Neutral Citation Number: [2016] EWHC 1924 (TCC)

Case No: HT-2016-000094

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 02/08/2016

Before :

MR STEPHEN FURST QC

(sitting as Deputy High Court Judge)

- -

Between :

ZVI CONSTRUCTION CO LLC **Cla**

- and -

THE UNIVERSITY OF NOTRE DAME (USA) IN ENGLAND **Defe**

- -

- -

Mr Alexander Nissen QC (instructed by **Sheridan Gold LLC**) for the **Claimant**

Mr Laurence Harris of **Cooley (UK) LLP** for the **Defendant**

Hearing dates: 17th & 20th June 2016

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Judgment Approved

MR STEPHEN FURST QC:

Introduction

1.
This judgment concerns Part 8 Proceedings brought by the Claimant (“ZVI”), in essence, to prevent the Defendant (“UND”) from enforcing the decision of an expert and to obtain declarations as to the meaning of the Development Agreement.

The Facts

2.
TJAC Waterloo LLC (a company registered in the Commonwealth of Massachusetts) (“TJAC”), agreed to sell a property known as Conway Hall, 51-55 Waterloo Road, London SE1 8TX to UND pursuant to a Development Agreement dated 25th October 2010. Completion of the sale was conditional upon certain building works being carried out to the property. It was agreed that ZVI would carry out the building works and it was also a party to the Development Agreement. One of the issues raised in this action is what obligations ZVI owe to UND under the Development Agreement.

3.
Clause 17 of the Development Agreement states:

“17. Disputes

17.1 Save as otherwise provided in this agreement any dispute arising between the parties hereto as to their respective rights duties and obligations hereunder or as to any matter arising out of or in connection with the subject matter of this agreement (other than any with regard to the meaning or construction of this agreement) shall be determined by an independent duly experienced surveyor appointed (in default of agreement between the Buyer and the Seller within ten Working Days from the dispute arising) by the President or other proper officer of the Royal Institution of Chartered Surveyors on the application of either the Buyer or the Seller and:-

17.1.1 such person shall act as an expert and his decision shall be final and binding on the parties hereto

17.1.2 he shall consider all written representations made on behalf of the Buyer and the Seller which shall be delivered to him within 10 Working Days of notice of his appointment and he shall use all reasonable endeavours to give his decision as speedily as possible

17.1.3 if he dies or refuses or is unable to act the procedure for appointment shall be repeated as often as necessary and

17.1.4 his fees and the costs and expenses of his appointment shall be payable by the parties hereto in such proportions as he shall determine or in default of such determination equally between them.

17.2 Any dispute or difference arising between the parties hereto as to the meaning or construction of this agreement shall be referred to and determined by an independent solicitor or barrister of at least ten years' standing who is experienced in drafting negotiating and advising upon agreements similar to this agreement such independent person to be agreed between the parties hereto or (failing such agreement within ten Working Days from the dispute arising) to be nominated by the President or other proper office of the Law Society on the application of either the Buyer or the Seller at their joint expense and such person shall act as an arbitrator in accordance with the Arbitration Act 1996.”

4.
There is a close connection between TJAC and ZVI. The Development Agreement was signed by Mr Zvi Schwarzmann as “Manager” for both entities which appear to be part of a larger linked corporation known as The Triad Group.

5.
On 12th May 2011 ZVI entered into a Duty of Care Agreement with UND whereby ZVI agreed that it had and would continue to carry out “the completion of the design, construction and completion of the Project in a good and workmanlike manner and in compliance with the terms of the Building Contract and all associated drawings and specifications…” The Building Contract referred to was entered into between TJAC, as employer, and ZVI, as contractor, whereby it agreed to carry out the works as referred to under the Development Agreement. The Building Contract was in the JCT Design and Build Standard Form, Revision 2, 2009.

6.
The building works were carried out between November 2010 and 12th August 2011, when Practical Completion was certified, and the sale was completed and the property transferred to UND on 15th

November 2011 (according to submissions made to the expert on 30th December 2014) or on 15th December 2011 (according to the chronology provided by UND for this action).

7.
UND alleged the work carried out by ZVI was defective. By a letter dated 12th May 2014, solicitors for UND wrote a letter of claim to solicitors, who at that stage represented both TJAC and ZVI. The letter alleged that the Development Agreement provided that "TJAC/ZVI would renovate the building now know as Conway Hall, so it could be used by UND for student accommodation." It enclosed a Schedule of Defects and contended that they resulted from "contractual breaches under the Agreement; (ii) breaches of the specifications under the Agreement; and (iii) breaches of industry regulations and codes, which are also contractual breaches under the Agreement". It then went on to identify various clauses of the Development Agreement which it alleged had been breached as "a result of the defects in the works carried out by TJAC/ZVI". However it maintained that this was not a comprehensive list of all the contractual provisions upon which its clients would rely; "indeed they will rely on the whole of the Agreement and also on your client ZVI Construction LLC's Duty of Care Agreement with UND dated 12 May 2011." Under the Heading "Dispute Resolution Procedure", the letter referred to Clause 17.1 as providing for disputes to be determined by an experienced surveyor and suggested an adjustment in the timetable for the provision of written representations to the surveyor.

8.
It is apparent that this letter was alleging that both TJAC and ZVI were liable under the Development Agreement for the defects and that UND intended to use the expert determination procedure set out in Clause 17.1 to resolve any disputes.

9.
On 2nd December 2014 UND requested the R.I.C.S to appoint an independent duly experienced surveyor to resolve the dispute. It is apparent that this request was made pursuant to Clause 17.1 of the Development Agreement. I have not been provided with this request for appointment but it is set out in the surveyor's ("the expert") determination on liability:

"The dispute arises from the purchase after renovation. The University of Notre Dame (UND) purchased Conway Hall from TJAC Waterloo LLC ("TJAC") on 15 December 2011. The contract for the purchase of the building required TJAC and ZVI Construction LLC ("ZVI") to refurbish the building prior to its sale to UND for use as student accommodation, and to ensure that the works undertaken complied with all necessary legislation, regulations and codes, and were free from defects.

A number of defects were reported by UND to TJAC following the purchase of Conway Hall. Several of these were very serious safety critical defects. A dispute subsequently arose between the parties regarding liability for the defects. The defects are extensive and cover issues of workmanship and compliance with regulations, including fire safety issues, plumbing, electrical and other Works.

A Letter of Claim was sent on behalf of UND to TJAC and ZVI on 12 May 2014. Correspondence between the parties has been exchanged in the intervening period and UNO has provided comprehensive detailed listings of the defects, together with its reasons for believing TJAC and ZVI to be responsible for the losses subsequently suffered.

Nevertheless it has not been possible to reach agreement in respect of any of the defects. UND is therefore invoking the dispute resolution clause contained at paragraph 17 of the Agreement dated 25 October 2010 between the parties (the Agreement). That clause requires such disputes to be resolved

by expert determination. Once the expert has been appointed, the parties will have ten working days to submit written representations and the expert's decision shall be final and binding on the parties."

10.
The solicitors then representing both TJAC and ZVI responded by letter dated 22nd October 2014. Whilst the letter refers throughout to its "client", in the singular, there is nothing to suggest that the letter was not written on behalf of both ZVI as well as TJAC. Indeed one paragraph of the letter stated that "ZVI satisfied all of its fire and life safety requirements under the Development Agreement…", indicating that, at least, it represented ZVI. The letter went through the Schedule of Defects setting out why it contended that its "client", i.e. TJAC and ZVI, were not in breach of the Development Agreement. This letter did not assert that ZVI owed no relevant duties to UND under the Development Agreement nor did it take issue with the dispute being referred to the expert.

11.
On 12th December 2014 the R.I.C.S nominated Mr Anthony Bingham as the expert and on 17th December 2014 he issued initial directions under "Notice No.1". That Notice named UND as the Claiming Party and TJAC and ZVI as the Respondents. The Notice stated that he, as the expert, was "not appointed to decide those matters embraced by the Contract at Clause 17.2". That clause, as set out above, concerned disputes about the meaning or construction of the Development Agreement which were to be referred to arbitration.

12.
The parties cross-served submissions or representations on 30th December 2014.

13.
UND's Statement of Case largely repeated the allegations set out in its solicitor's letter dated 12th May 2014, but added:

"UND will say that, in short, TJAC and ZVI were required to refurbish the building so that it would be fit for the purpose of student accommodation, in accordance with good building practice and all appropriate regulations and codes, free from defects and that they failed to do so."

14.
It went on to identify the six major defects on which it relied and concluded:

"UNDs case is simple and unanswerable:

ZVI agreed to undertake the Works to Conway Hall, and TJAC agreed to ensure that those Works were properly carried out. TJAC agreed to sell Conway Hall to UND, so that it could be used by UND for student accommodation. The Works under the Agreement were carried out by ZVI and its sub-contractors. TJAC was obliged to hand over a building that was fit for purpose.

……

The defects are entirely the fault of TJAC and ZVI. They are, as identified in the Schedule of Defects, breaches of the Agreement, breaches of the specifications under the Agreement, or breaches of industry regulations and codes (which are also breaches of the Agreement). In many cases, they are all three."

15.

UND set out various declarations that it sought, including a declaration that TJAC and ZVI had breached their contractual obligations in respect of each of the defects identified in the Schedule of Defects.

16.
TJAC and ZVI served a joint submission entitled “First Round Submissions on behalf of the Respondents”, the Respondents being TJAC and ZVI. This submission referred to the Development Agreement and stated that it “provided that the Respondents were to carry out certain works to the Property”. It went on to deny that the Respondents failed to comply with their contractual obligations as set out in the Development Agreement and in particular that they had complied with the clauses of the Development Agreement which had been identified by UND as founding liability. The submission gave a detailed response as to why the Respondents were not liable for the six major defects.

17.
It is therefore to be noted that ZVI, in particular, did not contend that the expert did not have jurisdiction to determine the dispute nor did it argue that it did not owe duties to UND, under the Development Agreement, which could give rise to liability for the defects.

18.
By email dated 13th December 2014 the expert enquired whether the parties were content that his jurisdiction be extended to matters falling within Clause 17.2 of the Development Agreement. UND agreed to this suggestion but noted that, from the correspondence so far exchanged, no such disputes had arisen. ZVI however did not agree to extending the expert’s jurisdiction, but did not suggest that there were or might be disputes which would fall with that clause.

19.
In early January 2015 the parties agreed that the expert would provide a decision on liability first, before proceeding to consider quantum.

20.
On 23rd January 2015 the parties served responsive submissions, but these have not been provided. The expert held hearings on liability on three days in February 2015 and on 30th May 2015 he provided a draft decision on liability, inviting comments by the parties. The parties provided comments on 16th June 2015, but once again nothing was said by the Respondents to suggest that the expert lacked jurisdiction or that ZVI’s duties under the Development Agreement were very limited.

21.
On 21st July 2015 the expert provided his final determination on liability. The determination set out what are described as “Observations” on “Machinery”:

“Expert Determination is not an Arbitration, nor is it HGCRA “Construction Contract” Adjudication. Instead it is machinery contractually agreed to decide disputes. It will be that contract which indicates what has been entrusted to the Expert and what is to be decided by the Expert and the effect of each decision.

[It then set out Clauses 17.1 and 17.2]

Note: Clause 17.2 is not with the Expert Appointment (the Expert sought clarification 13 December 2014).”

22.

It is not clear why this “Observation” was included since none of the parties had raised any jurisdictional issue. In any event the determination went on to hold TJAC/ZVI liable for many of the defects. The determination, whilst referring to the clauses of the Development Agreement referred to by UND as founding liability, contained no discussion or consideration as to whether those clauses, or any other clauses of the Development Agreement, could give rise to liability for the defects on the part of ZVI. Most of the determination is set out in the form of answers to questions which had been jointly formulated by the parties. Some of them started with the words “Whether (as a consequence of breach)…..” In other words the question pre-supposed that the Respondents, both TJAC and ZVI, were in breach of the Development Agreement and the only question to be answered was the consequences of that breach.

23.
On 9th October 2105 UND served its quantum submissions and TJAC and ZVI responded on 16th October. UND estimates that the sum recoverable pursuant to the determination on liability will be in the region of US $9m, although TJAC/ZVI put a much lower figure on the likely recovery.

24.
Shortly after these submissions had been served, TJAC/ZVI asked for the process under Clause 17.1 to be postponed due to the illness of their client. UND was prepared to agree but sought an undertaking from TJAC and ZVI that they would not seek to transfer or dispose of their assets outside the normal course of business dealings, without prior notification to UND, until the quantum phase of the determination had been concluded. UND also sought confirmation that TJAC and ZVI continued to comply with Clause 12.2 of the Development Agreement. That clause stated that TJAC was to require ZVI and each member of the Professional Team and each sub-contractor to maintain professional indemnity insurance for a sum of £5m (or such lower sum as might be agreed with UND) for a minimum period of 12 years following Practical Completion.

25.
The solicitors for TJAC and ZVI failed to provide the undertaking requested and refused to provide confirmation as to the maintenance of the professional indemnity cover, arguing that TJAC had no such obligation.

26.
In consequence UND issued proceedings on 29th January 2016 in the Superior Court for Suffolk County, Massachusetts, USA seeking pre-judgement relief from TJAC and ZVI, for an order that TJAC and ZVI be restrained from dissipating, encumbering, or transferring assets until further order of the Court, and only as necessary in the normal course of business. The action was transferred to the Federal Court in the District of Massachusetts. UND amended its claim and TJAC/ZVI issued a Motion to Dismiss the Amended Complaint. A written decision was provided by the District Court, by District Judge Allison D. Burroughs on 7th April 2016. This decision is entitled “Memorandum and Order”.

27.
On 1st March 2016 TJAC/ZVI filed its opposition to UND’s applications. One of the arguments advanced by TJAC/ZVI was that the expert had no authority to issue an award against ZVI, i.e. he had no jurisdiction in the matter. It argued that Clause 17.1, by its plain language, was limited to disputes arising between UND and TJAC and did not extend to disputes involving ZVI. In support of that argument ZVI contended that under the Development Agreement it was only a “nominal party” and that its only obligation under that Agreement was to engage Patrick Watson Hogan, which it maintained it had complied with. It pointed out that UND was not without recourse against ZVI since

ZVI owed duties to UND under the Duty of Care Agreement and that disputes under that Agreement were subject to the jurisdiction of the English Courts. Anticipating a submission that ZVI had waived its right to challenge the jurisdiction of the expert, ZVI argued that, as a matter of U.S. and English law, in the absence of a contractual agreement to confer jurisdiction on the expert, he had none, at least as regards ZVI. It also cited U.S. authority for the proposition that a party is not precluded from challenging an arbitrator's decision merely because it participated in the arbitral proceedings. (For reasons which are not material to his judgment, the expert's determination was treated in the U.S. courts as equivalent to or the same as an arbitral award.)

28.
The Order of the District Court confirmed liability under the Arbitral Award (i.e. the expert's determination on liability) and ordered an attachment of TJAC/ZVI's property in the sum of $7.2m. It dismissed the other claims for relief as being unnecessary. The Order concluded by directing the parties to submit a joint status report every 60 days until the expert issued his final determination on quantum.

29.
The reasoning of the Judge, as regards the arguments advanced by ZVI, was as follows:

"Second, ZVI argues that even if the Determination on Liability is final and binding, the Court should nonetheless decline to confirm it with respect to ZVI, because the Expert lacked jurisdiction over ZVI. To the extent the Expert issued a decision on ZVI's liability, ZVI argues,

it was "beyond the scope of the submission to arbitration" and therefore should not be confirmed. [ECF No. 47 at 12-16].

The Expert had jurisdiction pursuant to the Dispute Clause of the P&S Agreement, which provides in relevant part:

Any dispute arising between the parties hereto as to their respective duties and obligations hereunder (other than any with regard to the meaning or construction of this agreement) shall be determined by an independent duly experienced surveyor … on application of either Buyer or Seller …

[ECF No. 12-2 § 17. l]. ZVI contends that because only the "Buyer" or the "Seller" can "apply" for an expert determination, the Expert only had jurisdiction over Notre Dame and TJAC. "By its plain language", ZVI argues, "the P&S Agreement limits the jurisdiction of the Expert to only disputes between TJAC (defined in the P&S Agreement as 'Seller') and Notre Dame (defined in the P&S Agreement as the 'Buyer'), and not ZVI (defined as the 'Contractor')." [ECF No. 47 at 13].

ZVI's argument is contradicted by the text of the P&S Agreement, which states that "any dispute arising between the parties hereto as to their respective duties and obligations … shall be determined by an independent duly experience surveyor." [ECF No. 12-2 § 17.1 (emphasis added)]. ZVI is undisputedly a party to the P&S Agreement. The title page of the P&S Agreement states that it is between TJAC, ZVI, and Notre Dame, and the first line of the P&S Agreement states that it is made "BETWEEN the Seller, the Contractor and the Buyer." Id. at 1, 5. Moreover, Zvi Schwarzman signed the P&S agreement twice, once on behalf of TJAC and once on behalf of ZVI. Id, at 40. Despite this, ZVI contends that it was only a "nominal" party and that the majority of the P&S Agreement establishes contractual obligations between Notre Dame and TJAC. [ECF No. 47 at 14]. This may be true, and ZVI is, of course, free to argue during the damages phase of the expert proceeding that TJAC is largely or even wholly responsible for the damages. Any allocation of damages, however, is

separate from the issue of jurisdiction. The Disputes Clause unmistakably gave the Expert jurisdiction over the three parties to the P&S Agreement – TJAC, Notre Damage, and ZVI.

Moreover, this argument is belied by ZVI's conduct throughout the expert proceedings. From the beginning, ZVI agreed to be included in the arbitration, and throughout the process, ZVI and TJAC jointly filed documents, without distinguishing liability between the two. [See, e.g. ECF Nos. 12-9; 29-5]."

30.
I am told that this order is subject to appeal by ZVI.

31.
In the meantime, and following the issue of proceedings by UND in the U.S., TJAC/ZVI issued an application to the expert on 9th February 2016, alleging that the U.S. proceedings were founded on an "egregious error", namely the assumption that ZVI had any liability under the Development Agreement. It also contended that the expert had no jurisdiction to make any findings against ZVI. It thus set out, in substance, the same argument as would be subsequently advanced by ZVI in the U.S. proceedings. It sought a declaration from the expert that "under the Agreement made on 25th October 2010, he has no jurisdiction to make any order against ZVI in relation to the allegations of breach of contract made within the matters referred to him because ZVI as Contractor has no direct contractual obligations to UND other than in one irrelevant respect…"

32.
UND replied to this application by a Responsive Note dated 15th February 2016. It argued that the expert's determination was final and binding on the parties and that it was now too late to take the points raised by ZVI. It also contended that ZVI was liable under the Development Agreement and that Clause 17 encompassed disputes between all the parties to the Development Agreement. However UND also argued that since ZVI was seeking to raise a question of the interpretation of the Development Agreement this was a question of law to be determined under Clause 17.2 and was outside the jurisdiction of the expert. Accordingly the expert was not entitled to make the declaration as sought by ZVI.

33.
In the light of its submission to the expert, it is not surprising that UND does not contend that the expert's subsequent decision is binding on ZVI or gives rise to an issue estoppel. Thus it does not argue that the expert was given jurisdiction to decide his own jurisdiction or any other issue raised by ZVI's application made on 9th February 2016. Nevertheless it is appropriate to record that by a decision dated 5th March 2016, the expert expressed the view that he had had jurisdiction to arrive at his determination of 21st July 2105.

34.
On 9th March 2016 both parties filed their submissions on quantum with the expert and a hearing was held on 18th and 19th May 2016. His determination on this issue is outstanding.

35.
On 1st April 2016 ZVI's new solicitors wrote a letter before action and on 15th April 2106 these Part 8 proceedings were issued.

Relief Claimed

36.

ZVI seeks three declarations as follows:

36.1
The expert has [or had] no jurisdiction to determine a dispute [arising out of the proper construction of the Development Agreement] between UND and ZVI as to whether ZVI owes UND any substantive [legal] obligations as regards the quality of the executed works undertaken pursuant to the Development Agreement; and

36.2
ZVI is not a party to the arbitration agreement contained in Clause 17.2; and

36.3
ZVI does not owe UND any substantive obligations as regards the quality of the executed works undertaken pursuant to the Development Agreement.

(It was suggested in the course of argument that the words in square brackets might be added to the first declaration by way of clarification.)

37.
Its pleaded case sought two injunctions but in the course of argument this was reduced to one, seeking a final injunction against UND restraining UND from taking any steps to enforce any aspect of the expert determination against ZVI.

38.
UND agrees with the first declaration sought by ZVI but contends that ZVI is a party to the arbitration agreement under Clause 17.2 and that it does owe UND substantive obligations as to the quality of the works pursuant to the Development Agreement. It also opposes the grant of the injunction.

39.
Before considering the parties' arguments, it is to be noted that it is not contended that the expert purported to decide the question of substance referred to in the first declaration by his determination dated 21st July 2015. As I say above, insofar as he may have dealt with this issue in his second determination dated 5th March 2016, it is common ground this is of no effect. It is to be noted that the second declaration concerns Clause 17.2, the arbitration clause, which to date has not been acted upon. The third declaration is a pure question of construction, but one touched upon in the judgment of the Federal Court. No declaration is sought as to the status of the determination made by the expert on 21st July 2015.

40.
There is no obvious link between the three declarations sought and the injunction. Even if the three declarations are answered favourably to ZVI, it is not apparent why or how this could justify the grant of the injunction. In argument it was suggested that if ZVI did not owe UND any substantive obligations under the Development Agreement then that would undermine the whole basis of the expert's determination and thereby justify the grant of the injunction. Of course ZVI might be entitled to the grant of the injunction as free-standing relief, and I consider that below.

The Parties' Submissions

41.
ZVI's case can be summarised as follows:

41.1

On a proper construction of Clause 17.1 of the Development Agreement, an expert was only ever capable of determining a dispute between UND and TJAC, ZVI was not a party to this dispute resolution process;

41.2
Clause 17.2 is the exclusive dispute resolution process to resolve issues as to the meaning and construction of the Development Agreement but once again ZVI was not a party to this dispute resolution process;

41.3
Thus the expert had no jurisdiction to determine a dispute between ZVI and UND as to whether ZVI owed UND any substantive obligations as to the quality of the work executed by ZVI;

41.4
In consequence the experts' determination dated 5th March 2016 is void and of no effect. As I say, this is common ground between the parties but not for the same reason;

41.5
Any dispute as to the meaning or construction of the Development Agreement as between UND and ZVI falls to be dealt with by the English Courts pursuant to Clause 27 of the Development Agreement;

41.6
UND has a right of direct recourse against ZVI pursuant to the Duty of Care Agreement and this also gives the English Courts jurisdiction to decide disputes arising under this Agreement;

41.7
On a proper construction of the Development Agreement ZVI owed UND no substantive duties as to the works.

42.
By contrast UND submits, in summary:

42.1
ZVI participated fully in the expert determination process without reservation; it has therefore submitted to the expert's jurisdiction and cannot now argue it is not subject to Clause 17.1. ZVI has waived its rights to object and/or is estopped by its conduct from objecting, an estoppel by convention having arisen;

42.2
Further it is an implied term of the Development Agreement that any dispute as to the meaning or construction of the Agreement must be raised before an expert determination is progressed if the legal dispute impacts the factual one;

42.3
An issue estoppel has arisen in relation to the matters raised before the U.S. Courts and this estoppel extends to the proper meaning of Clause 17.2;

42.4
These proceedings are an abuse of process since they involve a collateral attack upon the U.S. decision;

42.5

If it is necessary to decide the proper meaning of the Development Agreement then, on a proper construction of that Agreement, ZVI is a party to the dispute resolution procedure under Clauses 17.1 and 17.2 and it did owe UND substantive obligations under the Agreement.

43.
In answer to UND's submissions, ZVI contends:

43.1
The question of jurisdiction in relation to an expert determination is always a matter for the court, see **Barclays Bank plc v Nylon Capital LLP**[2010] EWCA Civ 826 and the matter is a fortiori where, as in this case, there is no express contractual provision conferring jurisdiction on the expert to decide his own jurisdiction. Thus even if ZVI did submit to the jurisdiction of the expert, it is still open to the Court to review the expert's jurisdiction;

43.2
However, in the light of the decision in **Rhodia Chirex Ltd v Laker Vent Engineering Ltd** [2003] EWCA Civ 1859, there would have to be clear evidence that ZVI had submitted to the expert's jurisdiction, without reservation;

43.3
As regards the U.S. proceedings, the U.S District Court lacked jurisdiction to determine disputes in relation to the Development Agreement since Clause 27 gave the English Courts exclusive jurisdiction but, in any event, no issue estoppel can arise since the U.S District Court did not construe the Development Agreement in accordance with English Law. Further the U.S. court did not consider Clause 17.2 of the Development Agreement;

43.4
An expert determination cannot give rise to res judicata or issue estoppel, see **Woodford Land Ltd v Persimmon Homes Ltd**[2011] EWHC 984 (Ch);

43.5
As regards the estoppel by convention, there was never any adequate articulation of the legal premise relied upon to render ZVI liable to UND under the Development Agreement, there was no unequivocal representation of a convention and there is no witness statement to support the necessary ingredients of such an estoppel. In any event ZVI can rely upon Clause 24 of the Development Agreement (a non-waiver provision);

43.6
These proceedings cannot amount to an abuse of process, since it is asking this court to determine matters which fall within the sole jurisdiction of the English Courts in accordance with Clause 27 of the Development Agreement. Further any question as to abuse of process could only arise as and when ZVI is sued in Court under the Duty of Care Agreement when an issue estoppel might be raised;

43.7
The suggested implied term is not necessary to give the Development Agreement business efficacy and could not operate where, as might be anticipated, a point of construction arises in the course of an expert determination.

Submission to Expert Determination

44.

There seems to me little doubt that a party to a contract containing a clause providing for disputes to be decided by an expert can expressly or impliedly, by words or conduct, confer jurisdiction on such an expert where otherwise there would be none.

45.
This, it would seem to me, was decided albeit obiter, in **Rhodia Chirex Ltd**. by the Court of Appeal. The case concerned the mechanism for resolving disputes following a termination for convenience by the employer under the IChemE Model Form of Contract, 3rd (June 1995) edition. In short the Court of Appeal held that a dispute following the termination of the contractor's employment under the contract had properly been referred to the expert. However the Judge at first instance had also held that the employer had submitted to the jurisdiction of the expert, reaching that conclusion on the basis that although the employer had reserved its position, it did so too late. In deference to the arguments put forward and because it disagreed with the Judge, the Court of Appeal considered a further ground of appeal on this point.

46.
Having referred to a passage from the first instance judgment, Auld L.J., with whom Hale and Dyson L.JJ. (as they then were) agreed, said, at paragraph 36:

"It may be that failure by a party expressly to reserve its position coupled with other circumstances could amount to a submission to the jurisdiction of an expert. But neither of the authorities upon which the Judge relied for that proposition, Fastrack v. Morrison(2000) 4 BLR 168 and Whiteways Contractors (Sussex) Ltd. v. Impressa Castelli Construction UK Ltd. [2001] 75 Con LR 92, are directly in point. More important is whether on the facts of this case, it can be said that Rhodia had no real prospect of successfully defending Laker Vent's claim that it had submitted to the jurisdiction of the expert. This is essentially a factual question. It turns largely on the documentary evidence before the Judge, the essentials of which I have summarised."

47.
Auld L.J. returned to the point at paragraph 40:

"As to whether failure by a contracting party to reserve its position on jurisdiction would amount to a submission to it is a more difficult question, and one that is highly fact sensitive. To succeed on such a basis at trial, a claimant would have to show that such silence, when considered with all the other material facts, amounted to a clear submission to the jurisdiction. See e.g. Project Consultancy Group v. The Trustees of the Grey Trust (1999) BLR 377; Nordot Engineering Services Ltd. Siemens Plc (unreported) 14th April 2000; and Cowlin Construction Ltd. V. CFW Architects (2003) BLR 241 It would not be enough to conclude, as the Judge did at the beginning of the passage I have set out in paragraph 34 above, that Rhodia

"did not make it clear what they were saying if it was that they were not abandoning any jurisdictional point." [my emphasis]

Still less is that a permissible basis upon which to give summary judgment against it on such an issue. Given the history of the matter as contained in and illustrated by the documentation before the Judge, I would have held, had it been necessary, that Laker Vent had not shown that Rhodia had no real prospect of successfully defending on this issue, and would have allowed this ground of appeal."

48.

As I read these passages, the Court of Appeal was accepting that a party could submit a dispute to the jurisdiction of an expert under a clause such as Clause 17.1 of the Development Agreement; in other words there is no issue of principle which exempts expert determination clauses from such a doctrine. It is however a question of fact as to whether there has been “a clear submission to the jurisdiction”.

49.
Questions of submission to jurisdiction arise with some frequency in cases concerning the enforcement of adjudicator’s decisions given under the statutory scheme enshrined in Housing Grants, Construction and Regeneration Act (as amended) 1996. In **Aedifice Partnership Ltd v Mr Ashwin Shah**[2010] EWHC 2106 (TCC) Akenhead J., having reviewed various authorities, summarised the position as follows:

“(a) An express agreement to give an adjudicator jurisdiction to decide on a binding way whether he has jurisdiction will fall into the normal category of any agreement; it simply has to be shown that there was an express agreement.

(b) For there to be an implied agreement giving the adjudicator such jurisdiction, one needs to look at everything material that was done and said to determine whether one can say with conviction that the parties must be taken to have agreed that the adjudicator had such jurisdiction. It will have to be clear that some objection is being taken in relation to the adjudicator's jurisdiction because otherwise one could not imply that the adjudicator was being asked to decide a non-existent jurisdictional issue which neither party had mentioned.

(c) One principal way of determining that there was no such implied agreement is if at any material stage shortly before or, mainly, during the adjudication a clear reservation was made by the party objecting to the jurisdiction of the adjudicator.

(d) A clear reservation can, and usually will, be made by words expressed by or on behalf of the objecting party. Words such as "I fully reserve my position about your jurisdiction" or "I am only participating in the adjudication under protest" will usually suffice to make an effective reservation; these forms of words whilstdesirable are not absolutely essential. One can however look at every relevant thing said and done during the course of the adjudication to see whether by words and conduct what was clearly intended was a reservation as to the jurisdiction of the adjudicator. It will be a matter of interpretation of what was said and done to determine whether an effective reservation was made. A legitimate question to ask is: was it or should it have been clear to all concerned that a reservation on jurisdiction was being made?

(e) A waiver can be said to arise where a party, who knows or should have known of grounds for a jurisdictional objection, participates in the adjudication without any reservation of any sort; its conduct will be such as to demonstrate that its non-objection on jurisdictional grounds and its active participation was intended to be and was relied upon by the other party (and indeed the adjudicator) in proceeding with the adjudication. It would be difficult to say that there was a waiver if the grounds for objection on a jurisdictional basis were not known of or capable of being discovered by that party.”

50.
Although this formulation applies to adjudication, it provides a useful summary of the approach to be taken in a case such as the present and merely expands upon the formulation of the issue as expressed by the Court of Appeal in **Rhodia Chirex Ltd**.. However, at sub-paragraph (e) above, Akenhead J. goes further in finding that a waiver can also arise in such circumstances. Once again, I can see no reason in principle why, by words or conduct, a party to a contract might not waive a right

to object to the jurisdiction of an expert under an expert determination clause. Once again, it is all a question of fact.

51.
I have set out the facts above but it seems to me that the following matters are of particular relevance:

51.1
The exchange of correspondence in May and October 2014 which assumed that ZVI owed duties under the Development Agreement, which had been allegedly breached coupled with the suggestion that the Clause 17.1 procedure be adopted for resolution of the dispute which, whilst not agreed to by the solicitors acting for TJAC and ZVI, was not challenged;

51.2
The agreement of the parties in January 2015 that the expert should decide issue of liability before dealing with quantum;

51.3
The service of submissions by TJAC and ZVI without any reservation and again on the basis that ZVI (and TJAC) owed duties under the Development Agreement;

51.4
The exchange of emails in December 2014 with the expert in circumstances when it might reasonably have been anticipated that if there was any question as to jurisdiction or construction of the contract, it would have been raised;

51.5
The service of responsive submissions, apparently without any reservation as to jurisdiction;

51.6
The provision of comments by ZVI and TJAC on 16th June 2015 but with no reservation as to jurisdiction;

51.7
The fact that ZVI (and TJAC) reached agreement with UND on the formulation of questions which the expert was to answer; and

51.8
The provision of quantum submissions by ZVI (and TJAC) on 6th October 2015.

52.
In my view this is a course of conduct from which it may be inferred that ZVI impliedly agreed that the expert would have jurisdiction under Clause 17.1 to decide the points in dispute between the parties. In my opinion this is clear or, adopting the formulation in **Aedifice Partnership Ltd** , “one can say with conviction that the parties must be taken to have agreed that the [expert] had such jurisdiction”. Not only did ZVI not advance any reservation, it took an active part in the procedure from about the middle of December 2014 to June 2015.

53.
However one must be clear as to the precise nature and extent of this implied agreement. It was not an implied agreement that the expert should decide whether ZVI did indeed owe substantive obligations under the Development Agreement. Not only would this have been a matter of the proper

construction of the contract, which would have fallen within Clause 17.2 (and therefore outside the expert's jurisdiction), but there was never any suggestion that there was any such dispute. Similarly there was no dispute raised as to the scope of Clause 17.1 and whether it could encompass disputes between UND and ZVI arising under the Development Agreement. Since it was not disputed, there was nothing for the expert to decide, but once again and in any event, such a dispute would have fallen within Clause 17.2 and outside the jurisdiction of the expert. For the avoidance of doubt I ignore the expert's second determination on the basis that it is not contended that that decision is binding on UND or ZVI. Thus there was an implied agreement that the expert should decide whether and to what extent ZVI (and TJAC) were liable for the six major defects and the remedial costs of those defects.

54.
Having impliedly agreed to submit the dispute as to whether there were defects for which ZVI (and TJAC) were responsible under the Development Agreement, ZVI is now bound by Clause 17.1.1 which renders the expert's determination final and binding on it. There is nothing unfair or illogical about this. ZVI had every opportunity to argue these points but for whatever reason it either chose not to deploy those arguments or did not consider them.

55.
It is therefore not necessary to decide whether, on a proper construction of Clause 17.1, the expert did in fact have jurisdiction to decide a dispute as between UND and ZVI.

Estoppel by convention and waiver

56.
Since there was no dispute about the principles applicable to an estoppel by convention, I can adopt the summary from **The Law of Waiver, Variation and Estoppel**, 3rd ed., 2012, Wilken & Ghaly (which was also adopted by Carr J. in **Jawaby Property Investment Ltd v The Interiors Group Ltd**[2016] EWHC 557 (TCC)) as a useful summary of the law:

"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely forming his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties."

57.
Whilst UND, as appears from its solicitor's letter dated 12th May 2014, must have formed its own view that ZVI was liable to UND under the Development Agreement and that the dispute was capable of being adjudicated upon by the expert under Clause 17.1, that view, or those assumptions, were adopted by ZVI by its conduct, as summarised above. That conduct "crossed the line" since each of the matters referred to above was communicated by UND to ZVI and by ZVI to UND. It was or became a common assumption and ZVI must have conveyed to UND an understanding that it expected UND to rely upon it. UND did in fact rely upon this common assumption or understanding (I consider this

requirement in more detail below) and that reliance occurred in the context of mutual dealing, i.e. the conduct of the proceedings before the expert.

58.
That formulation of an estoppel by convention leaves out any question as to unconscionability. In **Mears Ltd v Shoreline Housing Partnership Ltd**[2015] EWHC 1396 (TCC) Akenhead J. formulated this requirement as follows:

"(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the **Texas Bank** case described that this is what is needed and Lord Denning talks in these terms."

59.
Wilken & Ghaly states that where the party seeking to establish the estoppel has acted on the basis that the shared assumption was correct, it will be sufficient to establish detriment by the mere fact that there has been a change in the presumed position. The textbook goes on to explain this on the basis that there is an element of injustice inherent within the concept of the shared assumption; one party has acted unjustly in allowing the belief or expectation to "cross the line" and arise in the other's mind. Therefore, the detriment suffered by withdrawing from the shared assumption will suffice to establish the estoppel. (See paragraph 10.12, op. cit.)

60.
On this basis there is detriment since it is inherent in the manner in which ZVI conducted itself and UND relied upon that conduct so as to give rise to a common assumption.

61.
In **Mears Ltd,** the judge concluded his summary of the law by noting that the estoppel can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.

62.
ZVI's principal argument was that there was no witness statement to demonstrate either reliance upon the common assumption or detriment. Whilst this is correct, where, as in this case, the facts are sufficiently clear, a court is entitled to infer reliance from the facts and circumstances and, therefore, detriment. In **Societe Italo-Belge v Palm and Vegetable Oils (Malaysia) SDN. BHD.** [1981] 2 Lloyd's Rep 695 Robert Goff J held, in relation to an assertion of an estoppel by representation:

"I approach the matter as follows. The fundamental principle is that stated by Lord Cairns, viz. that the representor will not be allowed to enforce his rights "where it would be inequitable having regard to the dealings which are thus taken place between the parties". To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice for the representor to enforce his legal rights. Take the facts of **Central London Property Trust Ltd v High Trees House Limited**[1947] KB 130, the case in which Lord Justice Denning MR breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be

content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist upon his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a Court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the Court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice. But it does not follow that in every case in which the representee has acted, or failed to act, in reliance on the representation, it will be inequitable for the representor to enforce his rights; for the nature of the action, or inaction, may be insufficient to give rise to the equity, in which event a necessary requirement stated by Lord Cairns for the application of the doctrine would not have been fulfilled." (My emphasis.)

63.
In my opinion in this case the relevant reliance and detriment can be inferred from the fact that UND continued with the expert determination and indeed took proceedings in the U.S. courts on the clear assumption that ZVI accepted that it owed UND substantive obligations under the Development Agreement and that the expert had jurisdiction to determine the disputes as to the nature and extent of the alleged defects and the damages to which UND were entitled. Indeed since UND's reliance and detriment is negative in the sense that it failed to take other steps which it might have taken had ZVI put forward the arguments it now relies upon earlier, a witness statement would be of little value since it would merely consist of speculation as to what UND might have done on this hypothesis.

64.
In my view an estoppel by convention arises which prevents ZVI seeking to assert the true position (assuming it is correct in its submissions as to the true construction of the Development Agreement). It is estopped from contending that the expert determination made on 21st July 2015 or the future expert determination as to quantum is outside the jurisdiction of the expert. That estoppel does not however apply to any future dispute under Clause 17.1 or 17.2 or in any court proceedings.

65.
Precisely the same analysis would support a waiver; i.e. ZVI must be taken to have waived any rights it might have had or might still have to object to the jurisdiction of the expert.

Clause 24

66.
This provides as follows:

"No modification, alteration or waiver of any of the provisions of this agreement, except as otherwise provided in this agreement, shall be effective unless it is in writing and signed by or on behalf of the party against which the enforcement of such modification, alteration or waiver is sought."

67.
ZVI contends that there is no document signed by or on behalf of ZVI which affected any of the terms of the Development Agreement. It accepts however that, at least in principle, the requirements of Clause 24 could be varied by conduct and that it does not preclude an estoppel by convention. However it contends that the Court should be slow to conclude that the parties had in fact conducted themselves in a manner which had the effect envisaged by Clause 24 unless there is clear evidence that the parties intended by such conduct to modify, alter or waive the terms of the existing

agreement, in short that they intended to un-do the agreement as set out in Clause 24. ZVI contends that there is no evidence that the parties did in fact conduct themselves in a manner which modified, altered or waived the provisions of the Development Agreement, still less that they intended to make such modification, alteration or waiver. It also points out that this argument arises in relation to events long after the substantive obligations under the Development Agreement had been performed, which makes it less likely that the parties intended to undermine the Clause 24 provisions.

68.
By contrast UND contends that the requirements of Clause 24 were satisfied by:

68.1
The exchange of emails in December 2014 whereby no issues of law were raised and ZVI's subsequent conduct in submitting to the jurisdiction of the expert;

68.2
ZVI's submissions dated 30th December 2014, signed by Counsel instructed by ZVI;

68.3
ZVI's comments on the expert's draft determination, once again signed by Counsel on behalf of ZVI.

69.
If it is wrong about that then there was in fact a waiver or estoppel, which it accepts must be established in the usual way, but that there is no requirement that the representation or conduct be directed at Clause 24 or that, by virtue of Clause 24, a higher level of proof of waiver or estoppel is required.

70.
I reject UND's contention that by virtue of the matters it relies upon, ZVI indicated that it was agreeing to a modification, alteration or waiver of any of the provisions of the Development Agreement so as to fall within Clause 24. These matters were simply never addressed; indeed as I have found both parties simply proceeded on the basis that the expert had jurisdiction to determine the dispute as against ZVI and that ZVI owed UND substantive obligations under the Development Agreement.

71.
The question of whether a non-waiver provision, such as Clause 24, can itself be waived has been a matter of some controversy. This point was considered in **(1) Globe Motors Inc and (2) Globe Motors Portugal-Materail Electrico Para A Industria Automovel LDA and (3) Safran USA Inc v TRW Lucas Varity Electric Steering Ltd and others**[2016] EWCA Civ 396.

72.
The action concerned an exclusive supply agreement. Article 6.3 provided as follows:

"6.3 Entire Agreement; Amendment: This Agreement, which includes the Appendices hereto, is the only agreement between the Parties relating to the subject matter hereof. It can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties."

73.
The judge at first instance had found that the Agreement, including Article 6.3, had been varied or waived by the parties' conduct because in their dealings under the agreement, over a long period of

time, they had operated as if the Second Claimant ("Porto") was a party to the agreement. He concluded that it was "overwhelming clear" that TRW Lucas treated Porto as a contracting party. On appeal Beatson LJ (with whom LJJ Moore-Bick and Underhill agreed) considered whether, in the light of Article 6.3, it was open to the parties to amend the agreement orally. Their decision on this point is obiter, but it is clear from the context that it is intended to provide guidance since the Court considered two contradictory Court of Appeal decisions, **United Bank Ltd v Asif** (11 February 2000) and **World Online Telecom Ltd v I-Way Ltd** [2002] EWCA Civ 413, and decided it should follow the latter decision. The Court of Appeal thus decided that "…in principle a contract containing a clause that any variation of it be in writing can be varied by an oral agreement or by conduct" (per Beatson LJ., paragraph 113) and "…Article 6.3 does not prevent the parties from varying the Agreement orally or in any other informal manner…. The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties. If there is an analogy with the position of Parliament, it is in the principle that Parliament cannot bind its successors." (per Moore-Bick L.J., paragraph 119).

74.
Any doubts as to the status of the decision in **Globe Motors** have been dispelled by the subsequent decision in **MWB Business Exchange Centres Ltd v Rock Advertising Ltd**[2016] EWCA Civ 553. It was submitted in that case that an anti-oral variation clause did not prevent the operation of doctrines of waiver or estoppel but it would require something on the facts to render it unconscionable to enforce the clause before such a clause could be defeated. Kitchin LJ held (paragraph 34):

"I find myself unable to accept Mr Darton's submissions. The relevant principles, the material policy considerations, the earlier authorities and the issue of precedent were considered in depth and with the benefit of very full argument in Globe Motors and for my part I consider it would require a powerful reason for this court now to come to a conclusion or adopt an approach which is different from that of all members of the court in that case. In my judgment and despite the attractive way Mr Darton developed his arguments, none has been shown. To the contrary, I respectfully agree with Beatson LJ that the decision of this court in World Online Telecom was correct and should be followed for the reasons he gave. To my mind the most powerful consideration is that of party autonomy, as Moore-Bick LJ explained it.…"

75.
In that case Rock entered into a licence agreement, Clause 7.6 of which provided:

"This licence sets out all of the terms as agreed between MWB and the licensee. No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

76.
The Court of Appeal held that this clause did not preclude any variation of the licence other than one in writing and in accordance with its terms.

77.
Reverting to **Globe Motors Inc.,** the question of the standard of proof required in such cases was considered. Beatson LJ held (at paragraph 109):

“Difficulties of proof may arise whenever it is claimed that a contract has been made orally or by the conduct of the parties, and the facts have to be determined by the trial judge from the evidence given by the parties and their witnesses. In the Energy Venture Partners and Virulite cases referred to at [105] above Gloster LJ and Stuart-Smith J considered the statements of HHJ Mackie QC in Spring Finance Ltd v HS Real Company LLC[2011] EWHC 57 (Comm) at [53] and in the summary judgment decision in this case ([2012] EWHC 3134 (QB) at [33]) that the court would be likely to require "strong evidence" before finding there has been an oral variation of such a clause. In the first of these cases, Gloster LJ's inclination to regard an oral variation as effective notwithstanding such a clause was stated to be "where the evidence on the balance of probabilities established such variation was indeed concluded". Stuart-Smith J was of the same view in the second case: see [2014] EWHC 366 (QB) at [60]. See also McKay v Centurion Credit Resources LLC[2011] EWHC 3198 (QB) at [56]. I respectfully agree with them.”

78.
The passage in **Virulite LLC v Virulite Distribution** to which Beatson LJ referred to reads as follows:

“Each case will be fact sensitive, depending upon the terms of the original contract and what has happened thereafter. To my mind, the fact that a clause was specifically negotiated or was insisted on by one party or the other (for a particular reason or no reason at all) may be a relevant factor; and the existence of a written clause excluding any unwritten modification will require the court to look closely both at whether the parties subsequently reached an agreement that would, if enforced, vary the effect of the original contract and also at whether in reaching that agreement the parties intended to enter into legal relations so as to vary the terms of their original contractual obligations. But it seems to me that, while all relevant facts should be given their due weight in assessing these questions and the burden of proof rests on the person who alleges that the original contractual obligations have changed, the standard of proof is and remains the balance of probabilities throughout. I would prefer not to adopt the use of "strong evidence" or "a very high evidential burden" since there is a danger that they may be treated as affecting the burden or standard of proof. Similarly, I would prefer not to adopt the phrase "evidential presumption", though the intent behind it is clear. Rather, I adopt the approach that the Court should give all relevant evidence its due weight when asked to find on the balance of probabilities that there has been a subsequent variation which has legal affect even though it does not comply with the formalities stipulated by the original contract. The terms of the original contract will always be material to that exercise; the circumstances in which those terms were negotiated and agreed may also be.”

79.
Beatson LJ also endorsed a passage from the judgement of Gloster LJ in **Energy Venture Partners Ltd v Malabou Oil & Gas Ltd:**

“In many cases, such as United Bank Limited v Asif …where the relationship between the parties was a formal banking relationship) the factual matrix of the contract and other circumstances may well preclude the raising of an alleged oral variation to defeat an entire agreement clause. In others, the evidence may establish on the balance of probabilities that the parties by their oral agreement and/or conduct have varied the basis of their contractual dealings, and have effectively overridden a written clause excluding any unwritten modification. Such a situation might well arise in circumstances where, as in the present case, there are effectively only two individuals negotiating a variation to, and subsequently operating under, the terms of an unusual agreement in unusual circumstances. But the question whether the entire agreement clause has been overridden is necessarily fact-sensitive.”

80.
These passages make clear that the issue in such cases is fact-sensitive, that the question has to be decided on a balance of probabilities and that one relevant factor to consider is the fact that the parties have agreed a specified manner in which their contract can be varied or modified. There is however nothing in these passages to suggest that the parties must have directed their minds to the relevant clause or that they must have intended to modify, alter or waive the terms of the Development Agreement, or the non-variation clause in particular. What must be determined by the Court is whether, by their actions, words or conduct they must be taken to have intended to modify or alter or waive a term of the Development Agreement, bearing in mind that they agreed to the terms of Clause 24 in the first place.

81.
Accordingly I conclude that the parties were able to vary the Development Agreement other than in accordance with Clause 24; they were able to un-do the limitation of Clause 24. Furthermore, on the assumption that Clause 17.1 did not give the expert the necessary jurisdiction, it is clear that the parties did so. In particular ZVI's conduct as summarised at paragraph 51 above, can only be understood as impliedly agreeing to submit the dispute raised by UND against TJAC and ZVI for decision by the expert and/or as waiving any right ZVI may have had to object to the dispute being decided by the expert. Furthermore UND is not precluded by Clause 24 from relying upon an estoppel by convention to defeat any argument that ZVI may be able to advance to the effect that the expert lacked jurisdiction in relation to the dispute referred to him. In summary ZVI must be taken to have agreed not to insist upon the formalities of Clause 24 being adhered to in order to bring the dispute before the expert.

Issue Estoppel

82.
My findings above are sufficient to justify the refusal of the injunction sought by ZVI but, in deference to the arguments put forward and evidence deployed, I think it is appropriate that I consider this argument.

83.
An issue estoppel can arise where an essential issue is decided which formed the basis of the judgement. That decision is then binding on the parties in any subsequent proceedings. There is no doubt that the doctrine can apply to foreign judgements (**Carl-Zeiss (No. 2)**[1967] 1 AC 853).

84.
However an essential feature of an issue estoppel is that the issue must be the same as between the two sets of proceedings. The issue which was determined in the District Court was whether UND was entitled to an attachment order. That depended on whether the expert's determination was final and binding. ZVI argued it was not, for three reasons: (1) the determination only dealt with liability and not quantum, (2) in reliance upon two sentences of the determination which suggested that the determination was not final and (3) the arguments outlined in the decision of the District Court at paragraph 29 above as to the jurisdiction of the expert.

85.
If UND were to succeed in its application, it had to defeat all three arguments, which it did. Clearly therefore the reasoning outlined at paragraph 29 concerning the issue of jurisdiction above was essential or fundamental to the outcome.

86.
However this conclusion was given in the context of Clause 17.1 of the Development Agreement; it was the expert's determination given pursuant to that provision which founded the application for the attachment.

87.
By contrast, the second declaration sought by ZVI relates to Clause 17.2 and as regards the third declaration, the District Court only dealt with the point very shortly ("Despite this, ZVI contends that it was only a "nominal" party..... Any allocation of damages, however, is separate from the issue of jurisdiction.") and it appears to have been addressing a different question to the one now raised.

88.
UND contend that since the issue that would arise as to jurisdiction under Clause 17.2 is identical to that under Clause 17.1 (apart from irrelevant minor differences in wording), I should treat the District Court decision as determinative of the second declaration.

89.
The question as to whether an issue estoppel arises where a very similar, although not identical, issue arises in the subsequent proceedings, does not appear to have been finally decided, although the Privy Council decision indicates that it must the very same issue. (**Rajah of Pittapur v Sri Rajah Garu** (1884) LR 12 Ind App 16.)

90.
Thus, if the matter rested there, I would disregard the District Court decision but it seems to me that an essential argument in support of the injunction is the assertion that the expert lacked jurisdiction to determine a dispute to which ZVI was a party. In that regard it is clear that the District Court decided this issue adverse to ZVI and that, subject to the next question, it would give rise to an issue estoppel as to that point.

91.
The only remaining question is whether the District Court's decision was final. In the context of German proceedings (**Carl-Zeiss (No. 2)**[1967] 1 AC 853 at 191) it was said:

"When we come to issue estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the lex fori but the lex fori ought to be developed in a manner consistent with good sense."

92.
The fact that a judgment or decision can be appealed does not, for these purposes, prevent the judgment or decision from being final.

93.
I have been provided with the witness statements of Richard Briansky, on behalf of ZVI, and Mr Larson, on behalf of UND, both of whom are lawyers qualified to practise in the United States. Mr

Briansky represents ZVI in the proceedings in the United States, whereas Mr Larson appears to have had no previous involvement in this matter.

94.
Mr Briansky argues that the Memorandum and Order of 7th April 2016 is not final under United States law. He argues that a distinction is to be made between an order and a judgement and that the former is interlocutory whereas the latter is generally final. He refers to Rule 54 of the Federal Rules of Civil Procedure whereby, until all issues and claims have been determined, it is not possible to enter final judgement and that that is the position here. Furthermore until such a judgement is drawn up then, under Rules 54, 59 and 60 of the Federal Rules, the court may reconsider an order previously made. He points out that the court expressly retained jurisdiction directing the parties to submit a joint status report every 60 days until the expert issued his final determination on quantum. He also refers to a hearing, held on the application of UND on 5th May 2016, before the same judge, in which she said:

"I'm not going to enter a final judgement because I want the authority to continue to oversee this attachment, and because it is an attachment, it is not an injunction, and I don't think I'm divested of jurisdiction."

95.
By contrast Mr Larson argues that the Memorandum and Order are final, at least as regards the confirmation order i.e. confirming the expert's determination pursuant to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. He contends that a judgement is not required for an order to be final, finality in practice depending on whether the order adjudicates all the parties' rights and that there is no reasonable possibility that the Memorandum and Order could be reversed or changed. No evidence or argument has been put forward by ZVI which would permit it to challenge the decision already made. The only reason the court refused to enter a final judgement was so as to retain jurisdiction to oversee the writ of attachment.

96.
Mr Briansky responds that there is no authority supporting the view that only part of an order can be final and that there is nothing to indicate that the court regarded this part of the order as final.

97.
Following the decision in **Carl-Zeiss (No. 2)**the question is whether the courts in the United States would regard the confirmation order as final. This is a question which will be decided by the First Circuit Court of Appeals since ZVI has issued an appeal and the Court of Appeals has ordered ZVI to either move for voluntary dismissal of the appeal or show cause as to why the appeal should not be dismissed for lack of jurisdiction. It appears that the latter question turns on whether the District Court's decision is indeed final.

98.
It would seem to me that whilst Mr Larson is probably right, namely that there is no real possibility of the District Court re-considering the confirmation order or the arguments leading to the making of that order, United States law would not regard the Memorandum and Order, let alone the confirmatory part of the Order, as final. Thus, in this respect, there is a real difference in United States law, between an order and a judgement and that, coupled with the fact that the Judge refused to enter judgement, strongly suggests that the District Court remains seized of all issues. The fact that the District Court is highly unlikely to alter its existing order, is not to the point. Issue estoppel is not

just a question of substance; it is also a question of form. It is a serious and important doctrine which, potentially, deprives a party of an important right: to advance a point to support its position in any subsequent proceedings. The burden rests on the party seeking to set up the issue estoppel, UND, and for the reasons set out above, I find that that burden has not been discharged by UND. Accordingly no issue estoppel arises.

Other Issues

99.
In view of my decision on my decision on submission to jurisdiction, estoppel by convention and waiver, it is unnecessary for me to arrive at a decision about the remaining issues and, in particular, as to whether these proceedings, or any part of them, about to an abuse of the process of court.

Declarations

100.
The power to make declarations is discretionary. The court should take into account justice for the claimant and the defendant, whether the declaration would serve a useful purpose and whether there are any special reasons why or why not the court should grant the declaration. (**Financial Services Authority v Rourke** [2002] C.P. Rep. 14.)

101.
As I say, as regards the first declaration, there is no dispute. It is accordingly not disputed that the expert had no jurisdiction to make the determination he did on 5th March 2016. I cannot think that in the present circumstances that determination is of any relevance to either party, and given that it is not disputed, I decline to make a declaration.

102.
As regards the second declaration, as I say, there is no application to refer a dispute to arbitration and certainly none that involves ZVI. I therefore see no useful purpose in making a declaration on this issue.

103.
The third declaration differs from the other two. Whilst the District Court was addressed on the issue of whether ZVI owed any substantive obligations under the Development Agreement, it did not express a concluded view but instead suggested that that issue might be relevant to the allocation of damages as between ZVI and TJAC. As an English lawyer, this is difficult to understand; if in truth ZVI has no liability under the Development Agreement, then it cannot be liable for any damages and no question of an allocation of damages could arise.

104.
Nevertheless, the expert determination proceeded (at least until 2016) on the basis that there was no dispute but that ZVI did owe TJAC substantive obligations under the Development Agreement, thus there is no obvious purpose to this declaration. Neither party suggested that a declaration on this issue could be used or adopted in some way. However, it may be that, were the declaration to be in ZVI’s favour, it might be used to undermine in some way the expert’s determination or it may be that it could be put forward in the United States proceedings. This would be or could be potentially unfair to UND since it has proceeded on the basis that it was not disputed that ZVI owed TJAC substantive obligations under the Development Agreement.

105.

For these reasons I decline to consider the third declaration.

Conclusion

106.
For the reasons given above:

106.1
ZVI impliedly agreed to the expert having jurisdiction in regard to the issues referred to him pursuant to Clause 17.1 of the Development Agreement;

106.2
ZVI is estopped from asserting that the expert lacked jurisdiction to decide the issues referred to him and/or waived its right to advance such an argument;

106.3
Clause 24 of the Development Agreement does not prevent UND asserting or relying upon the implied agreement, the estoppel or the waiver;

106.4
No issue estoppel arises from the Order and Memorandum of the District Court dated 7th April 2016;

106.5
I decline to grant the injunction sought by ZVI;

106.6
I decline to make the declarations sought by ZVI.

107.
I will deal with questions of costs and any other relief, separately.