Ohpen Operations UK Ltd v Invesco Fund Managers Ltd

[2019] EWHC 2246 (TCC)

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)

O'FARRELL J

18 JULY, 16 AUGUST 2019

Contract – Construction – Alternative dispute resolution – Clause providing for mediation of dispute before submission by either party to exclusive jurisdiction of English courts – Claimant issuing proceedings against defendant without engaging in mediation first – Defendant seeking to enforce alternative dispute resolution provisions by means of order staying proceedings – Applicable principles – Whether stay appropriate.

By a framework agreement dated 1 July 2016 ('the Agreement'), the defendant ('Invesco'), an investment manager, engaged the claimant ('Ohpen') to develop and implement a digital online platform for customers to buy and sell investments in funds. Clause 11 of the Agreement stated different procedures for the resolution of disputes during different phases of the Agreement. Clause 11.1 provided: 'The parties will first use their respective reasonable efforts to resolve any Dispute … the Dispute shall be referred to mediation …'. Dispute was defined in Sch 1 as: 'a dispute or failure to agree'. Clause 11.1.2 stipulated that the parties had to use the CEDR Model Mediation Procedure to attempt to reach a settlement of their dispute. Clause 11.2 provided: 'If a Dispute was not resolved in accordance with the Dispute Procedure, then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts'. Dispute Procedure was defined in Sch 1 as: 'the procedure for resolving Disputes contained in Clause 11 of the Agreement'. In October 2018, Invesco issued a notice of termination on the grounds of (incurable) material breach and/or repudiatory breach. Ohpen disputed breach. In April 2019, Ohpen issued proceedings against Invesco, claiming damages of £4.7m arising from Invesco's wrongful termination. Invesco intimated a counterclaim in the sum of approximately £5.7m. In May, Invesco issued an application, seeking: (i) a declaration that the court would not exercise any jurisdiction it might have to hear the claim filed by Ohpen; and (ii) an order for a stay of the claim pending compliance with the contractually agreed dispute resolution procedure. Consideration was given to the applicable legal principles where a party sought to enforce an alternative dispute resolution provision by means of an order staying proceedings, and the question of whether, as a matter of construction of the Agreement, the relevant dispute resolution provisions were applicable.

Held – (1) The following principles could be derived from the authorities as applicable where a party sought to enforce an alternative dispute resolution provision by means of an order staying proceedings: (i) the agreement had to create an enforceable obligation requiring the parties to engage in alternative dispute resolution; (ii) the obligation had to be expressed clearly as a condition precedent to court proceedings or arbitration; (iii) the dispute resolution

process to be followed did not have to be formal but had to be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties; and (iv) the court had a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement, and in exercising that discretion, it would have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes (see [32], below); *Holloway v Chancery Mead Ltd* [2008] 1 All ER (Comm) 653, *Tang v Grant Thornton International Ltd* [2013] 1 All ER (Comm) 1226 and *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] All ER (D) 40 (Jul) considered.

(2) On its proper construction, the Agreement contained a dispute resolution provision (cl 11.1) that was applicable to the dispute between the parties and created an enforceable obligation requiring the parties to engage in mediation, and one (cl 11.2) that operated as a condition precedent to the commencement of legal proceedings. The mechanism under cl 11.1.2 was sufficiently clear and certain to be enforceable. The provision for mediation to be carried out under the CEDR model procedure produced a process that did not require any further agreement by the parties to enable a mediation to proceed. The rules for selection of the mediator and conduct of the mediation were set out in the CEDR rules. It would be possible for the court to determine by reference to objective criteria whether the parties had participated in a mediation and whether or not their disputes remained unresolved. Lastly, it would be appropriate to stay the proceedings (from 28 October 2019 to 9 December 2019) to enable a mediation to take place. Pleadings should be served so that the substantive issues might be clarified before the mediation. If the parties were unable to settle the dispute by 9 December 2019, they should notify the court of the position and apply for a date for a costs and case management conference (see [35]–[51], [53], [54], [56], [60], [61], below).

Notes

For alternative dispute resolution (ADR) and the continuing encouragement to settle, see *Halsbury's Laws* CIVIL PROCEDURE vol 11 (2015) para 127.

Cases referred to

Cable & Wireless plc v IBM UK Ltd [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041.

Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] 1 All ER 716, [1975] 1 WLR 297, [1975] 1 EGLR 117, CA.

Dunnett v Railtrack plc (in railway admin) [2002] EWCA Civ 303, [2002] 2 All ER 850, [2002] 1 WLR 2434.

Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145, [2014] 2 Lloyd's Rep 457, [2014] All ER (D) 40 (Jul).

Heyman v Darwins Ltd [1942] 1 All ER 337, [1942] AC 356, HL.

Holloway v Chancery Mead Ltd [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653, (2007) 117 ConLR 30.

Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, [1980] AC 827, [1980–84] LRC (Comm) 188, [1980] 2 WLR 283, HL.

Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New

York Star [1980] 3 All ER 257, [1981] 1 WLR 138, [1980–84] LRC (Comm) 105, [1980] 2 Lloyd's Rep 317, PC.
Smith (Paul) Ltd v H & S International Holding Inc [1991] 2 Lloyd's Rep 127.
Tang v Grant Thornton International Ltd [2012] EWHC 3198 (Ch), [2013] 1 All ER (Comm) 1226, [2013] 1 Lloyd's Rep 11.

Application

The defendant, Invesco Fund Managers Ltd ('Invesco'), issued an application seeking: (i) a declaration that the court would not exercise any jurisdiction it might have to hear the claim filed against it by the claimant, Ohpen Operations UK Ltd ('Ohpen'); and (ii) an order for a stay of the claim pending compliance with the contractually agreed dispute resolution procedure.

Fionn Pilbrow QC (instructed by *Herbert Smith Freehills LLP*) for Invesco.
Matthew Parker (instructed by *Bryan Cave Leighton Paisner LLP*) for Ohpen.

Judgment was reserved.

16 August 2019. The following judgment was delivered.

O'FARRELL J.

[**1**] The issue before the court is whether the claim has been issued in breach of a contractually agreed tiered dispute resolution procedure and, if so, whether these proceedings should be stayed, pending referral of the dispute to mediation.

BACKGROUND TO THE DISPUTE

[**2**] By a framework agreement dated 1 July 2016 ('the Agreement'), the defendant ('Invesco'), an investment manager, engaged the claimant ('Ohpen') to develop and implement a digital online platform through which Invesco's retail customers could buy and sell investments in funds offered by Invesco for an initial term of eight years.

[**3**] The Agreement provided that during the period between the effective date of the Agreement of 1 July 2016 and the launch of the platform ('the Development and Implementation Phase'):

(i) the parties would agree the requirements for the platform and its implementation, which would be set out in a Development and Implementation Plan ('the DIP');

(ii) Ohpen would develop and deliver the platform in accordance with the DIP; and

(iii) Invesco would pay Ohpen an implementation fee of £75,000 per month.

[**4**] Following the launch of the platform ('the Commencement Date'), Ohpen would operate the platform, which would process transactions and provide administration, reporting and other services, the Business Process Outsourcing ('BPO') services, and Invesco would pay Ohpen service charges.

[**5**] The Agreement provided that the Commencement Date would be 1 March 2017, subject to any agreed extensions. Delays occurred and the Commencement Date was not achieved. There is a dispute as to responsibility for the delays and the revised Commencement Date agreed by the parties.

[**6**] By letter dated 11 October 2018 Invesco issued a notice of termination on the grounds of (incurable) material breach and/or repudiatory breach.

[7] By letters dated 16 October 2018 and 22 November 2018 Ohpen disputed any material and/or repudiatory breach, disputed the validity of Invesco's purported termination and purported to accept Invesco's repudiatory breach.

[8] Thus, both parties agree that their primary obligations under the Agreement have been terminated. There is a dispute as to which party was in material and/or repudiatory breach of contract. The competing arguments are set out in the witness statements of David Phillips, solicitor for Invesco, dated 24 May 2019 and Oliver Glynn-Jones, solicitor for Ohpen, dated 28 June 2019.

[9] At the end of January 2019 the parties attended a 'without prejudice' meeting to attempt to resolve the dispute but no settlement was concluded.

[10] On 20 February 2019 Ohpen sent a letter of claim.

[11] On 23 April 2019 Ohpen issued these proceedings, claiming damages of £4.7 million arising from Invesco's alleged wrongful termination. Invesco has intimated a counterclaim in the sum of approximately £5.7 million.

[12] On 24 May 2019 Invesco issued this application seeking:

> (i) a declaration that the Court will not exercise any jurisdiction it may have to hear the claim filed by Ohpen; and
>
> (ii) an order for a stay of the claim pending compliance with the contractually agreed dispute resolution procedure.

[13] Mr Pilbrow QC, counsel for Invesco, submits that cl 11 of the Agreement is a valid, binding and applicable alternative dispute resolution clause, which prescribes a mandatory escalation and mediation procedure prior to the commencement of proceedings. Ohpen has commenced these proceedings in breach of that provision. In those circumstances, the Court should exercise its discretion to stay the proceedings to give effect to the procedure agreed by the parties.

[14] Mr Parker, counsel for Ohpen, opposes the application on the ground that, as a matter of construction of the Agreement, the relevant dispute resolution provisions are not applicable outside the Development and Implementation Phase or following termination of the Agreement. The Agreement has been terminated by Ohpen or Invesco. It follows that the provisions are no longer binding on the parties.

THE AGREEMENT

[15] Clause 3.5 states:

> 'Parties will jointly agree in writing on the contents of the Development and Implementation Plan within a period of two (2) months after the Effective Date … Ohpen will manage the process of drafting the Development and Implementation Plan for approval by Client and when Parties agree on its contents, it shall be signed by Parties and attached to this Agreement as Schedule 4 (Development and Implementation Plan) ("Agreed Development and Implementation Plan"). Ohpen will thereafter manage the execution and delivery of the Agreed Development and Implementation Plan in accordance with the agreed planning, deliverables and dependencies (including any agreed actions to be executed by Client and Ohpen) set out in the Agreed Development and Implementation Plan …
>
> The date after the signature date on which the last Party has signed off the Development and Implementation Plan is considered to be the Commencement Date of the BPO Services, unless Parties agreed to a specific and different commencement date of such BPO Services.'

[**16**] Clause 3.6 states:

'During the Development and Implementation Phase, Ohpen will carry out the Implementation Services in order to meet its obligations resulting from the agreed Development and Implementation Plan. Ohpen shall have an autonomous responsibility to plan its resources in such a way that the milestones derived from the Development and Implementation Plan shall be met in time. An Implementation Fee as described in Schedule 3 (Pricing) shall apply to Client from the Effective Date …

Any disputes about or arising out of delays shall be resolved through the Dispute Procedure as described in Clause 11.1.1 and 11.1.2. Pending the resolution of the dispute, the parties shall continue to work together to resolve the causes of, and mitigate the effects of, the delay.'

[**17**] Clause 3.8 states:

'As of the Commencement Date, Ohpen shall perform the BPO Services in accordance with all elements of this Agreement, but specifically in accordance with the Service Level Agreement for Client and Client's (prospective) Customers …'

[**18**] Clause 11 is entitled 'Dispute Resolution' and provides as follows:

'11.1 Internal Escalation

11.1.1 The Parties will first use their respective reasonable efforts to resolve any Dispute that may arise out of or relate to this Agreement or any breach thereof, in accordance with this Clause. If any such Dispute cannot be settled amicably through ordinary negotiations within a timeframe acceptable to Client and Ohpen, either Party may refer the Dispute to the Contract Managers who shall meet and use their reasonable efforts to resolve the Dispute.

11.1.2 During the Development and Implementation Phase, any disputes shall firstly be handled by the persons as described in Clause 22.1. If such escalation does not lead to resolution of the Dispute, then the Dispute shall be escalated to the executive committees of respectively Client and Ohpen. If escalation to the executive committee does not lead to resolution of the Dispute, then the Dispute shall be referred for resolution to mediation under the Model Mediation Procedure of the Centre of Dispute Resolution (CEDR) for the time being in force. If the Parties are unable to resolve the Dispute by mediation, either Party may commence court proceedings.

11.1.3 If any such Dispute that arises after Commencement Date is not resolved by the Contract Managers within ten (10) Business Days after it is referred to them, either Party may escalate the Dispute through the hierarchy of the committees, as set out in the chapter on governance of Schedule 2 (Service Level Agreement), who will meet and use their respective reasonable efforts to resolve the Dispute.

11.1.4 Ohpen shall continue to provide the Services and to perform its obligations under this Agreement notwithstanding any Dispute or the implementation of the procedures set out in this Clause. Client's payment obligations that are listed in Schedule 3 (Pricing) shall not be halted during the resolution of any Dispute.

11.2 Jurisdiction

If a Dispute is not resolved in accordance with the Dispute Procedure, then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts.

11.3 Urgent Relief

Nothing contained in Clause 11.1 shall restrict either Party's freedom to commence summary proceedings to procure or ensure performance of obligations and/or any required action to prevent further damages, preserve any legal right or remedy or to prevent the misuse of any of its Confidential Information.'

[**19**] Dispute is defined in Sch 1 as—'a dispute or failure to agree.'

[**20**] Dispute Procedure is defined in Sch 1 as—'the procedure for resolving Disputes contained in Clause 11 of the Agreement.'

[**21**] Contract Manager is defined in Sch 1 as—

'The employee of Ohpen and Client respectively appointed as a contract manager in accordance with the chapter on governance of Schedule 2 (Service Level Agreement).'

[**22**] Clause 20.5.2 states:

'Termination of this Agreement will not affect any accrued rights or liabilities or payments due or the coming into force or continuing in force of any provision of this Agreement which is expressly or by implication intended to come into or continue in force on or after termination. Without limitation, Clauses 18 and 19 and any other provision expressed to survive termination or expiry and those provisions necessary for interpretation or enforcement of this Agreement shall survive termination or expiration of this Agreement for whatever reason and shall continue to apply indefinitely.'

[**23**] Clause 22.1 identifies the individual for each party to whom communications and notices should be sent. Those individuals are the persons who are required to handle disputes as set out in cl 11.1.2.

[**24**] Clause 22.12 states:

'This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation will be construed in accordance with and governed by the laws of England and Wales. Each Party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation.'

CHALLENGE TO JURISDICTION

[**25**] CPR 11(1) provides:

'A defendant who wishes to …

(b) argue that the court should not exercise its jurisdiction,

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.'

[**26**] CPR 11(6) provides:

'An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including—…

(d) staying the proceedings.'

APPLICABLE PRINCIPLES

[**27**] It is common ground that a clause requiring the parties to follow a specified dispute resolution process can in principle create a condition precedent to the commencement of court proceedings.

[**28**] In *Cable & Wireless plc v IBM UK Ltd* [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041 Colman J recognised that a contractual agreement to refer a dispute to ADR could be enforceable by a stay of proceedings:

'[21] … Essentially the question that arises is whether that reference is in substance nothing more than an agreement to negotiate and, as such, an agreement incapable of enforcement in English law as decided by the Court of Appeal in [*Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297]… 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" …

[23] 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 [*Smith (Paul) Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127]. That is because a 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 cl 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.

[24] However, the clause went on to prescribe the means by which such 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. Resort to CEDR and participation in its recommended procedure are, in my judgment, engagements of sufficient certainty for a court readily to ascertain whether they have been complied with.

[28] For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnett v Railtrack plc (in railway administration)* [[2002] EWCA Civ 303, [2002] 2 All ER 850, [2002] 1 WLR 2434] …

[32] … In principle … where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find …

[34] The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction

absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreement, is in origin an equitable remedy.'

[**29**] In *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653, (2007) 117 ConLR 30 (at [81]), Ramsey J identified three requirements for such agreements to be enforceable:

> '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.'

[**30**] Further guidance was provided by Hildyard J in *Tang v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), [2013] 1 All ER (Comm) 1226, [2013] 1 Lloyd's Rep 11:

> '[59] The court has been in the past, and will be, astute to consider each case on its own terms. The test is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect.
>
> [60] In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.
>
> [61] In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.'

[**31**] The public interest in the enforcement of agreed ADR provisions was considered by Teare J in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145, [2014] 2 Lloyd's Rep 457 (at [64]):

> 'Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time-consuming arbitration.'

[**32**] The following principles can be derived from the above authorities as applicable where a party seeks to enforce an alternative dispute resolution provision by means of an order staying proceedings:

(i) The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.

(ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.

(iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties.

(iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the Court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

WHETHER ENFORCEABLE ALTERNATIVE DISPUTE RESOLUTION OBLIGATION

[**33**] Mr Pilbrow's submission is that the Agreement contains a valid, binding and mandatory alternative dispute resolution clause. Clause 11.1.2 applies to any dispute arising during the Development and Implementation Phase and is not otherwise time-limited. Clause 11 survives the termination of the Agreement as an ancillary provision that is necessary for the enforcement of the parties' rights and obligations under the Agreement.

[**34**] Mr Parker's submission is that as a matter of construction of this Agreement, the alternative dispute resolution requirements do not apply outside the Development and Implementation Phase or after termination. Clause 11 is a self-contained provision containing machinery for the determination of disputes during the currency of the Agreement. The clear commercial purpose of cl 11.1.2 is to provide a means of resolving disputes quickly to facilitate progress of the platform development and launch. That commercial purpose disappears following termination of the Development and Implementation Phase. The Development and Implementation Phase came to an end on termination of the Agreement by Invesco or Ohpen. It follows that, as that phase has come to an end, those alternative dispute resolution provisions are no longer applicable.

[**35**] Starting with the words used by the parties, the language in cl 11.1, stipulating that the parties should attempt to resolve any disputes by the specified procedure, is in mandatory terms: 'The parties will first use their respective reasonable efforts to resolve any Dispute … the Dispute shall be referred for resolution to mediation …' Therefore, on its face, the clause requires the parties to engage in a defined dispute resolution procedure, including mediation.

[**36**] Turning to the commercial purpose of the provision, cl 11 sets out different procedures for the resolution of disputes during different phases of the Agreement. Clause 11.1.2 expressly applies during the Development and Implementation Phase. The commercial purpose of the tiered procedure in cl 11.1.2 is to enable the parties to achieve swift resolution to any disputes that arise and avoid litigation. Specifically, the purpose served by cl 11.1.2, including the provision for mediation, is to avoid disruption to the development and implementation of the online platform.

[**37**] Clause 11.1.3 expressly applies to any dispute that arises after the Commencement Date, that is, after the end of the Development and

Implementation Phase. A separate set of dispute resolution provisions are applicable, using the committees set out in the Service Level Agreement, which comes into force after the Commencement Date. Clause 11.1.3 does not include any reference to mediation. This indicates that the parties consciously decided to put in place separate and distinct dispute resolution procedures that would apply at different stages of the project.

[**38**] Against that background, the Court must consider the meaning of the words used by the parties. The issue is whether the dispute resolution procedure is intended to apply to all disputes arising during those specified stages or are limited to those disputes only to the extent that the specified stages of the project continue.

[**39**] In my judgment, on a proper construction of the Agreement, cl 11.1.2 applies to any dispute *arising* during the Development and Implementation Phase. I accept that the express words: 'During the Development and Implementation Phase' at the beginning of cl 11.1.2 indicate a temporal limitation to the provision. However, despite those opening words, the clear intent is for the procedure to apply to all disputes arising during that part of the project. Support for that intent is found in Sch 1. The definition of 'Dispute' is wide and encompasses any failure to agree. The definition of 'Dispute Procedure' indicates that cl 11 contains the procedure for resolving all disputes. It follows that, subject to any express term to the contrary, any dispute must be capable of falling into either the procedures set out in cl 11.1.2 or those set out in cl 11.1.3.

[**40**] Clause 11.1.3 expressly refers to disputes *arising* after the Commencement Date. If, as Ohpen submits, the application of cl 11.1.2 were limited to dispute resolution procedures during the Development and Implementation Phase, there would be a gap in the procedures for disputes arising during that phase but remaining unresolved at the end of the phase. No commercial purpose would be served by curtailing the parties' right to use the dispute resolution process in respect of a dispute that had already arisen, or by halting an ongoing process, on conclusion or termination of the relevant phase. This could lead to a situation where certain disputes in relation to the development of the platform were caught by the dispute resolution procedure and others not, even where such disputes were closely connected and arose at the same time. It is very unlikely that the parties would have intended an incomplete mechanism for resolving their disputes.

[**41**] Clause 11.1.4 requires Ohpen to continue to provide the services and perform its obligations notwithstanding any dispute or the implementation of the procedures set out in cl 11. Contrary to Mr Parker's submission, it does not indicate that cl 11 would apply only while the parties remained under reciprocal obligations to perform their primary obligations under the Agreement. That is not what the words say. In any event, it begs the question as to which, if any, of the obligations under the Agreement survived termination.

[**42**] Termination occurred during the Development and Implementation Phase. At the point of termination, the Development and Implementation Phase had not been completed and the Commencement Date had not been achieved. The dispute as to whether Invesco or Ohpen was in repudiatory breach, or whether there was wrongful termination arose prior to, or at the point of termination. On termination, the parties' future obligations to perform, including development and implementation of the online platform, ceased.

[**43**] It is common ground that, as a matter of principle, dispute resolution obligations ordinarily survive the discharge of the parties' primary obligations under a contract: *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138. In delivering the judgment of the Privy Council as to whether contractual exclusion clauses could survive fundamental breach of the contract, Lord Wilberforce stated:

> '… it is quite unreal to equate this clause with those provisions in the contract which relate to performance. It is a clause which comes into operation when contractual performance has become impossible, or has been given up; then, it regulates the manner in which liability for breach of contract is to be established. In this respect their Lordships found it relevantly indistinguishable from an arbitration clause, or a forum clause, which, on clear authority, survive a repudiatory breach (see *Heyman v Darwins Ltd* [1942] 1 All ER 337, [1942] AC 356, *Photo Production Ltd v Securicor Transport Ltd* [[1980] 1 All ER 556 at 567, [1980] AC 827 at 849]). Counsel for the consignee appealed for support to some observations by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [[1980] 1 All ER 556 at 566–567, [1980] AC 827 at 849], where reference is made to putting an end "to all primary obligations … remaining unperformed." But these words were never intended to cover such "obligations" to use Lord Diplock's word, as arise when primary obligations have been put an end to. There then arise, on his Lordship's analysis, secondary obligations which include an obligation to pay monetary compensation. Whether these have been modified by agreement is a matter of construction of the contract.' (See [1980] 3 All ER 257 at 262, [1981] 1 WLR 138 at 145.)

[**44**] Clause 20.5.2 preserves certain provisions in the Agreement following termination: 'Termination of this Agreement will not affect … any provision of this Agreement which is expressly or by implication intended to come into or continue in force on or after termination …'

[**45**] Clause 20.5.2 does not expressly identify cl 11.1 as a provision that survives termination. However, because cl 11 is intended to apply to all disputes that arise, it is indistinguishable from an arbitration clause which, on the above authorities, would survive termination. Therefore, it falls within the meaning of cl 20.5.2 as a provision intended by implication to continue in force after termination.

[**46**] Further, cl 20.5.2 expressly preserves the applicability of 'those provisions necessary for … enforcement of this Agreement' following termination. Clause 11 is an ancillary provision that provides a mechanism for the parties to enforce their rights and obligations, by the alternative dispute resolution provisions in cl 11.1, or by litigation in cl 11.2. Therefore, it falls within the meaning of cl 20.5.2 as a provision necessary for the enforcement of the Agreement.

[**47**] Ohpen suggests that cll 11.1.2 and 11.1.3 would be inoperable post termination because there would no longer be the relevant contract managers, other persons or committees to conduct the dispute resolution processes. I do not accept that is a valid objection. The relevant persons are expressly named, or identifiable, at the date of termination. As an integral part of the agreed process, the parties would be required to make those individuals available to participate in the procedure.

[**48**] Mr Parker submits that the jurisdiction provisions in cll 11.2 and 22.12 indicate that cl 11 is intended to have effect only during the currency of the Agreement. Clause 11.2 provides for disputes to be submitted to the exclusive jurisdiction of the English courts but is limited to disputes that are not resolved in accordance with the Dispute Procedure. This can be distinguished from the separate and general jurisdiction provision set out in cl 22.12. Clause 22.12 expressly applies to any dispute or claim and provides for the courts of England and Wales to have exclusive jurisdiction over such matters. Mr Parker submits that cl 22.12 is necessary because cl 11.2 ceases to apply following termination.

[**49**] I reject that proposed interpretation of the clauses. Clause 11.2 applies to 'a Dispute'. As set out above, a Dispute is defined in Sch 1 as 'a dispute or failure to agree' without any further limitation. Thus, on a plain and natural reading of the clause, it encompasses disputes arising prior to, and after, termination.

[**50**] Clause 22.12 is expressed in very wide terms to apply to 'any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation'. On its face, these words would include any dispute arising during the currency of the Agreement. There is no express exclusion in respect of disputes to which cl 11 applies and no basis on which such exclusion should be implied. Therefore, the existence of cl 22.12 does not provide support for Ohpen's case that the parties must have intended to introduce discrete jurisdiction provisions that would apply separately to disputes during the Agreement or after termination.

[**51**] For the above reasons, I conclude that the Agreement contains a dispute resolution provision that is applicable to the dispute between the parties and creates an enforceable obligation requiring the parties to engage in mediation.

CONDITION PRECEDENT

[**52**] Clause 11.2 provides: 'If a Dispute is not resolved in accordance with the Dispute Procedure, then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts.' Compliance with cl 11 is identified as a condition precedent to the parties' entitlement to commence court proceedings. In this case, if the parties are unable to resolve the dispute by mediation, either party may commence court proceedings.

[**53**] The clear purpose of cl 11.2 is the mandatory requirement to operate the dispute resolution procedure in cl 11 before the parties become entitled to institute proceedings. Although the term 'condition precedent' is not used, the words used are clear that the right to commence proceedings is subject to the failure of the dispute resolution procedure, including the mediation process.

[**54**] Therefore, I conclude that the Agreement contains a dispute resolution provision that operates as a condition precedent to the commencement of legal proceedings.

ENFORCEABLE ADR PROCESS

[**55**] The parties have referred the dispute to their executives and held a 'without prejudice' meeting. The dispute remains unresolved. Clause 11.1.2 stipulates that the parties must use the CEDR Model Mediation Procedure to attempt to reach a settlement of the dispute.

[**56**] The mechanism under cl 11.1.2 is sufficiently clear and certain to be enforceable. The provision for mediation to be carried out under the CEDR model procedure produces a process that does not require any further agreement by the parties to enable a mediation to proceed. The rules for

selection of the mediator and conduct of the mediation are set out in the CEDR rules. It would be possible for the Court to determine by reference to objective criteria whether the parties had participated in a mediation and whether or not their disputes remained unresolved.

EXERCISE OF DISCRETION

[**57**] The Court has a discretion to stay the proceedings pending mediation under s 49(3) of the Senior Courts Act 1981 or under its inherent jurisdiction.

[**58**] There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement.

[**59**] The Court must consider the interests of justice in enforcing the agreed machinery under the Agreement. However, it must also take into account the overriding objective in the Civil Procedure Rules when considering the appropriate order to make.

[**60**] In this case, I conclude that it would be appropriate for the Court to stay the proceedings to enable a mediation to take place. However, the prospects of a settlement will be improved if the parties are clear as to the ambit and basis of the claims and defences relied on. Pleadings should be served so that the substantive issues may be clarified before the mediation.

CONCLUSION AND ORDER

[**61**] For the reasons set out above, the Court makes the following order:

(i) The Defendant shall serve and file the Defence and Counterclaim by 4pm on 27 September 2019.

(ii) The Claimant shall serve and file the Reply and Defence to Counterclaim by 4pm on 25 October 2019.

(iii) From 28 October 2019 to 9 December 2019 there shall be a stay of these proceedings to allow the parties to arrange and attend a mediation.

(iv) If the parties are unable to settle the dispute by 9 December 2019, they should notify the Court of the position and apply for a date for a costs and case management conference.

Order accordingly.

Robert Chan Barrister.