JUDGMENT : **THE HONOURABLE MR JUSTICE JACKSON**: TCC. 11th October 2004.

1. This judgment is in seven parts: namely, part 1, introduction; part 2, the facts; part 3, the proceedings to challenge the jurisdiction of the arbitrator; part 4, was there a dispute on 11th December 2002; part 5, was Pell Frischmann's document, dated 18th December 2002, a valid decision under clause 66; part 6, is the engineer's jurisdiction limited to claims in respect of defects A, B and C as identified in the engineer's decision; part 7, conclusion.

Part 1: Introduction

2. These proceedings concern a challenge to the jurisdiction of an arbitrator, pursuant to section 67 of the Arbitration Act 1996. AMEC Civil Engineering Ltd is the claimant in these proceedings and the respondent in the arbitration. I shall refer to this company as "AMEC".

3. The Secretary of State for Transport is respondent in these proceedings but claimant in the arbitration. I shall refer to this party as "the Secretary of State".

4. The Highways Agency at all material times acted as agent for the Secretary of State. I shall refer to the Highways Agency as "HA".

5. Pell Frischmann Consultants Ltd is a firm of engineers which was named as "the engineer" in the contract with which this court is concerned. I shall refer to this firm as "Pell Frischmann".

6. The issues between the parties arise out of renovation works which were carried out to Thelwall Viaduct in the mid-1990s. Thelwall Viaduct is the viaduct which carries the M6 motorway across the Manchester Ship Canal, the River Mersey and Warrington Road.

7. The scheme of this judgment is as follows: I shall first outline the relevant facts. I shall then describe the course which proceedings have taken thus far. I shall then address the three challenges which AMEC mount to the jurisdiction of the arbitrator.

8. In the factual section of this judgment, I shall refer to certain letters which are headed *"Without Prejudice"*. The phrase *"without prejudice"* has been used inappropriately by the writers of certain letters in this case. The use of this phrase has no practical effect. In no instance has the letter thereby become privileged. I shall therefore generally make no reference to the fact that a particular letter is headed "*Without Prejudice*".

9. In the course of this judgment I shall make references to the oral evidence. That oral evidence was called before the arbitrator at a hearing on 13th February 2004. A transcript of that oral evidence has been placed before this court. It is agreed that I should treat this as evidence in the present proceedings.

10. The witnesses who gave oral evidence were Mr Rodney Chilton and Mr John Gallagher of Pell Frischmann and Mr David Grunwell of HA.

11. Finally, I should mention that on 19th December 2002 the Treasury Solicitor, on behalf of the Secretary of State, served a document headed "Notice of Dispute to Refer and to Concur in the Appointment of an Arbitrator." For simplicity, I shall refer to this document as "the notice of arbitration".

12. That concludes the introductory remarks. It is now necessary for me to outline the relevant facts.

Part 2: The Facts

13. By a contract not under seal, made on 31st March 1995, the Secretary of State engaged AMEC to carry out renovation works at Thelwall Viaduct. The contract incorporated the ICE conditions, 5th edition, subject to certain amendments. Clause 66 of the ICE conditions, as amended by the parties for the purpose of this contract, so far as material, provided as follows:

"1. If any dispute or difference of any kind whatsoever shall arise between the employer and the contractor in connection with or arising out of the contract or the carrying out of the works, including any dispute as to any decision opinion instruction direction certificate or valuation of the engineer (whether during the progress of the works or after their completion and whether before or after determination, abandonment or breach of the contract) it shall be referred to and settled by the engineer who shall state his decision in writing and give notice of the same to the employer and the contractor. Unless the contract shall have been already determined or abandoned, the contractor shall in every case continue to proceed with the works with all due diligence and he

shall give effect forthwith to every such decision of the engineer unless and until the same shall be revised by an arbitrator as hereinafter provided. Such decisions shall be final and binding upon the contractor and the employer unless either of them shall require that the matter be referred to arbitration as hereinafter provided. If the engineer shall fail to give such decision for a period of three calendar months after being requested to do so or if either the employer or the contractor be dissatisfied with any such decision of the engineer, then and in any such case either the employer or the contractor may within three calendar months after receiving notice of such decision or within three calendar months after the expiration of the said period of three months (as the case may be) require that the matter shall be referred to the arbitration of a person to be agreed upon between the parties or (if the parties fail to appoint an arbitrator within one calendar month of either party serving on the other party a written notice to concur in the appointment of an arbitrate) a person to be appointed on the application of either party by the president for the time being of the Institution of Civil Engineers ... Any such arbitration shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1950 or the Arbitration (Scotland) Act 1984 as the case may be or any statutory re-enactment or amendment thereof for the time being in force. Any such reference to arbitration may be conducted in accordance with the Institution of Civil Engineers Arbitration Procedure (1983) or any amendment or modification thereof being in force at the time of the appointment of the arbitrator and in cases where the president of the Institution of Civil Engineers is requested to appoint the arbitrator, he may direct that the arbitration is conducted in accordance with the aforementioned procedure or any amendment or modification thereof. Such arbitrator shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the engineer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties ..."

14. Pell Frischmann were named as engineer in the contract. The work which was specified in the contract included the replacement of the existing reinforced concrete deck slab of Thelwall Viaduct and the provision of new roller bearings which permit the slab or other elements of the viaduct to move.

15. Whilst clause 8 (b) of the ICE conditions as amended provides for various design responsibilities to be imposed on AMEC, there is a possible issue as to the extent, if at all, that all or some of those responsibilities were transferred to the engineer.

16. The works to Thelwall Viaduct were substantially completed on 23rd December 1996 and were so certified by the engineer. In June 2002 defects came to light. The roller bearings on pier V had deteriorated and one of those bearings, namely bearing number 5, had failed. In July, HA informed Pell Frischmann of this development, and over the following months Pell Frischmann gave considerable help to HA and its various consultants in dealing with the problem.

17. On 19th July Pell Frischmann informed HA that the bearing design had been carried out by AMEC and suggested that AMEC be contacted.

18. On 29th July Mr Grunwell of HA wrote to AMEC informing them about problems with the roller bearings. In the third paragraph, Mr Grunwell wrote:
"The investigation work is being managed by our managing agents Atkins with input from the original designers Pell Frischmann. Given that the failure may have a connection with the work executed by yourselves under the renovation contract, you may wish to contact our agents and make arrangements to inspect the damaged bearings."

19. Upon receiving this letter, AMEC appreciated that a claim might be made against them by the Secretary of State. AMEC made a written note that they should contact their insurers and also their suppliers, a firm known as "FIP".

20. On 20th September a meeting was held in Manchester to discuss the Thelwall Viaduct bearings. Representatives attended from HA, Atkins (who were HA's current advisers), FIP, Pell Frischmann and AMEC.

21. The history of events to date was outlined. Proposed future investigations were discussed. The question of responsibility was discussed. Pell Frischmann expressed the view that they were not to blame. AMEC also expressed the view that they were not responsible. See the minutes of that meeting,

Pell Frischmann's letter of 15th October supplementing those minutes, and the evidence-in-chief of Mr Chilton at pages 38-39 of the transcript.

22. On 2nd October, HA wrote to AMEC enclosing copies of the minutes of the meeting on 20th September. This letter included the following passages:
"The factual report on the problems with the additional bearings/bearing plates is still awaited from Atkins but will be available early next week and forwarded to you then. In summary, there are seven additional roller bearings and a total of 19 top or bottom bearing plates which are cracked, spread across 16 additional piers, excluding the original problems on pier 5 ... I explained at the meeting that we had initiated works to Pier V as emergency works aimed at mitigating the traffic disruption caused by the closure of most of the northbound running lanes. You should be aware that the likely costs of these works ... will be in the region of £3.5 million to £4 million. Treatment of the additional 16 piers will depend on the management strategy for the structure currently being prepared by Atkins on our behalf. I therefore have no feel at this stage for the likely costs associated with these works but I would expect them to be substantial. As you are aware, no detailed work has yet been undertaken to establish why these problems have arisen within six years of the viaduct being refurbished. Notwithstanding that detailed work, the Highways Agency's stance is firmly that there is a defect to be addressed here by one or more of the parties involved and the Highways Agency will be looking for the costs of correcting that defect (or defects) to be met by others. In the light of the latest developments on the additional piers, I would appreciate a formal response from your company, including any proposals to address the problems identified once you have received the factual report referred to earlier."

23. In the event, HA never did send to AMEC the factual report promised in this letter. For their part, AMEC did not send to HA the formal response requested in the last paragraph of this letter.

24. On 7th October, AMEC faxed to FIP a copy of HA's letter dated 7th October. In another fax of the same day to FIP, AMEC wrote:
"Further to the receipt of the Highways Agency's letter of 2nd October 2002, faxed to you earlier today, it is clear that the Highways Agency have recorded a potential claims situation where they expect costs to be borne by others. In view of this, I believe it would be prudent that you notify any other parties relative to your situation that are or may become involved, ie insurers, in order that we are aware of their requirements in proceeding with this issue."

25. Also on 7th October, AMEC wrote to Mr Grunwell of HA requesting much detailed information concerning the roller bearings on the piers. HA stated that they would need such information before they could make the formal response which HA had requested. HA did not send to AMEC the extensive further information which had been requested. Instead, on 6th December HA sent to AMEC a letter of claim in the following terms:

"1. We refer to all the previous correspondence which has passed between the parties via themselves and their representatives, and to the meetings held, for the background to this dispute with which you are, of course, familiar.

"2. The current position (which may of course alter in the future) with regard to Thelwall Viaduct is, in broad terms, as follows:

"a. One large diameter roller has split into two 'halves' on Pier V and ultrasonic investigations suggest that two other rollers may be cracked on this pier.

"b. Seven smaller diameter rollers are either visibly cracked or cracked as determined by means of ultrasonic testing.

"c. A number of bearing plates are also either visibly cracked or cracked as determined by ultrasonic testing.

"d. 136 roller bearings are in use on the viaduct. Most are 120mm diameter, with the exception of the four rollers on Pier V which are 340 mm diameter.

"e. Testing of all the damaged bearings and the six smaller apparently uncracked bearings from piers T and N will be carried out as these are gradually removed from the structure. This information will be used to assist with prediction of the future life that can be reasonably expected for the remaining apparently undamaged rollers.

"f. It is not yet clear whether all bearings will need to be replaced, though that is obviously possible.

"g. It is not yet clear what the ultimate cost of all remedial works and all ancillary and related costs will be, however the possible costs range from around £5 million to £20 million. Costs have already been incurred in investigating this problem, in enclosing the northbound carriageway and for professional fees and traffic management.

"3. We hold you responsible for the situation with Thelwall Viaduct in that you are in breach of your contractual and/or tortious obligations including regarding the works being carried out in a proper, good and workmanlike manner; using materials and/or components in accordance with the specification and/or materials and/or components of satisfactory quality; using materials and/or components fit for their intended purpose, when complete the works and/or materials and/or components being fit for their intended purpose, inspecting, testing and/or checking workmanship and/or components and/or materials, warning about defects or potential shortcomings in design and/or materials and/or components and/or workmanship, and regarding design generally.

"4. The best details which we are able presently to provide of those breaches are as follows:

"a. The bearings should last at least 30 years and have not done.

"b. The materials of which the bearings are made were noncompliant with the bearings schedule/contract as regards loading strength and/or movement parameters and/or resistance and/or seating.

"c. Alternatively, the materials of which the bearings are made have become noncompliant with the bearings schedule/contract as regards loading strength and/or movement parameters and/or resistance and/or seating.

"d. The steel has corroded and should not have done.

"e. The materials were poorly manufactured in that the quenching process resulted in steel with a brittle phase towards the interior of the bearings and an elastic phase towards the exterior of the bearings and/or there were grain boundaries and in any event inherent weaknesses or stress concentration and thus crack initiation points or otherwise.

"f. The bearings were poorly assembled and/or installed in that the lower flanges distorted the bearing plate and/or the rollers were incorrectly aligned and/or the bearings snagged or were inappropriately loaded by the side guides. Alternatively the bottom plate of the flange was distorted, damaging the bearings, or inappropriately loading them, or otherwise.

"g. Alternatively, the bearing plates were supplied deformed.

"5. Please confirm by close of business on Tuesday, 10th December that you accept that you are responsible for the situation with Thelwall Viaduct and please confirm that you will pay damages and/or provide an indemnity in relation to the Secretary of State's damage arising from this situation, including the cost of remedial works and ancillary and related costs and costs already incurred."

26. HA sent a copy of that letter by fax to Pell Frischmann. Curiously, HA did not also send a copy by fax to AMEC, the addressee. Instead, HA sent the letter by post. AMEC received that letter on Monday, 9th December. On the next day, namely 10th December, AMEC sent the following response to that letter:

"We refer to your letter of 6th December 2002 concerning the bearings on the above structure.

"We have forwarded a copy of your letter to our bearings supplier FIP Industriale for their urgent response.

"We note that we have not received any response from yourselves to our letter of 7th October 2002 requesting further information to enable us to assist you in this matter.

"We also acknowledge receipt of a letter of 6th December 2002 to Mr Alan Johnson regarding 'scope for material testing?' We shall be responding to this letter under separate cover in the next few days.

"In view of the above, we are not in a position to make any comment on liability."

27. On 11th December HA wrote to Pell Frischmann as follows:

"1. We copied you our letter to AMEC Civil Engineering Ltd dated 6th December 2002.

"2. AMEC Civil Engineering Ltd has not acknowledged that it is responsible for the situation with Thelwall Viaduct by close of business on Tuesday, 10th December 2002.

"3. We refer the dispute to you as engineer pursuant to clause 66 for your decision."

28. HA did not send a copy of this letter to AMEC, so AMEC at this stage remained unaware that an engineer's decision was being sought under clause 66. The other event on 11th December which I

should mention is this: HA sent a letter of claim to Pell Frischmann holding that firm responsible for the defects on Thelwall Viaduct.

29. On 18th December Mr Gallagher issued the engineer's decision under clause 66 of the contract conditions. The operative part of that decision reads as follows:

*"**Engineer's decision***

"The following defects are presently known to exist on the renovated Thelwall Viaduct:

"a. One large diameter roller on Pier V has split into two halves, and ultrasonic investigations suggest that two other rollers on the same pier may also be cracked.

"b. Seven smaller diameter rollers are either visibly cracked or have been determined as cracked by means of ultrasonic testing.

"c. A number of bearing plates are also either visibly cracked or have been determined as cracked by means of ultrasonic testing.

"It is considered from the limited information presently available that the contractor has provided and installed roller bearings which are not in accordance with the contract. It is the opinion of the engineer that the defects have resulted from the use of materials or workmanship not in accordance with the contract and that this constitutes a breach of contract.

"Reference is made to clause 8 of the conditions of contract, contractors' general obligations, and to clause 61(2), unfulfilled obligations."

30. Pell Frischmann duly sent copies of that decision both to HA and to AMEC. On 19th December the Treasury Solicitor came on to the scene. In a letter to AMEC sent by fax at 1.53 pm, the Treasury Solicitor stated that he acted for the Secretary of State. The Treasury Solicitor referred to the engineer's decision and then continued as follows:

"Please confirm by 5pm today that you accept the engineer's decision. In the absence of a clear acceptance of the engineer's decision by this time, the employer will deem you to be dissatisfied with the engineer's decision and will take the necessary steps to protect the employer's position."

31. No response was received by the Treasury Solicitor during the course of that afternoon. Accordingly, at the end of the afternoon the Treasury Solicitor sent a notice of arbitration to AMEC both by post and by fax. That notice recounted the history of events and included the following passages:

"4. By a letter dated 11th December 2002, the employer sought the engineer's decision on this dispute. On 18th December 2002 the engineer issued his clause 66 decision. On 19th December 2002 the Treasury Solicitor on behalf of the employer wrote to the contractor asking the contractor to confirm by 5 pm on 19th December that the contractor accepted the engineer's decision. No such confirmation has been received and the employer therefore understands that the contractor is dissatisfied with this decision and that a dispute or difference exists between employer and contractor.

"5. The employer claims damages for breach of contract and/or for breach of any and all of the duties of care described at paragraph 1 above (ie which are intended to reflect all potential claims in negligence, whether described as negligence or negligent misstatement or negligent misrepresentation, et cetera); such breaches arising from failures on the part of the contractor including (but without limitation) breach of his contractual and/or tortious obligations including (but without limitation) regarding the works being carried out in a proper, good and workmanlike manner using materials and/or components in accordance with the specification and/or materials and/or components of satisfactory quality, using materials and/or components fit for their intended purpose, when complete the works and/or materials and/or components being fit for their intended purpose; inspecting, testing and/or checking workmanship and/or components and/or materials; warning about defects or potential shortcomings in design and/or materials and/or components and/or workmanship and regarding design generally. Further information and detail appears in the employer's letter dated 6th December 2002 and has been the subject of discussion between the parties, their servants and agents."

32. Thus an arbitration was commenced in which the Secretary of State was claimant and AMEC was respondent. In due course Mr Robert Akenhead QC was appointed arbitrator. It will be noted that the arbitration was commenced just four days before the end of the limitation period.

33. It was against this background that AMEC brought proceedings to challenge the jurisdiction of the arbitrator.

Part 3: The Proceedings to Challenge the Jurisdiction of the Arbitrator

34. At an early stage in the arbitration, AMEC raised three objections to the jurisdiction of the arbitrator, which I would summarise as follows:
    1. *On 11th December 2002 no dispute existed which was capable of being referred to the engineer for decision under clause 66 of the contract conditions. Therefore Pell Frischmann's document dated 18th December 2002 was not a valid engineer's decision.*
    2. *Alternatively, even if a dispute was referred to the engineer in accordance with clause 66 of the contract conditions on 11th December 2002, nevertheless Pell Frischmann's document dated 18th December 2002 was not a valid decision under clause 66 by reason of certain irregularities.*
    3. *In the further alternative, if Pell Frischmann's document dated 18th December 2002 was a valid engineer's decision under clause 66 of the contract conditions, nevertheless the arbitrator's jurisdiction was limited to claims in respect of defects A, B and C as identified in the engineer's decision. Accordingly, most of the claims which the Secretary of State sought to advance in the arbitration were outside the scope of the arbitrator's jurisdiction.*

35. AMEC raised these three objections before the arbitrator in accordance with section 31 of the Arbitration Act 1996. The matter was argued and evidence was called at a hearing before the arbitrator on 13th February 2004. By an interim award dated 30th March 2004, the arbitrator rejected all three of AMEC's contentions. The arbitrator ruled that he had jurisdiction in relation to the dispute relating to the contents of HA's letter to AMEC dated 6th December 2002: see page 57 of the interim award.

36. AMEC were aggrieved by the arbitrator's decision concerning jurisdiction. Accordingly, on 27th April 2004 AMEC issued the present proceedings in the Technology and Construction Court, in order to challenge the arbitrator's interim award pursuant to section 67 of the Arbitration Act 1996.

37. By its Particulars of Claim in the present proceedings, AMEC contends that the arbitrator erred in rejecting each of AMEC's three contentions. AMEC asks this court to set aside the interim award and to make a declaration as to the arbitrator's lack of jurisdiction or alternatively as to the limited extent of the arbitrator's jurisdiction.

38. Any challenge under section 67 of the Arbitration Act 1996 to an arbitrator's decision on his own jurisdiction proceeds by way of rehearing rather than review: see **Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering SDN BHD** [2002] EWHC 1993 (Comm); [2004] 1 Lloyd's Law Reports 190 at paragraphs 19-23; and **Peterson Farms Inc. v C&M Farming Ltd**, [2003] EWHC 121 (Comm); [2004] 1 Lloyd's Law Reports 603 at paragraphs 17-18.

39. In the present case, the parties have very sensibly agreed that the written and oral evidence adduced before the arbitrator should stand as evidence in the present proceedings in this court. I have the same bundle of primary documents as the arbitrator had. I also have a transcript of the oral evidence which was called before the arbitrator.

40. The matter came on for substantive hearing on Friday, 8th October. AMEC was represented by Vivian Ramsey QC and Simon Hughes; the Secretary of State was represented by John Marrin QC and Sarah Hannaford. I am grateful to counsel on both sides for the excellence of their skeleton arguments and their oral submissions. In this case, as in many others, the Technology and Construction Court has been well served by the specialist counsel and specialist solicitors who practise before it.

41. The hearing on Friday lasted all day. At the end, I said that I would consider counsel's submissions over the weekend and give my decision on Monday morning. This I now do.

Part 4: Was There a "Dispute" on 11th December 2002?

42. The question what constitutes a "dispute" for the purposes of clause 66 of the ICE conditions and a number of similar provisions is not one which is free from authority. Indeed, there is a rapidly growing jungle of decisions on this subject to which I am now being asked to add. Let me try to distill the effect of the principal authorities upon which counsel rely in this case.

43. In **Monmouthshire County Council v Costelloe & Kemple Ltd** (1965) 5 BLR 83, a contractor carried out road improvement works for the county council. The contract incorporated the ICE conditions, 4th edition. The works were completed in September 1961. In 1964 the contractor referred certain claims to the engineer for decision under clause 66 and thereafter commenced an arbitration.

44. The council responded by bringing proceedings in the High Court to challenge the validity of the arbitrator's appointment. The council contended that the contractor's claims had been referred to the engineer and settled by him some years previously. The Court of Appeal comprehensively rejected that argument. The court held that at the relevant earlier time, there was no dispute or difference in respect of some of the contractor's claims. Furthermore, there was no reference to the engineer of any dispute or difference under clause 66. Finally, the engineer's letter upon which the council relied did not constitute a decision under clause 66.

45. In relation to the first of those issues, Lord Denning MR said this:
"The first point is this: was there any dispute or difference arising between the contractors and the engineer? It is accepted that in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractor. Until that claim is rejected you cannot say that there is a dispute or difference. There must be both a claim and a rejection of it in order to constitute a dispute or difference."

46. One feature of the **Monmouthshire County Council** case which should be borne in mind is this: the various claims which the contractor was submitting to the engineer were claims which might be accepted or might be rejected. The engineer's reaction was in no sense a foregone conclusion. It is therefore quite clear why the Court of Appeal stressed the need for a clear rejection before any dispute could come into being.

47. In **Tradax International v Cerrahogullari** TAS [1981] 3 All ER 344, the plaintiff charterers repeatedly asked the defendant ship owners to pay certain dispatch money which was indisputably due. The defendants did not admit liability for the claim. They simply ignored it and all communications relating to it. Kerr J held that these facts gave rise to a dispute and thus triggered the arbitration clause which was incorporated in the charterparty.

48. **Tradax** illustrates that an express rejection of a claim is not required in every case in order to generate a dispute. If the recipient of a claim does not respond within a reasonable time, then he is taken not to have admitted that claim and thus a dispute arises.

49. In **Ellerine Brothers (Pty) Ltd v Klinger** [1982] 1 WLR 175 the plaintiffs repeatedly requested the defendant to account for certain receipts as required by an earlier agreement between the parties. The defendant delayed and his secretary made various non-committal responses. The Court of Appeal held that despite the absence of any express rejection a dispute had arisen between the parties. This dispute fell to be resolved by arbitration in accordance with the arbitration clause contained in the agreement between the parties. Accordingly, the litigation between the parties had to be stayed pursuant to section 1(1) of the Arbitration Act 1975.

50. Templeman LJ, who gave the leading judgment, said this at page 1381:
"Again by the light of nature, it seems to me that section 1(1) is not limited either in content or in subject matter, that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary for a dispute to arise that the defendant should write back and say 'I don't agree.' If on analysis what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."

51. In my view, this passage must be read in its context. The context in **Ellerine** was that the recipient of a claim was avoiding making any effective response. In that situation, a dispute does not arise at the very moment when the claim is delivered. A dispute only arises when the recipient, despite having had a reasonable time to say whether he admits the claim, simply prevaricates.

52. In **Cruden Construction Ltd v Commission for the New Towns** (1995) 2 Lloyd's Law Reports 37, a contractor built 145 houses and flats for the predecessor of the commissioner pursuant to a contract in the JCT standard form 1963 edition. On 7th October 1993, some years after completion, solicitors for

the commission wrote to the contractor's solicitors saying that the current owner, a housing association, was alleging defects in the buildings. This letter went on to ask if the contractor's solicitors would accept service of notices of arbitration. The contractor's solicitors replied on 11th October as follows:

"'... Whilst not in any way acknowledging or admitting that your clients have any basis for a claim against our clients, we confirm that we are authorised to accept on behalf of our clients service of any process of law or notices in connection with Tanterton sites 6 and 9.

"'We presume that when we hear from you again we will be given some information upon which we can take specific instructions, as our clients are currently unaware of any basis for an alleged claim ...'"

53. The commission thereupon served notices of arbitration. His Honour Judge Gilliland held that at the material time there was no dispute or difference between the parties. Therefore, the notices of arbitration were invalid. At page 393 Gilliland J said this:

"The words 'dispute or difference' are ordinary English words and unless some binding rule of construction has been established in relation to the construction of those words in clause 35 of the JCT contract I am of the opinion that the words should be given their ordinary everyday meaning. The decisions in ***Tradax*** *and in* ***Ellerine*** *show that a dispute can be said to exist where a claim in respect of some identified or specific matter has been made and either ignored as in* ***Tradax*** *or met with by prevarication as in* ***Ellerine****. Neither of those cases however in my judgment lays down any general principle of construction applicable to all arbitration clauses which contain a reference to disputes or to disputes and differences ...*

"The reference [in ***Ellerine****] to 'a matter on which agreement has not been reached' implies that an opportunity had been given at some stage for an agreement to have been reached on the matter but where a person has not in fact been told and is unaware in what respects he is alleged to have broken his obligations it is in my judgment quite impossible to say that the matter is one on which agreement has not been reached, at least where further information about the matter is being sought."*

54. As in the earlier cases, this passage must be read in context. The context here is that the contractor had not been told anything about the nature of the defects. Furthermore, the only party positively alleging defects was an outsider, namely the subsequent purchaser of the buildings.

55. I come now to **Halki Shipping Corporation v Sopex Oils Ltd** [1998] 1 WLR 726, a decision which has loomed large in counsel's submissions. In **Halki**, the plaintiffs were the owners of the motor tanker **Halki** which was chartered to the defendants Sopex Oils Ltd under a tanker voyage charterparty for the carriage of palm oil and coconut oil from various ports in the Far East to various ports in Europe. The vessel loaded cargo at five ports in the Far East and discharged at four ports in Europe. It was the plaintiffs' case that the defendants failed to load and discharge the vessel within the lay time provided by the charterparty, with the result that they claimed demurrage in the sum of US$517,473. The claim was in essence a claim for liquidated damages for breach of the charterparty. The defendants did not admit liability.

56. The plaintiffs commenced proceedings in the High Court claiming demurrage and applied for summary judgment under order 14 of the Rules of the Supreme Court, as then in force. The defendants countered by seeking an order staying the action under section 9 of the Arbitration Act 1996. Clarke J refused summary judgment and granted the defendants' application for a stay. The Court of Appeal by a majority upheld that decision.

57. The central issue in **Halki** was whether section 9 of the Arbitration Act 1996 applied to a claim which was so strong as to merit summary judgment under RSC Order 14. The ship owners argued that in such a situation there was no genuine dispute which merited reference to arbitration. On the other hand, the defendants argued that the prospects of a successful defence were irrelevant; any claim which was not admitted fell to be dealt with by arbitration and so the claimant was not entitled to apply to the court for summary judgment.

58. There are passages in the judgments of the Court of Appeal in **Halki** which at first blush appear to say that whenever a claim has been made but not admitted, a dispute exists for the purposes of the arbitration clause in the charterparty: see the judgment of Henry LJ at page 753 and the judgment of

Swinton Thomas LJ at page 761. However, these passages must be read in context. The lord justices were not attempting to identify the precise moment in time at which a reference to arbitration could be made. They were focusing upon a different question, namely whether mere non-admission of a claim entitled the defendant to an arbitration, however flimsy his defence may be.

59. Let me now move on to the recent cases concerning adjudication. During 1998 the adjudication provisions of the Housing Grants Construction and Regeneration Act 1996 came into force. I shall refer to this as "the Housing Grants Act."

60. Section 108(1) of the Housing Grants Act provides:
"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
"For this purpose 'dispute' includes any difference."

61. During the six years since this Act has come into force there have sprung up numerous decisions on the question what constitutes a "dispute" for the purposes of section 108. I shall concentrate on those decisions which have been the subject of submissions in this case.

62. In **Fastrack Contractors Limited v Morrison Construction Limited** [2000] Building Law Reports 168, His Honour Judge Thornton QC held that certain alleged disputes had indeed arisen and accordingly that the adjudicator had jurisdiction. At paragraphs 27-29 Judge Thornton said this:

"27. A 'dispute' can only arise once the subject matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion. This is clear from a consideration of two decisions, one concerned with arbitration and the other with the dispute resolution procedure that is required to have been gone through in many civil engineering contracts before arbitration can be commenced. In the arbitration field, the Court of Appeal confirmed in ***Halki Shipping Corporation v Sopex Oils Ltd*** *[1998] 1 WLR 726 that a 'dispute', the existence of which is the statutory precondition of a party being entitled to enforce an arbitration clause and to have legal proceedings stayed for arbitration under the Arbitration Act 1996, has a wide meaning. The term includes any claim which the opposing party has been notified of which that party has refused to admit or has not paid, whether or not there is any answer to that claim in fact or in law. In the civil engineer field the Court of Appeal in* ***Monmouthshire County Council v Costelloe & Kemple Ltd*** *(1965) 5 BLR 83, held that clause 66 of the 4th edition of the ICE Conditions of Contract, which only allowed for arbitration where there was a dispute or difference that had already been referred to and decided by the engineer required there to have been a claim by one party and its rejection by the other before a dispute or difference could be referred to the engineer. The Court of Appeal held that a rejection after claim does not necessarily occur when the claim is submitted to the engineer or during subsequent exchanges of views in relation to that claim. A dispute only arises when the claim is rejected in clear language. An obvious refusal to consider the claim or to answer it can however constitute such a rejection.*

"28. These cases help in showing that a claim and its submission do not necessarily constitute a dispute; that a dispute only arises when a claim has been notified and rejected; that a rejection can occur when an opposing party refuses to answer the claim; and a dispute can arise when there has been a bare rejection of the claim to which there is no discernible answer in fact or in law.

"29. However, the essential first step in considering whether there is jurisdiction to appoint an adjudicator under the HGCRA is to identify the context of the suggested dispute. Only then is it possible to consider whether the claiming party has fulfilled the necessary precondition of a submission of the underlying claims to the other party, followed by that party subsequently rejecting them."

63. Thus Judge Thornton proceeded on the basis that the authorities concerning clause 66 of the ICE conditions and other arbitration clauses shed light upon the meaning of the word "dispute" in section 108 of the Housing Grants Act. The converse of this proposition must be that the growing mountain of cases on adjudication sheds light, or perhaps casts a lengthening shadow, over the meaning of the word "dispute" in arbitration clauses.

64. In **Sindall Ltd v Solland** (TCC) 15th June 2001, His Honour Judge Humphrey Lloyd QC held that at the date of Sindall's notice of adjudication, no dispute existed, therefore the adjudicator lacked

jurisdiction. The facts of this case are instructive. On 11th January 2001 Sindall asked the contract administrator for an extension of time. On 9th February Sindall submitted three lever-arch files of material in support of its claim for an extension of time and requested a formal response within seven days. The contract administrator said that it needed more time in order to consider and investigate the claim. Sindall, undeterred, served its notice of adjudication on 16th February 2001.

65. In paragraph 15 of his judgment, Judge Lloyd said this:
"I do not accept, first, that Sindall was entitled to say 'either let us have the result within seven days or otherwise there will be a deemed dispute' or secondly, and in any event, that MEA's failure to respond to the letter of 11th February by the time the adjudication notice was served constituted a deemed dispute. Both parties have referred to ***Fastrack Contractors Ltd v Morrison Construction Lim****ited [2000] BLR 168. This and other decisions concerning what may constitute a dispute for the purpose of statutory adjudication show that the absence of a reply (for example, by a person in the position of contractor administrator) may give rise to the inference that there was a dispute eg where there was prevarication. But I am unable to reach that conclusion on the present facts. For there to be a dispute for the purposes of exercising the statutory right to adjudication, it must be clear that a point has emerged from the process of discussion or negotiation has ended and that there is something which needs to be decided ... Sindall asked MEA to look at a mass of information to which MEA had not previously been referred or specifically referred. Even if MEA had not said that it needed more time, it would not have been required to provide an answer within seven days. A person in the position of the contract administrator must be given sufficient time to make up its mind before one can fairly draw the inference that the absence of a useful reply means that there is a dispute."*

66. Two comments should be made about this case. First, MEA, the contract administrator, could not simply admit or deny the claim. By reason of its special position MEA was under a duty to give a properly considered response to the claim for extension of time. Secondly, this case illustrates that failure to respond to a claim only gives rise to the inference of a dispute after the lapse of a reasonable time. What constitutes a reasonable time depends critically upon the facts of the case and the contractual structure within which the parties are operating.

67. In **Beck Peppiatt Ltd v Norwest Holst Construction Ltd** 2003 EWHC 822 (TCC); [2003] BLR 316, Forbes J held that a dispute existed on the date of a notice of adjudication. Accordingly, the adjudicator had jurisdiction. In reviewing the earlier authorities, Forbes J said this at paragraph 4 of his judgment:
"In my view the law is satisfactorily stated by His Honour Judge Lloyd QC in his unreported decision of ***Sindall v Solland*** *in June 2001, in which he said this:*

> *"'For there to be a dispute for the purposes of exercising the statutory right to adjudication, it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided.'*
>
> *"As it seems to me, that is a statement of principle which is easily understood and is not in conflict with the approach of the Court of Appeal in* ***Halki****. I should have been very surprised if it was. It has to be borne in mind that, as observed in* ***Halki****, 'dispute' is an ordinary English word which should be given its ordinary English meaning. This means that there will be many types of situation which can be said to amount to a dispute. Each case will have to be determined on its own facts and attempts to provide an exhaustive definition of 'dispute' by reference to a number of specified criteria are, in my view, best avoided. I therefore reject the suggestion that the word 'dispute' should be given some form of specialised meaning for the purposes of adjudication."*

68. From this review of the authorities I derive the following seven propositions:

1. *The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.*

2. *Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.*

3. The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

69. I must now apply these propositions to the facts of the present case. Let me begin by summarising the contentions of the parties.

70. Mr Marrin for the Secretary of State in essence contends as follows:
1. HA's letter to AMEC dated 2nd October 2002 constituted a claim.
2. HA's letter to AMEC dated 6th December 2002 constituted a claim.
3. A dispute arose at the very moment when AMEC received from HA any letter of claim.
4. Further or alternatively, AMEC's letter dated 10th December 2002 constituted a nonadmission of the claim and thus gave rise to a dispute within the meaning of clause 66.
5. In the further alternative, AMEC's conduct amounted to prevarication and by this means a dispute arose within the meaning of clause 66.

71. It seemed to me that the third of these contentions was somewhat extreme and I pointed this out during argument. Mr Marrin relented only to this extent: AMEC needed to open the envelope and actually read the letter of claim before it could be said that a dispute within clause 66 had arisen.

72. Mr Ramsey for the claimant in essence argued as follows:

73. The letter of 2nd October was not a claim. The letter of 6th December was a claim but it had not been responded to before 11th December when HA purported to refer a dispute to the engineer. AMEC's letter dated 10th December did not amount to a non-admission. The lack of any positive response from AMEC between 9th and 11th December could not be characterised as prevarication. AMEC was quite reasonably awaiting necessary information concerning the claim. Furthermore, on 11th December there had not been a lapse of sufficient time to allow the inference of a dispute from AMEC's lack of response. Accordingly, clause 66 was not triggered.

74. My conclusions on this issue are as follows:

75. HA's letter of 2nd October 2002 to AMEC constituted a claim. By 2nd October the nature of the defects was apparent, although their precise extent and cause was being investigated. The gist of the claim against AMEC was apparent. AMEC had resolved to notify its insurers of the matter. The defects had been discussed at a meeting on 20th September. At that meeting AMEC had made it clear that it did not accept responsibility for the defects.

76. The fact that HA did not require any immediate response to the letter of 2nd October did not prevent that letter being a claim. HA's letter to AMEC dated 6th December 2002 also constituted a claim. By this stage the general positions of all parties were well defined and unsurprising. The Secretary of State, represented by HA, was seeking to recover the ongoing remedial costs from all parties who may be responsible, obviously including both Pell Frischmann and AMEC. Each party which had been involved in designing or constructing the defective elements of Thelwall Viaduct was seeking to protect its own position.

77. It was inconceivable that at this stage either Pell Frischmann or AMEC or any other party would expressly admit liability for the defects. In other words, it was a foregone conclusion that AMEC would decline to make the admission of liability requested in HA's letter dated 6th December.

78. In those circumstances, and contrary to first appearances, the deadline for responding imposed in HA's letter was not an unreasonable one. The deadline was imposed for good reason, namely the fact that the limitation period was about to end. Furthermore, the deadline would not and did not cause AMEC any difficulty. The answer which AMEC sent to HA on 10th December was in substance a non-admission of liability. The clause "we are not in a position to make any comment on liability" must be read in context. In the circumstances of this case, where several parties were involved in design, manufacture, installation, supervising and checking, it was self-evident that AMEC would not be prepared to admit liability for massively expensive defects on the viaduct. Furthermore, AMEC's letter dated 10th December expressly refrained from making any such admission.

79. It will be recalled that in the letter dated 6th December 2002 HA had asked AMEC to acknowledge that AMEC was responsible for the situation with Thelwall Viaduct and to confirm that it would pay damages and provide an indemnity. It can be seen from AMEC's letter dated 10th December 2002 that AMEC was declining to make the admission of liability which had been requested.

80. For all these reasons I conclude that on 10th December 2002 a dispute existed between the parties. The disputed issue was whether HA's claim against AMEC as set out in HA's letter dated 6th December 2002 was well founded.

Part 5: Was Pell Frischmann's document dated 18th December 2002 a valid decision under clause 66?

81. In relation to this issue, Mr Ramsey for AMEC contends that there are a number of instances of procedural unfairness. These matters, either individually or cumulatively, vitiate the engineer's decision dated 18th October. If I may draw together Mr Ramsey's oral and written submissions but depart from his system of numbering, the matters upon which Mr Ramsey relies are these:
    1. No copy of HA's request for a clause 66 decision was sent to AMEC.
    2. No copy of AMEC's letter dated 10th December was sent to the engineer for his information.
    3. AMEC was not given any opportunity to make submissions to the engineer on the matter before the engineer promulgated his decision on 18th December.
    4. The engineer substantially drafted his decision before receiving the formal request for a decision under clause 66.
    5. The engineer was told that his decision was needed urgently. He was influenced by the urgency. He produced the final version of his decision with undue speed.
    6. Because HA was making a parallel claim against the engineer, the engineer was faced with so stark a conflict of interest that he could not properly discharge his duties. The embarrassment of the engineer's position is illustrated by the fact that the letters issuing his decision were headed "Without Prejudice".

82. Before evaluating these submissions, it is first necessary to identify what Pell Frischmann's duties were in relation to issuing the decision under clause 66.

83. In relation to this, Mr Ramsey cited **Sutcliffe v Thackrah** [1974] AC 727, in particular the speech of Lord Morris. Mr Ramsey submitted that there are three categories of person who hold the ring between employer and contractor: first, a certifier, secondly an arbitrator and, thirdly an intermediate category of person who is in the position of a quasi-arbitrator: see the speech of Lord Morris at page 744. Mr Ramsey went on to argue that when the engineer in this case prepared his decision of 18th December 2002 he fell into that intermediate category.

84. I am afraid that I do not accept this submission. As I read the speech of Lord Morris, this intermediate category only exists where the contract does not provide for a review by arbitration of the decisions made by the architect or engineer. In the present case, every engineer's decision under clause 66 was susceptible to review by an arbitrator. Pell Frischmann were in what I might call the conventional position of certifiers. It was Pell Frischmann's duty to issue certificates and make decisions independently and honestly. But Pell Frischmann did not have any additional duties flowing from or attaching to the label "quasi-arbitrator".

85. What then was the ambit of Pell Frischmann's duty in relation to the engineer's decision under clause 66 in this case? In this regard both counsel have drawn my attention to the helpful judgment of Megarry J in **Hounslow London Borough Council v Twickenham Gardens Developments Ltd** [1971] Ch. 233. At pages 259-260, Megarry J said this:

"The real question for me, however, is whether the principles of natural justice apply to the architect's notice at all. Mr Neill's sheet anchor was ***Hickman v Roberts*** *[1913] AC 229. That was a case of an architect who misapprehended his position. He allowed his judgment to be influenced by the billing owners and improperly delayed issuing his certificates in accordance with their instructions. Throughout the speeches in the House of Lords there are references to the arbitrator as a judge with a judicial position, a judicial attitude and so on. If an architect abdicates his somewhat special and delicate position of independence and becomes an instrument of the building owner, then I can well see that the building owner cannot rely upon the architect's certificate. That, however, does not carry the point that in all decisions that he makes, and in particular in issuing certificates, anything that he does without observing the rules of natural justice is null and void. The question is whether that ought to be the rule.*

"I think the answer must be no ... It seems to me that under a building contract, the architect has to discharge a large number of functions both great and small which call for the exercise of his skilled professional judgment. He must throughout retain his independence in exercising that judgment. But provided he does this, I do not think that, unless the contract so provides, he need go further and observe the rules of natural justice, giving due notice of all complaints and affording both parties a hearing. His position as expert and the wide range of matters he has to decide point against any such requirement, and an attempt to divide the trivial from the important with natural justice applying only to the latter would be of almost insuperable difficulty. It is the position of independence and skill that affords the parties proper safeguards and not the imposition of rules requiring something in the nature of a hearing. For the rules of natural justice to apply, there must, in the phrase of Mr Harmon, be something in the nature of a judicial situation and this is not the case."

86. In formulating these principles, Megarry J drew assistance from two authorities which had not been cited to him in argument. The first was the House of Lords' decision in **Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Company Ltd** [1947] AC 428. The second was Richmond J's decision in the New Zealand Supreme Court in **AC Hatrick (NZ) Ltd v Nelson Carlton Construction Co. Ltd** [1964] NZLR 72.

87. The latter case had in fact gone to the New Zealand Court of Appeal and had been reported at [1965] NZLR 144. This reference is not picked up in the judgment of Megarry J. Nevertheless, I do not think that alters the position. The New Zealand Court of Appeal upheld the decision of Richmond J and adopted broadly the same line of reasoning.

88. Even though it is now 34 years since the decision in **Hounslow**, in my view the passages quoted above from the judgment of Megarry J are still broadly correct as a statement of the position of the architect or engineer under many of the standard form conditions which are in use. If the rules of natural justice were imported by implication into the first limb of clause 66 of the ICE conditions, the rights and remedies of the parties would become unduly convoluted. If either or both parties were dissatisfied with an engineer's decision, two different remedies would be available: a challenge in the High Court on procedural grounds and a challenge before an arbitrator on the merits.

89. This cannot have been intended by the parties. It is also completely unnecessary. What matters is the quality of the decision reached, not whether the engineer followed this or that procedural rule.

90. Clause 66 of the ICE conditions, like many other standard form construction contract conditions, provides for any engineer's decision which causes dissatisfaction to be fully reconsidered by an arbitrator. That provides sufficient protection for the parties. In a case such as the present, it is inconceivable that the engineer's decision will stand unchallenged. A reference to arbitration is inevitable.

91. Let me now focus specifically on the contract in this case.

92. There is no basis, either in law or in fact, to imply into the contract a term that Pell Frischmann would adhere to any particular procedure when giving a decision under clause 66.

93. Against this background, let me return to Mr Ramsey's specific contentions. For this purpose I will use the numbering system identified above rather than (a) the paragraph numbers of Mr Ramsey's skeleton argument or (b) the numbers which Mr Ramsey allocated to his points during oral argument.

Contention 1

94. No copy of HA's letter to the engineer seeking decision under clause 66 needed to be sent to AMEC. It does sometimes happen that the employer seeks a formal decision from the architect or engineer without informing the contractor. This may occur, for example, when the employer is seeking termination. If the engineer in this case felt that input from AMEC was needed, he could and would have asked AMEC for its comments.

Contention 2

95. It is quite true that Pell Frischmann did not receive a copy of AMEC's letter to HA dated 10th December. However, I do not see how this omission could possibly have affected the engineer's decision. Pell Frischmann were informed quite correctly that AMEC had not acknowledged responsibility for the defects on Thelwall Viaduct. The fact that AMEC wished to be given further and detailed information was unsurprising but not relevant to the engineer's decision.

Contention 3

96. Mr Gallagher of Pell Frischmann was the person who actually made the engineer's decision. He specifically considered whether to contact AMEC and invite their comments. He decided against this course for perfectly sensible reasons: see pages 114-115 of the transcript of evidence. In my judgment, it cannot be said that the engineer was under a legal duty to go any further than that.

Contention 4

97. The reason why the engineer started work in relation to his decision before a formal reference came under clause 66 was explained by Mr Chilton in evidence. Pell Frischmann were told on 9th December that HA would seek a decision under clause 66 if AMEC did not accept liability. It must have been obvious to Pell Frischmann that AMEC were not going to accept liability. It therefore made sense for Pell Frischmann to start work on considering the decision which would be required.

Contention 5

98. Mr Gallagher was told about the urgency of obtaining a decision under clause 66 from HA's point of view. However, Mr Gallagher did not regard that requirement of urgency as binding upon him. He took such time as he needed: see pages 128-131 of the transcript of oral evidence.

99. Furthermore, when viewed objectively, the time taken to produce the engineer's decision was not unduly short. Pell Frischmann started working on this exercise on 9th December 2002. The formal decision was issued on 18th December.

Contention 6

100. It is quite true that the engineer was in a position of conflict of interest. Pell Frischmann was facing a claim very similar to that which was made against AMEC. However, the possibility of such conflict of interest is inherent in clause 66 of the ICE conditions. Indeed, it frequently happens in this court or in arbitration that parallel claims are made by the client against both engineer and contractor. In that situation the engineer will still have to give a preliminary decision under clause 66 in respect of the claim against the contractor.

101. There cannot possibly be implied into clause 66 a requirement that the engineer must not be a judge in his own cause. Clause 66 requires that very thing to happen.

102. In relation to this part of his case, Mr Ramsey placed reliance upon a line of adjudication cases. These are summarised in paragraphs 16-140 to 16-141 of the first supplement to the 7th edition of Keating on Building Contracts. These show that an adjudicator is required to abide by the principles of natural justice. A number of adjudicators' awards have been overturned because an adjudicator adopted an inappropriate procedure. Mr Ramsey went on to submit that the same principles should apply to an engineer's decision under clause 66 of the ICE conditions. I am afraid that I cannot accept this last proposition. There is a great difference between an engineer's decision under clause 66 and an adjudicator's decision under the Housing Grants Act. For example, in practice an adjudicator's decision is likely to have a greater impact on the position of the parties during the period before it can be effectively challenged.

103. In conclusion, it seems to me that the engineer was under a duty to act independently and honestly, but the engineer was not under a duty to comply with the more elaborate procedural rules for which Mr Ramsey contends.

104. Having read all of the documentary evidence, including the e-mails in December 2002, and having considered the transcript of the oral evidence of Mr Chilton, Mr Gallagher and Mr Grunwell, I am satisfied that the engineer discharged his duty to act independently and honestly. Whether the engineer's decision was right or wrong is quite another matter. That will be determined in the arbitration.

105. In conclusion, for the reasons stated above, I reject each of the allegations of procedural unfairness which are made by AMEC. I therefore hold that Pell Frischmann's document dated 18th December 2002 is a valid engineer's decision under clause 66 of the contract conditions.

Part 6: Is the Engineer's Jurisdiction Limited to Claims in Respect of Defects A, B and C as Identified in the Engineer's Decision?

106. The first matter which I must address under this heading is the ambit of HA's letter of claim dated 6th December 2002. In my judgment, this letter embraces not only the specific defects identified on Pier V but also the other suspected defects which were to be investigated as stated in that letter. All these actual and suspected defects were embraced within the phrase "the situation with Thelwall Viaduct". That phrase appears in the letter at the paragraphs numbered 3 and 5.

107. The next document which I must construe is the notice of arbitration. The relevant parts of that notice are set out in part 2 above. It seems to me that the Secretary of State was attempting to refer to arbitration not only the defects identified as A, B and C in the engineer's decision but also all of the claims contained in HA's letter dated 6th December 2002: see in particular the last sentence of paragraph 5 of the notice of arbitration.

108. The next question which arises is whether clause 66 of the contract conditions permits that course. Mr Marrin submits that it does; Mr Ramsey submits that it does not.

109. This issue turns upon the meaning of the phrase "the matter" which appears in line 11 and line 17 of the clause 66. Mr Ramsey submits that "the matter" means the subject matter of the engineer's decision. Mr Marrin submits that "the matter" means that which was referred to the engineer for decision.

110. I have come to the conclusion that Mr Marrin is correct on this issue, for the following reasons.

111. The phrase "the matter" occurs twice in clause 66(1), namely in the third sentence and then again in the fourth sentence. The fourth sentence embraces two situations. These are, one, that the engineer fails to give a decision; two, that the engineer gives a decision with which one party is dissatisfied.

112. In the first of these situations the phrase, "the matter", must mean the matter which was initially referred to the engineer. It cannot mean the subject matter of the engineer's decision because there is no such decision.

113. The phrase, "the matter", in the fourth sentence must have a single fixed meaning. It cannot change its meaning if situation 2 arises. Furthermore, reading clause 66(1) as a whole, it seems to me that the phrase "the matter" in the third sentence must have the same meaning as the phrase "the matter" in the fourth sentence. Any other interpretation would be nonsensical.

114. It should be noted that in each of the two sentences the whole of the surrounding clause is virtually identical. In the third sentence the clause reads: *"that the matter be referred to arbitration."*

In the fourth sentence, the clause reads: *"that the matter shall be referred to the arbitration."*

115. There is a further reason why I reject the construction for which Mr Ramsey contends. If Mr Ramsey is right, an employer in the position of the Secretary of State in this case would have to serve two notices. There would be an initial notice concerning the matters dealt with in the engineer's decision; there would then be a second notice approximately three months later concerning matters referred to the engineer but not dealt with. I cannot believe that the contracting parties intended to create such a bizarre procedure.

115. For all of these reasons my conclusion is that the arbitrator's jurisdiction is not limited to claims (a), (b) and (c) as identified in the engineer's decision. On the contrary, the arbitrator has jurisdiction relating to the dispute relating to all of the contents of HA's letter to AMEC, dated 6th December 2002.

Part 7: Conclusion

116. For the reasons set out in paragraphs 4, 5 and 6 of this judgment, I reject each of AMEC's three challenges to the jurisdiction of the arbitrator. I therefore reach the same conclusions as the arbitrator has reached in his interim award.

117. It can be seen from a comparison of this judgment with the interim award that on some issues my reasoning coincides with that of the arbitrator; on other issues my reasoning and that of the arbitrator follow somewhat different tracks. This is unsurprising, as the hearing in this court is a complete rehearing rather than a review.

118. In the result, I am satisfied that the arbitrator has reached the right conclusion on each of the issues referred to him for decision.

119. I pay tribute to the arbitrator for the meticulous care and thoroughness with which he has prepared his interim award.

120. I would be grateful for counsel's submissions as to the correct form of order. My preliminary view is that this court should make an order under section 67(3)(a) of the Arbitration Act confirming the interim award.

MR MARRIN: *So far as the form of order is concerned, it is my submission that that would be the correct form of order; simply an order confirming the award.*

MR J.JACKSON: *Because the award is that which appears on page 57 of the award.*

MR MARRIN: *Yes. He has adopted the usual practice on page 57 of using bold type, separating out the order that he is making. If you have page 57, it is 1, 2 and 3 which represents his conclusions on the issues. 4 is his conclusion as to jurisdiction.*

MR J.JACKSON: *Which was in issue.*

MR MARRIN: *Which was the central issue. And 5, of course, is the order in relation to costs.*

MR J.JACKSON: *If I make an order under section 67(3)(a) confirming the award, what I am confirming is the passage in bold type on pages 57 and 58?*

MR MARRIN: *Yes, my Lord.*

MR J.JACKSON: *And the reasons for that confirmation appear in the judgment of this court.*

MR MARRIN: *Yes.*

MR J.JACKSON: *I think that is right.*

MR HUGHES: *My Lord, that seems right, absolutely.*

MR J.JACKSON: *I am grateful to both counsel. I therefore confirm my preliminary view. This court makes an order under section 67(3)(a) of the Arbitration Act 1996 confirming the interim award of the arbitrator dated 30th March 2004.*

MR HUGHES: *My Lord, there are the questions of permission to appeal and costs. I do not know which one you wish to take first.*

MR J.JACKSON: We will do costs first.

Submissions by MR MARRIN

MR MARRIN: *I seek an order for costs. A statement of costs for summary assessment has been prepared. I think there was an agreement between the parties that they would mutually waive the requirements to put them in on Thursday in accordance with the rules. May I hand up a copy.*

MR J.JACKSON: *I think I had a copy faxed through to me this morning.*

MR MARRIN: *As it happens, I am bound to tell you about an amendment, because in respect of Ms Hannaford's fees, modest though they appear, they do in fact exaggerate the fees relative to this particular application.*

MR J.JACKSON: *Has it been corrected in that document?*

MR MARRIN: *No, it has not.*

MR J.JACKSON: *Do you want to correct it, and then give me the corrected version.*

MR MARRIN: *Yes.*

MR HUGHES: *If it assists, plainly the Treasury Solicitor is entitled to its costs of the hearing, first of all; secondly, we do not say that the costs are in any sense unreasonable. If Mr Marrin says that there was an agreement between the party to waive the 24-hour rule, then so be it.*

MR J.JACKSON: *Thank you. Mr Hughes, it seems to me, and I rather think you agree, that I should make an order that AMEC do pay the Secretary of State's costs assessed in the sum of £12,798.50.*

MR HUGHES: *Yes.*

MR MARRIN: *Thank you, my Lord.*

MR J.JACKSON: *In view of the agreement reached between counsel, which I think is a sensible one, the court orders that AMEC do pay the Secretary of State's costs assessed at £12,798.50.*

Submissions by MR HUGHES

MR HUGHES: *My Lord, on leave to appeal, two points by way of introduction. First of all, the test which applies is the ordinary test to be found in the White Book at page 1432, rule 52.3.6. I am looking at the notes to rule 52.3.6, and the application today before you is made under the first ground.*

"The first ground ('real prospect of success') presents no conceptual problems. It is precisely the same test as that which the courts apply when considering summary judgment: see rule 24.2. The rationale is the same. If a claim or defence has no real prospect of success, the court will prevent the litigant from pursuing it. Likewise if an appeal has no real prospect of success, the court will prevent the litigant from pursuing it. The main practical difference is that (for obvious reasons) more appeals are weeded out by this process than first instance claims or defences."

MR J.JACKSON: *I must confess that I am actually the author of this paragraph, so I am familiar with it.*

MR HUGHES: *Perhaps I did not need to read it out.*

MR J.JACKSON: *No, not at all.*

MR HUGHES: *The next matter of some significance is the provision within the Arbitration Act, which is section 67(4), which provides as follows:*

"The leave of the court is required for any appeal from a decision of the court under this section."

There are notes in the White Book, volume 2 which read as follows:

"Only the trial judge can grant permission to appeal against a decision under section 67. There is no jurisdiction in the Court of Appeal to do so."

There are a series of decided cases in relation to that.

MR J.JACKSON: *Yes. The same notes appear in volume 1 of the White Book as well.*

MR HUGHES: *Yes, they do. It is on that base thus I apply on behalf of AMEC for permission to appeal my Lord's decision, on a number of grounds.*

First of all, in relation to the first objection taken by AMEC, namely the question of the dispute, there are the following issues which are substantially points of law and/or construction and on which in my submission AMEC have real prospects of succeeding in the Court of Appeal.

Whether the AMEC letter dated 10th December was on its true construction a non-admission so as to trigger a dispute.

We say that is a point of construction. There are words in that letter which my Lord has construed, naturally against their background, but that is nonetheless construed as to give rise to a non-admission, placing that letter squarely within the authorities which allow a dispute to crystallise thereafter.

The second point: whether there was a reasonable time left for AMEC to respond, bearing in mind, as the court's judgment has it, in particular the question of limitation. My Lord will know the period that was left to AMEC was about a day. We say that the evidence is the evidence and it is a matter for the Court of Appeal, and it would be properly a matter for the Court of Appeal to decide whether one day is a reasonable period in the circumstances, and having regard to the authorities.

Turning to the second objection, as AMEC called it in their submissions, namely natural justice and so forth, the first question: whether the engineer in making a decision under clause 66 is obliged to observe the rules of natural justice and/or whether in making a decision under clause 66 the engineer does something in the nature of a judicial decision. That caveat comes in because that would bring us into the authorities on judicial decision.

Submissions in relation to that point, as the court pointed out in its judgment, it has been some 34 years since ***Hounslow****. The rules of natural justice can be fairly described as having moved on some way in 34 years, albeit perhaps not in the TCC. I mean in the Divisional Court, for example.*

My Lord said in his judgment that the rules of natural justice applied to an engineer's decision would make the decision unduly convoluted. Of course, it might be said that the application of the rules of natural justice in almost every context in modern society have made things unduly convoluted, but in my submission that would not necessarily be an answer to why they ought not apply; and if it is an answer, then that is a matter for the Court of Appeal.

In my Lord's judgment there was then a passage in relation to an engineer's decision --

MR J.JACKSON: *Are we now on point 2 about natural justice?*

MR HUGHES: *We are. I have a note of the judgment, which is: what matters is the quality of the decision reached by the engineer, not whether this or that procedural rule has been followed.*

In a different context, judicial review in the Divisional Court, that analysis would not, in my respectful submission, find favour. In those courts the substantive rightness or wrongness of the decision, if I can call it that, is less under scrutiny than the procedures which are followed, so it would be a matter for the consideration of the Court of Appeal as to whether it is only necessary to get the thing right and for that to be corrected by arbitration if need be, or whether indeed certain procedures ought to be followed or adhered to.

The third point: whether on its true construction the HA's letter dated 6th December was a submission so as to trigger the requirement upon the engineer to receive submissions from the opposing party, namely AMEC. AMEC has in mind in relation to that proposed ground of appeal the judgment of Turner J in the appeal in ***Hatrick****, who at page 153 indicated that there would be a requirement upon an engineer or certifier to receive submissions from one party if he had already received submissions from the other party.*

Accordingly, if the Court of Appeal were to consider that the 6th December letter was on a true construction a submission, then we would wish to argue that that in turn triggered an obligation to hear from us.

The final point under the second objection: should the principles requiring observance by adjudicators of the rules of natural justice also apply to the process of decision-making by the engineer under clause 66? My Lord's judgment found that the two things were somewhat different: a decision of an engineer and a decision of an adjudicator. AMEC's submission is the decision of an engineer, like a decision of an adjudicator, arises under a contract; it need not arise, although it could arise under statute. A decision of an adjudicator is final and binding until challenged and overturned, but that is an indefinite process. Under clause 66, by contrast, if there is no challenge within three months, it is final and binding absolutely. AMEC's submission, therefore, is that if natural justice applies to adjudicator's decisions then ***a fortiori*** *to those of an engineer under clause 66.*

Two grounds of appeal in relation to the third objection: on a true construction are the allegations within the HA's 6th December 2002 letter confined to A, B and C and/or is the phrase "the situation at Thelwall Viaduct" to be taken as a reference to all the matters which are now sought to be referred to Mr Robert Akenhead QC?

Finally, AMEC would wish to contend for the alternative construction of the word "the matter" contained in clause 66. AMEC would wish to rely, apart from anything else, upon the conventional wisdom and the practice in the arbitration industry that disputes arise; those disputes are referred to the engineer, and it is only disputes referred to the engineer and then decided by the engineer that are capable of being referred to arbitration. That is the orthodox view, in my submission.

Any matters not dealt with by the engineer can then be dealt with by further reference to arbitration. My Lord has found that twin reference, or the possible requirement for the double reference to arbitration, cannot have been the intention of the parties. We would argue that that is the meaning to be attributed to the words, and we would want the opportunity to argue that in the Court of Appeal.

In relation to all the grounds that I have, I am afraid, rather hastily sketched out during the course of my Lord giving judgment, AMEC's submission is that they have real prospects of success and a decision in AMEC's favour on any one of them would have a very substantial effect on either whether the arbitrator has jurisdiction or, if so, quite what the scope of his jurisdiction is. So my application is made on that basis.

MR J.JACKSON: *Thank you, Mr Hughes.*

Submissions by MR MARRIN

MR MARRIN: *My Lord, I resist that application. So far as the test is concerned, I have no particular submissions to advance.*

So far as the position about permission, my friend is right, in that this is one of those cases where it is for the trial judge alone to determine the issue of permission.

On the first challenge relating to dispute, it is perhaps notable that, perhaps for obvious reasons, there is no challenge to the tests applied. The grounds put forward are concerned with the application of the tests adumbrated in the judgment to the facts. My learned friend is inclined to characterise the position adopted by AMEC in its letter of 10th December as a point of law or construction. But, as is clear from the reasons given in the judgment, this is regarded, we would submit properly, as a letter which has to be read in the context of the circumstances, and therefore dependent on the findings of fact about the background to that letter.

Likewise also, my learned friend's second suggested point about the reasonableness of the period given; again, for the reasons set out in the judgment, the view has been taken that that is conditioned by the background, again heavily fact dependent. In those circumstances, it would be my submission that both of the suggested challenges on issue 1, whether there was a dispute, being fact dependent, on matters upon which the court today could properly and should take the view that there is no real prospect of success.

MR J.JACKSON: *In order to succeed, the claimant would have to succeed on both points. It would have to show (a) that the letter was not a non-admission and (b) that the period of time allowed was not reasonable.*

MR MARRIN: *That is my understanding, yes.*

MR HUGHES: *My Lord, that is right, with respect.*

MR MARRIN: *The second area was the second challenge to the award based on natural justice and fairness. The first issue was essentially whether the rules of natural justice apply after all. My submission is there is no real prospect of success there in the circumstances. Of course, I adopt the reasoning set out in the judgment but I also respectfully remind the court that there is this difficulty about the rules of natural justice, in that, at least on one view, it is an all or nothing matter. The rule of natural justice which requires that no man should be judged in his own court is one which simply cannot apply here.*

The next matter taken under this heading was whether the letter of 6th December, that is to say the Highways Agency's letter of claim, should be regarded as a submission such as to trigger a duty in the engineer to call for submissions in response. In my submission, this is a very difficult point so far as AMEC are concerned. Of course the letter written is not a short letter. But it is not something in the nature of a submission and certainly should not be regarded as something in the nature of a submission, having regard to the background in which obviously all parties had been concerned in discussion and they were moving forward, no doubt as expeditiously as was possible in the circumstances, to take steps which were thought appropriate to, at least as far as the engineer was concerned, confirm the provisional view the engineer had already come to, namely that the problem lay with the materials.

The last point in this area was a challenge to the ruling that an engineer under clause 66 is in a different position from an adjudicator.

MR J.JACKSON: *Can I go back to the last point for a moment. If the rules of natural justice were to apply, one would expect there to be a little cluster of cases on natural justice and engineers' decisions or similar decisions, in the same way as there is a little cluster of cases on natural justice and adjudicators' decisions.*

MR MARRIN: *To be candid, the cluster would, at least in my expectation, be smaller in quantity than in regard to adjudicators.*

MR J.JACKSON: *Yes, because of the mass of adjudicators' decisions. But one would expect there to be some decisions.*

MR MARRIN: *I would be a little surprised if there were not more, in the circumstances. Of course, looking at another aspect of the same point, it is perhaps right for the court at this stage to have in mind that, albeit that we have a bespoke amendment to clause 66, it echoes in substantial measure the standard form, which has been developing over the years but developing very slowly. It has maintained the same structure. A common theme is that there has never been any procedure imposed upon the engineer for the conduct of his decision-making process.*

If the parties had contemplated that there should be a procedure to be followed, comparable with the article 6 obligations under the European Convention, one perhaps might expect to find it written into the clause, having regard to the relatively prescriptive nature of the contract with which the court is concerned.

I think the last point in connection with this same challenge on natural justice and fairness was a challenge to your ruling, my Lord, that an engineer is in a rather different position from an adjudicator. One point of distinction which I would respectfully advance, which I think may not have found expression in the judgment, is this: that the engineer is, of course, ordinarily speaking, engaged by the employer and is occasionally an employee of the employer and is therefore not independent. By contrast, adjudicators are always independent and are challenged if they are not, for good reason.

That is the last submission I had in that area of the second challenge based on natural justice and fairness.

So far as the point my learned friend made in support of permission to appeal on the third ground of challenge, that the jurisdiction is limited to paragraphs (a), (b) and (c), this is primarily a matter of the construction of clause 66 as amended. It is my understanding that the place and use of the expression, "the matter", is something which this bespoke clause shares with the standard form, although I am bound to say I have not been able to check that in the moments since I have been in court because my papers are, through my own fault, deficient.

In any event, it would be my submission that the analysis which has found favour with the court is overwhelmingly the right analysis, once reasoned out. I recall that it was a point which was advanced to me by the court on Friday for consideration, which seemed to make it obvious that the expression "the matter" must refer to the matter which was referred to the engineer rather than the matter decided by him.

My learned friend referred to what he described as conventional wisdom and practice in relation to how the profession sees what may be referred to arbitration and what may not. It is the fact that there is no evidence of that before the court. I am sorry to say that I personally am unaware of any such convention or wisdom or established practice. I can say no more than that.

My Lord, unless I can assist further, those are my submissions.

MR J.JACKSON: *Thank you very much. Mr Hughes?*

Submissions in reply by MR HUGHES

MR HUGHES: *Very briefly by way of reply. In relation to the meaning of the dispute question and the question of the true interpretation of the 10th December letter, the Secretary of State contends that really this is not a matter worthy of an appeal because the letter simply has to be read against the background of all the circumstances, and that would then be a question of fact.*

That might be said of any point of construction of a document; that the truth of the matter is that the Court of Appeal, apprised of all the usual matrix and factual background, would be in a position to come to a view as to the true meaning of the 10th December letter. That is a point of construction and it is a point which, in my submission, AMEC have a real prospect of succeeding in, in contending for a fourth category; namely there are admissions, denials and nonadmissions, and there is a fourth category into which the 10th December letter falls where they are simply saying nothing, as Mr Ramsey submitted.

In relation to my second ground, Mr Marrin contends that this is really a question of fact because it is all conditioned by background, namely the question of reasonable time. In fact the particular matter relied on by the court as to reasonableness was the question of limitation. So the question which arises is whether the issue of limitation which is pre-eminently a difficulty of the Highways Agency, and not a difficulty in any sense created by my clients, whether it is reasonable to have that weighed in the balance on the question of reasonableness. It is simply a matter entirely in the hands of the Highways Agency's making.

On the second objection, Mr Marrin contended that rules of natural justice and their applicability is an all or nothing matter. That itself is a ground of appeal; whether indeed it is right that one either imports the entirety of the rules of natural justice or one has none of them.

In relation to the question of whether the 6th December letter is on its true construction a submission, if I could very briefly take the court to the document itself. It is to be found in file 2, page 175. Paragraph 4:

"The best details which we are able presently to provide of these breaches are as follows: (a) to (g)."

In the hands of the engineer, when it was sent to him, this was plainly a submission. If this is not a submission then I do not know what is. These are allegations of best details to be provided at this stage, allegations of breach, and they contain a series of factual assertions which, if supported, would constitute causes of action. That must be squarely within the definition of a submission in the hands of the engineer.

If my clients are right about that, that it is indeed a submission, then that would, as I have already submitted, potentially trigger that line of authority which would require the engineer to hear from AMEC.

My Lord, I have no further submissions.

MR J.JACKSON: *Thank you very much. I have one question of you, Mr Hughes. If I am persuaded by you to grant permission to appeal, what could be done to prevent an unacceptable delay to the progress of the arbitration? Is the answer nothing?*

MR HUGHES: *The answer is probably very little. The appeal goes to the very basis of the arbitrator's ability and power to proceed. We would obviously wish to get on with the appeal extremely quickly. I do not know that our appeal would fall within the grounds of an expedited appeal.*

MR J.JACKSON: *I wonder if it could be expedited.*

MR MARRIN: *It may be you would want to have regard to section 67(2), which reads as follows:*

"The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction."

MR J.JACKSON: *Thank you very much.*

MR MARRIN: *I have an idea that, in common with many members of the bar who practise as arbitrators, that this arbitrator will be taking the obvious course of awaiting the outcome of the proceedings in court. In those circumstances, if it were the court's view that it would be appropriate for the arbitration proceedings to proceed, then it would be my submission that it is open to the court to express observations to that effect, which may or may not weigh with the arbitrator if he is inclined to consider proceeding.*

May I, since I am on my feet, just mention that the court is obviously aware that there are court proceedings in being. They were originally started against all three defendants. Of course, the proceedings were stayed as against AMEC but the proceedings are continuing against the other two defendants.

It is perhaps not appropriate to weary the court today with progress, but to invite the court to have in mind that if there are to be disputes arising out of these defects with which AMEC are also concerned, that it is desirable in the overall interests of effecting justice that the dispute should generally proceed in parallel, rather than have one held up.

MR J.JACKSON: *We do not want to have the arbitration held up. Suppose this appeal goes to the Court of Appeal and the appeal is dismissed; if the arbitration does not proceed in the meantime, then it will fall behind the litigation. On the other hand, if the arbitration does proceed now, but the appeal succeeds, then the costs incurred in progressing the arbitration will be wasted. What is the lesser of two evils?*

MR MARRIN: *In my respectful submission, it is necessary when looking at the balance of the two evils to have regard to this court's contemplation of the likely prospects of success on appeal. The comparison is between what will be a series of interlocutory steps in the arbitration proceedings, liable to fall short of a hearing. They will be conducted in the arbitration as between the Highways Agency and AMEC of course, but the context will be that they will follow similar steps which have been taking place in the litigation with the other defendants, so that a good deal of the expenditure relating to the question of how precisely the defects came about, how extensive they are and how much remedial work is needed, that expenditure is expenditure which is already necessitated by the ongoing court proceedings.*

MR J.JACKSON: *That is the expenditure on your side.*

MR MARRIN: *Yes.*

MR J.JACKSON: *From the Secretary of State's point of view, it is desirable to press on with the arbitration and run the risk of the costs being wasted?*

MR MARRIN: *By all means.*

MR J.JACKSON: *You would positively urge me to suggest that the arbitrator might exercise his powers under section 67(2)?*

MR HUGHES: *In relation to that, I do not know whether this is a point --*

MR J.JACKSON: *Is the answer from Mr Marrin to my question yes?*

MR MARRIN: *Yes, my Lord.*

MR HUGHES: *It is a very short point, but it may be relevant. The power under section 67(2):*

"The arbitral tribunal may continue the proceedings and make a further award while an application to the court is pending."

There is then the question of what we mean by the court. Section 105 defines the court as the High Court or the County Court. I suppose it is a point against my own client, but it is a point of which the court should be aware. Mr Marrin's seeking of comfort in the notion that section 67(2) might extend to a power exercised by the arbitral tribunal while there is something before the Court of Appeal would not be right. That may colour the debate.

MR MARRIN: *If I may respond to that directly, the reference in section 67(2) is to the expression: "while an application to the court under this section is pending".*

An application to the court is an application under section 67, and of course it is made in the first instance to the High Court. But if that is subject to appeal and is subject to permission to appeal, then it would be my submission that that original application to the court remains pending, at least for the purposes of section 67(2), until the matter is determined by the Court of Appeal if permission is granted.

It is difficult to see why the power given to the arbitral tribunal to continue proceedings should extend to an application to the first instance court but not beyond.

MR J.JACKSON: *Mr Hughes, what is your position? Suppose that there is, one way or another, power for the arbitration to continue; would you want to get on with the arbitration, as a precaution, in case you lose the appeal; or would you want the arbitration to be suspended until the outcome of the appeal?*

MR HUGHES: *We say that these considerations are all really bound up with the application of the test of real prospects of success, in truth. We think we have real prospects of success. My clients are genuinely pursuing a series of objections in which they believe, to the extent it is relevant, and on that basis and with that conviction, they would far prefer to have this matter dealt with finally by way of the Court of Appeal dealing with any surviving objections they have, that being the end of the matter, and then having the arbitration proceed on that basis.*

This is for two reasons: one, the obvious point that if they are successful and the arbitrator has no jurisdiction, then there will be a saving in cost. Secondly, it is perfectly conceivable that the Court of Appeal will conclude that the arbitrator has jurisdiction only in respect of a very limited range of matters and it is right, as my Lord has it in the judgment, to say that if the Secretary of State were constrained within the four corners of the 6th December letter, then the arbitration would be a very small engineering arbitration, compared to what it might otherwise be.

We say that the court need go no further than apply its mind to the test of whether there are real prospects of success on the mooted appeal and, if there are, then the next step is to have the arbitral proceedings on hold, in effect.

MR J.JACKSON: *The only test is not real prospects of success; the second limb is some other substantial reason.*

MR HUGHES: *That is right. That test, of course, would tend to militate in favour of the proposed appellant, namely that there is a real and compelling reason why there ought to be an appeal. In the present case, maybe people are casting around for a reason why there ought not to be an appeal.*

RULING

MR J.JACKSON: *This is an application for permission to appeal to the Court of Appeal. The tests which I must apply are as set out in rule 52.3 of the Civil Procedure Rules. Subparagraph (6) provides:*

"Permission to appeal will only be given where (a) the court considers that the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard."

In this case the points of law raised by AMEC are both difficult and important. It is also the case that very large sums of money are in issue in this litigation. I have come to the same conclusions on all issues as the arbitrator reached. Despite that coincidence of views, because of the difficulty and complexity of the points which arise, there must be a real possibility that the Court of Appeal will take a different view. Accordingly, I grant permission to AMEC to appeal to the Court of Appeal. I grant such permission pursuant to section 67(4) of the Arbitration Act 1996.

I am concerned about the delay which an appeal to the Court of Appeal will cause to the smooth progress of the arbitration if at the end of the day that arbitration is going to go ahead. I understand the powerful reasons which Mr Hughes puts forward for not wanting the arbitration to proceed whilst it is under the shadow of the present

appeal to the Court of Appeal. Therefore it seems to me that the most desirable course is for the appeal to the Court of Appeal to be brought as speedily as possible.

Although the issues of law are not straightforward ones and although the sums of money at stake are substantial, this is an appeal which will not take a lengthy period to hear; it will not take a lengthy period for either party to prepare. The work has really been done already. I therefore wish to explore with counsel what steps can be taken to bring the appeal forward as soon as possible.

There is nothing about expedited hearings in the Practice Direction which accompanies part 52. I know there is nothing in the commentary which accompanies part 52, for the reasons previously mentioned.

MR MARRIN: *I have been checking the index and I cannot find a reference to expedited hearings, except in relation to the Commercial Court.*

Mr Hughes suggests that since this is not a small matter, a convenient course may be for the court to allow us a short while in which to prepare a note, hopefully a joint note, as to the procedural powers open to this court for the purposes of influencing the expedition, if at all, in the Court of Appeal.

I think my learned friend has in mind preparing such a note within hours, rather than letting it go on.

MR J.JACKSON: *I have been thinking about it. I do not believe that I can have any procedural powers, because the case is now passing beyond and above me to another court. I think all I can do is to give an indication and ask that it be drawn to the attention of the Registrar of Civil Appeals.*

I would like to give the following indication:

In my view, this is an appeal which needs to be progressed rapidly, for a number of reasons. The first reason is this: the notice of arbitration was served as long ago as December 2002. Despite the effluxion of almost two years, the arbitration has not yet really got off the starting line. There are still issues to be resolved concerning the jurisdiction of the arbitrator. It is not in the parties' interests and it is not in the public interest that the issues between AMEC and the Secretary of State should be spun out for an extended period of time, as has already happened. These issues need to be brought to a speedy resolution. That is the first reason why, in my view, this appeal needs to be progressed as rapidly as is practicable.

The second reason why the appeal needs to be progressed rapidly is this: the Secretary of State is bringing other proceedings against other parties who have been involved with the Thelwall Viaduct and it clearly makes sense for all the proceedings concerning Thelwall Viaduct to go forward in parallel. Complications will be added and additional expense will be incurred by all parties if the proceedings go forward at a different pace. Therefore, the existence of those other proceedings, which Mr Marrin has described to me this morning, is a further reason why in my judgment the present appeal to the Court of Appeal should be progressed as quickly as possible.

I very much hope that if the appeal fails or partially fails, then the proceedings before the arbitrator can be progressed rapidly so that they can catch up with the other proceedings which are on foot in the courts concerning Thelwall Viaduct.

I invite counsel to draw my observations to the attention of the Court of Appeal so that that court may bear them in mind when making listing arrangements.