Neutral Citation Number: [2007] EWHC 2495 (TCC)

Case No: HT-07-191

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 30/07/2007

Before :

THE HONOURABLE MR JUSTICE RAMSEY

- -

Between :

(1) Neil Holloway

(2) Samantha Holloway **Clai**

- and -

Chancery Mead Limited **Defe**

- -

Transcribed from tape by Harry Counsell & Co

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Mr Nigel Jones QC, & Mr Alexander Gould(instructed by Mundays) for the Claimants

Mr Geraint Jones QC (instructed by the Defendant) for the Defendant

Hearing dates: 25th July 2007

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Judgment

Mr Justice Ramsey :

Introduction

1.
These proceedings under part 8 of the CPR were commenced by Mr and Mrs Holloway against Chancery Mead and relate to a proposed arbitration in respect of their purchase of a property known as The Lighthouse, Fairbourne, Cobham, Surrey. Chancery Mead was the developer of the property. Under a contract for sale and purchase of property dated 8 May 2006 (“the Contract”) Chancery Mead agreed, as the Seller, to sell the property to Mr and Mrs Holloway, as the Buyer. The price was £1.95 million and completion took place on 21 July 2006.

2.

Under the Contract, Chancery Mead undertook certain obligations, in particular under clause 20 it agreed to complete the dwelling house in a proper, neat and workmanlike manner, in accordance with certain documents including the technical requirements of the NHBC. Under clause 23 of the Contract, it was provided as follows: “The Seller is entered on the register of the NHBC and undertakes to deliver to the Buyer the Build Mark Documentation as soon as practicable after the date hereof”.

3.
Subsequently, documentation was provided to Mr and Mrs Holloway in the form of a document entitled “NHBC Buildmark Offer” from a builder, Brodsworth Estates Limited (“Brodsworth”). Mr Duke, a director of Chancery Mead, is also a director of Brodsworth and they are, at least to that extent, connected companies.

4.
The Buildmark Offer provided as follows: “NHBC and the Builder offer the First Owner of the Home and all subsequent Owners (within the period of cover) the protection set out in the Buildmark booklet which accompanies this document. To accept this Offer the First Owner or person authorised to act on their behalf must complete the Acceptance Form below and return it to NHBC”. It appears that the Acceptance Form was completed on behalf of Mr Holloway and signed by his solicitors, Mundays. It is dated 23 October 2006.

5.
The Buildmark documentation contained an insurance cover given by the NHBC and it also included certain obligations upon the builder, Brodsworth. Section 1 dealt with cover before completion. Section 2 dealt with the first two years after completion and section 3 set out the cover in years three to 10. It is common ground that the current disputes between the parties relate to section 2, the first two years after completion.

6.
Section 2 stated what the builder, Brodsworth, had to do if it was given notice of defects or damage in the property. Its obligation was “within a reasonable time and at his own expense to put right any Defect or Damage to your Home or its Common Parts which is notified to him within this period of cover”. Damage was defined as follows: “Physical damage to the Home caused by a Defect” and Defect was defined as “A breach of any mandatory NHBC requirement by the builder or anyone employed by him or by acting for him”.

7.
Under section 2 of the Buildmark documentation, the NHBC insurance only applied if the builder did not meet its obligations under that section. In particular it provided that the NHBC would pay for: “Any arbitration award or court judgment which you obtain against the Builder relating to obligations under Section 2 which he has failed to honour”; “The Cost of any work contained in a Resolution Service report which is accepted by you and which the Builder does not complete all arrange to complete within the time set” and “If the Builder is insolvent, the Cost of any work which he would otherwise have been liable for under Section 2.”

8.
The reference above to the Resolution Service is further elaborated in section 2. It states: “If the Builder does not deal with your complaint to your satisfaction, contact NHBC…. We will usually offer our Resolution Service.” It is then provided in the Buildmark documentation as follows: “If there is a disagreement about the Builder’s obligation, we will usually try to resolve matters under our

Resolution Service. See the important note below." That is a reference to a note which says: "We will normally offer our Resolution Service. However, we can only help with disputes about Defects or Damage. We will not be able to help if you have a dispute about such matters as financial or contractual issues or boundary disputes. In these circumstances, we will suggest you consider another type of dispute resolution procedure. See complaints and dispute resolution procedures on pages 21 and 22."

9.
The description of the Resolution Service continues:

"When we offer our Resolution Service we will investigate any Defects or Damage which you have complained to the Builder about and which he has not put right within a reasonable time. We may need to visit your Home. We will then issue a report informing both you and the Builder of any work that he must carry out to fulfil his obligations under this Section.

The Builder must carry out the work within a reasonable period of time which will be set by an NHBC. You must allow the Builder reasonable access during normal working hours to carry out the work.

If the Builder does not carry out the work within the time set, and has not agreed a programme with you to complete the work, we will, at our option, pay the Cost of the work detailed in a report or arrange of the work to be done.

If you disagree with our Resolution Service report, there are other ways of resolving your dispute with the Builder. These are explained in the complaints and disputes procedures on page 21. Please note that the Financial Ombudsman Service cannot assist if you disagree with our Resolution Service report as it can only deal with complaints about our insurance cover.

We have no liability under this section unless we have issued a Resolution Service report which you have accepted or unless the Builder is insolvent or has failed to honour an arbitration award or court judgment."

10.
At page 22 of the Buildmark documentation, it then sets out as follows under the complaints and disputes procedure:

"Disputes with the Builder. NHBC's Resolution Service is valuable for resolving straightforward disputes about standards of workmanship. The details are on page 11. It is free to Owners and is generally quicker than other options.

Other options for resolving disputes with the NHBC or the Builder. The following notes give guidance on ways of resolving the different types of dispute. However you may wish to seek advice about the most suitable method to meet your specific needs."

11.
It then sets out under separate paragraphs Arbitration, Small Claims Court, Other Courts, other forms of alternative dispute resolution. The passage under Arbitration was obviously written before recent reforms in the TCC. It says:

"Arbitration means an independent arbitrator considers the facts of the dispute and decides how it will be settled. Arbitration has the advantage of being generally quicker than court actions and can deal with any matters provided both parties agree. An arbitrator's award is legally binding and can be enforced in the same way as the court judgment. However, as in the court proceedings, one party may

have to pay the costs and arbitrator's fees. Further details are available free of charge from the Chartered Institute of Arbitrators. If after receiving details you wish to proceed the Institute will appoint an arbitrator upon your application."

12.
It can be seen from this that Mr and Mrs Holloway could, on giving notice to Brodsworth, have Defects and Damage made good by Brodsworth or in default of Brodsworth doing so obtain remedies from the NHBC.

The current position

13.
Regrettably, disputes have arisen between Mr and Mrs Holloway and Chancery Mead. This has led to acrimonious correspondence between Mr Haria of Mundays and Mr Duke and Mr Geraint Jones, a director of Chancery Mead. Each party considers that the attitude being taken by the other party is unreasonable. Mr and Mrs Holloway have obtained expert reports and maintain that there are significant defects in the property. Chancery Mead say that most of the items are snagging and that they have made reasonable offers to carry out any work which they consider to be their responsibility.

14.
On the 30 April 2007 Mundays, on behalf of Mr and Mrs Holloway, sent Chancery Mead a Notice to Refer and a draft Statement of Case seeking to commence arbitration proceedings under clause 24 of the Contract. The draft Statement of Case claimed under the following headings:

(1) Costs incurred by Mr and Mrs Holloway in rectifying the installation of a fire and in dealing with drainage problems.

(2) Costs of rectifying defects and completing outstanding works which Mr and Mrs Holloway intend to have carried out.

(3) Costs of professional fees and ancillary costs associated with the investigation and carrying out of the remedial works.

(4) Costs of rental of alternative accommodation whilst remedial works are being carried out.

(5) Costs of the removal and storage of furniture and personal effects during remedial works.

(6) General damages for distress and inconvenience.

15.
In response, on 4 May 2007, Chancery Mead said that whilst they were content to agree to the appointment of an arbitrator, they first required Mr and Mrs Holloway to abide by clause 24.1 of the Contract and refer their complaints to the NHBC dispute conciliation service, and that under clause 24.6 this was a condition precedent to arbitration.

16.
On 10 May 2007, Mundays wrote to the President of the Chartered Institute of Arbitrators ("the President") seeking the appointment of an arbitrator and enclosing the Notice to Refer and their letter of 30 April 2007 together with the first page of Chancery Mead's reply of 4 May 2007. In their letter Mundays stated:

"The Sale Contract which includes an arbitration clause states that the parties should apply for arbitration pursuant to the NHBC Arbitration Scheme. It is our clients' position that this dispute falls

outside the scope of the NHBC Arbitration Scheme by reason of Chancery Mead Limited not being registered with the NHBC. Furthermore, Chancery Mead Limited did not build the property or provide the NHBC cover for the property.

Chancery Mead Limited have consented to the appointment of an Arbitrator subject to compliance with what they state is a “condition precedent” under the Sale Contract. We enclose a copy of the first page of their letter for your information. It is our clients' position that the requirement for our client to refer their complaint to the NHBC Dispute Conciliation Service is an erroneous provision and/or unfair contract term. We therefore ask that you proceed to make the appointment of an appropriate Arbitrator and leave it to Chancery Mead Limited to challenge the jurisdiction of his appointment if they deem fit. Of course it will then be for the Arbitrator to rule on his/her own substantive jurisdiction pursuant to section 30 of the Arbitration Act 1996.”

17.
Mundays received a response from IDRS Limited on 11 May 2007. IDRS Limited is a wholly owned subsidiary of the Chartered Institute of Arbitrators and provides dispute resolution services. In that letter the writer stated:

“I write to confirm that we are able to proceed with the appointment of an Arbitrator in this reference and will notify the parties when the appointment has been confirmed.

If either party is aware of an existing arbitration related to this matter, please advise the Institute of the Arbitrator appointed to deal with the existing arbitration.”

They enclosed a receipt for the £500 registration charge.

18.
On 12 May 2007 Chancery Mead wrote to the President stating that they did not accept that an arbitrator could yet be appointed. They referred to clause 24.6 of the Contract being a condition precedent and stated:

“It is our position that the appointing body (the President) cannot adjudicate upon whether the condition precedent has or has not been satisfied and/or whether it is or is not erroneous or unfair (as alleged). Further, these are not matters for any appointed Arbitrator within s. 30 Arbitration Act 1996 as that section refers to issues of jurisdiction only once a valid appointment of an arbitrator has been made.”

19.
They concluded their letter in these terms:

“If, notwithstanding the foregoing, it is your intention to appoint an Arbitrator please advise us accordingly as we will then have to decide whether or not to apply to the Court for an injunction against Mr and Mrs Holloway to restrain their pursuit of an appointment that we contend cannot be made at the present time as they have not complied with the condition precedent.”

20.
Mundays wrote to the President in response on 16 May 2007. They referred to section 30 of the Arbitration Act and said that the appropriate course was for the arbitrator to be appointed and then to consider and determine the matters raised by Chancery Mead. They concluded:

“Accordingly, the issues raised by Chancery Mead are issues that the arbitrator may deal with once he is appointed. They are not issues which it is, with all due respect, appropriate or desirable to be

determined by the nominating body. Neither is it a matter for the Court to determine, save by way of an appeal or review of the arbitrator's decision. Chancery Mead plainly misunderstand (or misrepresent) the provisions of section 30 of the Act.

In the premises and notwithstanding Chancery Mead's correspondence we repeat our request that an arbitrator be appointed at the earliest opportunity."

21.
On 16 May 2007 in a letter which crossed with Mundays' response, IDRS Limited responded and said:

"The Respondents' comments have been noted and accordingly the parties are requested to complete a Joint application form as the arbitration clause does not name the Chartered Institute of Arbitrators as the appointing body and there is no correspondence to show that the parties are in agreement for the matter to be referred to us for arbitration."

22.
On 22 May 2007, Mundays completed that form and submitted it to Chancery Mead who set out the following position:

"1. We require your clients to comply with the condition precedent to arbitration as set out in clause 24.6 of the contract.

2. If the time comes when it is appropriate to appoint an arbitrator, then we will (in the future) agree that the appointer should be the President of the Chartered Institute of Arbitrators, subject to us reaching agreement concerning the appropriate CIA arbitration scheme and the arbitrator being a Chartered Building Surveyor.

3. We decline to execute the form that you have sent to us under cover of your letter."

23.
On 22 June 2007, Mr and Mrs Holloway issued these proceedings in which they seek the following relief:

(1) A declaration that in the events that have happened and on a true construction of clause 24 of the Contract, the Claimants are entitled immediately to refer their present dispute with the Defendant to arbitration.

(2) A declaration that notice to refer served by the Claimants on the Defendant dated 30 April 2007 was effective and valid.

(3) Directions pursuant to section 18 Arbitration Act 1996 that the Defendant should withdraw its letter to the President dated 12 May 2007 objecting to the appointment by him of an arbitrator and that the President should proceed to appoint an arbitrator pursuant to the Claimants' letter and application dated 10 May 2007.

(4) A declaration that any remaining dispute about the jurisdiction of the arbitrator may be resolved by the arbitrator pursuant to section 30 of the Arbitration Act 1996.

The role of the court.

24.
Chancery Mead objects to the involvement of the Court in this dispute. Mr Geraint Jones QC, who has appeared as counsel for Chancery Mead under the Bar's public access scheme, has referred me to

section 1(c) of the Arbitration Act 1996 which provides: “The provisions of this part are founded on the following principles and shall be construed accordingly … (c) in matters governed by this Part the court should not intervene except as provided by this Part.”

25.
That provision, as Mr Geraint Jones accepts, sets out the objective of Part I of the Act. He submits that section 30 of the Arbitration Act 1996 does not entitle an arbitrator to determine matters of jurisdiction unless and until he is appointed. He referred me to a passage from the judgment of Thomas J. in Vale do Rio Doce Navigacio v. Shanghai Bao Steel Ocean Shipping Company Ltd [2002] 2 All ER (Comm)70, at paragraph 54, where Thomas J. said:

“Once the arbitral tribunal is constituted, then in accordance with the policy of the 1996 Act it is for that tribunal to rule on its own jurisdiction in the circumstances specified in section 32. Section 32 allows the court to determine a preliminary point of jurisdiction but such an application requires the agreement in writing of all parties or the permission of the tribunal and in the latter case the court must be satisfied of certain additional requirements. It is evidently not applicable here. However I accept the principle that it is only once an arbitrator is appointed that he can rule on jurisdiction under section 30 of the Arbitration Act 1996.”

26.
I accept that proposition but the effect of the submissions made by Mr Geraint Jones is effectively this: the Court should not determine the application and an arbitrator cannot do anything until he or she is appointed. However, Chancery Mead will not make a joint application to the President and the President will not make an appointment on the unilateral application of Mr and Mrs Holloway. Therefore at present no arbitrator can be appointed.

27.
Mr Geraint Jones submits that the way out of this conundrum is for Mr and Mrs Holloway to comply with the condition precedent which they seek to challenge and matters can then proceed.

28.
However, as Mr Nigel Jones QC, who appears with Mr Alexander Gould on behalf of Mr and Mrs Holloway submits, this cannot be so. He says that this would mean that Mr and Mrs Holloway have no forum in which they can raise what he says is a good, arguable point on the applicability of the condition precedent and which they wish to have determined.

29.
I consider that there is nothing in section 1(c) of the Arbitration Act 1996 which prevents this court from unlocking the current deadlock and avoiding the wholly unattractive and unmeritorious position which Chancery Mead contends would apply. Mr and Mrs Holloway issued these proceedings in court. That is something which they are entitled to do. They seek essentially two remedies: First, a declaration of the true meaning of clause 24 and in particular whether there was a condition precedent to arbitration under clauses 24.1 and 24.6; secondly, directions for the appointment of an arbitrator under section 18 of the Arbitration Act 1996.

30.
Given that clause 24 contains an arbitration clause, it would have been open to Chancery Mead to seek an automatic stay of these proceedings for a declaration under section 9 of the Arbitration Act 1996. However, in circumstances where they do not wish to have an arbitrator appointed at this stage, it is understandable why they have not done so. If they had done so I would have had to grant a stay

under section 9 and could have done so despite the contention that there was a condition precedent because section 9(2) now provides:

“An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.”

31.
This overcomes the problem in Channel Tunnel Group Limited v Balfour Beatty Construction Limited, [1993] AC 334, as set out in the speech of Lord Mustill at page 353.

32.
That however would still have left the section 18 application. In this case clause 24 did not state the method of appointment of an arbitrator. However, the parties have now agreed that the sole arbitrator should be appointed by the President.

33.
In this case, the notice to refer concluded by saying this:

“Take notice that the Claimants require that the matters in dispute be referred to arbitration. In the absence of provision in the contract for the appointment of the arbitral tribunal, you are invited to concur in the appointment of a person to be chosen by the President of the Institute of Chartered Arbitrators in writing within seven days after service of this notice on you and further take notice that in default of your doing so we will apply to the High Court to appoint an arbitrator pursuant to section 18 of the Arbitration Act 1996.”

34.
Under section 16 of the Arbitration Act 1996 it provides:

“(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

(2) If and to the extent that there is no such agreement, the following provisions apply.

(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so...”

35.
Section 18 of the Arbitration Act 1996 provides as follows:

“(1) The parties are free to agree what is to happen in the event of a failure over the procedure for the appointment of the arbitral tribunal....

(2) If and to the extent that there is no such agreement, any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

(3) The powers are: (a) to give directions as to the making of any necessary appointments; (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made; (c) to revoke any appointments already made; (d) to make any necessary appointments itself. ”

36.
As the editors of Mustill and Boyd on Commercial Arbitration (Second Edition, 2001 Companion) state in relation to section 18 of the Act:

“A failure of the appointment procedure may come about in a variety of ways. It may result from a failure or refusal of a party … to make or concur in an appointment or from the failure or refusal of a third party to make an appointment as provided in the arbitration agreement ….”

37.
There has plainly been a failure of the appointment procedure in this case and Mr and Mrs Holloway were entitled to apply to the court to exercise its powers under section 18 of the Arbitration Act 1996. In such circumstances, the court would either have made the necessary appointments itself or, on the basis that the parties have now agreed that the President should appoint, give directions for the President to appoint. That however would still have left the question of whether the appointment should have been made immediately or whether the application should have been adjourned pending the fulfilment of the condition precedent which Chancery Mead contend is effective. There would then be two approaches: to appoint the arbitrator and leave him to determine any point arising as to the condition precedent or to determine the condition precedent point myself.

38.
The first would have been unsatisfactory as the appointment of the arbitrator would be bypassing any condition precedent which Chancery Mead contend exists. In such circumstances I consider that the best course would have been for me to determine the condition precedent as part of the section 18 application.

39.
That would have been the position if there had been an application for a stay under s. 9 of the Act and, as I have indicated, the Court could have resolved the position in those circumstances. In the circumstances which happened, the position is more straightforward. Chancery Mead has not sought to stay the proceedings under s.9 of the Act and I consider that there is nothing in s. 1(c) of the Act which prevents me from proceeding to determine the issue which is before me as part of the declaration and then giving any necessary directions, including directions under section 18 of the Arbitration Act 1996.

The true construction of clause 24.

40.
The relevant part of clause 24 provides as follows:

“24.1 If any dispute shall arise between the Seller and the Buyer touching or concerning the construction or setting out of the dwelling house and/or the property either party shall at the written request of the other seek to resolve such dispute (and if to the extent that the subject matter of the dispute comes within the scope of the NHBC Dispute Resolution Service) through conciliation by the NHBC.

24.2 If and to the extent that the dispute falls outside the scope of the NHBC Dispute Resolution Service, such dispute shall be and is hereby referred to arbitration in accordance with the NHBC Arbitration Scheme current at the date hereof.

24.3 Disputes or parts of dispute which fall outside the ordinary scope of the NHBC Arbitration Scheme shall be referred to arbitration and the rules applicable to those disputes or parts of disputes shall be determined by the Arbitrator.

24.4 If disputes or parts of disputes which fall outside the scope of the NHBC Arbitration Scheme are concurrent with disputes which fall within that scope, then all disputes shall be dealt with by the same arbitrator at the same time.

24.5 A determination by an NHBC investigator shall not prevent a party from subsequently referring the same dispute or part thereof to arbitration.

24.6 The making of a determination by an NHBC investigator shall be a condition precedent to any right to refer the matter to arbitration in accordance herewith save that the condition can be waived by consent of the parties."

41.
The issue which arises is whether and to what extent the provisions of clause 24.6 and/or 24.1 are conditions precedent or prevent an arbitration being commenced until they have been satisfied or complied with.

42.
Mr Geraint Jones on behalf of Chancery Mead submits that clause 24 should be read as follows:

(1) Clause 24.6 is a condition precedent to the arbitration under clause 24 of any dispute between the Seller and the Buyer. It applies to prevent any arbitration before it has been complied with.

(2) Clause 24.1 applies so that if (a) there is a dispute of the defined kind between the Buyer and the Seller and (b) the dispute comes within the ambit of the Dispute Resolution Service, then one of the parties is obliged to request the NHBC to deal with it when the other party requests that it should do so.

(3) Clause 24.2 to 24.4 require one arbitration and therefore the appointment of an Arbitrator must await the fulfilment of the condition precedent and/or the outcome of the NHBC Dispute Resolution Service.

43.
Thus in this case it is submitted on behalf of Chancery Mead that Mr and Mrs Holloway must put their claims to the NHBC investigator under clause 24.6 and/or instigate the NHBC Resolution Service for the claims which fall within clause 24.1, before an arbitrator can be appointed under clauses 24.2 to 24.4. In this way, they achieve the position as set out in clause 24.4 that "all disputes shall be dealt with by the same arbitrator at the same time."

44.
Mr Nigel Jones submits on behalf of Mr and Mrs Holloway that, as Brodsworth, not Chancery Mead, is the Builder under the NHBC Buildmark documentation, Mr and Mrs Holloway cannot refer their dispute with Chancery Mead to the NHBC Resolution Service and there is no provision for Brodsworth to be joined in the process. Even if an ad hoc reference to the NHBC could be made the process would be ineffective against Chancery Mead. They submit that the position of NHBC, as set out in correspondence, goes no further than accepting that the NHBC Resolution Service applies to disputes between Brodsworth and Mr and Mrs Holloway.

45.
It is also submitted on behalf of Mr and Mrs Holloway that the performance by Chancery Mead under clause 23 was a condition precedent to any reference under clause 24, that the breach of clause 23 means that Chancery Mead cannot enforce clause 24 and that arguably clause 24 has been frustrated.

46.
In relation to clause 24, it is submitted:

(1) Clause 24.1 provides for a dispute between the Seller and the Buyer to be resolved through NHBC Resolution Service to the extent that the subject matter comes within the defined dispute in clause 24.1 and within the limited scope of the NHBC Resolution Service. That service only gives a right of reference to the Buyer for claims against the Builder.

(2) Clause 24.2 provides for the deemed automatic reference of certain disputes to arbitration, being disputes falling outside the scope of the NHBC Resolution Service but only part of the dispute needs to fall outside the scope of clause 24.1 for all of that dispute to fall within clause 24.2.

(3) Clause 24.4 seeks to resolve all disputes that have been referred to arbitration by one arbitrator on one occasion.

(4) Clause 24.5, by providing that a dispute can subsequently be referred to arbitration, shows that the whole dispute goes to arbitration and by automatic reference.

(5) Clause 24.6 cannot apply to references to arbitration under clause 24.2 because clause 24.2 provides for automatic reference to arbitration. It cannot apply to a dispute which is not within the terms of the NHBC Resolution Service. The reference to “the matter” must be limited to the matter determined by the NHBC investigator, not “any matter”. Clause 24.6 cannot require a determination by an NHBC investigator of a non-NHBC conciliation scheme matter. As a result, clause 24.6 is limited to matters arising under clause 24.1.

(6) In any event, the provision of the NHBC Resolution Scheme are unenforceable as an agreement to agree or because they are uncertain.

47.
I now turn to consider those arguments. The starting point for a consideration of the position between Chancery Mead and Mr and Mrs Holloway is to recognise that there is a distinction between the rights and obligations undertaken under the Contract and those undertaken under the Buildmark documentation.

48.
Under the Contract, the claim by the Buyer is for damages for breach of contract. Under the Buildmark documentation the remedy, at least in the first two years, is for the Builder to remedy defects and damage, with the NHBC insurance underwriting the Builder’s performance. In principle, Mr and Mrs Holloway therefore have two alternative remedies: one against the Seller and the other against the Builder/NHBC. They have decided to pursue their remedy for damages against the Seller, Chancery Mead.

Clause 23

49.
The Contract was, it seems, signed on the basis that Chancery Mead would be the Builder because clause 23 was drafted on the basis that Chancery Mead “is entered on the register of the NHBC.” I consider that this may explain some of the language in clause 24. There was at one time a suggestion by Chancery Mead that a claim for rectification of clause 23 might be made to reflect the fact that “the Builder and/or developer” was the person who might procure the delivery of the NHBC documentation to the Buyer rather than, in this case, the Seller.

50.
No such claim is pursued and Chancery Mead do not contend that anything in clause 23 needs to be rectified or affects clause 24. Therefore, I do not consider that this affects the position. Neither do I consider that, as is submitted on behalf of Mr and Mrs Holloway, clause 23 gives any basis for impeaching clause 24. Clause 23 consists of two parts. The first is a statement that the Seller is on the register of the NHBC. That is not a correct statement but the second part states that the Seller undertakes to deliver to the Buyer the Buildmark documentation as soon as practicable after the date hereof. It seems to me that the Buildmark documentation, albeit in the name of Brodsworth, has been delivered to the Buyer. Therefore, I do not consider that there is anything in clause 23 which affects the interpretation of clause 24.

Clause 24

51.
In relation to clause 24, it is common ground that the NHBC provides only one service, the NHBC Resolution Service. It provides no NHBC Dispute Resolution Service or "conciliation". It is also common ground that there is no NHBC arbitration scheme. There is only the note in the Buildmark documentation mentioning arbitration and putting forward the Chartered Institute of Arbitrators as a possible option for resolution of disputes between the Buyer and the NHBC/Builder under that documentation. Both parties have agreed, however, that there is a valid arbitration agreement, despite the lack of an NHBC arbitration scheme.

Clause 24.1

52.
Clause 24.1 purports to require disputes between the Seller and the Buyer to be resolved through NHBC conciliation. As I have said, there is no such process and the NHBC has no function in relation to disputes between the Seller and the Buyer. If there was only a reference to "conciliation by the NHBC" I do not consider that that would give rise to an identifiable process. However, the reference in clause 24.1 to disputes "touching or concerning the construction or setting out of the dwelling house and/or the property" and the limitation of "to the extent that the subject matter of the dispute comes within the scope of the NHBC Dispute Resolution Service" do, in my judgment, achieve sufficient certainty as to the process. That is, the reference is to the NHBC Resolution Service.

53.
There is then a reference in clause 24.1 to the fact that "either party shall at the written request of the other party seek to resolve the dispute" by the NHBC Resolution Service. The NHBC Resolution Service, so far as explained in the Buildmark documentation, applies if the Builder does not deal with the Buyer's complaint and the Buyer contacts the NHBC. The NHBC will usually offer their Resolution Service where there is a disagreement about the Builder's obligation in respect of Defects or Damage. The Resolution Service under the Buildmark documentation will only apply where the Buyer gives notice to the Builder of the Defect or Damage, the Builder then does not deal with the Buyer's complaint and the Buyer contacts the NHBC. There is nothing to indicate a process by which the Builder can itself activate the Resolution Service and certainly nothing to indicate that a third party like Chancery Mead can operate that process.

54.
Further, the Resolution Service only applies to the Builder's obligations in respect of mandatory NHBC requirements – see the definition of Defect and Damage set out above.

55.
In my judgment, whilst the process in clause 24.1 might work if the dispute were between the Builder and the Buyer, if the Builder gave notice to the Buyer, it is simply inapplicable and can create no enforceable obligation to resolve the dispute between the Seller and the Buyer under the Contract. I say this for the following reasons:

(1) The dispute is for damages for breach of contract in this case in relation to obligations under the Contract, not for remedies available under the Buildmark documentation.

(2) The dispute is between the Seller and the Buyer, not between the Builder and the Buyer.

(3) In any event, the NHBC could only make recommendations which, if not complied with by the Seller, would not lead to insurance cover by the NHBC or any requirement for them to comply with those recommendations. The NHBC Resolution Service does not deal with financial claims, only with failures by the Builder to comply with mandatory NHBC requirements.

56.
Further, the letter from Chancery Mead to the NHBC of 23 June 2007 and the response of 4 July 2007 do not, in my judgment, say anything more than that Mr and Mrs Holloway may use the NHBC Resolution Service and that Brodsworth will be responsible under the Buildmark documentation. It gives no indication that the NHBC would make a wider or different service available or overcome the objections which are set out above.

57.
This is not a case where the Seller has introduced a precondition to any liability to the Buyer such as a requirement that the Buyer must first seek a remedy against the Builder. There is nothing to indicate that any consideration was given to the overlap of the remedies under the Contract and under the Buildmark documentation. Clear words would be required to limit or exclude a right to claim damages: see Modern Engineering v. Gilbert Ash[1974] AC 689 at 717.

58.
I am therefore of the opinion that clause 24.1 does not impose on Mr and Mrs Holloway any enforceable obligation to refer disputes to the NHBC Resolution Service.

Clause 24.6

59.
In relation to clause 24.6, the provision is expressed to be a condition precedent to arbitration. However, like clause 24.5, it refers to “determination by an NHBC investigator”. What process is that? When read in the light of clause 24.1, it is plain that it must be a reference to the NHBC Resolution Service. According to the Buildmark documentation where the NHBC Resolution Service is offered the NHBC will investigate the Defects or Damage. They will then issue a report informing the Buyer and the Builder of any work which the Builder must carry out to fulfil his obligations under section 2 of the Buildmark documentation. The Builder then has to carry out the work and the Buyer has to allow the Builder reasonable access to carry out the work, although the Buyer has the right to disagree and seek resolution of the dispute with the Builder by other means.

60.
It can be seen that it is the report of the NHBC investigator under the NHBC Resolution Scheme which must be the inaptly termed “determination” referred to in clauses 24.5 and 24.6. For the reasons set out above, I consider that the NHBC Resolution Scheme is inapplicable to resolve disputes

between the Seller and the Buyer. Chancery Mead submits however that all disputes must be the subject of an investigation by the NHBC as a condition precedent to disputes going to arbitration.

61.
In argument, the example was considered of where the Buyer had a dispute with the Seller which fell outside the scope of the NHBC Resolution Service and therefore could not be the subject of an NHBC investigation. On behalf of Chancery Mead it was submitted that in such a case the claim could not be pursued. I consider that this would be an unworkable and uncommercial result if that were to be the position.

62.
Clause 24.6 refers to the recommendation being a condition precedent to "any right to refer the matter to arbitration in accordance herewith". I consider that the reference to "the matter" must be a reference to the matter which is the subject of the determination. In other words, if under clause 24.1 there is a dispute of the defined type which comes within the scope of the NHBC Resolution Service, it would be a condition precedent to resolving the dispute in arbitration for the NHBC Resolution Service to have been used. That gives a workable and commercial purpose to the condition precedent. Thus, where there is notice by the Buyer to the Builder of a Defect or Damage and the Builder fails to deal with it satisfactorily, the Buyer cannot have the dispute resolved in arbitration until he has contacted the NHBC and obtained the report of the NHBC investigator on the defect or damage.

63.
The reference to "arbitration in accordance herewith" in clause 24.6 is, in my judgment, a reference to arbitration under clause 24 as appropriate. Therefore clause 24.6 would apply only in the same circumstances as clause 24.1, so as to make the recommendation of the NHBC investigator a condition precedent to arbitration in that case. It does not apply so as to make any condition precedent in relation to disputes between the Seller and the Buyer as to the Buyer's entitlement to damages under the Contract.

64.
The result is that the provisions of clauses 24.1 and 24.6 are inapplicable to the claims contained in the Notice to Refer and draft Statement of Case and impose no enforceable pre-conditions or conditions precedent to the right of Mr and Mrs Holloway to refer their disputes to arbitration. Rather, the disputes in this case are disputes which are "outside the scope of the NHBC Dispute Resolution Service". As a result, under clause 24.2, "such disputes shall be and are hereby referred to arbitration" as agreed by the parties without the requirement to seek the report of an NHBC investigator under the NHBC Resolution Scheme.

Clauses 24.3 and 24.4

65.
Clauses 24.3 and 24.4 deal with a position where some disputes or parts of disputes fall outside the non-existent "NHBC arbitration scheme". As there is no such scheme, I do not consider they affect the position although there is a clear intention in clause 24.1 that all disputes shall be dealt with by the same arbitrator at the same time. That is clearly a desirable objective and is achieved in this case.

The NHBC Resolution Scheme

66.

On behalf of Mr and Mrs Holloway, it was further submitted that if the NHBC Resolution Scheme did apply then its terms amounted to an agreement to agree and could not give rise to an enforceable obligation or a condition precedent. Although it is not necessary on the findings I have made to decide this aspect, the matter has been fully argued and I therefore set out my view on this aspect on the assumption that there was otherwise a binding obligation to refer the disputes to the NHBC Resolution Service.

67.
As set out above, the NHBC Resolution Service exists to deal with disputes between the Buyer and the Builder which arise because the Builder does not satisfactorily remedy Defects or Damage within the first two years under section 2 of the Buildmark documentation. The operation of the NHBC Resolution Service is clearly something which the NHBC will usually offer but may not do so. If they do, then the process is as follows: First, the buyer contacts the NHBC and explains that the Builder has not satisfactorily remedied the Defect or Damage. Secondly, the NHBC investigates the Defect or Damage and issues a report informing both the Buyer and the Builder of any work which the Builder must carry out to fulfil his obligations under section 2 of the Buildmark documentation. Thirdly, if that report is accepted by the Buyer, the Builder must carry out the work within a reasonable time and the Buyer must allow the Builder reasonable access. Fourthly, if the Builder does not carry out the work, the NHBC will at their own option either pay the cost of the work detailed in the report or arrange for the work to be done. Fifthly, if the Buyer disagrees with the report, the Buyer can proceed to have the dispute resolved by arbitration or the courts. Sixthly, the NHBC only has liability if the Buyer has accepted the report or if the Builder is insolvent and has failed to honour an arbitration award or court judgment.

68.
Does that process give rise to an enforceable agreement to resolve the disputes by the NHBC resolution process on its terms? I have been referred to the Court of Appeal decision in Courtney & Fairburn v. Tolaini Bros Ltd [1975] 1 WLR 297, which sets out the following principle, as summarised in the headnote: “the law did not recognise a contract to negotiate and where a fundamental matter was left to be the subject of negotiation there was no contract.”

69.
In the subsequent cases of ITEX Shipping v. China Ocean [1989] 2 Ll Rep 522, and Paul Smith Ltd v H&S International Holding Inc [1991] 2 Ll Rep 127 Stein J., as he then was, applied Courtney & Fairburn and held that claims which provided that disputes were to be ‘settled amicably’ or where ‘the parties shall strive to settle the same amicably’ did not create enforceable legal obligations.

70.
In Halifax Financial Services v Intuitive Systems[1999] 1 All ER (Comm) 303, McKinnon J. had to consider a clause in a contract for supply of software design services in the following terms: “In the event of any dispute arising between the Parties in connection with this agreement, senior representatives of the Parties will, within 10 Business Days of a written notice from either Party to the other, meet in good faith and attempt to resolve the dispute without recourse to legal proceedings. If the dispute is not resolved as a result of such meeting, either Party may, at such meeting (or within 10 Business Days from its conclusion) propose to the other in writing that structured negotiations be entered into with the assistance of a neutral adviser or mediator.” In the event of those negotiations failing, the dispute could be referred to the court unless the parties agreed on arbitration within a specified period.

71.
McKinnon J. accepted submissions that a distinction could properly be drawn between procedures which are determinative and those which are not. Determinative procedures included arbitration clauses, binding expert valuations and third party certifications where the parties had agreed that certain issues would be finally and conclusively resolved by a third party and the courts therefore refused to resolve those same disputes themselves. Non-determinative procedures included negotiation, mediation, expert appraisal and non-binding rulings from a mediator where it was hoped that the procedure would assist the parties themselves in resolving their dispute and the contract might provide the appropriate machinery but there was no obligation to resolve the dispute in that way. McKinnon J. said that the courts had consistently declined to compel parties to engage in cooperative processes, particularly good faith negotiation because of the practical and legal impossibility of monitoring and enforcing the process. He referred to Courtney & Fairburn, Walford v. Miles[1992] 2 AC 126 and Paul Smith v. H&S International Holding Inc.

72.
Subsequently in Cable & Wireless v. IBM United Kingdom [2002] 2 All ER (Comm) 1041 Colman J. had to consider a case where the dispute resolution clause contained a provision at clause 41 as follows:

“41.1 The parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this agreement or any local services agreement promptly through negotiations between the respective senior executives of the parties who have authority to settle the same pursuant to clause 40.

41.2 If the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any party or local party from issuing proceedings.”

73.
It was submitted on behalf of IBM that the court should give effect to clause 41.2 by ordering a stay of proceedings while the parties complied with the ADR provision. On behalf of Cable & Wireless, it was submitted that clause 41.2 was unenforceable because it lacked certainty. It was said that it imposed no more than an agreement to negotiate and, on the authority of the judgment of Stein J. in Paul Smith v. H&S International Holding and the earlier Court of Appeal decision in Courtney & Fairburn on which it was based, an agreement to negotiate is not enforceable at English law.

74.
Colman J. referred to these submissions and said this at paragraph 21:

“It is to be observed that the parties have not simply agreed to attempt in good faith to negotiate a settlement. In this case they have gone further than that by identifying a particular procedure, namely an ADR procedure as recommended to the parties by the Centre for Dispute Resolution, to which I refer as CEDR.”

75.
He then set out this at paragraphs 23 and 24:

“There is an obvious lack of certainty in a mere undertaking to negotiate a contract or settlement agreement just as there is in an agreement to strive to settle a dispute amicably, as in the Paul Smith case. That is because the court would have insufficient objective criteria to decide whether one or

both parties were in compliance or breach of such a provision. No doubt therefore, if in the present case the words of clause 41.2 had simply provided that the parties should attempt in good faith to resolve the dispute or claim, that would not have been enforceable. However, the clause went on to prescribe the means by which such an attempt should be made, namely 'through an ADR procedure as recommended to the parties by CEDR.' The engagement can therefore be analysed as requiring not merely an attempt in good faith to achieve resolution of a dispute, but also the participation of the parties in a procedure to be recommended by CEDR."

76.
He concluded as follows at paragraph 29:

"Accordingly in the present case I conclude that clause 41.2 includes a sufficiently defined mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediator with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements."

77.
He therefore held that it was an enforceable provision. I was referred by Mr Geraint Jones to the Court of Appeal decision in Petromec Inc v. Petroleo Brasiliero SA [2005] EWCA 891 where Longmore LJ made certain observations, obiter, on a provision contained in clause 12 of an agreement under which a party agreed to "negotiate in good faith". He referred at paragraph 120 to Walford v Miles where Lord Ackner, with whom the other members of the House of Lords agreed, said this:

"While negotiations are in existence either party is entitled to withdraw from those negotiations at any time and for any reason. There can thus be no obligation to continue to negotiate until there is a proper reason to withdraw. Accordingly, a bare agreement to negotiation has no legal content."

78.
Longmore LJ then said at paragraph 121:

"That shows the difference from the present case. Clause 12.3 of the Supervision Agreement is not a bare agreement to negotiate. It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors and issued under the imprint of Linklater & Paines, as Linklaters were then known. It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has no legal content, to use Lord Ackner's phrase, would be for the law deliberately to defeat the reasonable expectations of honest men to adapt slightly the title of Lord Stein's Sultan Azlan Shah lecture delivered in Kuala Lumpur on 24 October 1996 ((1997) 113 LQR 433)." At page 439 Lord Stein hoped that the House of Lords might reconsider Walford v Miles with the benefit of fuller argument. That is not an option open to this court. I would only say that I do not consider that Walford v Miles binds us to hold that the express obligation to negotiate as contained in clause 12.4 of the Supervision Agreement is completely without legal substance."

79.
I was also referred to paragraph 6.23 of Merkin on Arbitration Law and the citation in that paragraph of the judgment of Einstein J. in the Supreme Court of New South Wales in Aiton Australia Pty Ltd v. Transfield Pty Ltd[2000] ADRLJ 342. In that case the court undertook a detailed analysis of the twin features of ADR clauses, the obligation to negotiate in good faith and the degree of certainty

necessary to create a binding contract. On the former, Einstein J. rejected the decision in Elizabeth Bay Development Pty Limited v. Boral Building Services Pty[1997] ADRLJ 105, that it was impossible, by reason of vagueness, to enforce a clause which required good faith negotiation. Einstein J. held that an obligation to negotiate in good faith could be sufficiently certain to give rise to a binding obligation if it was expressed in the particular terms: (1) to undertake to subject oneself to a process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable). (2) to undertake in subjecting oneself to that process to have an open mind in the sense of (a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator as appropriate; (b) a willingness to give consideration to putting forward options for the resolution of the dispute.

80.
As regards certainty, Einstein J. held that an ADR clause would be sufficiently certain if it met the following minimum requirements: (1) it must be in Scott v.Avery form so that completion of mediation is a condition precedent to court proceedings. (2) the process established by the clause must be certain. There must not be stages in the process where agreement is needed on some course of action before the process can proceed as this amounts to an agreement to agree. (3) the administrative processes for selecting a mediator and determining the mediator's remuneration should be included in the clause and in the event that the parties cannot agree mechanism for selecting a mediator by a third party must be included. (4) the clause should set out in detail the process or at least the model of mediation to be followed.

81.
It seems to me that considering the above authorities the principles to be derived are that the ADR clause must meet at least the following three requirements: First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain.

82.
In the present case, as in the case of Cable & Wireless, I consider that these requirements are fulfilled. First, the process is sufficiently certain. Although there are stages where the report from the NHBC may be accepted or rejected, there are clear paths under the procedure as to what happens in that event.

83.
Secondly, the administrative processes for carrying out the resolution by the NHBC, without charge, are clear. The NHBC carries out its own investigation. The NHBC is the standard setting body and leading warranty and insurer provider for new and newly converted houses in the UK. It registers around 85 per cent of the new homes in the UK and around 1.6 million home owners currently benefit from the ten year warranty and insurance cover. NHBC has protected over 30 per cent of the existing homes in the UK. It was established in 1936 as a non-profit distributing company and its primary purpose is to help raise standards in the house building industry and provide consumer protection for new home owners. It is therefore well fitted to carry out the role of investigation.

84.
Thirdly, I consider that the process which I have set out above from the Buildmark documentation is sufficiently detailed to provide a method of dispute resolution which is certain.

85.
Therefore, had I found that clause 24.1 and/or 24.6 imposed a requirement or condition precedent requiring the parties to go through the NHBC Resolution Scheme before arbitration, I would have found that the requirements of that scheme were sufficiently certain to be enforceable.

Summary

86.
I now summarise the position. Clauses 24.1 and/or 24.6 do not impose a requirement on Mr and Mrs Holloway to submit their disputes with Chancery Mead, or any of them, to the NHBC Resolution Service before they can commence arbitration.

87.
Therefore, subject to any further argument, the terms of the declarations sought are as follows:

(1) In the events that have happened and on the true construction of clause 24 of the Contract, the Claimants are entitled immediately to refer their present disputes with the Defendant to arbitration.

(2) The Notice to Refer served by the Claimants on the Defendant dated 30 April 2007 was effective and valid.

88.
The parties, as I have noted, are agreed that the President of the Chartered Institute of Arbitrators should appoint the sole arbitrator. I trust that on the basis of this judgment Chancery Mead will now do so. I propose, subject to hearing argument, to adjourn the application under section 18 of the Arbitration Act 1996, with liberty to apply.