

JUDGMENT : His Honour Judge John Toulmin : 27th February 2002. QBD.

1. This is an application to enforce the award of an adjudicator acting under section 108 of the Houses Grant Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("The Act").
2. On 7 September 2001 Mr Peter J Talbot delivered his decision as adjudicator that Imperial Homes Development Ltd forthwith shall pay to Gibson the sum of £89,730.06 plus Vat, making a total, including Vat, of £102,522.12, together with £2,910.70, representing interest and £2,047.80, representing the adjudicator's fees and expenses. For the purposes of this hearing the claim to interest is not pursued by the claimant. The sum by which the claim is reduced is £2,910.70, leaving a total claim of £107,480.62.
3. On 2 October 2001 the claimant started enforcement proceedings to enforce the award. On 7 November 2001 the claimant applied for Part 24 judgment. The matter was listed for hearing with an inadequate time estimate on 7 December 2001 and was heard by me on 25 January 2002.
4. After I had nearly completed the judgment, I heard that **Braymist v Wise Finance Limited** [2002] EWCA Civ 127 had gone to the Court of Appeal and that judgment was pending. I decided to wait until judgment had been given on 20th February 2002 before delivering this judgment. Since the Court of Appeal have upheld the first instance judge, I have not asked for further submissions beyond raising the question with the parties this morning. Miss Randall has very properly said that on the basis of the summary that I have given her, she has no further submissions to make.
5. The defendant has throughout disputed the adjudicator's jurisdiction to determine the dispute between the parties. This has been maintained both throughout the adjudication procedure and before me. The defendant has always reserved its position on the merits of the claim both before the adjudicator and before me. Despite the objections that had been taken, the adjudicator decided that he had jurisdiction to proceed with the adjudication and make his award.

The Adjudicators award

6. At paragraph 9 of his award the adjudicator summarised the objection as follows: *"The essence of the challenge is that no contract came into existence between these named parties. More specifically the challenge relates to an issue as to the identity of the parties. Whilst it is common ground that Mr I Gibson is the referring party, it is contended that no contract was entered into with Gibson as a sole trader rather than a limited company. Additionally, even if a contract to which Gibson is a party in his personal capacity did exist, such a contract was not concluded with IDHL, but rather with Chinadome Ltd, for which IDHL is a non-trading holding company."*
7. IDHL argues that Gibson has failed to demonstrate that there is a written contract for the purposes of the Housing Grants Construction and Regeneration Act 1996 ("The Act").
8. It follows from the fact that IDHL contend that the adjudicator has no jurisdiction to act, that IDHL contend that the adjudicator has no jurisdiction to make an award. The adjudicator concluded that there was not a sufficient doubt that a contract exists between the parties to prevent him from carrying out the adjudication. As he put it: *"I am not persuaded on the basis that a contract exists that it would not fulfil the necessary criteria."*

In this conclusion, he referred to the requirement under section 107 of the Act that this part of the Act (requiring submission to adjudication) only applied to agreements in writing.

The history

9. On or before January 1999 Chinadome Ltd, whose registered address is 12 Bourne Court, Southend Road, Woodford Green, Essex, IG8 8HD, embarked on the project of developing 7 Stansfield Road, Bow, London E3, which comprised a house with a number of warehouse units to the rear. Chinadome Ltd applied for planning permission to redevelop the site.
10. On 18 January 1999 and 24 February 1999 they carried on negotiations for loan facilities with Granville Bank to provide substantial funds for the project. Mr Robert Davis and Mr Steven Goldstone were guarantors. The completion of the property took place on 1 March 1999. A solicitor's letter accompanying the completion statement for the sale and purchase of 7 Stansfield Road has the purchasers as R Davis and S Goldstone, Chinadome Ltd.
11. On 20 October 1999 Granville Bank provided a facility letter to provide substantial funds for the project.

12. On 13 September 1999 C N Associates (Mr Nash) wrote to Mr Davis of Imperial Developments at the same address as Chinadome Ltd, confirming an agreement to act as agents for the project at 7 Stansfield Road, E3. The letter goes on to set out the duties to be undertaken. It confirms: *"We will act on instructions issued by the client/architect who is deemed to be the lead consultant for the project."*
The letter sets out C N Associates' duties, which include: *"place on behalf of the client and prepare any agreement and subcontracts."*
13. Mr Nash's letter was replied to by Mr Goldstone on 14 September 1999 on Imperial Developments notepaper, agreeing to the terms of the letter, subject to two points on the finances which are not relevant. The letter includes the following:
"Also whilst writing, this property is in our company name, CHINADOME LIMITED, therefore any invoices or accounts should be made in that name."
14. On 22 September 1999 a letter from Hamilton Fraser Insurance Solutions Limited "re Chinadome Ltd and/or C N Management" said that underwriters were provisionally holding the property covered. On 23 September 1999 Mr Goldstone wrote a letter to Mr Nash at C N Associates Limited on Imperial Developments notepaper concerning the developers' all risk policy on Stansfield Road.
15. On 1 October 1999 Mr Nash wrote to Hamilton Fraser Insurance Solutions Limited, explaining the procedure as follows:
The letter was headed: *"Re. Chinadome Limited and/or C N Management Services Limited"*.
It went on *"We are in receipt of a copy of your fax to Stephen Goldstone regarding the above project and wish to respond as follows to the matters raised in your correspondence. The works are being carried out on a construction management basis which means that we at CN Management Services Limited procure and manage the works and generally act in the capacity of the management structure of the traditional main contractor. We have an agreement in place with Chinadome to act on their behalf and place direct orders with subcontractors and suppliers to carry out the works. The invoices will be forwarded to us for approval and we will approve the applications and send them on to Chinadome for payment."*
16. On 7 October 1999 Mr Nash wrote to Gibson Construction Limited on C N Associates' notepaper. The parties are all agreed that this letter is of great importance. The letter is addressed to Mr Ian Gibson.
17. It is headed, *"Re. 7 Stansfield Road, Bow, London E3"*. It starts: *"Further to our recent meeting we hereby confirm on behalf of our Client, Imperial Developments Limited, that you are to proceed with the works at the above premises as discussed."*
18. The letter goes on to say that the role is to be that of principal contractor. It sets out the responsibilities of the principal contractor, the agreed rates for workmen, the hours of work and the terms of payment. The letter ends: *"No formal contract will be entered into between yourself and the employer and all payments will be invoiced to Imperial Developments sent c/o C N Associates for payment by the employer. We trust this agreement is acceptable and look forward to working with you again on this project."*
19. In the documents before me I have a bundle of invoices. The first two invoices in the bundle are dated 21 November 1999 on notepaper headed Gibson Construction Limited, addressed to China Dome Limited:
"To services carried out as instructed as 8 Stansfield Road, London E1."
The invoices are for £8,706.75 and £3,331.13.
20. On 9 January 2000 and thereafter the invoices are on Gibson Construction notepaper, addressed first to *"China Dome Limited"*, until 21 May 2000, after which they are addressed to *"Chinadome"*. The invoice of 2 July 2000 is addressed to Chinadome Limited.
21. There are two cheques in the bundle which evidence payment. The first, which is dated 26 October 2000, is a cheque for £15,000, drawn on a company called Chinabone Limited, and addressed to Gibson Construction. The second is dated 8 January 2001; it is for £25,000 and is again drawn on a company called Chinabone Limited, and is addressed to Gibson Construction.
22. It is clear that the redevelopment project started almost immediately. I have a note of a preliminary meeting by the architects of 14 October 1999, attended by Mr Davis and Mr Goldstone, described as Imperial Developments, Mr Nash and the architects. In their letter of 13 June 2001, Messrs Masons say

that their client, Mr Gibson, commenced work on site on 11 October 1999. This may or may not be correct, but it seems clear that, if not work started soon after.

23. On 20 October 1999 planning permission was granted by Tower Hamlets to Chinadome Limited, as developer, and Granville Bank Limited, as chargee.
24. On 16 November 1999 Mr Nash wrote to Mr Davis, addressed as China Dome Limited, c/o Imperial Developments, enclosing payment certificates in respect of payments due to suppliers and subcontractors. Mr Goldstone replied the following day on Imperial Developments notepaper. The letter included the following: *"Obviously we need to claim back the Vat on these and all future invoices, and as these invoices are not made payable to Chinadome Limited, I am not sure if the Vat office will accept them."*
25. On 17 November 1999 Hamilton Fraser Insurance Solutions Limited, having effected insurance on the site, sent an invoice to China Dome Limited.
26. On 10 December 1999 Mr Nash enclosed payment certificates to Mr Davis in respect of payments due to various suppliers and subcontractors. The first payment listed is the sum of £12,037.88 to Gibson Construction Limited. This clearly relates to the two invoices dated 21 November 1999, to which I have already referred.
27. On 22 December 1999 Mr Gibson, who had in fact been a sole trader, registered a company not in the name of Gibson Construction Limited, but in the name of Gibson Construction (UK) Limited. The registered address is 12 Hatherley Road, Sidcup, Kent. There was already in existence a company called Gibson Construction Limited, incorporated on 22 March 1999 and dissolved on 5 December 2000. This company with its registered office in Glasgow has no relationship with Mr Gibson or his company.
28. In paragraph 6 of Mr Gibson's witness statement, dated 23 August 2001 he said: *"At the time I entered into the contract and commenced work I acted as sole trader under the name of Gibson Construction. On 22 December 1999 Gibson Construction (UK) Limited, of which I am a director, was incorporated. However, all the work I performed for IDHL on the Stansfield Road site was in my capacity as a sole trader and was not in connection with Gibson Construction (UK) Limited. The invoices of 22 November 1999 identify me as Gibson Construction Limited. However, this was a typographical error of which I informed Mr Steven Goldstone and Mr Robert Davis (directors of IDHL) at the time."*
29. Mr Goldstone and Mr Davis deny this. Whether Mr Gibson informed Mr Goldstone and Mr Davis that the word *"Limited"* was an error is an issue between the parties which I am unable to resolve without oral evidence.
30. The company, Gibson Construction (UK) Limited immediately applied to the Zurich Building Guarantees for builder membership under their New Homes Guarantee Scheme - see letter in response dated 10 January 2000. Their application was rejected on 14 March 2000 because neither an up to date balance sheet and accounts, nor a net worth balance had been received. 31.
31. On 18 January 2000 Mr Nash sent further payment certificates in respect of payments due to suppliers and contractors. The first name is Gibson Construction Limited in the sum of £12,883.88. This total approximates to the two invoices of 9 January 2000 which are on Gibson Construction notepaper.
32. The claimant through its then solicitors wrote to the defendant's solicitors on 8 March 2001 asking for payment of the sums which were outstanding.
33. The response from the defendant's solicitors dated 19 March 2001 is headed "Re Gibson Construction and Chinadome Limited". It goes on to say that: *"The contractual position seems to be that our client appointed the contract manager (Nash Associates). That firm had responsibility for appointing the providers of services and suppliers for the site which included your client. Amongst other things C N Associates were to enter into agreements on behalf of our client with those suppliers and service providers and thereafter was to manage the site."*
34. This letter was replied to by Masons Solicitors, who had taken over from the previous solicitors on 13 June 2001. The letter seeks to correct mistakes in the letter of 19 March 2001.
"1. Although previous communications have referred to Chinadome Limited, our client's agreement in respect of the development was made with Imperial Homes and Development Limited (IHDL). This is evidenced by the letter

from C N Associates (CNA) to our client of 7 October 1999. We appreciate that at the beginning of that letter CNA referred to 'Imperial Developments Limited', but it is clear that this was a typographical error since:

- a. it does not appear that in October 1999 there was a registered company named Imperial Development Limited;*
- b. the name at the head of IHDL's notepaper is Imperial Developments Limited; and*
- c. throughout the course of this project and another at City Walk, which had begun a few months earlier, our client dealt with Messrs Robert Davis and Steven Goldstone, the sole shareholders and directors of IHDL."*

35. I have a number of witness statements before me. Mr Nash, of C N Associates, supports Mr Gibson in saying that Imperial Homes and Development Ltd were the contracting party, not Chinadome Limited or otherwise. *"This belief and understanding is based on the representations made by Mr Steven Goldstone and Mr Robert Davis during the course of the project and by the fact that they did not identify any other companies, Chinadome Limited or otherwise as being the contracting party."*
36. The witness statement says that Mr Nash interpreted the letter of 14 September 1999 from Mr Goldstone as requesting that any invoices or accounts be sent to Chinadome Limited as meaning that Chinadome Limited were the paying agents for Imperial Homes & Development Limited. In paragraph 7 of his second statement, Mr Goldstone denies that either he or Mr Davis said that Chinadome Limited was the paying agent for IDHL, so this too remains an issue of fact that cannot be decided at this stage.
37. It is surprising that Mr Nash does not address the central issue of who he thought he was contracting with on behalf of his client; nor does he refer to the previous association with Mr Gibson in relation to the other development. All he says about 7 October 1999 letter is the following:
"7. Mr Goldstone and Mr Davis were aware of the letter sent to Gibson on 7 October 1999 and of Gibson's acceptance to act as principal contractor and to fulfil duties set out therein."
38. The defendants rely, first, on the witness statement of Mr Goldstone dated 17 August 2001. He says that in his letter dated 14 September 1999 he made it clear to CNA that the contracting party was Chinadome and that IHDL was (and remains) a holding company that has never traded.
39. He said that he was not aware of the letter of 7 October 1999 until it was disclosed in connection with the adjudication proceedings. He said that he did not give CNA instructions on behalf of Imperial Developments Limited. He was not aware that any company of that name exists. He says that the project at City Walk started about two months after (not before) the start of work at Stansfield Road.
40. Mr Gibson was instructed by Mr Goldstone's company, New York Developments Limited. He makes no assertion in relation to with whom or which company he thought that his company was contracting in connection with that development.
41. Mr Goldstone made a second witness statement on 31 August 2001. In paragraph 3 he says that at no time did Mr Gibson explain to him or Mr Davis that the identification of Gibson Construction Limited on the invoice of 21 November 1999 was a typographical error. He also denies that he was told by Mr Gibson that Gibson Construction was not a limited company, or that all payments should be made in his name.
42. In relation to the City Walk Project he says that this project was discussed with Mr Nash shortly before the letter of 13 September 1999 in a cafe close to the architect's office. Mr Nash was told that the holding company was IHDL, but that individual projects were run by separate and individual companies. This last comment is consistent with Mr Goldstone's letter of the following day, 14 September 1999.

Contentions of the Parties

43. In his admirably succinct submissions, Mr Patten, for the claimants, contends that the defendants have no real prospects of defending the claim.
 - 1) The letter of 7 October 1999 at the very least evidences the contract (work started three days later), and is within the definition of a contract in writing for the purposes of section 107 of the Act.
 - 2) The identification of Gibson Construction Limited as the contracting party was a mistake. Mr Gibson was clearly contracting in his personal capacity. The contract could not have been with Gibson Construction Limited, the Glasgow company or with Gibson Constructions (UK) Limited, which was not yet in existence.
 - 3) The Key is Mr Gibson's real intention. Even if after having heard the evidence the Court could find that the company was the contracting party, Mr Gibson would still be entitled to sue in his own name. The

only basis, so it is argued, that Mr Gibson could have been suing on behalf of the company was on behalf of Gibson Construction (UK) Limited, a company not incorporated. By reason of section 36C of the Companies Act 1986 (Incorporated in the Act by the Companies Act 1989), an individual may sue and be sued in his own name in the pre-incorporation phase. Mr Gibson was therefore entitled to sue the defendant, whether the court finds that he is suing as a sole trader or as an individual where the company was in the preincorporation stage.

- 4) Looked at objectively, the claimant contracted with C N Associates, who in turn acting on behalf of IDHL. They had ostensible authority to do so.
44. In an equally cogent and succinct submission, Miss Randall, on behalf of the defendants, made the following submissions.
- 1) There was no contract in writing within section 107 of the Act on the claimant's own case. In paragraph 2 of the referral, the claimant said:
"The letter of 7 October 1999 and subsequent contractual agreement between the parties constitutes a construction contract in writing in accordance with section 104(i)."
In paragraph 15 of the reply served on behalf of the applicant/claimant it was asserted that, "the contractual agreement that existed between Gibson and IHDL arose out of and is subsequent to the letter of 7 October 2001." In these circumstances, which are unexplained in the evidence, the defendants contend that there is no document before the court which could constitute a contract in writing.
 - 2) Even if the contract was said to have been evidenced by the letter of 7 October 1999, no contract came into existence between the parties before the court. In the letter the parties were identified as Gibson Construction Limited and Imperial Developments Limited.
 - 3) No explanation has been provided of the reference to Gibson Construction Limited. This gives rise to the question of whether or not CNA believed and intended to place the contract on behalf of the defendant or Chinadome Limited. Mr Nash's evidence is said to be in conflict with the contemporaneous documents, including the content of his own letter written six days earlier to Chinadome's insurers. Further, Mr Nash in his evidence provided on behalf of the claimant, not the defendant, fails to say in his evidence with what entity he thought he was contracting.
At its highest in favour of the claimant, so the defendant argues, the issue of who is the proper defendant cannot be resolved before trial.
 - 4) The defendant challenged the adjudicator's jurisdiction to make any award of costs on the basis that he was not empowered to do so either by the Act or the Scheme in the absence of an agreement between the parties.

The Law

45. The 1996 Act provided by statute a procedure whose primary purpose was described by Lord Ackner in the course of the Report stage in the House of Lords as follows. *"What I have always understood to be required by the adjudication process was a quick enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of 'pay now argue later', which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts."* (See Hansard HL Vol 571, Columns 989, 990)
46. This is not the first dispute which has come before me relating to and adjudication commenced after the contract has been completed. If instead of starting the adjudication process an ordinary action had been started in this Court in March 2001, even allowing time for a mediation which might well have been successful, the trial on the merits would already have taken place and the parties would now have a final decision. If there was no real defence, on the merits the final judgment would have been obtained some months ago. Instead, I am considering a provisional decision by the adjudicator which the losing party will have an opportunity to overturn at a later stage on the merits. Clearly the claimants are entitled to take the matter to adjudication, but I am not sure that it is appropriate to do so when forms of final dispute resolution are immediately available.
47. There is no dispute between the parties that this is a construction contract under section 108(1), or that under section 198(3) the decision of the adjudicator is binding until the dispute is finally determined by

legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

48. The first challenge to the adjudicator's jurisdiction is that the adjudication provisions apply only to agreements in writing and this is not such an agreement. Section 107 provides as follows:
- 1) *"The provisions of this Part apply only where the construction contract is in writing and any other agreement between the parties as to any matter is effective for the purpose of this Part only in writing;*
 - 2) *There is an agreement in writing...*
 - c) *if the agreement is evidenced in writing;*
 - 4) *where parties agree or otherwise than in writing by reference to terms which are in writing they make an agreement in writing;*
 - (iv) *an agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties or by a third party with the authority of parties to the agreement."*
49. I conclude that subject to arguments about ostensible authority on the part of C N Associates (see paragraphs 62 below), and arguments in relation to the claimant's assertion in their reply that the contract arose subsequently to the letter of 7 October 2001 (see paragraph 58 below) the letter of 7 October 2001 evidenced a contract which is within the definition of an agreement in writing within section 107 of the Act.
50. The other question of law which I have to consider is who the parties to the contract were and whether those are the parties before the court. In relation to the claimant the argument is that either Mr Gibson is suing in his own name, or on behalf of Gibson Construction (UK) Limited and in either case Mr Gibson is the appropriate claimant. If Mr Gibson was acting for Gibson Construction (UK) Limited in a pre-incorporation contract is he is entitled to sue in his own name?
51. The starting point of these submissions is section 36 C of the Companies Act 1985, enacted in the Companies Act 1989, section 130 (2). Section 36(C) provides as follows:
- "1. A contract which purports to be made by or on behalf of a company at a time when a company has not been formed has effect, subject to any agreement to the contrary, as one made with a person purporting to act for the company, or as agent for it, and he is personally liable on the contract accordingly."*
52. The section was considered by Etherton J at first instance and by the Court of Appeal in **Braymist Limited v Wise Finance Company Limited**, Etherton J concluded that on a proper construction of Section 36C(1) both parties mutually could enforce the contract and the wording of the section did not mean that a party to a pre-incorporation contract could be sued but had no power to sue under the contract.
53. The matter went to the Court of Appeal. Arden LJ at paragraph 2 of her judgment referred to the concluding words of section 36C(1) "and he is personally liable on the contract accordingly as 'the tailpiece'". She said in paragraph 5 of her judgment: *"As I see it, the function of the tailpiece is to establish liability only and to leave the question of whether the agent can enforce the contract to the general law. The common law thus applies to determine whether such a person can enforce the contract."*
- She concludes at paragraph 62 of her judgment that: *"The purpose of section 36C was limited to: (i) complying with the United Kingdom's obligations to implement Article 7 of the first (EC Company Law Directive 68/151/CEE OJ number 1968L6); (ii) removing the possibility that the agent would be held not liable on the ground that he merely confirmed the company's signature; and (iii) putting such persons or agents in the same position as they would be at common law, and in particular (in the case of agents) this is the same position as agents who contracted as agents."*
54. Arden LJ went on to make it clear that in her judgment Parliament did not intend section 36C to determine the rules which should apply where an agent makes a contract as agent on behalf of a principal which then claims to enforce the contract.
55. Her conclusions are supported in separate judgments by Latham LJ and Judge LJ. Judge LJ agreed, noting (paragraph 81) the language of section 36C(1): *"It is not apt to undermine or alter any of the well understood principles which govern contractual arrangements."*

He went on at paragraph 83 to note that where (A) discovers that he has entered into a contract with (B) where he intended to and believed that he was contracting not with (B) but with (C), this may be of more than mere academic interest to (A).

56. He concludes at paragraph 84: *"The answer, however, is not that the contract is automatically deprived of the effect which section 36C(1) has created, but rather just as section 36C(1) is not apt to exclude considerations such as illegality, or misrepresentation or other incidents of a contract, it is equally inappropriate to exclude relief on the basis of the identity of the contracting party, if relief would be available on ordinary contractual principles."*

Conclusion

57. I have to keep well in mind that this is a Part 24 application and the test is whether the claimant can prove that the defendant has no real prospects of succeeding on its defence. The first question is whether the defendants have any real prospect of succeeding in its claim that section 107 does not apply because there was no construction contract in writing within section 107(1) of the Act. The defendants say that this must be so, because of paragraph 15 of the reply served in the adjudication on behalf of the applicant. The applicant asserted the contractual agreement that existed between Gibson and IDHL arose out of and was subsequent to the letter of 7 October 2001. The claimants say that this assertion in the reply was plainly an error.
58. On the evidence before me I have reached the conclusion on the evidence that it has no real prospect of success. Work started soon after the letter of 7 October 1999 was sent. No-one has suggested that the work was carried out on terms which are in conflict with the letter of 7 October. The obvious inference is therefore that the letter of 7 October evidenced an agreement in writing under section 107(4) of the Act in that it was recorded by a third party, with the authority of the parties to an agreement.
59. Miss Randall's second and third submissions challenge the decision of the adjudicator on the grounds that the defendants have a real prospect of showing that the contract was not made between the parties before the adjudicator or before the court. If so, she argues, this is a category of error which goes to jurisdiction because there is no underlying contract between the parties. In relation to the claimant, she contends that the proper claimants may be Gibson Construction Limited.
60. It is noteworthy that Mr Nash gives evidence about other matters, but none on this central issue. If he had done so, his evidence above might have resolved the matter. Instead, the claimants ask me to reject the defendants contention on the basis of clear inference. Although the letter of 7 October 1999 from C N Associates is addressed to Gibson Construction Limited, and the two invoices dated 21 November 1999 are on notepaper headed Gibson Construction Limited, the word "limited" is said to be a mistake, which was rectified when Mr Gibson told Mr Goldstone and Mr Davis about it. This is disputed and I cannot resolve this issue now.
61. The fundamental question is whether the claimant could have been anyone other than Mr Gibson suing on his own behalf, or as agent for Gibson Construction (UK) Limited in the course of formation. I would have found that there was only a small prospect of showing that the contract was or might have been a pre-incorporative agreement made by Mr Gibson on behalf of Gibson Construction (UK) Limited, formed nearly three months after the contract was made on 22 December 1999.
62. This might have been sufficient to enable me to say that I could not conclude that the defendant has no real prospect of successfully defending the claim, had the decision of the Court of Appeal in *Braymist* gone the other way and Mr Gibson had been debarred from bringing Claims on behalf of *Braymist* before it was incorporated. But in view of the decision in *Braymist*, which enables Mr Gibson to sue as agent on behalf of the company as well as to be sued, it does not matter. The question of whether or not CN Associates had authority to contract with Mr Gibson is a matter which goes to the merits rather than to jurisdiction and is therefore a matter for the adjudicator. It is right to say that on the evidence before me the Defendant has no real prospect of showing that CN Association did not have ostensible authority.
63. I therefore conclude this issue in favour of the claimant, despite the fact that Mr Nash had not given evidence on the subject as he could have done. Equally, I am satisfied that the defendants have no real prospect of success in their plea that the contract was made with Chinadome Limited rather than IDHL. It may be that it should have been made with Chinadome Limited, but Mr Nash has ostensible authority to

make the contract with Mr Gibson on behalf of IDHL or Chinadome, and on the documents in front of me it is clear that he made the contract on behalf of IDHL.

64. I find also that there is no real prospect of the defendants succeeding in showing that the contract was with Imperial Developments Limited rather than Imperial Developments, the name in which CN Associates were authorised to contract.
65. In these circumstances, this application succeeds. I only observe again that a summary judgment application on the merits would have been heard months ago, as would a mediation between the parties. I am concerned that the use of this procedure may have made the cost of the action much more expensive than it need have been. I note that the total cost claimed by the claimant amounts to just over £15,000. I have not yet heard argument on the question of the adjudicator's fees. I am prepared to hear any further submissions now.

(A Submission by Miss Gilmore on the question of the adjudicator's fees)

JUDGE TOULMIN: *The order that I am proposing to make is that the matter should be referred for a detailed assessment, and that in the course of that detailed assessment the costs judge should consider specifically whether or not the claimants should pay the whole costs of the assessment, on the basis that had they not produced conflicting bills which made the assessment necessary, this matter could have been dealt with without a detailed assessment. That matter should be drawn to the attention of the costs judge, as should the disparity between the defendant's costs and the claimant's costs in relation to this matter. That should form part of the order.*

MISS GILMORE: *So far as the remainder of the order is concerned, I make the submission that the claimant should be entitled to receive at least a proportion of the costs.*

JUDGE TOULMIN: *Since this matter has been prolonged because it appears to be that the claimant has put in a claim for fees which look on their face to be substantially in excess of what may be recovered, and since there is a question as to who is going to have to pay for the costs of the hearing before the costs judge, I am not going to make any order in relation to payment of costs in advance.*

(Miss Randall applied for leave to appeal)

JUDGE TOULMIN: *Miss Randall, that was an extremely elegant submission, even more impressive for the fact that you did not have advance notice of the judgment and therefore time to consider it, but I am afraid I do not think the appeal has any real prospects of success, and I do not think there is a point of law involved, so I am afraid the application is refused.*

Mr BENEDICT PATTEN (instructed by Messrs Mason, London EC1) appeared on behalf of the Applicant.

MISS LOUISE RANDALL (instructed by Messrs Richard Pearlman & Co, London EC2) appeared on behalf of the Defendant