JUDGMENT : His Honour Judge Seymour QC. TCC. 8th June 2001.

1. The claimants in this application are Mr. Trevor Wicketts and Miss Patricia Sterndale, who are the freehold owners of the property known as and situated at Number 33 Hillside Road, Portishead, Bristol. The title to that property is unencumbered, on the evidence before me. Evidence has been adduced in the arbitration proceedings to which I shall refer in a moment, demonstrating that to be the case.

2. The first, respondents, who do not appear and are not represented in the proceedings before me, are a firm called Brine Builders. The second respondent is Mr. H. C. Siederer, who has appeared in person. Mr. Wicketts and Miss Sterndale employed Brine Builders, to build them a house, the property which they own. The agreement between Mr. Wicketts and Miss Sterndale on the one hand, and Brine Builders on the other, included an arbitration clause.

3. Disputes arose between Mr. Wicketts and Miss Sterndale on the one hand and Brine Builders on the other. Those disputes were referred to arbitration. Mr. Siederer, who is by profession a quantity surveyor, but who is also a Fellow of the Chartered Institute of Arbitrators, was appointed arbitrator in relation to those disputes in about July 1999. Although Mr. Siederer has issued directions in the arbitration on at least nineteen occasions, and although hearings have taken place before him both for directions and in relation to issues of liability over a total of, I think,* some seven days or so, no conclusion has so far been reached in relation to any issue.

4. The most optimistic valuation placed by Mr. Wicketts and Miss Sterndale upon their claim, is some £60,000-odd, plus interest. Brine Builders have put forward a counterclaim. The counterclaim as originally advanced was not quantified. By an amended counterclaim, served only a matter of a few days ago, the respondents in the arbitration, Brine Builders, have finally, it appears, sought to quantify the amount which they are counterclaiming.

5. The evidence on behalf of Mr. Wicketts and Miss Sterndale in relation to issues of liability in the arbitration has been completed. Subject to the outcome of the application before me the present state of play is that Mr Siederer, at a hearing before Cresswell J on 1st May, indicated that there would be a further hearing in the arbitration proceedings, over the period 25th to 29th June of this year, such hearing to cover all issues as to liability and quantum.

6. The application now before me is for an order under ***'Section 24(1) of the Arbitration Act 1996'***, for the removal of Mr. Siederer as arbitrator. So far as is presently material, Section 24(1) of the Arbitration Act 1996 is in the following terms *'A party to arbitral proceedings may upon notice to the other parties, to the arbitrator concerned and to any other arbitrator, apply to the court to remove an arbitrator on any of the following grounds.'*

7. Those which are identified in the arbitration application before me are:
   '(c) That he is physically or mentally incapable of conducting the proceedings, or there are justifiable doubts as to his capacity to do so,' and
   '(d) That he has refused or failed (i) properly to conduct the proceedings, or (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.'

8. As the application before me has unfolded, it has become clear that the sole ground upon which Miss Karen Gough, who appears on behalf of Mr. Wicketts and Miss Sterndale, seeks to rely, is that set out in paragraph (d) of subsection (1) of Section 24.

9. There are a number of other provisions of the Arbitration Act 1996 which are material to the application presently before me. Of these, the first is Section 1, which provides, so far as is presently material: *'The provisions of this Part [which is Part 1 of the 1996 Act] are founded on the following principles and shall be construed accordingly...'*

10. The only paragraph relevant is (a): *'The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal, without unnecessary delay be expense.'*

11. The next provision to which I need to refer, is Section 33, subsection (1) of which provides that: *'The tribunal shall (a) 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, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'*

12. Miss Gough has submitted, as I think rightly, that in addressing the question whether particular arbitration proceedings have been properly conducted, the court should consider whether they have been conducted in such a manner as to give effect to the principles to be found in Section 1(a) and Section 33(1) of the 1996 Act.

13. The next provision to which I should refer is Section 38, subsection (3) of which provides: *'The tribunal may order a claimant to provide security for the costs of the arbitration. This power shall not be exercised on the ground that the claimant is (a) an individual ordinarily resident outside the United Kingdom, or (b) a corporation or association, incorporated or formed under the law of a country outside the United Kingdom, or whose central management or control is exercised outside the United Kingdom.'*

14. In Section 59(l) of the 1996 Act, is to be found this: *'References in this Part to the costs of the arbitration are to (a) the arbitrator's fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties.'*

15. I return to Section 41 of the 1996 Act, and to subsection (5), by which it is provided: *'If without showing sufficient cause, a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.'*

16. Subsection (6): *'If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing the claim.'*

17. Subsection (7): *'If, party fails to comply with any other kind of peremptory order, then without prejudice to section 42, Enforcement by a Court of Tribunal's Peremptory orders, the tribunal may do any of the following:*

(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order

(b) draw such adverse inferences from the Act of non-compliance as the circumstances justify

(c) proceed to an award on the basis of such materials as have been properly provided to it

(d) make such order as it thinks fit, as to the payment of costs of the arbitration incurred in consequence of the non compliance.'

18. In Section 82, subsection (1) of the 1996 Act, there is a definition of the expression ***'peremptory order***,' as follows: *'Peremptory order means an order under Section 41(5), or made in an exercise of any corresponding power conferred by the parties.'*

19. It is plain, in my judgment, that the reference to *'any corresponding power conferred by the parties,'* means conferred on the arbitrator by the agreement of the parties.

20. Then Section 73(1), which is in these terms: *'If a party to arbitral proceedings takes part or continues to take part in the proceedings without making either forthwith or within such time as is allowed-by the arbitration agreement or the tribunal or by any provision of this part, any objection*

a) that the tribunal lacks substantive jurisdiction,

b) that the proceedings have been improperly conducted,

c) that there has been a failure to comply with the arbitration agreement or with any provision of this part, or

d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection before the tribunal or the court, unless he shows that at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence has discovered, the grounds for the objection.

21. There is one further provision of the Arbitration Act 1996 to which I ought to refer. That provision is only relevant in the event that I am persuaded that I should accede to the application to remove Mr Siederer. The provision in question is Section 24(4), by which is it provided: *'Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement, if any, to fees or expenses, or the repayment of any fees or expenses already paid.'*

22. Reverting to Section 73(1), it is common ground between the parties before me, that no time for the making of such objection, as is referred to in that subsection, is allowed by the arbitration agreement between the claimants and the first respondent. No time has been allowed by the tribunal -- that is to say Mr. Siederer. There is no relevant provision of the Arbitration Act 1996 dealing with any time for making any objection that the proceedings have been improperly conducted. It is, I think – but it is not accepted, I find -- that the provisions of Section 73(1) are material in the context of an application for the removal of an arbitrator under Section 24(1)(d). Therefore it is necessary to consider, first, whether the claimants in the present proceedings have taken part or continued to take part in the arbitration proceedings before Mr. Siederer without making an objection that the arbitration proceedings had been improperly conducted by him. Second, if on the evidence they had taken part or continued to take part in those arbitration proceedings, whether they had made an objection forthwith before doing so, that the proceedings had been improperly conducted.

23. The effect of Section 73(1) in the circumstances of the present case, is therefore that unless I am satisfied on the evidence that the claimants before me have not taken part or continued to take part in the arbitration proceedings before Mr. Siederer, after the occurrence of something which is relied upon as being improper conduct, then I must be satisfied that before taking part or in those proceedings, an objection was raised: forthwith.

24. Neither the expression ***'objection***,' nor the expression ***'forthwith,'*** is defined for the purposes of the Arbitration Act 1996. As any objection has to be made forthwith if no longer time is allowed, it seems to me to be clear as a matter of construction, that an objection can be taken in any way. It does not have-to be taken in writing, and in particular does not have to be taken by commencing legal proceedings.

25. The expression ***'forthwith,'*** I think, cannot seriously be interpreted as meaning ***'within a matter of seconds,***' but bearing in mind the seriousness of the nature of the matters about which objection might be made, must mean something equivalent to '***promptly***' or ***'without unnecessary delay***.' What in any particular case amounts to ***'making an objection forthwith***,' is likely to be a question of fact.

26. The grounds upon which reliance is placed in the arbitration application before me as justifying the granting of the relief sought, are set out at paragraphs 20 to 24 inclusive. The narrative within those paragraphs is divided into a substantial number of subparagraphs, and I do not consider that it is necessary for the purposes of this judgment to read the grounds extensively. Each of the grounds is headlined, and I simply identify the headline description.

'*Paragraph 20:* *Delays and additional costs arising in connection with the failure to adopt suitable procedures.*

Paragraph 21: *Interference with the applicants' case, and threatened orders to re-open the claimants' case on liability.*

Paragraph 22: *Directions Order 40 of 6th November 2000.*

Paragraph 23: *Failure to understand and apply properly his powers in relation to Sections 38(3) and 40 of the 1996 Arbitration Act.*

27. As the Sections identified suggest, the particular matters which are elaborated in paragraph 23 relate to security for costs and the making of peremptory orders.

'*Paragraph 24:* *Peremptory order 41 of the 18th January 2001.*

28. The evidence in support of the arbitration application was, first, the first witness statement of Mr. Lee Bartlett. Mr. Lee Bartlett has in fact made three witness statements in support of the arbitration application, but for present purposes I think I need refer only to the first.

29. In a section of the witness statement entitled *'**Events on 1st/2nd November 2000**,'* there appears, beginning at paragraph 27, the following: *'Finally [this is on 1st November 2000] Mr. Wicketts lost all patience and remonstrated with the arbitrator about his apparent total lack of ability to manage the arbitration. Mr. Wicketts accused the arbitrator of spinning out the proceedings and allowing the respondent to conduct his case in such a way, such that costs were through the roof and rising. A heated exchange followed, during which Mr. Wicketts made it clear that he considered the arbitrator was negligent and incompetent, and that he might well take action against him or make complaint against him. The arbitrator said that Mr. Wicketts was not so clever, having gone through two or three sets of solicitors during the case, to which Mr. Wicketts responded truthfully that all had advised him that the arbitrator had been misconducting the proceedings. The arbitrator immediately said that he considered Mr. Wicketts complaint to be a threat that if he did not find in the claimants' favor, he would be sued, and he would not be threatened in such a way and he would note the award, award. Mr.Wicketts denied that was his intention. The formal proceedings adjourned in disarray. The arbitrator returned to the hearing room shortly afterwards, and indicated to counsel and to Mr. Poole that he considered that Mr. Wicketts had given the respondent a good excuse to appeal any award he issued in the claimants' favour, on the grounds that it was procured by undue pressure/influence. He appeared to be completely unmoved by the charges of mismanagement of the arbitration. After the arbitrator left, the parties agreed to leave things overnight and speak on a without prejudice basis the following morning, to see if a compromise could be achieved. Although discussions took place for a considerable period of time the following morning, no compromise could be achieved. The arbitrator was called back to the hearing and informed of the failure of the discussions. The respondent then sought to adjourn the proceedings. Counsel or Mr. Wicketts and Miss Sterndale objected to the application, but when Mr. Brine assured the arbitrator that he felt he was about to have a breakdown and was not in a fit state to give evidence that day, she was pressed to agree. Mr. Poole also stated that if his clients had to be billed for half a days' costs, so be it, but he would not continue. However -- and to the surprise of the parties' representatives -- the arbitrator was keen to continue on another subject, the scope of the amended agreement. He wanted counsel and Mr. Poole to address him on the amended agreement. Both objected to that course, and said that they wanted to address the matter once and fully, in submissions at the conclusion of the evidence. Neither had prepared to address him on that occasion. The arbitrator remarked that he considered that to be a common fault with lawyers, only able to do one thing at a time.'*

30. Mr. Poole appeared at the hearing of the 1st and 2nd November of last year as the representative of Brine Builders.

31. Mr. Siederer has not, in his witness statement of 21st May of this year, put before me, or in his submissions to me today, sought to dispute the substance of the account given in the passage from Mr. Bartlett's first witness statement which I have just read. Indeed, Mr. Siederer indicated to me that the outburst by Mr. Wicketts on 1st November of last year, was the first indication that he, Mr. Siederer, had had, of any dissatisfaction on the part of Mr. Wicketts in relation to how the arbitration proceedings had been conducted.

32. Following the conclusion of the hearing or 2nd November', Mr. Siederer wrote a letter dated 6th November of last year, described as a second letter, which was in the following terms: *'I take this opportunity of congratulating the parties in that they found themselves `able to get together last Thursday to discuss a possible settlement of their dispute. It is always my policy to encourage parties to achieve settlements if at all possible, and I regret on this occasion there was not a successful outcome. The parties may yet find it possible to reach a settlement without the necessity to resume the hearing. In the event that that does happen, certain requirements will have to .be met, and I attach here to my directions in that regard.'*

33. Those directions were dated also 6th November 2000, numbered 40, entitled, *'**Possible Settlement Agreement,**'* and read as follows: *'In the event that the parties reach agreement on the settlement of their dispute, the following directions are issued, and it is hereby ordered as follows:*

*40.1 A draft of the settlement **agreement is to be-submitted** to me for my approval prior to its implementation. The detailed terms of the agreement will not be a matter for my concern, but I will wish to satisfy myself as far as practicable that neither party has been subjected to any duress in entering into the agreement.*

40.2 If the agreement contains provisions for the payment of monies by one party to the other, it should be stated precisely how much the payment is to be, and precisely when it is to be made.

40.3 The agreement is to contain detailed provisions as to the apportionment of the parties' costs in the arbitration; i.e., the agreement should state if each party is to bear its own costs, or if one party is to bear a part or the whole of the other party's costs. The amount or proportion should be clearly prescribed, and the agreement should state precisely when any payment is to be made by one party or the other.

40.4 The agreement is to contain detailed provisions as to which party is to pay my fees and charges, or as to the apportionment of them between the parties. The agreement is not to be implemented before I have confirmed in writing that I have received the whole of my fees and charges from one party or the other. That is to say that no payment, such as that referred to in paragraph 40.2 above, is to be made or received prior to the whole of my fees and charges being discharged.'

34. It will be apparent from what I have said so far in this judgment, that prior to the hearings on 1st and 2nd November of last year, there had been a number of exchanges and indications of unhappiness on the part of the claimants with how the arbitration proceedings were being conducted. However, in my judgment, the effect of Section 73(1) of the Arbitration Act 1996, on the evidence before me, is to preclude any consideration of those matters, because there is no evidence that any objection was taken that the proceedings were not being properly conducted, and the claimants continued to participate in the arbitration proceedings. I therefore leave entirely out of account anything which had happened before 1st November of last year.

35. After the issuing of the Order for Directions dated 6th November of last year, Mr. Siederer wrote, on 8th November, as follows -- it is a letter addressed to the solicitors for the claimants and to the representatives of the respondents in the arbitration proceedings, the first respondents before me. What the letter said was this: *'For the information of the parties; I give below the total of my fees and charges which have been accrued up to and including Monday last, the 6th instant. 172.45 hours at £98.50, £16,986.33.'*

36. There was added to that an amount of Value Added Tax, producing a subtotal of £19,958.94, and then there was added an amount of £560.40 expenses, to produce a total of £20,519.34.

37. On 24th November of last year, Mr. Siederer wrote to the representatives of Brine Builders, with a copy to the claimants' solicitors, a letter which was in the following terms: *'I refer to your letter of 21st instant, which embodied a renewed application for an order for security for the respondents' costs. The matter of the title deeds of is no longer relevant. You will recollect that on 23rd May 2000, I issued a Peremptory Direction in this regard, that my further direction under 34.3 of the same date, gave my consent to the respondent to make application to the court to enforce the Peremptory Direction. He opted not to make such an application. At the beginning of the hearing on 7th September last, I considered your renewed application for an order for security for the respondents' costs. I decided then that the circumstances since your earlier application were not significantly altered, and accordingly I again declined to grant your application. I have now given consideration as to whether or not the circumstances have altered since 7th September last. I have decided that there has been a change. In early September, it was expected that I would be in a position to publish an award on liability during October. With the resumed hearing on liability now unlikely to take place until February 2001, it is unlikely that my award on liability will be available before late March or even April 2001. This brings to mind the matter of my own fees and charges, for which the parties are jointly and severally liable, and for which an unsuccessful*

party would primarily be liable, at least in part and possibly in whole. You will remember that both parties agreed at one stage to make interim payments to me. Indeed, your client actually sent me a cheque which I subsequently declined to present to his bank, because the claimants had a change of mind, citing the fact that my terms of engagement did not include any provision for interim payment of my fees and charges. Toward the end of the last hearing, I again requested the parties to agree to make interim payments to me. The respondent agreed, but the claimants did not. They gave no reason. I normally do not ask parties to make interim payments to me in respect of my fees and charges, unless the proceedings become protracted is these in this arbitration. My Direction Number 12, 1999, recorded the parties' agreement that if an oral hearing was requited, it was likely to be held at the end of February or early March 2000. We are now some twelve months behind that projection. Accordingly, I have to consider whether the claimants' continued refusal to make any payment to me, assuming that they are not acting in bad faith, is possibly due to some financial difficulty they may be experiencing. I have thought it reasonable to make a brief perusal of the respondents' accounts and bank statements, copies of which I have in my possession. I see that it appears that the respondent is operating profitably, but that he also appears to be heavily in debt to his bank by way of an overdraft facility, which presumably is guaranteed in some way. Therefore it might well be appropriate to ask the respondent to consider whether or not he would be prepared to provide security for the claimants' costs in a similar sum to that you mention in your letter, -plus an amount in respect of my own fees and charges. I am therefore minded to direct both parties to provide security for the other parties' costs, plus my own fees and charges, unless they are now prepared to make interim payments to me. The security could be in the form of a cash deposit as described in the final paragraph of your letter, or alternatively as I have previously indicated, in the form of a guarantee bond provided by a reputable bank or insurance company. The premiums for such bonds would probably be of the order of 1.5 to 2 per cent of the value of the bonds. I would direct that such premiums would be costs in the arbitration. Would you kindly let me have your response and comments to the above no later than Friday next, 1st December 2000?'

38. Mr. Siederer wrote again to the representatives of Brine Builders, with a copy to the claimants' solicitors, in a letter dated 11th December 2000. He referred to a response from MDP Associates, the representatives of Brine Builders, and dealt with various other matters that I need not specifically refer to, before coming to a paragraph which was in the following terms: *'My letter of 8th November 2000 showed that the total of my fees and charges up to and including Monday, 6th November 2000, amounted to £20,519.34. It is likely that by the time the hearing on liability is completed and I have published my award, the total will be in excess of £26,000. Either party could ultimately be liable for part or even all of the total. However, for the time being, I am going to proceed on the basis that each party may be prepared to deposit fifty per cent, i.e. £13,000, as an indication of good faith. Please request your client to make this deposit with me is soon as possible. If there is likely to some delay in arranging the finance, please ask your client to confirm whether or not he is making the appropriate arrangements.'*

39. The last paragraph of the letter read: *'My letter of even date faxed to both parties earlier today asked the claimants' solicitor to respond to my letter of 24th November 2000 by no later than 10 a.m. on Wednesday next, the 13th instant. That response should indicate whether or not the claimants are likely to be prepared to make a similar deposit to that referred to above.'*

40. In a letter to MDP Associates dated 17th January 2001, Mr Siederer wrote as follows: *'I will place on record your telephone call to me on Monday morning last. You asked if it would be in order for you to raise at the forthcoming hearing the matter of the claimants' earlier arbitration in connection with 33 Hillside Road. That arbitration has been referred to on at least one previous occasion during the hearings in this arbitration. I stated that it is in order for either party to raise any matter considered relevant to the matters currently under discussion. Mr. Poole also advised me that the respondent was posting a cheque to me on Monday last in the sum of £13,000, for me to place on deposit as a security for my fees. Your letter of the 5th instant indicated that Brine Builders are in the process of making the necessary arrangements to do this. I have today received Mr. Brine's hand-written letter enclosing his cheque for £13,000. Unfortunately, he has placed two `restrictions, viz (1) that I must hold the cheque until the claimants have made a similar deposit, and (2) that even then, the cheque will not be valid until I have given seven days*

notice, together with an " interim invoice. These restrictions are unacceptable, and frankly make Mr. Brine's cheque apparently worthless. In any event, the cheque is not for an interim payment of my fees, and thus would not merit an invoice from me. I have also received a facsimile letter from Messrs Farrells, acting for the claimants, from which I infer that it is not the intention of the claimants to make any deposit with me as security for my fees. They make no mention of the fact that I have, as they requested, referred them to the legislation which empowers me to order such security. It now appears that neither party has made the gesture of good faith which I was hoping would be forthcoming regarding security of costs. I have a duty to safeguard the interest of both the parties as well as my own interest. Accordingly tomorrow I shall issue peremptory directions ordering each party to provide security for the other party's costs in defending respectively the claim and counterclaim in the sum of £30,000. Although I have been prepared to accept deposits of £13,000 from each party, to secure an anticipated £26,000 of my fees and charges, I have to point out that in the end either party may become liable for part or even all of those fees and charges. Thus, I shall now direct that each party provide security for the full £26,000. In the event that the parties are both prepared to waive security for their costs, I would be prepared to proceed with the remainder of the liability hearing, subject to each party depositing the sum of £13,000 with me as security for my fees and charges.'

41. Then on 18th January, Mr. Siederer wrote a letter addressed both to Messrs Farrells on behalf of the claimants and to MDP Associates. The material part of that letter for present purposes reads as follows: *'The respondents latest application brought to my mind the matter of my own fees and charges. It is not my normal practice to include a requirement for interim payments in my terms of engagement. If proceedings become protracted, as in this instance, I request parties to agree to make interim payments to me, but I have never found this to pose any problem. Indeed, in this instance both parties agreed to my first such 'request, but the claimants subsequently reneged on the agreement. The respondents sent me a cheque which I was not prepared to present to his bank, because I felt it accept an interim payment of my fees from one party in the absence of a similar payment from the other party. Recently I have indicated that if the parties did not wish to make interim payments in respect of my fees and charges, I would accept payments as security, which I would deposit in a bank account entirely, separate from my business. I would not draw on such monies until the conclusion of the hearing on liability at the earliest, and not without first advising the parties of my intention. I have now opened such a deposit account with HSBC Bank in anticipation. On 8th November 2000, I informed the parties that up to 6th November 2000 my fees totalled £19,958.94 including VAT, and my out of pocket expenses in respect of hotel bills etcetera, totalled £560.40, making a grand total of £20,519.34. To date I have received no payment. I have stated that the total of my fees and charges, when I have published my award on liability, is likely to be in excess of £26,000, although either party could ultimately be liable for part or even all of this amount, I have been hoping for a gesture of good faith from the parties in the form of a payment of £13,000 from each of them.'*

42. On the 18th January of last year, Mr. Siederer issued further directions, numbered 41, entitled Security for Costs. The directions read as follows:

43. 'The following **PEREMPTORY DIRECTIONS** those two words in capital letters underlined – *'...are issued` and it is hereby ordered as follows:*

41.1 Security may be provided either by sending me a cheque for the required amount which I shall lodge in a deposit bank account under my sole control, or

41.2 By means of an unconditional guarantee bond provided by a reputable bank or insurance company, and which may be activated solely on my instruction.

41.3 All the securities are to be in place no later than by noon on Friday, 2nd February 2001.

41.4 The claimants are to provide security for the respondents costs in defending the claimants claim, in the sum of £30,000.

41.5 The claimants are to provide security for my fees and charges in the sum of £26,000.

41.6 The respondent is to provide security for the claimants' costs in defending the counterclaim, in the sum-of £30,000.

41.7 The respondent is to provide security for my fees and charges in the sum of £26,000.

44. The making of that order for directions seems to have prompted the writing by the claimant's solicitors of a long letter dated 2nd February 2001, setting out various complaints about how the arbitration proceedings had been conducted by Mr Siederer. I need not read that letter, but it is fair to say that it does include reference both to the directions of 18th January 2001 and to the directions of 6th November 2000.

45. Mr. Siederer did not consider it appropriate to respond in detail to the letter of 2nd February 2001, and a consequence was that the arbitration application currently before me was issued on 7th March of this year.

46. In answer to the arbitration application before me, and to the matters relied upon in support of that application, Mr. Siederer has very properly reminded me of the terms of Section 73(1) of the Arbitration Act 1996. As I have indicated, I am conscious of those provisions, and I have indicated my view of the effect of those provisions in the circumstances of the present case. Apart from that point, Mr. Siederer's position really is this: that he considers that he has behaved entirely correctly, and that the directions that he has given have been entirely appropriate. It is right to say that following the making of the arbitration application, Mr. Siederer was invited to adjourn a hearing in the arbitration proceedings which had been fixed for May of this year, pending the determination of this application. Mr. Siederer reminded himself, entirely properly, of the provisions of Section

47. 24(3) of the Arbitration Act 1996, which are as follows: *'The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.'*

48. He decided that the appropriate exercise of his discretion was to continue with the hearing already fixed for May. As a result of that decision, the claimants made application to Cresswell J, on 1st May of this year, for an injunction restraining Mr. Siederer from proceeding with that hearing. As a result of a discussion with the learned judge, Mr. Siederer came to the conclusion that it was appropriate to agree that the hearing fixed for, May of this year be adjourned, and it has been adjourned, as I have indicated, to the period between 25th and 29th June of this year. The order made by Cresswell J in the light of that indication by Mr. Siederer, included a provision that the costs of the application to him were reserved to me, when I heard this application, Cresswell is order including a direction for the hearing of this application before me today.

49. In addition to that matter, Miss Gough has drawn to my attention that after the making of the arbitration application, what was described as a supplemental witness statement of Mr. John Brine, the, or one of the, principals in Brine Builders, was served by the solicitors now representing him, and that without affording the claimants any opportunity to make any comment as to what should be the status of that supplementary or purported' supplementary statement, Mr. Siederer directed that it should be received as part of the evidence of Mr. Brine'. Miss Gough submits that that was an inappropriate course, particularly as the claimants' evidence as to matters of liability having been given, and, as she rightly contended, the purported supplemental witness statement of Mr. Brine raising factual issues which had not previously been identified in the Statements of Case of the parties, the effect of Mr. Siederer's order without giving the claimants the opportunity of being heard, was to bring about a situation in which either the claimants would be prejudiced because they would/not be given an opportunity to deal with new matters, which had hitherto been considered to be concluded -- the claimants' case as to liability -- would have to be re-opened in order to go into other issues, and in particular into the issue of the terms of the contract between Mr. Wicketts and Miss Sterndale on the one hand and Brine Builders on the other.

50. Another matter arising after the making of the arbitration application upon which Miss Gough placed reliance, was that a few days ago, as I have indicated, Brine Builders, up to now having advanced an unquantified counterclaim which therefore had no obvious monetary value sought to amend it in order to advance a claim which does have monetary value, and Miss Gough submitted that it was inappropriate for Mr. Siederer to have permitted that to happen.

51. In my judgment, the terms of the Order for Directions made by Mr. Siederer on 6th November 2000, were wholly inappropriate. The directions were given by him unsolicited by either of the parties. By the particular directions which he considered it appropriate to make, he was seeking to intervene in a matter which was none of his concern; the parties to the arbitration proceedings before him might be minded to compromise their differences. Although Mr. Siederer submitted to me that his intention in giving those directions was to assist the parties in their discussions by reminding them of matters which might appropriately be included in any agreement which they might make, so as to avoid future difficulty, it is quite plain in my judgment, from the terms of the directions, that Mr. Siederer was seeking to instruct the parties as to what they should do, as to what terms they should include in any settlement agreement, and most particularly that they were not in any circumstances to give effect to any settlement agreement which they might make, without both sides ensuring that Mr. Siederer's fees and expenses were paid.

52. I regret to have to say that the terms of those directions are quite the most outrageous that I have ever seen given in any arbitration proceedings. In my judgment, the terms of those directions amount plainly to the clearest evidence that Mr. Siederer has failed properly to conduct the proceedings in relation to giving them. I am inclined on the evidence which has been put before me, to the view that the claimants have not proceeded with the arbitration proceedings since the giving of those directions. What has happened in the arbitration proceedings is that there has been an attempt by Mr. Siederer, of his own volition substantially, although prompted by an application on behalf of Brine Builders for security, to make a comprehensive Order for Directions in relation to security for costs, which has been resisted. In my judgment, it would be inappropriate to regard the resistance to, that attempt as amounting to a taking part or continuing to take part in the arbitration proceedings after-the making of the Order for Directions of 6th November. I am inclined, therefore, to the view that it is open to the claimants to rely upon the making of the order for Directions of 6th November, in support of the resent application. However, even if I am wrong about that, it is quite plain that the claimants have not taken part or continued to take part in the arbitration proceedings since the making of the Order for Directions of 18th January. The making of that Order for Directions demonstrates, in my judgment, a total lack of understanding on the part of Mr Siederer of what is his proper function as an arbitrator in the pending arbitration proceedings, or what powers he has under the Arbitration Act 1996 and what is the appropriate exercise of those powers. I am satisfied, therefore, that the making of the Order for Directions of 18th January itself demonstrates that Mr. Siederer, has failed properly to conduct the arbitration proceedings.

53. What is wrong with the Order for Directions of 18th January 2001? Many things. First, Mr. Siederer has given directions which have not been prompted by any application made to him, in so far as ordering, the respondent to provide security for the claimants' costs is concerned. Second, he has made an order that the claimants provide security for the respondents, costs, notwithstanding that there was not put before him any evidence which would suggest that the claimants, if unsuccessful in the arbitration proceedings, would be unable to pay the costs of the respondent and the arbitrator's own costs. Not merely that, but in circumstances in which previously, there had been put before him evidence that the claimants were the unencumbered freehold owners of property of substantial value. Then, Mr. Siederer has ordered each of the parties to provide security for his own fees and charges, in an amount which is manifestly inappropriate. I cannot understand how anyone could possibly have thought that it was an appropriate exercise of the discretion given to an arbitrator under Section 38(3) of the Arbitration Act, in relation to ordering the provision of security for his own costs -- and there is undoubtedly power to make such an order -- to order each party to the arbitration to provide security for 100 per cent of the anticipated amount of those costs, so that if the order was complied with, the arbitrator would be doubly secured as to the full amount of his anticipated fees and expenses.

54. The learned arbitrator seems to have felt that it was open to him to make his own assessment of material which had been put before him as to the financial position of the parties, in deciding how to exercise a discretion in his own interest. In my judgment, that cannot be right. It is plain, in my judgment, from the terms of Section 38(3) of the Arbitration Act 1996, that the power which is intended to be conferred upon an arbitrator by that subsection, is intended to be exercised in circumstances analogous to those in which the court will make an order for security for costs against a party to litigation; that is to say, there must be credible evidence that the relevant party would be unable to pay the costs of the arbitrator in the event that it was ordered to do so. There is simply no such evidence in the case of the claimants, and so far as the respondents are concerned the material seems to be extremely sketchy. The terms of the arbitrator's letter to which I have referred, in which he sought to justify making an order against the respondents, seem to be based on nothing more than speculation on his part. Then, the order for security was made on peremptory terms, notwithstanding that there had been no previous order for the provision of security. In my judgment, it is plain from the terms of Section 41 of the Arbitration Act 1996 that Mr. Siederer had no power to make as a first order a peremptory order. The order that he made was therefore one which he ought not to have made and had no power to make.

55. The question arises in the light of my clear conclusions that Mr. Siederer has failed properly to conduct the proceedings, whether substantial injustice has been or will be caused to the present applicants, who are the claimants in the arbitration proceedings. If they were to comply with the terms of the two sets of directions to which I have referred, they would manifestly sustain substantial injustice. So far as the directions of 6th November 2000 are concerned, they would be inhibited if they were to comply with those terms, in making a settlement agreement with Brine Builders, which might otherwise be achievable and appropriate. So far as the directions of 18th January are concerned, if they were to comply with them, they would be put to substantial expense, amounting in total to almost the maximum value of the claimants' claim, leaving out of account interest, and that would place extreme commercial pressure on them in relation to the continuation of the arbitration. Not only that, but the terms of the two sets of directions to which I have referred, demonstrate to my satisfaction that Mr. Siederer has a pitifully inadequate comprehension of the nature of his function as arbitrator, what powers he has and what is the appropriate way in which to exercise these powers. He seems to have no conception of the fact that these powers are to be exercised in accordance with law, or what the relevant principles of law are. That fact on its own means that if the arbitration proceeds with Mr. Siederer as the arbitrator, it is likely that substantial injustice will be caused to the claimants, because it is likely that Mr. Siederer will continue to demonstrate that wholly inadequate grasp of the nature of his functions and powers to which I have referred.

56. These conclusions I reach without consideration of the matters which have arisen since the making of the arbitration application, to which Miss Gough has drawn my attention. I am confident that my conclusion that Mr. Siederer should be removed, is amply justified without considering the matters which have arisen since the making of the arbitration application. If those matters are appropriate matters for me to consider in deciding how I should exercise my discretion, then in my judgment they simply reinforce the conclusions which I have otherwise reached.

57. So for all of those reasons, I accede to the application for removal of Mr. Siederer as arbitrator. In those circumstances, I need to consider under subsection (4) of Section 24, whether I should make an order in respect of Mr. Siederer's entitlement to fees and expenses, and if so, what. I am invited by the claimants to make such an order. Mr. Siederer submitted that if, I was persuaded, as I have been persuaded, that it was appropriate to order his removal as arbitrator, I should make an order that he should be entitled to the full amount of the fees and expenses which he claims.

58. In exercising my discretion in relation to fees and expenses which I am satisfied in the circumstances of the present case it would be appropriate for me to exercise, I am not limited, as it seems to me, to considering only the matters which have led to the conclusion that Mr. Siederer should be removed as arbitrator. In considering what fees and expenses it is proper he should receive, I am both entitled and bound, in my judgment, to consider the full progress of the arbitration and all of the events in it since it commenced.

59. It is plain, in my judgment, that in relation to a claim, the maximum value of which is something of the order of £60,000 plus interest, the time which has been taken and the effort which has been devoted to the arbitration proceedings, is quite disproportionate. It is clear, in my judgment, that it would be quite inappropriate to order that Mr. Siederer should recover all of his fees and expenses in respect of all of the work which has been done. Much of that work was either unnecessary or should have been done more expeditiously and more briefly. It is difficult to credit that in relation to a claim which has the cash value which I have mentioned, there should have been at least nineteen sets of directions, and some seven days of hearing, one way or another, without a stage having been achieved beyond slightly more than the end of the claimants' evidence on the original case.

60. In the first witness statement of Mr. Bartlett, at paragraph 70, Mr. Bartlett sets out his clients position as follows: *'They (that is the claimants) consider that the costs of the proceedings have been greatly extended as a result of his (that is Mr. Siederer's) failures, and that therefore he should not be entitled to recover fees and expenses for work which has caused them such expense, from which there should be no discernable benefit to the parties. Without prejudice to their view that the work done by the arbitrator has incurred enormous unnecessary expense for the parties and is therefore worthless or of negligible value, I am instructed that they will be prepared to offer the sum of £5,000 as a contribution to his fees and expenses, in settlement of his claim for fees and expenses.'*

61. It seems to me to be implicit in that offer, that the position adopted by the claimants is that the appropriate sum for Mr. Siederer to receive in respect of his fees and expenses, is an amount of £10,000, my understanding being that the claimants are offering, in the circumstances, to pay half of what they consider to be appropriate, and expecting that the respondent will also pay half. As it happens, if a sum of £10,000 is paid, that would represent, in broad terms, half of the amount of the, last quantified bill or indicative statement of his fees produced by Mr. Siederer, which was that set out in the letter of 8th November of last year.

62. In my judgment, the appropriate figure for Mr. Siederer to receive in respect of his fees and expenses, is £10,000. So the orders which I make up should be removed as arbitrator, on the ground that he has failed properly to conduct the arbitration proceedings and that substantial injustice has been and will be caused to the applicants, and that his fees in respect of acting as arbitrator up to this point should be £10,000.

63. There remains the question of what order I should make in relation to the costs reserved by Cresswell J, as to which I will hear argument, and indeed, Miss Gough, I may say, the costs of the application.

MISS K. GOUGH: *My Lord, thank you. First of all if I could just -- there was one error. You mentioned 18th January, and you said 'last year' in your judgment..; It should have been this year. It was 18th January 2001 that Directions Order 41 was issued.*

H.H.J.SEYMOUR QC: *Yes. I was not under any misapprehension as to the correct date. It was a slip of the tongue if I said last year rather than this year.*

MISS K. GOUGH: *I just thought that for the tape I'd mention that in case……..*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *Well, certainly it will be transcribed. My Lord, first of all, the fees you've just mentioned of £10,000, my clients' have made an offer of £5,000: That was a lump sum*

offer. They're not registered for VAT.. They couldn't recover VAT if they were to have to pay it, so £5,000 plus VAT would be a considerably larger sum for them.

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *If that could be clear, and if that could be agreed with you.. That was the offer that was made in paragraph 70.*

HH.J.SEYMOUR QC : *Is inclusive of Value Added Tax.*

MISS K. GOUGH: *Yes, it was a lump sum offer, on a without prejudice basis. Indeed, I think the £5,000 was in regard to the totality of the fee claimed, but your Lordship has made an order that £10,000 would be the right figure.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *But certainly in so far as £5,000 is concerned, it was a lump sum and was not offered subject to the addition of any further amount of VAT.*

H.H.J.SEYMOUR QC: *Yes. That may be. My assessment is that £10,000 is the right figure, and Mr. Siederer is registered for Value Added Tax as I understand it, and he ought therefore to be able to charge it and recover it.*

MISS K. GOUGH:. *Your Honour ----*

H.H.J.SEYMOUR QC: *That's a different question from the question of whether there ought to be any set offs by the time we get to the end of dealing with questions as to costs.*

MISS K. GOUGH: *Well, that would be the thing I would move to next, but I thought that I ought to be clear one way or the other ----*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *----- for better or worse, regarding the exact amount that your Lordship was ordering.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *So your Lordship has ordered £5,000 as against each of the two parties to the arbitration, £10,000 in total, which would attract VAT. My Lord, I've two applications for costs.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *The first is in relation to 21st May ----- 1st May, I beg your pardon.*

H.H.J.SEYMOUR QC: *Yes*

MISS K. GOUGH: *If I could invite your Lordship to go briefly to my skeleton argument, where I dealt with it as a discrete matter. My Lord, I do contend that I should have -- my client should have the entirety of their costs involved in making that application. They made, in my submission, extensive efforts to try and persuade Mr. Siederer to adjourn the hearing that was scheduled for 9th to 14th May. They wrote to him. He said that he required -- has your Lordship got a copy of the exhibit, number -- the third -- second statement, and the exhibit LB8?*

H.H.J.SEYMOUR QC: *You gave me earlier a copy of the second statement, and there are some documents behind it, but they are, I think, all letters dated 26th or 27th April.*

MISS K. GOUGH: *My Lord, the relevant correspondence starts in early April.*

H.H.J.SEYMOUR QC: *Right.*

MISS K. GOUGH: *What happened, which I do not think is disputed, the application was obviously sent into the commercial court.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *For sealing and issuing. It was therefore not actually posted to Mr. Siederer until 28th March.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *He did not receive it until 5th April. In the meantime, he wrote to the parties on 2nd April, saying, 'If I don't get this application, I'm going ahead with the hearing.'*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *And he required the parties to respond to him -- yes, this is a letter dated 2nd April from Mr. Siederer to both the parties, when he says: "**Accordingly, in the event I do not hear from the parties by noon on Monday next, the 9th instant, that they have agreed the dates on the resumed hearing, I propose that the hearing should be resumed on Wednesday, 9th May.**'*

*He got a letter from MDP on behalf of the respondent on the 3rd, saying go ahead on 9th May. He then got a letter on 6th April from Farrells, where it said: **'We write to acknowledge receipt of your letter of 2nd April,*** and gives details of the application. It goes on to say**: '*** ***In the event that you and the respondents decide to proceed with this arbitration on 9th May, we shall issue an application for an injunction staying these proceedings, pending the determination of the application for the arbitrator's removal.'***

That was on 6th April. There were further exchanges. On 9th April, Farrells wrote again and said: ***'We have your letter of 6th April. If you intend to proceed with the arbitration we will have no alternative but to make an application to the court for an injunction order, preventing the determination of the arbitration proceedings pending your removal. As we have said in previous correspondence, this will entail a great deal of costs, and if we are obliged to make an application we will have no alternative but to seek an order from the court that you be penalised as to those costs. If the respondents support your stance, then it may be that we shall ask the court that they be condemned as to the costs of the application also. In the circumstances, we would respectfully suggest that you reconsider your view as to the setting of this application down for a hearing.'***

*Then the arbitrator the next day didn't respond to either the 6th or the 9th April letters from Farrells, he simply wrote on 10th April, back to Farrells, saying: **'I have your letters of the 6th and 9th ..... please let me have an acknowledgment of service form. I enclose herewith my directions for the resumed hearing.'***

So, he had no debate on the subject whatsoever, and carried on and issued his directions, which were Directions Order Number 42 for the resumed hearing.

*Farrells then wrote again. There were further exchanges of correspondence, but Farrells wrote at length on 18th April concerning the letter of 10th April and the Directions Order. Your Lordship will recall that in the pre-amble to that Directions' Order, there are short responses to issues on Section 24(3) and Section 73(1). Basically the arbitrator was saying in his acknowledgment of service, **'Section 73, your whole application is out of time, therefore I'm not interested in it, but even if it isn't, under Section 24(3) I'm entitled to continue and I'm going ahead.'***

*So Farrells wrote at length on 18th April addressing those two issues in particular, and finished by saying: **'In this case, the claimants have made a serious application. We advise you to give serious thought to whether you should in the face and nature of the application,. continue with the proceedings until the outcome is known. We invite you to exercise your discretion and await the outcome of***

this application. The claimants would, for their part, undertake to attempt to obtain an expedited hearing date.'

*So the claimants there addressing in detail the arbitrator's points, but saying, '**Please don't go ahead with the arbitration. We will try and get our case heard quickly.**'*

*There was a response from the arbitrator, I think on the 19th: '**Thank you for your letter of 18th of instant with enclosure.' Most of your letter does not require a detailed response from me. Indeed, I am of the view that such could well be counter productive.**' Then there.is some discussion about the hearing, and he said: '**I am pleased to note that claimants, counsel and yourself are all available on the 9th and 10th,**' and basically saying the fact that the clients are on holiday on the 11th is really not a problem, and criticising the claimants for not complying with the directions.*

*So the claimants wrote yet again on 19th April. '**Thank you for your letters of 17th and. 19th. Our letter of the 18th April deals in part with your letter of 17th, and we do refer to your letter of the 17th hereunder.**' Then there is some discussion about the basis on which the arbitrator might continue with the arbitration, and a complaint that he may be considering continuing without either party. '**All tribunals must act fairly and be seen to act fairly,**' it's said. '**Continuing with this arbitration in the absence of the parties fundamentally undermining the aforementioned concept.'***

*Then saying that they do not accept, as the arbitrator had put in his directions, that they would accept any liability for costs if he continued anyway in their absence, and also pointing out that, finally as the arbitrator had in his acknowledgement of service to the commercial court, applied to that court to stay our application while he carried on with the arbitration. '**Finally, as you have now applied to the court to stay our clients' application for your removal, it would be most appropriate for the court to adjudicate on the respective applications. Please confirm you agree that the arbitration will not be 'resumed until these applications are decided.**'*

So, my Lord, in my submission that's extensive efforts -- the right thing to do in the face of the nature of these applications, which has been more than borne out by the detailed judgment you've given this afternoon, was that this arbitration should have been suspended. The arbitrator, had he exercised his discretion in accordance with the principles of the Act, would and should have awaited the outcome of this application. He was determined not to do so. Again, in my respectful submission to the arbitrator, for all the wrong reasons. He wanted to get to an arbitration, he wanted to get to some fees. He should not have proceeded. Had he been in the least bit amenable and taken the option that we made available on the 18th, we would have been here in exactly the same way that we are here today. But instead, there was a great deal of expense gone into, issuing an application for an injunction, the expense of the draft orders, getting in front of the court, all the supporting evidence, and only to achieve, at the end of that hearing, exactly what he was asked to agree to on 18th April, before any of it started.

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *So in my respectful submission, my clients have an unanswerable claim to recover the costs of and incidental to making that application to restrain the arbitrator from proceeding.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *The only thing they could do to achieve what they set out to achieve before the application was made.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *That's in relation to that application. Shall I let Mr. Siederer answer that before I proceed with the next part?*

H.H.J.SEYMOUR QC: *Well I imagine that the next part is little more sophisticated, with respect, than you've succeed on the application and you want your costs.*

MISS K. GOUGH: *Basically, yes, my Lord.*

H.H.J.SEYMOUR QC: *Right. Well, let's take that as read, and Mr. Siederer can deal with both questions.*

MISS K. GOUGH: *Thank you.*

MR. H. C. SIEDERER: *Two points that I'd mention. You mentioned I am registered for VAT, and that I would therefore recover the Value Added Tax. I'm afraid it's the other way round. Why should I have to pay Value Added Tax out of the £10,000? I won't receive £10,000 at the end of the day, I shall receive about £8,000-odd*

H.H.J.SEYMOUR QC: *No, Mr. Siederer, I think you've misunderstood the position.*

MR. H. C. SIEDERER: *Sorry.*

H.H.J.SEYMOUR QC: *What I have said is that your fees are to be.£10,000, and you can charge VAT on top of that:*

MR. H. C. SIEDERER: *Oh, I beg your pardon. I thought that it included the VAT.*

H.H.J.SEYMOUR QC: *No. That's what Miss Gough was asking me to say, but I decided that you should have VAT on top of the £10,000.*

MR. H. C. SIEDERER: *I'm obliged to your Honour. The only point I would make about this hearing, was that when it was discussed with me before 1st May, Miss Gough was talking about a two or three day hearing for today's application, and in fact it was Cresswell J who said one day will be sufficient. I was told two or three days, and that seemed excessive to me.*

Other than that, I don't think I can say any more than -- can add any more to what Miss Gough has said to you.

H.H.J.SEYMOUR QC: *You're sure there's nothing else you want so say? Because, of course, what she's said to me is that I should order you to pay the costs.*

MR. H. C. SIEDERER: *Well, I'd prefer otherwise, of course. I'm obviously not very happy about your judgment, I suppose that goes without saying, and I would prefer not to pay the costs out of the £10,000. They would probably be more than £10,000. I have acted as I felt properly throughout, and used my initiative throughout. If I'm taking the risk of getting penalised for costs, it wasn't a risk that I ever thought an arbitrator should have to take. I was under the impression that I was immune from suit. There's nothing more that I can add. I obviously would oppose any application that I should be responsible for any of the costs.*

H.H.J.SEYMOUR QC: *Yes. So far as the costs reserved by Cresswell J are concerned, it is quite plain in my judgment that the respects in which I have criticised Mr. Siederer's lack of understanding of his proper function and his powers, has been manifested additionally in relation to the interrelationship between the court on an application such as the present, and the arbitrator in relation to whether arbitration proceedings should continue. One of the documents which Mr. Siederer himself has put before me is a copy of his letter of 6th April 2001, to Farrells on behalf of the claimants, a copy was sent to MDP Associates, which includes the following paragraph:*

'In the meantime it would be appropriate for you to request the court to take no action on your application, until I have published my award on liability. That award will be based solely on the evidence adduced before me, and will embody reasons. Nevertheless, if either party feels aggrieved, they will of course be at liberty to apply to the court for leave to appeal, and if you wish to proceed with your application to have me removed in order that I do not deal with matters of quantum, you will be free to do so.'

It seems to me that that was a wholly inappropriate position for Mr. Siederer to have adopted. What Mr. Siederer should have done, once he was made aware that an application was to be made to the court for him to be removed, was to consider the balance of advantage as between proceeding nonetheless with the arbitration, and adjourning any further hearing until after the court had indicated a conclusion. Had he considered the advantages and disadvantages of each course objectively, it is clear to me, as I think it must have been clear to Cresswell J when he raised with Mr. Siederer the question whether it would be appropriate to adjourn, that the appropriate course was not to proceed with the arbitration proceedings until such time as the present application had been heard. I am therefore satisfied that the appropriate order to make in relation to the costs reserved by Cresswell J, is that those costs should be paid by Mr. Siederer.

So far as this application is concerned, that is to say the arbitration application upon which I have adjudicated this afternoon, the matter is, as it were, even more straightforward. The claimants have succeeded. They have succeeded on substantial grounds, they are entitled to the costs and I order that Mr. Siederer should pay them. Costs will be assessed if not agreed on the standard basis, Miss Gough.

MISS K. GOUGH: *I'm grateful for that, my Lord. My Lord, in view of your order for costs, can I also, in so far as my own clients' contribution to Mr. Siederer's fees is concerned -- that would be £5,000 plus.VAT -- ask your Lordship to stay any payment of that order pending the resolution of the cost issue, because certainly when the matter comes down to it, there'll be a substantial sum of money flowing in the other direction.*

H.H.J.SEYMOUR QC: *Yes. Although you have now said a couple of times that my order was that your client should pay £5,000 and the respondents should pay £5,000 ----*

MISS K. GOUGH: *That we are jointly ----*

H.H.J.SEYMOUR QC: *----- what I've actually said is that the fees to which Mr. Siederer is entitled are £10,000 plus VAT.*

MISS K. GOUGH: *Yes.*

H.H.J.SEYMOUR QC: *I have not dealt with the question of who should pay them or when. I am not sure that I have power under subsection (4) of Section 24 to do that.*

MISS K. GOUGH: *My Lord, I think you will probably be hindered also by the general provision in Section 20-something, which says that the parties are jointly and severally liable for the arbitrator's fees.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *So my application therefore should be amended slightly, I think, so that if and to the extent there was any attempt by the arbitrator to visit the whole of the £10,000 plus VAT on my clients, in the event for some reason that that portion -- pausing for a moment.*

H.H.J.SEYMOUR QC: *Well, perhaps the appropriate ----*

MISS K. GOUGH: *My Lord, perhaps the -- perhaps I could make this application: my Lord, the respondent is in fact a respondent to this application.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *They have filed an acknowledgement of service, they have given notice of an intention to defend.*

H.H.J.SEYMOUR QC: *I think you're embarking on a course which is probably a bit sporting. They've given notice of intention to defend, but they've actually done nothing.*

MISS K. GOUGH: *They have actually done nothing. It's Section 28, my Lord, I was thinking of joint and several liability. Well, my Lord, I'll -- it's' Friday afternoon. I'll cease with the sporting and go to perhaps something that's slightly more attractive by way of an application. It's this if and to the extent -- any amount which the arbitrator seeks to recover from my clients in respect of the order for fees that you've made in his favour, my application is that that, whatever the amount would be, should be stayed pending the outcome of the costs -- the assessment and payment of the costs orders that my client has succeeded in obtaining: against the arbitrator this afternoon.*

H.H.J.SEYMOUR QC: *Yes. Right. Mr. Siederer, what is sought now is an order, in effect, that you shouldn't be entitled to be paid anything in respect of your fees, until your liabilities in respect of costs have been assessed, so that one can be set off against the other if appropriate. Is there anything that you want to say about that?*

MR. H. C. SIEDERER: *Not specifically, your Honour, on that topic. There is one other question I would like to ask you.*

H.H.J.SEYMOUR QC: *Yes. All right. Well, so far as that is concerned, what I will say is, as part of the assessment, that the sum to be paid. Should be £10,000 plus VAT, such sum not to be payable until after the assessment of costs payable by Mr. Siederer to the claimants has been made. That will simply mean that the amount is not due until your clients are able to say, if payment is sought from them, 'but you owe us an amount,' which has by then been quantified.*

MISS K. GOUGH: *My Lord, yes. I just have a slight concern that it's absolutely clear that the first respondent should also have some liability for this assessment of fees on the part of Mr. Siederer. Obviously there are no -- as far as I'm aware, there are no costs orders in the arbitration per se, so either this £10,000 has to carry forward as the costs of the arbitration, or else we draw a line under this arbitration and ------*

H.H.J.SEYMOUR QC: *Well, there are two possibilities, and I'm not sure that it's appropriate for me to get involved in how the matter pans out beyond this. As you rightly point out under Section 28 of the Arbitration Act, the parties are jointly and severally liable to pay. So that if I say nothing beyond what I have already said, half of the sum which I have indicated should be paid by your clients, and half should be paid by Brine Builders. If, as theoretically might happen, Mr. Siederer was to look to your clients for payment of the whole, then your clients would have a claim over against Brine Builders for their half.*

MISS K. GOUGH: *Yes.*

H.H.J.SEYMOUR QC: *It may well be considered appropriate, if the arbitration proceedings continue, to treat the amount which I have indicated should be paid to Mr. Siederer, as costs in the arbitration. Therefore it may be that the final decision as to who should pay what to whom, will depend upon the outcome of the eventual arbitration proceedings. I'm not seeking to preclude that possibility.*

MISS K. GOUGH: *No.*

H.H.J.SEYMOUR QC: *And I'm not seeking to encourage it either.*

MISS K. GOUGH: *Precisely. My Lord, my only interest was to canvass the matter-----*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *---- and have it recorded, so that at least if some dispute arises down the line, those that come to look at it can see how it was that the court dealt with it this afternoon.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH:. *And I think what you've just said is extremely helpful.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *Thank you very much.*

H.H.J.SEYMOUR QC: *Right. Thank you. There was something else you wanted to mention.*

MR. H. C. SIEDERER: *Well, two things now. I'm not quite clear from what you just said whether the first respondent, that's Brine Builders, who are the respondent in the arbitration, have any liability for the costs of these court proceedings.*

H.H.J.SEYMOUR QC: *Not the court proceedings, no.*

MR. H. C. SIEDERER: *No That's neither the injunction nor today's?*

H.H.J.SEYMOUR QC: *That's right.*

MR. H. C. SIEDERER: *I see. The other thing I was going to ask you, I might need to take some legal advice on this.*

H.H.J.SEYMOUR QC: *Yes.*

MR. H. C. SIEDERER:- *With the possibility of an appeal. Do I have leave to appeal if I'm advised that such would be worth doing?*

H.H.J.SEYMOURQC: *Well, you need to take advice if you are considering this issue seriously. If you are considering this issue seriously, I think you will probably be told that there are two questions. The first is whether there is an issue of importance which I ought to certify as fit to be considered by the Court of Appeal, and the second is whether I should grant you permission to appeal. I think probably the best course is to adjourn any application for permission to appeal for a period, so that you can take legal advice if you want to, and then if you do want to, a properly formulated application can be made.*

MR. H. C. SIEDERER: *So and for how long would the adjournment be for, your Honour?*

H.H.J.SEYMOUR QC: *Well, I will obviously hear from Miss, Gough, but the difficulty that we have is that you're representing yourself today.*

MR. H. C. SIEDERER: *Yes.*

H.H.J.SEYMOUR QC: *This is a matter of some technicality, and my feeling, subject to hearing from Miss Gough, is that it would be unjust to you to expect you to make some application, the nature of which you don't fully appreciate, without having the opportunity of taking some advice about it. I would be inclined to give you a period in which to seek advice, and perhaps the best way of avoiding a need to come back unnecessarily, would be to make an order in the form 'unless by a certain date' you make application for permission to appeal, permission is refused. So that would give you an opportunity to take advice and come back to court if you felt it was appropriate, having taken advice, but it would mean that nobody need do anything if you decided to do nothing about it.*

MR. H. C. SIEDERER: *Your judgment will be issued in writing, presumably, and I will get a copy of it?*

H.H.J.SEYMOUR QC: *The judgment which I have given is an oral judgment. It has been tape recorded. It can be transcribed, but it won't be transcribed unless one party or the other asks for that to happen.*

MR. H. C. SIEDERER: *I think I would need to have it if I'm going to take legal advice, your Honour.*

H.H.J.SEYMOUR QC: *Right. Well, then you will need to speak to my clerk, the lady here, as to who you need to apply to in order for that to happen. There is a.cost involved.*

MR. H. C. SIEDERER: *Yes.*

H.H.J.SEYMOUR QC: *I'm not seeking to influence you one way or the other, but merely to make sure that you understand that there is a cost involved if you do it. So how long would you like? It may take some days to transcribe the judgment.*

MR H C SIEDERER: *I would think twenty-eight days after I've received the transcription.*

H.H.J.SEYMOUR QC: *Well, that is a little uncertain for court purposes.*

MR. H. C. SIEDERER: *Yes.*

H.H.J.SEYMOUR QC: *I would rather, if I decide to do this when I've heard from Miss Gough, fix a date.*

MR. H. C. SIEDERER: *The end of July then.*

H.H.J.SEYMOUR QC: *Right. That's your application.*

MR. H. C. SIEDERER: *Yes.*

H.H.J.SEYMOUR QC: *I'll hear from Miss Gough.*

MISS K. GOUGH: *My Lord, I think the correct -- the correct thing to do here is to adjourn any application for permission to appeal, because with all due respect to Mr. Siederer, he probably doesn't begin to understand the effect of the two things that the must seek to establish to get an application on its feet. So accepting in all fairness that that's what you have to do, then the only question really is how long that should be for. Here I would say there are some competing interest. My clients have -- have an order for the removal of an arbitrator. They still have an unresolved dispute.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *----- and a lot of costs concerned with the arbitration that have to be dealt with.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *So any lengthy adjournment is not something that is going to be in any way attractive to them, and indeed would be quite prejudicial to them. On the other hand, there has to be a transcription of the judgment in order for Mr. Siederer to take advice. I've no idea how long it would take to get a judgment transcribed, even with an estimate. I don't know if your clerk can help us with that.*

CLERK of the COURT: *I don't know the answer, sir.*

H.H.J.SEYMOUR QC: *It seems to depend, amongst other things, upon the length of the judgment.*

MISS K. GOUGH: *Ah.*

H.H.J.SEYMOUR QC: *It is possible to do it within seven days. I have known that happen, but I am not in a position to commit anybody to doing anything in any particular period.*

MISS K. GOUGH: *No. Well, my Lord, in order to bring some certainty to the adjournment, perhaps you could say twenty eight days, on the assumption that Mr. Siederer will make an application to have it done quickly and to take some advice, but on the understanding that if it's completely impossible to get the transcript, then he might seek an extension from the court.*

H.H.J.SEYMOUR QC: *Yes.*

MISS K. GOUGH: *That would seem to me to be an appropriate and fair way to deal with it, but that could mean an undue burden on my clients to wait perhaps, if it wasn't done until the end of July, could he get back in front of the court if he got the transcript in two or three weeks time before the vacation came on, so it could end up being quite*

extended for my clients. So I would invite your Lordship to make an order just to adjourn for twenty eight days.

H.H.J.SEYMOUR QC: *Yes. Thank you, Miss Gough. What I'm inclined to do, Mr. Siederer, is to say that your time for making any application for permission to appeal be extended to four p.m. on whatever Friday is four weeks from today, which is a date we will get in just a minute.*

CLERK of the COURT: *9th June is three weeks on, 6th July.*

H.H.J.SEYMOUR QC: *6th July. And then if I give you liberty to apply in relation to a further extension. So what that means is, you'll have to do something by 6th July unless you decide that you don't want to seek permission to appeal. If you are in a position to take advice and you decide that you do want to seek permission, then an application will have to be made by four p.m. on 6th July. That means that you'll have to issue the application.*

H.H.J.SEYMOUR: *Yes*

H.H.J.SEYMOUR QC: *Not that the hearing needs to have taken place.*

MR. H. C. SIEDERER: *Yes.*

H.H.J.SEYMOUR QC: *If you are not in a position to do that, then you need to make an application for an extension of that time, before four p.m. on 6th July. Again, that's just making the application, it doesn't have to be heard. Now, if you want to seek an extension of time for permission to apply, then you might think that it would be helpful to write to Miss Gough's solicitors explaining why you want the extension of time, because if you do that they might agree, and if they agree and if I think there's a good reason, then I will make an order on paper, without there having to be a hearing. But it would be an extension of time for another fixed period.*

MR H. C. SIEDERER: *I see.*

H.H.J.SEYMOUR QC: *We're not going to get into a situation where it's open ended, and there would have to be a good reason.*

MR. H. C. SIEDERER: *Yeah. I understand.*

H.H.J.SEYMOUR QC: *And the most likely good reason is that you've not been able to get the transcript typed up. Now, is there anything further?*

MISS K. GOUGH: *No, my Lord, thank you very much.*

H.H.J.SEYMOUR QC: *Thank you.*

MISS K. GOUGH (Farrells, Bristol) appeared on behalf of the CLAIMANTS.
MR. H. C. SIEDERER (2nd Respondent) appeared IN PERSON.