JUDGMENT : LORD JUSTICE MAY : CA. 17th March 2005

1. **Introduction** : This appeal has shown up in stark form apparent unsatisfactory features of the provisions for arbitration in the standard ICE (Institution of Civil Engineers) Conditions of Contract. Clause 66 of these conditions provides for disputes or differences in the first instance to be referred to and settled by the Engineer. The initiation by either the Employer or the Contractor of the contractual machinery for arbitration depends on the parties receiving the written decision of the Engineer or on the Engineer failing for three months to give a decision. If the antecedent operation of this machinery is a condition precedent to the ability of either party to give a valid notice of arbitration, sufficient under section 14 of the Arbitration Act 1996 to start arbitration proceedings for the purpose of the Limitation Acts, circumstances might arise in which either party is unjustly disabled from starting arbitration proceedings within the statutory period of limitation.

2. These proceedings concern serious structural deficiencies which appeared during the Summer of 2002 in the Thelwell Viaduct, which carries the M6 motorway across the Manchester Ship Canal, the River Mersey and Warrington Road in Lancashire.

3. The appellants, Amec Civil Engineering Limited, had as Contractor carried out major renovation works to the viaduct under a contract with the Secretary of State as Employer. Amec substantially completed these works on 23rd December 1996. The work included replacing an existing reinforced concrete deck slab and providing new roller bearings permitting the slab or other elements to move. In June 2002, some of the roller bearings appeared to have failed. The Highways Agency, acting as agent for the Secretary of State, needed to investigate the cause of the failure. Investigation, which included materials testing, was bound to take some time.

4. Intrinsically the cause of the failure was likely to be poor workmanship, poor design, poor materials or a combination of these. Amec had supplied and installed the roller bearings which had been supplied to them by a sub-supplier in Italy. Amec had also designed the roller bearings, but their design had been adopted by the Engineer under the contract, Pell Frischmann Consultants Limited.

5. It is not surprising that the Secretary of State turned first to Amec as being responsible for the failure of the bearings and for the remedial costs, which were likely to be very substantial. It was inevitable that Amec would resist such a claim, at least until full investigation had finally determined the cause of the failure. Nor is it surprising both that Amec would look towards their Italian suppliers and that the Secretary of State would have an eye to a possible additional or alternative claim against Pell Frischmann. This in turn would mean that Pell Frischmann had an interest of their own, which might be said to compromise their ability to give a fair decision under the machinery leading to arbitration.

6. In the present appeal, Amec say that the Secretary of State was on the facts unable to start arbitration proceedings by giving a contractually valid notice of arbitration before the end of the statutory limitation period for want of a contractually valid decision of the Engineer. They say this, despite the fact that the Secretary of State did give notice of arbitration within the limitation period with reference to a decision of the Engineer. Amec say, without conviction, that this Engineer's decision was not contractually valid because there was at the time no dispute or difference to refer to him. They say with somewhat greater conviction that the Engineer's decision was invalid because the process by which he made it was unfair. There is a third meritless ground of appeal which seeks to limit the scope of the arbitration, if each of the first two grounds of appeal fail.

7. If there had been a less cumbersome arbitration clause, or no arbitration clause at all, the Secretary of State could have started proceedings within the limitation period at short notice and without fuss. Appropriate case management would readily and economically have accommodated any difficulty arising from the fact that a full formulation of the technical claim might reasonably have to wait until sophisticated technical investigations were complete. If perhaps it were subsequently apparent that the Secretary of State had failed to make timely use of

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a relevant pre-action protocol, some kind of adverse costs order might have been considered. But the limitation position would have been duly preserved.

8. Instead, with this ICE arbitration clause, Mr Vivian Ramsey QC, for Amec, is able to advance a series of arguments to the general effect that the contracting parties' objective intention, derived from what he suggests is the true construction of the arbitration clause, was that neither of them might secure effective protection against a defence of limitation, if a full-blooded formalised dispute had not crystallised and been determined by the Engineer before the expiry of the limitation period - this despite the fact that the Secretary of State had formulated the bones of a very large and structurally obvious claim, which Amec were inevitably going to resist. It was, of course, possible that Mr Ramsey might have been right in this and other contentions. But it would be commercially and jurisprudentially surprising if he were. In my view, a court construing this clause is both entitled and obliged to bear this in mind. This is not a case in which the Secretary of State carelessly overlooked the question of limitation and by mistake presented Amec with the windfall of a limitation defence.

9. **The proceedings** : Mr Robert Akenhead QC was appointed arbitrator. He is a specialist leading counsel with wide experience of construction contract matters. He rejected Amec's contentions that he had no jurisdiction because the notice of arbitration was ineffective. He also rejected their contention as to the limited scope of the arbitration. Amec appealed against this decision under section 67 of the 1996 Act. On 11th October 2004, Jackson J, sitting in the Technology and Construction Court, dismissed Amec's appeal in a persuasive judgment. He gave Amec leave to appeal to this court, his leave being a necessary precondition of such an appeal under section 67(4) of the 1996 Act. I am not convinced that he was right to do so. The policy of the 1996 Act does not encourage such further appeals which in general delay the resolution of disputes by the contractual machinery of arbitration. The judge and Mr Akenhead had reached the same conclusion for substantially the same reasons. Their combined experience and authority was, I think, sufficient to conclude the matter without an expensive second appeal.

10. I was at one point inclined simply to say that I would dismiss this appeal because the judge came to the right conclusion for the right reasons, to be found at [2004] EWHC 2339 (TCC). The issues are, however, of some general interest and importance and there is a lot of money at stake.

11. **The arbitration clause** : The version of Clause 66 of the ICE Conditions of Contract which the Secretary of State and Amec by amendment had in their contract was, so far as is material, as follows:
"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 the 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. ... 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 3 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 3 calendar months after receiving notice of such decision or within 3 calendar months after the expiration of the said period of 3 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 ... a person to be appointed ... 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 1894 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."

12. The contract was not under seal, so that the statutory period of limitation was 6 years. The assumption has been that time started to run from the date when the works were substantially complete, 23rd December 1996. So 23rd December 2002 was a critical date.

13. **Facts** : The material events between June and December 2002 are set out in paragraphs 16 to 33 of the judge's judgment. There is no need to repeat them in full. A brief summary will suffice.

14. The defects came to light in June 2002. Cracks and other defects in the bearings at Pier V were described in an initial report dated 26th June 2002. The Highways Agency informed Pell Frischmann of the problems in July 2002. Pell Frischmann gave help to the Highways Agency and its consultants over the succeeding months.

15. The Highways Agency wrote to Amec on 29th July 2002 informing them of the problems with the roller bearings saying that, since the failure might have a connection with Amec's work, they might wish to inspect the damaged bearings. Amec appreciated that a claim might be made against them. They set about contacting their insurers and their suppliers.

16. There was a meeting on 19th September 2002, attended by the Highways Agency, Atkins, their current advisors, Amec, Amec's suppliers and Pell Frischmann. Proposed future investigations were discussed. Both Pell Frischmann and Amec expressed the view that they were not responsible. A letter dated 15th October from Pell Frischmann supplementing the minutes of the 19th September meeting stated:
"Additionally the minutes did not record Amec's views that the bearings had been installed correctly or that FIP Industrials had provided bearing calculations for the cracked roller bearing (the Contract required the Contractor's design to be adopted by the Engineer) and that these had been checked by Pell Frischmann and forwarded to Atkins on 5th September 2002."

17. On 2nd October 2002, the Highways Agency wrote to Amec sending copies of the minutes of the 19th September meeting. The letter said that an expected factual report from Atkins would be sent to Amec the following week. There was a short summary of the defects observed to date. A figure was given for the likely cost of emergency works to Pier V, but the writer of the letter had no feel at that stage for the likely costs of works to the additional 16 piers, but would expect them to be substantial. No detailed work had yet been undertaken to establish why the problem had arisen within 6 years of the viaduct being refurbished. The letter then said:
"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 cost 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."

18. The Highways Agency did not send Amec the factual report referred to in the letter. Amec did not send the Highways Agency the requested formal response. They wrote on 7th October requesting much detailed information and saying that without it they could not make a formal response. They did, however, fully appreciate (as was obvious) that the Highways Authority had *"recorded a potential claims situation where they expected costs to be borne by others"* - see Amec's fax to their suppliers dated 7th October 2002.

19. There was then no material written communication between the parties until, on 6th December 2002, the Highways Agency sent Amec what is accepted to have been a formal letter of claim.

20. The terms of the letter of 6th December are quoted at length in paragraph 25 of the judge's judgment. The letter referred to the background to "this dispute" with which Amec were familiar. It recorded the current technical position, referring to testing that was in progress, and saying that it was not yet clear whether all the bearings would need to be replaced nor what the ultimate full costs would be. The letter explicitly held Amec responsible for the situation with Thelwell Viaduct, saying that Amec were in breach of contractual and/or tortious obligations. It gave the best details that could then be provided of the breaches. It invited Amec to confirm by close of business on Tuesday 10th December that they accepted that they were responsible. The Highways Agency sent this letter to Amec by post. Amec received it on 9th December. The Highways Agency

had sent a copy of the letter by fax to Pell Frischmann, who therefore received it earlier than did Amec.

21. On 10th December, Amec replied to the 6th December letter in non-committal terms set out in paragraph 26 of the judge's judgment. They said that they were not in a position to make any comment on liability.

22. On 11th December, the Highways Agency wrote to Pell Frischmann referring to their letter to Amec of 6th December and saying that Amec had not acknowledged that they were responsible. The Highways Agency referred "the dispute to you as Engineer pursuant to clause 66 for your decision". The Highways Agency did not send a copy of this letter to Amec. Also on 11th December, the Highways Agency sent a letter of claim to Pell Frischmann holding them responsible for the defects in the Thelwell Viaduct. I understand that this was regarded as a necessary or desirable prelude to bringing proceedings against Pell Frischmann within a perceived limitation period.

23. Mr Gallagher of Pell Frischmann gave an Engineer's decision under clause 66 on 18th December. The material terms of it are in paragraph 29 of the judge's judgment. It included a short description in three lettered sub-paragraphs (a), (b) and (c) of defects presently known to exist. The decision then was:

"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."

This decision was sent to both the Highways Agency and Amec. On 19th December, the Treasury Solicitor, acting for the Secretary of State, sent a fax to Amec asking for immediate confirmation that Amec accepted the Engineer's decision. In the absence of this, the employer would regard Amec as being dissatisfied with the decision. Towards the end of that afternoon, the Treasury Solicitor gave Amec notice of arbitration with reference to the claim advanced in the letter of 6th December.

24. Amec's challenge to the arbitrator's jurisdiction is and has been on three grounds. These are:
    i) On 11th December 2002, no dispute existed which was capable of being referred to the Engineer under clause 66. Therefore there was no valid Engineer's decision. Therefore there was nothing capable of being referred to arbitration.
    ii) If that is wrong, the Engineer's decision of 18th December 2002 was invalid because the Engineer did not reach it by a fair process.
    iii) If there was a valid Engineer's decision, the arbitrator's jurisdiction was nevertheless limited to the three matters expressly identified in sub-paragraphs (a), (b) and (c) of the decision.

    Both the arbitrator and the judge rejected each of these contentions.

25. **Dispute or Difference** : Mr Akenhead had seen a difference of emphasis between the (now middle aged) decision of this court in ***Monmouthshire County Council v Costelloe*** (1965) 63 LGR 429; 5 BLR 83 on the one hand, and the more recent decisions of ***Ellerine Bros v*** **Klinger** [1982] 1WLR 1375 and ***Halki Shipping Corporation v Sopex Oils*** [1998] 1 WLR 726 on the other.

26. In the ***Monmouthshire*** case there was a question under a contract including the ICE conditions whether there had historically been claims by the contractor which the Engineer had already determined under clause 66. This court held that there had been no such earlier dispute or difference which the Engineer had determined. Lord Denning MR considered that until there was a claim which had been rejected there could be no dispute or difference.

27. In both ***Ellerine Bros*** and ***Halki,*** the question was whether there was a dispute sufficient to sustain a stay of court proceedings for arbitration under then existing statutory provisions. In ***Ellerine Bros***, Templeman LJ said that if letters were written making some request or demand and

the defendant did not reply, there was a dispute. It was not necessary, for a dispute to arise, that the defendants should write back and say "*I don't agree*". In ***Halki,*** Swinton Thomas LJ considered that there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable. Mr Akenhead regarded himself as bound by ***Ellerine Bros*** and ***Halki*** because they were more recent than the ***Monmouthshire*** case; because they concerned ordinary English words which should have the same meaning in clause 66 of the ICE conditions; because they had been applied in cases concerning statutory adjudication under section 108(1) of the Housing Grants Construction and Regeneration Act 1996; and because he preferred their logic. He found that the Secretary of State had submitted a claim in the letter of 6th December 2002, which had the essential features of a recognisable claim. Amec's response of 10th December did not amount to an admission. In the light of ***Halki***, there was a dispute in any event because Amec did not in fact admit the claim. Mr Akenhead also concluded that the letter of 2nd October 2002 was a claim, although a very general one, and that there was a dispute relating to its contents.

28. The judge examined these and other authorities at rather greater length in paragraphs 42 to 67 of his judgment. He referred colourfully to a rapidly growing jungle of decisions to which he was now being asked to add. In addition to the cases to which I have already referred, the judge's review of authority included:
    i) ***Tradax International v Cerrahogullari*** [1981] 3AER 344 as illustrating that an express rejection of a claim is not required in every case to generate a dispute; and
    ii) A number of first instance decisions relating to the Housing Grants Act 1996, including ***Fastrack Contractors Limited v Morrison Construction Limited*** [2000] BLR 168, and ***Sindall Limited v Solland*** 80 Con LR 152 (15th June 2001) HH Judge Humphrey Lloyd QC, - the latter illustrating that failure to respond to a claim only gives rise to the inference of a dispute after lapse of a reasonable time, which depends critically on the facts of the case and the contractual structure within which the parties are operating.

29. From his review of the authorities, the judge derived the following 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."

30. In **Collins (Contractors) *Limited v Baltic Quay Management (1994) Limited*** *[2004]* EWCA Civ 1757, Clarke LJ at paragraph 68 quoted Jackson J's seven propositions and said of them:

"63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so.

64. It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J."

31. Each of the parties has accepted in this court that the judge's propositions correctly state the law. I am broadly content to do so also, but with certain further observations, as follows:

1. Clause 66 refers, not only to a *"dispute*", but also to a. "*difference*". "*Dispute or difference*" seems to me to be less hard-edged than "*dispute*" alone. This accords with the view of Danckwerts LJ in ***F & G Sykes v. Fine Fare*** [1967] 1 LLR 53 at 60 where he contrasted a difference, being a failure to agree, with a dispute.
2. In many instances, it will be quite clear that there is a dispute. In many of these, it may be sensible to suppose that the parties may not expect to challenge the Engineer's decision in subsequent arbitration proceedings. But major claims by either party are likely to be contested and arbitration may well be probable and necessary. Commercial good sense does not suggest that the clause should be construed with legalistic rigidity so as to impede the parties from starting timely arbitration proceedings. The whole clause should be read in this light. This leads me to lean in favour of an inclusive interpretation of what amounts to a dispute or difference.
3. The main circumstances in which it may matter whether there was a dispute or difference which has been referred to and settled by the Engineer include (a) where one party contends that this has occurred without due reference to arbitration, so that the Engineer's decision has become final and binding; and (b) where, as in the present case, one party wishes to contend that arbitration proceedings have not been started within a statutory period of limitation.
4. If the due operation of the mechanism of clause 66 really is to be seen as a condition precedent to the ability to start arbitration proceedings within a period of limitation, the parties cannot have intended to afford one another opportunistic technical obstacles to achieving this beyond those which the clause necessarily requires.
5. I agree with the judge that, insofar as the existence of a dispute may involve affording a party a reasonable time to respond to a claim, what may constitute a reasonable time depends on the facts of the case and the relevant contractual structure. The facts of the case here included that:
   (a) Major defects in very substantial works emerged relatively shortly before the perceived end of the limitation period. These required detailed investigation. In consequence, the formulation of a precisely detailed claim was impossible within a short period.
   (b) Liability for the defects was bound to be highly contentious, but Amec were bound to be a first candidate for responsibility.

Amec (and others) were inevitably going to resist liability well beyond the perceived end of the limitation period.

32. Applying his propositions, the judge concluded that the Highways Agency's letter of 2nd October constituted a claim. The gist of the claim against Amec was apparent. The defects had been discussed at the meeting on 19th September when Amec had made it clear that they did not accept responsibility. The Highways Agency's letter of 6th December also constituted a claim. By that stage, the general positions of all parties were well defined and unsurprising. It was inconceivable that Amec or any other party would at this stage admit liability. In these circumstances, the deadline for responding to the Highways Authorities' letter of 6th December was not unreasonable. There was good reason for the deadline, namely limitation. Amec's letter of 10 th December was a non-admission of liability.

33. In my judgment, the judge's analysis here was entirely correct. I would go further and hold that in all the circumstances, including the imminence of the end of the statutory limitation period, there was a dispute or difference capable of being referred to the Engineer under clause 66 at any time after the meeting on 19th September 2002, when Amec indicated that they did not accept responsibility.

34. Amec in essence restate in this court submissions which the judge rejected. Mr Ramsey says that no dispute had in truth crystallised by 11th December when the Highways Agency purported to refer a dispute to the Engineer. The judge was wrong to say that the letter of 2nd October was a claim. The formal response to this letter was only to be provided once the factual report was sent, and Amec never received any such report. There was no dispute up to the time when the letter of 6th December was written, the letter containing the first formulation of the legal basis for the claim. The mere fact that it was inconceivable that Amec would admit liability did not absolve the Highways Agency from allowing a reasonable time to respond. The judge was wrong to consider that concerns about limitation, which were of the Highway Agency's making, were relevant to what was a reasonable deadline for a response. Limitation is irrelevant. The judge was wrong to conclude that Amec's letter of 10th December was a non-admission of liability. Amec were simply not in a position to say anything meaningful on **10th** December in response to a claim which they had only received on the previous day. No technical dispute had at that stage emerged. Indeed, by a letter dated 6th December 2002, Amec had been given until 13th December to respond to proposals about testing. Nothing more occurred in relation to testing until after the end of December 2002.

35. I am no more persuaded by these submissions than was the judge. They predicate, in my view, an over-legalistic approach to the proper construction of clause 66. The fact that the period of statutory limitation was thought to be about to expire is, in my judgment, relevant to an understanding of the facts as applied to clause 66 and to any decision as to what was a reasonable time in which Amec might respond. Amec's submissions on this and the second ground of appeal would mean both that no dispute capable of being referred to the Engineer was capable of arising until the finer technical reasons for a complicated engineering or materials failure had been worked out; and that the employer in the present case had no means wholly within his control of starting valid arbitration proceedings for any defect, however serious, which might have emerged for the first time after the 23rd September 2002. Mr Ramsey had to accept this consequence of his submissions. There was some (to my mind unpersuasive) criticism of the Highways Authority for inactivity between 2nd October and 6th December 2002. But, if the problems with the roller bearings had emerged in late September 2002, on the more extreme versions of Mr Ramsey's submissions, not only was there no dispute to refer, but, even if there had been a dispute, the employer may have had to wait for 3 months during which the Engineer failed to give a decision before being able to start arbitration proceedings.

36. Mr Ramsey rightly accepted, subject to the second ground of appeal, that there is nothing wrong if an employer, who needs an Engineer's decision quickly for limitation reasons, both warns the Engineer that a reference is on its way and urges the Engineer to make a speedy decision. Since I consider that a dispute or difference capable of being referred had arisen well before 6th December 2002, it is not strictly necessary to decide whether a 24 hour deadline was in this case reasonable.

It is sufficient to say that I would, if necessary, have agreed with the judge that on the facts of the present case it was. It was, as the judge rightly said, inevitable that Amec would resist liability. There was nothing meaningful which Amec could at that stage have added to their previous clear indications to this effect. I am only concerned that the structure of clause 66 might ever require such fine questions to be regarded as potentially determinative.

37. **The validity of the Engineer's decision** : Amec's contention here is that there was a number of matters of procedural unfairness vitiating the Engineer's decision of 18th December 2002. The judge listed them as follows:
    (1) No copy of the Highways Agency'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 were not given an opportunity to make submissions to the Engineer before the Engineer made his decision.
    (4) The Engineer had 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 the Highways Agency 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."

38. The judge rejected Mr Ramsey's submission, made with reference to ***Sutcliffe v Thackrah*** [1974] AC 727, that in acting under clause 66 the Engineer was in the intermediate postion of a quasi-arbitrator. Since clause 66 expressly provides for the Engineer's decision to be susceptible to review by an arbitrator, Pell Frischmann were in the conventional position of certifiers. Their duty was to make decisions independently and honestly. They did not have additional duties deriving from the label quasi-arbitrator. In ***Hounslow London Borough Council v Twickenham Gardens Development Limited*** [1971] Ch. 233, Megarry J rejected a submission that a certifying architect was obliged to act in accordance with the principles of natural justice. He was obliged to retain his independence in exercising his judgment, but, unless the contract so provides, he need not go further and observe rules of natural justice. For the rules of natural justice to apply, there must be something in the nature of a judicial situation, and this was not the case with the architect.

39. The judge in the present case regarded Megarry J's reasoning in *Hounslow* as still broadly correct. He noted that Megarry J had drawn assistance from ***Panamena v Leyland*** [1947] AC 428 and from Richmond J's first instance decision in the New Zealand Supreme Court in ***Hatrick v Nelson Carlton Construction*** [1964] NZLR 72.

40. Mr Akenhead had found the approach of Richmond J in ***Hatrick*** informative and compelling. He quoted lengthy passages from the judgment at pages 80 to 82 and 85. The essence of these passages is that an architect or Engineer acting as a certifier has to exercise an honest and independent judgment. He is not disqualified from doing so because he is the agent of the employers. Richmond J resisted any implications of "*fairness*" because that would tend to import obedience to natural justice. He said that the certifier in that case:
    "... was not regarded by the parties as a person who had necessarily to listen to both sides, or to notify the contractor and give him an opportunity to be heard. I think he was entitled to form an opinion on the basis of his own knowledge of the progress of the works and his general knowledge and experience as an Engineer. If he required further information ... then surely the parties must have contemplated that he would make his own enquiries, and if he chose to make them from the contractor that he would not necessarily be bound to give the employer an opportunity to check the information he gathered before finally forming an opinion."

41. It has on occasions been overlooked that ***Hatrick*** went to the New Zealand Court of Appeal ([1965] NZLR 144) where, as the judge in the present case said, the court upheld Richmond J's decision on broadly the same reasoning. North P said at page 151 that a certifier is not expected to conduct a judicial enquiry. Turner J emphasised at page 153 the need for impartiality and independence. Both North P and Turner J said that, if the certifier heard representations from one

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party of such a nature as to be calculated to influence him, he should give the other party the opportunity to be heard likewise.

42. In the present case, the judge considered that there was no basis for implying a term into the contract that Pell Frischmann would adhere to any particular procedure when giving a decision under clause 66. In relation to Amec's particular contentions, he considered that no copy of the Highways Agency's letter seeking a decision needed to be sent to Amec. If the Engineer felt Amec's input was needed, they could and would have asked for it. The judge did not see how a copy of Amec's letter of **10th** December could have affected the Engineer's decision. Mr Gallagher specifically considered whether to contact Amec and decided not to do so for perfectly sensible reasons. Mr Gallagher had said in evidence (page 114 to 115 of the transcript) that he had had some contact at meetings and he felt that he clearly understood the position. The Highways Agency felt the contractor was responsible. Amec felt they were not responsible. That seemed to him to be a clear difference he could deal with.

43. The judge considered it sensible for Pell Frischmann to have started work on a decision they knew they were going to be asked to make with some urgency. As to the urgency, Mr Gallagher did not regard the urgency as binding. He took such time as he needed. Objectively the time taken - from l1th to 18th December - was not unduly short.

44. It was true that the Engineer was in a position of conflict of interest, but this was an intrinsically inherent possible concomitant of the Engineer's position under the contract and clause 66 in particular. As the judge said at paragraph 101 of his judgment, 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. Mr Akenhead had referred in this context to an observation of Lord Thankerton in ***Panamena v Leyland*** at page 437 where he said:

"By entering into the contract the respondents agreed that the appellant's surveyor should discharge both these duties and therefore they cannot claim that the appellant's surveyor must be in the position of an independent arbitrator, who has no other duty which involves acting in the interests of one of the parties."

This was echoed in what Lord Hoffmann said in ***Beaufort Developments Limited v Gilbert Ash Limited*** [1999] AC 266 at 276 that the architect is the agent of the employer. He is a professional man, but can scarcely be called independent.

45. The judge considered that cases about adjudication were not here in point. There is a great difference between an Engineer's decision under clause 66 and an adjudicator's decision under the Housing Grants Act 1996. He decided that the Engineer in the present case was under a duty to act independently and honestly, but was not under a duty to comply with the more elaborate procedural rules for which Mr Ramsey contended. He was satisfied, as was Mr Akenhead, on the evidence that the Engineer in fact discharged his duty to act independently and honestly. That is not challenged in this court. He accordingly decided that the decision of 18th December 2002 was a valid Engineer's decision under clause 66.

46. I reach the same conclusion for much the same reasons. The rules of natural justice are formalised requirements of those who act judicially. Compliance with them is required of judges and arbitrators and those in equivalent positions, but not of an Engineer giving a decision under clause 66 of the ICE conditions. The clause is, in my view, to be so understood, taking due account of the reference, in the penultimate sentence of the clause as I have quoted it in paragraph 11 above, to *"evidence or arguments"*. This refers to evidence or arguments before the arbitrator but does not predicate that the Engineer's decision has to be reached by a judicial process.

47. Under clause 66, the Engineer is required to act independently and honestly. The use by the New Zealand Court of Appeal of the word *"impartially"* does not, in my view, overlay independence and honesty so as to encompass natural justice as Mr Ramsey appeared to contend. I would not be coy about saying that the Engineer has to act *"fairly"*, so long as what is regarded as fair is flexible and tempered to the particular facts and occasion. I would here adopt what Cooke J, sitting in the New Zealand Court of Appeal said in ***Canterbury Pipe Lines v The Christchurch Drainage Board*** (1979) 16 BLR 76 at 98:

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*"In **Hatrick** the term "fairness" was avoided in the judgments, Richmond J saying that he resisted it partly because of its vagueness and partly because it might be regarded as equivalent to natural justice. Since then, however, in **Sutcliffe v Thackrah** [1974] AC 727 (1977), 4 BLR 16 the House of Lords have used that very term to describe the duty of an architect when acting not as an arbitrator or quasi-arbitrator but in the role of valuer or certifier. Lord Reid (with whom Lord Hodson agreed), Lord Morris and Lord Salmon all spoke of a duty to act in a fair and unbiased manner or fairly and impartially, although Viscount Dilhorne appears to have regarded an honest exercise of professional skill and judgment as enough. The tenor of the opinions of the majority of their Lordships accords with the substance of the **Hatrick** judgments, if not with their actual wording.*

In our opinion it should be held in the light of these authorities that in certifying or acting under Clause 13 here the Engineer, though not bound to act judicially in the ordinary sense, was bound to act fairly and impartially. Duties expressed in terms of fairness are being recognised in other fields of law also, such as immigration. Fairness is a broad and even elastic concept, but it is not altogether the worse for that. In relation to persons bound to act judicially fairness requires compliance with the rules of natural justice. In other cases this is not necessarily so."

48. There will be circumstances in which an Engineer, using his knowledge of the course of the contract and its progress and incidence, can properly make a decision under clause 66 on request from one of the parties without formal reference to the other. There will be other occasions when he needs information from one or both of the parties. If he entertains representations from one party over and above those inherent in making the request for a decision in the first place, fairness may require him to invite representations from the other party. But I would not go so far as to say that this is a straightjacket requirement in all circumstances. He may be well aware, as in the present case, what the other party's position is. I do not consider that the letter of 6th December should be seen as containing representations which obliged the Engineer to invite balancing representations from Amec.

49. Fairness also entitles one or both of the parties to ask for a speedy decision, if limitation is becoming a problem; and fairness obliges the Engineer, I think, to give a speedy decision in such circumstances, provided that it is given honestly and independently and that it is in truth a properly considered decision. There is no basis for saying that the decision in the present case was not properly and sufficiently considered. In reality, the Engineer decided that, on the relatively limited information presently available, Amec were responsible. It was not on the facts a surprising decision. It may or may not turn out to have been correct. A corollary of Amec's position could be, as Mr Ramsey acknowledged, that the Secretary of State might have a claim for breach of contract or duty against the Engineer for failing to give a timely decision under clause 66 when asked to do so for limitation reasons. Granted that in other circumstances this might conceivably be so, it is a commercially unrealistic submission on the facts of this case. Mr Ramsey accepted that no case has decided that an employer under this Contract can sue the Engineer for failing to give a timely clause 66 decision.

50. I should add that I am unpersuaded that unfairness of the kind and degree contended for in this case should be regarded as inevitably rendering the eventual decision of the Engineer invalid for the purposes of clause 66. I am unpersuaded that such transgression must necessarily have that consequence. If in formal terms it would have seemed fair to inform Amec that the Highways Authority had requested a clause 66 decision and to invite their representations, the nature of any such response was inevitable and the decision would have been the same. It would be unduly formalistic to say that nevertheless such element of unfairness invalidated the decision so as to prevent the Secretary of State from starting timely arbitration proceedings. Here again, the position of adjudicators is not comparable.

51. I do not accept Mr Ramsey's submission that an Engineer's decision under clause 66, to which he would attribute a capital "D", has a different quality from other decisions of the Engineer under the contract so as to import an obligation to comply with the rules of natural justice. A decision under clause 66 undoubtedly affects the rights of the parties, but so do all Engineers' decisions having contractual effect. Mr Marrin pointed to clause 63(1)(b) as a clause providing for an Engineer's certificate capable of having a profound effect on the rights of the parties as enabling

the employer to expel the contractor from the site. The decision under clause 66 is not binding on the parties unless they chose to allow it to become so. The Engineer is not obliged to act judicially.

52. As to the contention that Pell Frischmann were disqualified from giving a valid decision because they themselves were the object of an equivalent claim, I agree with the judge and Mr Akenhead that this was an unavoidable potential incidence of the contractual relationship between the parties. Mr Ramsey accepted that the Engineer may readily be in a position of conflict. He was not disqualified as a matter of principle. It is a question of fact and degree, and these were very special facts. I do not accept this submission. There is again force in Mr Marrin's reference to clause 63(1)(b). Can an Engineer who has himself given a certificate under that clause then make an impartial decision as to its validity under clause 66? The quality of the problem is much the same. The problem arose in this case in stark form no doubt because limitation periods were about to run out on all sides. It cannot be a basis for disqualification in the light of the intrinsic contractual relationships. Mr Ramsey's suggestion that the Secretary of State could have terminated Pell Frischmann's engagement and appointed another Engineer is quite unrealistic.

53. **The scope of the arbitration** : Amec's contention here is that the scope of the arbitration is limited to the particular matters which the Engineer dealt with in the lettered sub-paragraphs of their decision letter.

54. The judge decided, correctly in my view, that the matters referred to the Engineer for decision in the letter of 6th December embraced all actual or suspected defects in the Thelwell Viaduct. He further decided, again correctly, that the notice of arbitration embraced all claims in the letter of 6th December. The judge then decided that "the matter" in the third and fourth sentences of clause 66 (lines 11 and 17 as printed) meant that which was referred to the Engineer, and not, as Mr Ramsey contended, that which the Engineer decided.

55. In my judgment, the judge was plainly correct here. "The matter" is the dispute or difference referred. The phrase in the fourth sentence also encompasses circumstances in which the Engineer has failed to give a decision, in which event *"the matter" can only be that which was referred. Mr Akenhead had further decided - again, I think, correctly - that the Engineer's decision of 18th December in fact embraced the entirety of that which was referred for decision. The lettered subparagraphs list the "defects presently known to exist"*. The decision, however, was the all embracing one that "the contractor has provided and installed roller bearings which are not in accordance with the contract". Yet further, the earlier part of the decision had referred to the Highways Agency's letter of 6th December as "the matter" which was referred to the Engineer for his decision under clause 66. It then stated that *"this document is the Engineer's decision in compliance with that request"*. The decision therefore intended to embrace that which was referred.

56. Amec's submission in this court puts the case in a slightly different way. They say that the letter of 11th December referred to the Engineer the claim in the letter of 6th December. That claim was limited to the immediately identifiable defects in paragraphs 2(a), (b) and (c) of that letter - these are the same as those in the lettered sub-paragraphs of the Engineer's decision. So that which was referred is so limited. I reject this submission, as did the judge. The letter of 6th December held Amec *"responsible for the situation with Thelwell Viaduct"*. This embraced both the defects then specifically identified and any related defects and remedial work which further investigation and testing would bring to light.

57. **Conclusion** : For these reasons I would dismiss this appeal.

Lord Justice Rix:

58. I agree that this appeal should be dismissed, although to some extent my path differs from that which Lord Justice May has adopted. I gratefully adopt his statement of the facts and issues of the case.

59. Three issues were debated before us. The first was whether a dispute within the meaning of clause 66 had arisen which the Highways Agency, as agent for the Secretary of State, was therefore entitled to refer to the engineer for his decision. The second was whether the engineer's decision was valid or invalidated by the engineer's failure to observe a duty of fairness, in particular the duty to *"hear the*

other side" (audi alteram partem). The third was whether the reference to arbitration was limited in its scope by the terms of the engineer's decision. Each issue was, on Amec's submissions, a tool with which to destroy, or limit the scope of, the arbitration which the Highways Agency had sought to bring against Amec very shortly before the expiry of the limitation period.

60. I agree in essence with Lord Justice May's analysis and disposition of the first issue, although as will appear below I have some observations to make about the terms in which the issue was argued before us. As to the second issue, I respectfully differ somewhat from Lord Justice May's analysis, but nevertheless agree in the result that the Highways Agency's reference to arbitration was valid and timeous. As to the third issue, I fully agree with what Lord Justice May has said and I have nothing to add.

61. As I agree in the disposition of the appeal I will seek to confine my remarks as much as will briefly permit me to explain my views.

62. ***Issue one:* Was *there* a valid *reference of* a *"dispute or difference " to the engineer?*** I agree that there was. I agree that the word "difference" probably goes wider than the concept of a "dispute", and that there was in any event a dispute or difference capable of being referred to the engineer under clause 66 at any time after the meeting of 19th September 2002. I also agree that the Highways Agency's letters of 2nd October and 6th December 2002 amounted in each case to a claim, and that in any event, that is to say whether or not there had been a previous dispute or difference, and especially against the background of the parties' previous discussions and correspondence and also of the imminent expiry of the limitation period, there was a dispute or difference capable of being referred to the engineer by the time of the Highways Agency's letter of reference to the engineer of 11 December 2002. After all, the Highways Agency had asked Amec to confirm that they accepted responsibility by 10 December 2002, and on that day Amec replied to the effect that they were not in a position to do so. Their actual words were "we are not in a position to make any comment on liability". That was a refusal to accept liability at present, even if it allowed of the theoretical possibility (but, I would infer, in the circumstances a highly unlikely possibility) that there would be a shift in view towards an acceptance of liability thereafter.

63. Like Lord Justice Clarke in ***Collins (Contractors) v. Baltic Quay Management (1994) Limited*** and Lord Justice May in the present case, I am broadly content to accept the propositions set out by Jackson J in para 68 of his judgment below. I would also agree with Lord Justice Clarke's and Lord Justice May's further observations, and would hazard these remarks of my own.

64. First, I would wish to be somewhat cautious about the concept of "a reasonable time to respond" to a claim. The facts of the present case demonstrate to my mind the difficulty of that test. In many ways Amec were not left with a reasonable time to respond. They were effectively given a period of one day in circumstances where they had been previously told (in the Highways Agency's letter to them dated 2 October 2002) that a "formal response" would be appreciated *"once you have received the factual report referred to earlier"*. That factual report was never sent to them. It was true that the limitation period was expiring, but that was not Amec's fault.

65. The words *"dispute"* and *"difference"* are ordinary words of the English language. They are not terms of art. It may be useful in many circumstances to determine the existence of a dispute by reference to a claim which has not been admitted within a reasonable time to respond; but it would be a mistake in my judgment to gloss the word *"dispute"* in such a way. I would be very cautious about accepting that either a *"claim"* or a *"reasonable time to respond"* was in either case a condition precedent to the establishment of a dispute.

66. Secondly, however, like most words, *"dispute"* takes its flavour from its context. Where arbitration clauses are concerned, the word has on the whole caused little trouble. If arbitration has been claimed and it emerges that there is after all no dispute because the claim is admitted, there is unlikely to be any dispute about the question of whether there had been any dispute to take to arbitration. And if the claim is disputed, any argument that the arbitration had not been justified because at the time it was invoked there had not been any dispute is, it seems to me, unlikely to find a receptive audience (although it appears that it did in ***Cruden Construction v. Commission***

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for the New Towns [1995] 2 Lloyd's Rep 37). So it is that in this arbitration context the real challenge to the existence of a "dispute" has arisen where a party seeking summary judgment in the courts has been met by a request for a stay to arbitration and the claimant has wanted to argue that an unanswerable claim cannot be a real dispute. In that context it was held in ***Hayter v. Nelson and Home Insurance*** *[1990]* 2 Lloyd's Rep 265 that for the purposes of section 1 of the Arbitration Act 1975 *"there is not in fact any dispute"* where a claim is unanswerable, even if disputed. However, for the purposes of section 9 of the Arbitration Act 1996, from which that particular language had been dropped, this court held, applying ***Ellerine Brothers (Pty) Ltd v. Klinger*** [1982] 1 WLR 1375, that an unadmitted claim gave rise to a dispute, however unanswerable such a claim might be: ***Halki Shipping Corporation v. Sopex Oils Ltd*** *[* 1998] 1 WLR 726.

67. It follows that in the arbitration context it is possible and sensible to give to the word "dispute" a broad meaning in the sense that a dispute may readily be found or inferred in the absence of an acceptance of liability, a fortiori because the arbitration process itself is the best place to determine whether or not the claim is admitted or not.

68. Thirdly, and significantly, the problem over "dispute" has only really arisen in recent years in the context of adjudication for the purposes of Part II of the Housing Grants Construction and Regeneration Act 1996. Jackson J referred below to some of the burgeoning jurisprudence to which the need for a *"dispute"* in order to trigger adjudication has given rise. In this new context, where adjudication is an *additional* provisional layer of dispute resolution, pending final litigation or arbitration, there is, as it seems to me, a legitimate concern to ensure that the point at which this additional complexity has been properly reached should not be too readily anticipated. Unlike the arbitration context, adjudication is likely to occur at an early stage, when in any event there is no limitation problem, but there is the different concern that parties may be plunged into an expensive contest, the timing provisions of which are tightly drawn, before they, and particularly the respondent, are ready for it. In this context there has been an understandable concern that the respondent should have a reasonable time in which to respond to any claim.

69. Fourthly, the question might arise as to whether the prior existence of a dispute is a condition precedent to a reference. The parties are agreed in this case that it is. Since they are agreed, I am content to assume that that is so. Ultimately, it would be a question of construction of any particular clause.

70. ***Issue two: Was the engineer's decision invalidated by his failure to observe the requirements of procedural fairness?*** Although Amec complained of many different aspects of what they said was the engineer's failure to be fair (see the list made by the judge and cited by Lord Justice May at para 37 above), I am content for present purposes to concentrate on the undisputed fact that the engineer did not give Amec an opportunity to make submissions to him before rendering his decision. Nothing for these purposes turns on the concept of an oral hearing. The Highways Agency made its case to the engineer in writing, and as I understand Amec's submission it would have sufficed if the engineer had permitted Amec to respond in the same way.

71. Lord Justice May has concluded, as did the judge below, that the engineer was obliged to act independently and honestly, but that he did so; and that his obligations of independence and honesty did not encompass the requirements of fairness to the extent of giving Amec an opportunity to respond. While acknowledging with respect these views, I regret that I am unable to share them.

72. I should emphasise that there is no question of the engineer acting other than honestly. I am concerned with the concepts of independence and fairness or natural justice.

73. Impartiality is the watchword of all tribunals, including arbitrators. The Arbitration Act 1996 section 1(a) speaks of "the fair resolution of disputes by an impartial tribunal" and section 33(a) says that the tribunal shall *"act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent"*. There is no reference,

however, to independence. There may be issues at the margin of what may be said in particular cases to be a derogation from such requirements of impartiality and fairness; but no one doubts that these requirements are basic. If, however, an engineer is to be regarded as acting, for the purposes of clause 66, in the manner of a (quasi) tribunal or arbitrator, there is an immediate problem which stems from the obvious fact that he is appointed by the employer and acts as his agent.

74. The judge essentially founded himself by analogy on what Megarry J said about the role of an architect in ***Hounslow London Borough Council v. Twickenham Garden Developments Ltd*** [1971] 1 Ch 233 at 259/260 and in particular in this passage: *"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 an expert and the wide range of matters that 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 the 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. Harman, be something in the nature of a judicial situation; and this is not the case."*

75. The issue there was whether the architect had to hold a hearing observing the requirements of natural justice before he gave a notice under condition 25(1) of the RIBA form specifying a default by the contractor and rendering the latter therefore at peril of the employer subsequently giving notice of termination.

76. Subsequently, in ***Sutcliffe v. Thackrah*** [1974] AC 727 the House of Lords had to consider the position of an architect who had issued interim certificates. The employer sued in negligence and breach of duty. The architect said he could not be so liable because he was acting as arbitrator. Their Lordships disagreed, contrasting the position of a certifier or valuer and of a quasi-arbitrator to whom a dispute is submitted by the parties. Lord Reid said of the architect (at 73713): *"The building owner and the contractor make their contract on the understanding that in all such matters [decisions reflected in the amounts contained in certificates issued by the architect] the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor."*

Lord Morris of Borth-y-Gest said (at 744G): *"They were employed and paid by the appellant. The duties involved that the architect would act fairly: he was to act fairly in ensuring that the provisions of the building contract were carried out. He was to exercise his care and skill in so ensuring. But his function differed from that of one who has to decide disputes between a building owner and a contractor."*

77. One of the decisions cited and relied on by Megarry J in ***Hounslow*** was that of Richmond J in New Zealand in A C ***Hatrick (NZ) Ltd v. Nelson Carlton Construction Co Ltd*** [1964] NZLR 72, especially as Richmond J there declined to follow the observations of Channell J in ***Page v. Llandaff and Dinas Powis Rural District Council*** *(1901)* 2 Hudson's Building Contracts (4th ed) 316 to the effect that if an architect hears one side, he must also hear the other. However, Megarry J appears to have been unaware that ***Hatrick*** went to appeal: [1965] NZLR 144. In the New Zealand court of appeal North P said this (at 151): *"The certifier is not expected to conduct a judicial inquiry. He is there to decide matters by the exercise of his skill and knowledge ... Of course, if he hears from one party representations which are of such a nature as to be calculated to influence him in arriving at his determination, then he must afford the other party the opportunity of answering what is alleged against him."*

And Turner J, after referring to a necessary "attribute of impartiality and independence", said (at 153): *"The next question is, what does this attribute involve, when tested by objective conduct? Audi alteram partem, said Mr Sanders. If by this submission Mr Sanders meant that it was obligatory upon the engineer to hear either party before giving his certificate, I would agree with Richmond J. that this submission must be rejected. But I understood Mr Sanders to make the more limited submission ...I agree that if he heard material representations from one, that attribute of impartiality and independence which I have accepted as essential to his functions must have been lost if he did not give to the other an opportunity to be heard likewise."*

78. In ***Canterbury Pipe Lines Ltd v. The Christchurch Drainage Board*** *(1979) 16* BLR *76* (NZCA) it was held that a certifying engineer was bound to act fairly and impartially, albeit not judicially. Cooke J, after reviewing ***Hatrick*** and **Sutcliffe *v. Thackrah*** in a passage cited by Lord Justice May at para 47 above, concluded (at *98/99): "In our opinion it should be held in the light of these authorities that in certifying or acting under Clause 13 here the engineer, though not bound to act judicially in the ordinary sense, was bound to act fairly and impartially. Duties expressed in terms of fairness are being recognised in other fields of law also, such as immigration. Fairness is a broad and elastic concept, but it is not altogether the worse for that. In relation to persons bound to act judicially fairness requires compliance with the rules of natural justice. In other cases this is not necessarily so. But we do not think it can be confined to procedure. Its use in the authorities in combination with "impartiality" suggests that it is not meant to be a narrow concept."*

    Lord Justice May himself accepts a flexible obligation on the part of the engineer to act "fairly" (at paragraph 47 above).

79. It is clear therefore that the New Zealand court of appeal in ***Hatrick*** and ***Canterbury Pipe*** and the House of Lords in **Sutcliffe *v. Thackrah*** went significantly beyond Richmond J's view at first instance in ***Hatrick*** that, requirements of honesty, independence and impartiality apart, *"I resist any implication of "fairness"..."* (at 85).

80. It appears that all previous cases concerning architects or engineers considered their duties and obligations in connection with their work as certifiers or notice givers. No case has been cited to us in relation to an engineer's role as the settler of disputes under clause 66. It seems to me that there is force in Mr Ramsey's submission that that role differs from his role elsewhere under the contract and that this case therefore differs from the circumstances previously under consideration in the earlier authorities. Clause 66 is headed *"Settlement of Disputes - Arbitration"*. It begins by postulating a "dispute or difference". Such dispute or difference may include "any dispute as to any decision opinion direction certificate or valuation of the Engineer". Such a dispute or difference *"shall be referred to and settled by the Engineer"*, and his decision *"shall be final and binding upon the Contractor and the Employer unless either of them shall require that the matter be referred to arbitration..."* It seems to me that these provisions demonstrate that a clause 66 dispute about a decision, certificate or valuation of the engineer, referred to the engineer for the purpose of his clause 66 decision, as part of the dispute resolution settlement provisions of the parties' contract, is quite unlike the underlying decisions, certificates or valuations of the engineer which were the subject matter of the earlier authorities. In my judgment this distinction, the presence or absence of a mutual agreement for the resolution of disputes, is highlighted throughout the speeches of their Lordships in ***Sutcliffe v. Thackrah***, for instance where Lord Reid says (at 737H) *"There is nothing judicial about an architect's function in determining whether certain work is defective. There is no dispute. He is not jointly engaged by the parties"*; or where Lord Morris says (at 744G) *"But his function differed from that of one who had to decide disputes between a building owner and a contractor"*.

81. Even, however, if the decision in question was of the more basic kind referred to in the earlier authorities, all of those authorities appear to consider that the engineer (or architect) must nevertheless act fairly, albeit that concept in the ordinary context where the engineer is employed by the building owner means less than it would were the engineer acting in a judicial or quasi judicial capacity. For the same reason *"independence"* and *"impartiality"* must necessarily be given a more restricted meaning than they regularly receive in other contexts. Even so, the engineer must "retain his independence in exercising [his skilled professional] judgment" (Megarry J at 259G); he must *"act in a fair and unbiased manner"* and *"reach his decisions fairly, holding the balance"* (Lord Reid at 737D); he must *"act fairly"* (Lord Morris at 744G); if he hears representations from one party, he must give a similar opportunity to the other party to answer what is alleged against him *(**Hatrick,*** **NZCA**); he must *"act fairly and impartially"* where fairness is *"a broad and even elastic concept"* and impartiality *"is not meant to be a narrow concept" (**Canterbury Pipe, NZCA**).*

82. Applying these concepts to the present case, I would be reluctant to agree that the engineer was entitled to come to his decision on the basis only of the Highways Agency's complaints and without any reference to Amec, especially in a situation where on one possibility, that of a design

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defect, there might be responsibility, as the Highways Agency itself pointed out to the engineer, on the engineer himself.

83. Mr Akenhead QC as arbitrator in this case founded himself essentially on ***Hatrick*** at first instance - it appears that he too was not shown the New Zealand court of appeal judgments in ***Hatrick*** - in confining the engineer's duty to one only of acting *"independently and honestly" (*at para 93 of his award). And similarly, Jackson J rejected all matters which might come within the rules of natural justice on the basis that Megarry J's judgment was still essentially the final word on the subject and that otherwise the position would become "unduly convoluted" and that all that mattered was *"the quality of the decision reached"* (at paras 89/90). It seems to me, however, that this does less than justice to the authorities as a whole. The fact is that in this context the concepts of "independence" and "impartiality" are given a special meaning very different from their normal meaning elsewhere: in effect these concepts have been emptied of any content beyond honesty and the absence of direct interference from the employer. I accept that, in the light of the engineer's employment by the employer, these concepts must be given something of a special meaning, but that, it seems to me, makes it all the more important for the engineer, as a skilled professional, to be prepared, especially in the context of clause 66, to wish to suspend his professional judgment until he has heard from the contractor as well. Moreover, it is not for the courts to judge the "quality" of the engineer's decision, a fortiori in the absence of Amec's response.

84. In the light of Lord Justice May's great experience in this area of the law, I express these views of my own with considerable diffidence. In any event, I do not regard them as decisive in this case: for, even if the engineer's clause 66 decision should be regarded as "*invalid and unenforceable*" (see ***Amec Capital Projects Ltd v. Whitefriars City Estates Ltd*** [2004] EWCA Civ 1418, unreported 28 October 2004) by reason of his failure to obtain Amec's representations in response to the Highways Agency's reference, his decision was not, in my judgment, a complete nothing: it remained a decision, in the light of which the Highways Agency was entitled to refer the dispute to arbitration. Thus, if there had been no reference to arbitration and the Highways Agency were relying on the engineer's decision as a final and binding resolution of the parties' dispute, its invalidity would be an answer to such reliance. Where, however, the Highways Agency makes an otherwise timely reference to arbitration, it seems to me not to matter that the engineer's decision may subsequently be shown to have been defective and invalid. For these purposes, it does not seem to me to matter whether one calls the decision invalid or void: see *Wade & Forsyth, Administrative Law,* 9th ed, 2004, at 494/6 and 304/6. The fact that under clause 66 the failure of the engineer to render a decision within three months of a reference to him is itself a catalyst for either party to refer the dispute to arbitration demonstrates that a valid decision of the engineer is not a *sine qua non of* arbitration. It does not seem to me that the parties contemplated that a reference to arbitration made at a time when an engineer's decision still stood should itself lose its validity if thereafter the engineer's decision was shown to be invalid. I would respectfully prefer to put the matter in this way, rather than to say with Lord Justice May (see para 50 above) that the engineer's decision would have been the same in any event. It seems to me that that is not a matter for the courts to judge: the parties have left such decisions to the engineer and ultimately to the arbitrator.

85. I would observe that it has not been submitted on behalf of Amec, I will assume for good reason, that the Highways Agency was not entitled to commence arbitration on the back of a decision in its own favour.

86. In sum, I agree, for the reasons set out above, that this appeal should be dismissed.

Lord Justice Hooper:

87. I agree that the appeal should be dismissed for the reasons given by May LJ.

Vivian Ramsey QC and Simon Hughes (instructed by MessrsWragge & Co Llp) for the Appellant
John Marrin QC and Sarah Hannaford (instructed by the Treasury Solicitor) for the Respondent