that the NR did not reach Newbury until after 17 April.
111. In my judgment, the requirements of Section 12(3)(b), which is concerned with conduct, are fully met here. The JV's conduct was such that it would be unjust to hold Mostyn to the strict terms of the service provision. Accordingly, even if I had not concluded that service had been properly effected, I should

have had no hesitation in concluding that time for service of the NR should be extended until 22 April 2003, the date on which the JV contends that the NR was received at Newbury.

Answers

112. The answers to the questions are therefore:

1. Mostyn did validly serve a notice to refer upon the JV.

2. Had I answered question I in the negative, I should have concluded that the Court should extend until April 2003 time for service of the NR pursuant to section 12(3)(b) Arbitration Act 1996