JUDGMENT : Judge Gilliland, Q.C. Sitting as an Official Referee. QBD. 21st December 1994

1. This is an application by the plaintiff by originating summons dated June 20th 1994 seeking declarations that two purported notices of arbitration each dated October 11th 1993 and served by the defendant on the plaintiff were ineffective to commence arbitration proceedings between the defendant and the plaintiff and that the appointment of Mr. J. F. Bray as arbitrator in pursuance of the notices of arbitration was void. The notices related to building work which had been carried out by the plaintiff at two sites known respectively as Tanterton Site 6 and Tanterton Site 9 for the Central Lancashire New Town Development Corporation ("*the Corporation*").

2. No question now arises in respect of the notice of arbitration given in relation to Tanterton Site 6 and the defendant now accepts that it cannot show that any contract between the parties in relation to that site contained a written arbitration agreement and the defendant accordingly, concedes that the plaintiff is entitled to the relief claimed in relation to site 6.

3. The work on site 9 was carried out by the plaintiff pursuant to a contract under seal dated May 22nd 1980 made between the plaintiff and the Corporation. Under that contract the plaintiff agreed to erect 145 dwellings with services including roads and sewers within the site for the Corporation on the terms set out in the contract and in accordance with the contract drawings referred to. The contract was in the JCT Standard Form of Building Contract for use with quantities Local Authorities edition 1963 July 1977 revision. Clause 35(1) contained an arbitration clause in familiar form: *". . .provided always that in case any dispute or difference shall arise between the Employer or the Architect/Supervising Office on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works as to construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith. . .then such dispute or difference shall be and is hereby referred to the arbitration and final decision of the person to be agreed between the parties or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the President or a Vice President for the time being of the Royal Institute of British Architects."*

4. The plaintiff carried out the work and a final certificate was issued in May 1986.

5. On July 1st 1985 the Corporation contracted to sell a large number of houses belonging to it and including the houses at site 9 to the North British Housing Association Limited ("*the Housing Association*"). The contract for sale contained terms which included the giving by the Corporation of warranties that the dwellings on site 9 had been developed and built in accordance with planning approval and the building regulations and also an indemnity in respect of the costs of remedying any structural defects as defined in the contract. By virtue of the Central Lancashire New Town Development Corporation (Transfer of Property and Dissolution) Order 1985 (S.I. 1985 No. 1951) the liabilities of the Corporation under the contract for sale with the Housing Association became vested in the defendant. It is not disputed that any rights of the Corporation under the building contract between the Corporation and the plaintiff are also now vested in the defendant.

6. In 1990 the defendant complained to the plaintiff that a number of defects had been revealed by a television survey of the sewers which had been constructed by the plaintiff at site 9 and required the plaintiff to remedy the defects failing which arbitration proceedings would be commenced pursuant to clause 35. In the event however the question of the defects in the sewers was finally resolved by agreement between the respective solicitors for the plaintiff and the defendant and that agreement is recorded in a letter dated September 1st 1993 from the plaintiff's solicitors and in a letter dated September 28th 1993 from the defendant's solicitors. The terms of settlement expressly reserved the defendant's rights in respect of any other defects in the plaintiff's work at site 9. However it had not at that stage been suggested to the plaintiff that there were any other defects in the plaintiff's work.

7. On September 1st 1993 the housing association served a specially endorsed writ on the defendant claiming an indemnity from the defendant or alternatively damages in respect of various alleged structural defects and an alleged failure to comply with the building regulations in relation to a large number of the properties which it had purchased from the Corporation in 1985. Among the properties complained of were some of the houses which had been built by the plaintiff on site 9. A lengthy

schedule (NBHA2) was served with the writ identifying particular properties which had been inspected by the housing association and which were alleged to be defective. However the housing association also pleaded in paragraph 6 of the statement of claim that the houses listed on NBHA2 represented only a percentage of all the properties which had been inspected and found defective and it alleged that all the un-inspected properties in a further schedule NHBA1 which had been served on the defendant in 1990 were also defective in the same proportions as the properties listed in NBHA2 had been found defective upon inspection. It would seem that the housing association is claiming that one out of every seven of the houses listed on NHBA1 is defective in some way, but without identifying all the individual houses which are defective.

8. The first intimation from the defendant to the plaintiff that there might be defects in the houses which have been built by the plaintiff on site 9 came in a letter dated October 7th 1993 from the defendant's solicitors to the plaintiff's solicitors. The receipt of that letter and the plaintiff's response thereto is said by the defendant to have given rise to a "***dispute or difference***" within the meaning of clause 35 of the building agreement entitling the defendant to serve the notice of arbitration dated October 11th 1993 to commence arbitration proceedings in respect of site 9. The plaintiff denies that any dispute or difference had arisen between the plaintiff and the defendant when the notice was served and accordingly the defendant was not entitled to commence arbitration proceedings. I have been informed by Counsel that if the notice dated October 11th 1993 was not effective to commence a valid arbitration then the Limitation Act, 1980 may apply to bar the defendant's claims in any fresh arbitration.

9. The letter from the defendant's solicitors dated October 7th 1993 is in the following terms so far as is material: *". . .our clients, the Commission for the New Towns, have recently received a very substantial claim from North British Housing Association Limited alleging structural defects and non-conformities with the Building Regulations in some of the properties including Tanterton Sites 6 and 9 transferred to NBHAL pursuant to an agreement dated 1 July 1985. "*

10. The Schedules of Defects referred to in the claim run to 5236 pages and are available for inspection by prior appointment. *"We are instructed to protect our clients position in relation to the structural defects and non-conformities alleged in relation to your clients work at Tanterton Sites 6 and 9 by the commencement of arbitration proceedings in respect thereof. We would be grateful if you would please confirm by return of fax whether you are authorised to accept service of Notices of Arbitration in relation to Tanterton Sites 6 and 9 for and on behalf of your client, Crudent Construction Limited. We look forward to hearing from you."*

11. That letter perhaps unusually for a letter which is said to give rise to a dispute or difference between the parties to a building contract does not call upon the plaintiff to put right any defects nor does it in terms assert that the plaintiff is in breach of its obligations under the building contract. Indeed the defendant does not itself assert that there are defects in the houses erected by the plaintiff. The assertion is that the housing association has alleged that there are defects but particulars of the alleged defects are not given although it is said that a very lengthy schedule of defects is available for inspection by prior appointment. Indeed the letter does not request the plaintiff to do anything. The only request which is made in that letter is made to the plaintiff's solicitors and is a request that they should confirm whether they are authorized to accept service of notice of arbitration on behalf of the plaintiff. It is clear from that letter that the defendant had already decided to commence arbitration proceedings in respect of the defects alleged by the housing association in the houses which had been built by the plaintiff on site 9.

12. The plaintiff's solicitors acknowledged receipt of that letter on October 8th when they said they had spoken to the plaintiff – *" . . .who will revert to us with instructions on Monday and we shall contact you immediately."*

13. On Monday October 11th the plaintiff's solicitors telephoned the defendant's solicitors and as appears from a letter from the defendant's solicitors dated October 11th told the defendant's solicitors that they did have authority to accept service. In the course of that telephone conversation the plaintiff's solicitors became aware that the housing association had served a writ on the defendant. Following that telephone conversation the plaintiff's solicitors sent a letter dated October 11th 1993 by fax to the

defendant's solicitors in the following terms: *"We refer to our letter of 8th October. Whilst not in any way acknowledging or admitting that your clients have any basis for a claim against our clients, we confirm that we are authorised to accept on behalf of our clients service of any process of notice in connection with Tanterton Sites 6 and 9. We presume that when we hear from you again we will be given some information upon which we can take some specific instructions, as our clients are currently unaware of any basis for an alleged claim, and in particular please let us have a copy of the Writ to which you referred in our telephone conversation. We would appreciate an early reply in case our clients have to consider notifying any other party of the existence of any alleged claim. We look forward to hearing from you."*

14. On October 11th 1993 the defendant sent the two notices of arbitration in relation to sites 6 and 9 to the plaintiff's solicitor under cover of a letter dated October 11th 1993 which referred only to the telephone conversation. The notices were sent addressed to the plaintiff's solicitors at the document exchange. Whether they were actually received on October 11th is not clear but nothing turns upon that and no suggestion has been made that the notices were sent before the letter dated October 11th had been received from the plaintiff's solicitors. This case has been argued on the footing that any dispute giving rise to an entitlement to commence arbitration proceedings arose out of the exchange between the solicitors of the letters dated October 7th and October 11th each of which were sent by fax.

15. The first submission which was made by Mr. Grime, Q.C. on behalf of the plaintiff was that no "***dispute or difference***" had arisen between the plaintiff and the defendant within the meaning of clause 35(1) of the JCT contract dated May 22nd 1980 when the notice of arbitration dated October 11th was served on the plaintiff's solicitors and that accordingly the notice of arbitration was ineffective to commence a valid arbitration. Mr. Wilmot-Smith, Q.C. has not suggested that if a dispute or difference did not exist within the meaning of clause 35(1) when the notice of arbitration was served a valid arbitration could nevertheless commence. It is also common ground between Counsel that for the purposes of the present application no significant distinction exists between the terms "***dispute***" and "***difference***" in clause 35(1).

16. Mr. Grime submitted that in order for a dispute or difference to exist between two parties there must have been some taking up by the parties of opposing positions and that until one party has shown by his words or conduct that he is not agreeing with the assertion or demand of the other no dispute or difference can arise. Further it was submitted that such a state of affairs cannot occur until the "***claimant***" has made his assertion or demand. He submitted that the law was correctly stated in the second edition of ***Mustill and Boyd's Commercial Arbitration*** at p. 128 where the following passage appears: *"On the other hand, even if a claim is not essential, there must be something in the nature of an assertion by one party: for a situation in which the parties neither agree nor disagree about the true position is not one in which there is a dispute. For example if the parties agree that a reasonable person shall enquire into the matter and decide what is reasonable without the parties themselves putting forward any view there is no dispute in existence between them. Just as a claim is not necessary to the creation of a dispute neither is it sufficient in itself. If a debtor agrees that money is due, but simply fails to pay it, there is no dispute; the creditor can and must proceed by action, rather than by arbitration. Equally, silence in the face of a claim does not raise a dispute, for it may simply indicate that the recipient is considering whether or not to deny the claim. What is required is a rebuttal or denial of the claim."*

17. Mr. Grime, Q.C. submitted that the letter dated October 7th from the defendant's solicitors made no definable claim against the plaintiff and that even if that letter were to be treated as the making of an assertion the plaintiff did not do anything by way of a reply which could fairly be said to constitute taking up of a contrary position or to give rise to an adversarial state of affairs.

18. Mr. Wilmot-Smith on the other hand submitted it was not necessary in order for a dispute to arise for a claim to be rebutted or denied and that a failure to deny a claim was sufficient where a claim is not admitted.

19. That a rebuttal or denial of a claim is required in order to give rise to a dispute has the support of Lord Denning, M.R. in **Monmouthshire County Council v Costelloe and Kemple**, [1965] 5 B.L.R. 83, 89 where the following passage appears: *"The first point is this: Was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on*

this contract, there must in the first place be a claim by the contractor. Until that claim is rejected you cannot say that there is a dispute or difference. There must be both a claim and a rejection in order to constitute a dispute or difference."

20. In that case the question arose under clause 66 of the ICE Conditions which provided that any *"**dispute or difference**"* had first to be referred to the engineer who was to state his decision in writing before the matter could go to arbitration. The clause also imposed a three months time limit from the engineer's notice of his decision within which arbitration could be commenced. The contractor sought to commence an arbitration in 1964 in respect of various claims which had been raised with the engineer in 1961 and earlier, and which the engineer had in 1961 said he could not accept. The Court of Appeal held that the contractors' claim was not barred because although a dispute or difference had existed in 1961 there had been no reference of that dispute to the engineer for his decision and they had not been notified of any decision on such a reference within the meaning of clause 66. The case was thus one in which there had been a rejection of the contractors' claims. Mr. Wilmot-Smith cited in support of his submission that it was sufficient for a dispute or difference to arise that a party did not admit or had failed to deny the claim what had been said in **Tradax International S.A. v Cerrahogullari T.A.S. (The M. Eregli)** [1981] 2 Lloyd's Rep. 169 at p. 173 by Mr. Justice Kerr and in **Ellerine Brothers (Pty) Ltd v. Klinger** [1982] 1 W.L.R. 1375 at pp. 1381 and 1383 by Lord Justice Templeman.

21. Both these decisions concerned situations where a claim had been made by one party but the other party had failed to respond. In the **Tradax** case the matter arose under the Centrocon arbitration clause which provided that: *". . . all disputes . . . shall be referred to the final arbitrament of two arbitrators. . .any claim must be made in writing and claimant's arbitrator appointed within 9 months of discharge. "*

22. Within nine months of discharge the charterers sent to the owners invoices claiming despatch money under the charter-party. The owners did not reply and the charterers did not seek to appoint their arbitrator until after the nine months had expired. It was held by the Court that the charterers' claim was barred unless the period for commencement of the arbitration could be extended under s. 27 of the Arbitration Act, 1950. The Court did extend the period. In giving judgment Mr. Justice Kerr said: *"Where an arbitration clause contains a time limit barring all claims unless an arbitrator is appointed within the limited time, it seems to me that the time limit can only be ignored on the ground that there is no dispute between the parties if the claim has been admitted to be due and payable. Such an admission would in effect amount to an agreement to pay the claim, and there would then clearly be no further basis for referring it to arbitration or treating it as time barred if no arbitrator is appointed. But if as here, a claim is made and is neither admitted nor disputed but simply ignored then I think that a time limit clearly applies and that the claimant is obliged (subject to any possible extension of time) to appoint an arbitrator within the limited time. The fallacy in the plaintiff's argument can be seen at once if one considers what would have been the position if the plaintiff had in fact purported to appoint Mr. Barclay as their arbitrator within the time limit of nine months. They could clearly have done so and indeed any commercial lawyer or businessman would say that this is what they should have done under the clause to enforce their claim. Arbitrators are appointed every day by claimants who believe - rightly or wrongly - that the claim is indisputable. However on the plaintiff's own argument Mr. Barclay would have had no jurisdiction since there was then - as they now say - no dispute to which the arbitration clause could have applied. In my view this argument is obviously unsustainable. "*

23. That passage was quoted with approval by Lord Justice Templeman in **Ellerine Brothers (Pty) Ltd v Klinger** [1982] 1 W.L.R. 1375 at p. 1383 where the learned Lord Justice said: *". . . as I understand it, the judge is saying - and I agree - that silence does not mean consent. If you can point as was the case **in London & North Western & Great Western Joint Railway Co v J. H. Billington Limited** [1899] A.C. 79, to an express or implied agreement to pay a particular sum then there is no dispute and the action can proceed. But the fact that the plaintiff's make certain claims which if disputed would be referable to arbitration and the fact that the defendant then does nothing - he does not admit the claim, he merely continues a policy of masterly inactivity - does not mean that there is no dispute. There is a dispute until the defendant admits that a sum is due and payable as Kerr, J. said in the **Tradax** case. "* Earlier in his judgment Lord Justice Templeman had said when referring to s. 1(1) of the Arbitration Act, 1975 at p. 1381 of the report: *". . . again by the light*

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

24. In **Ellerine** the question was whether a dispute existed within s. 1 of the Arbitration Act, 1975. In that case the arbitration clause was in very similar terms to cl. 35 of the JCT contract and provided that *"**all disputes or differences whatsoever. . .**"* were to be referred to arbitration. The clause did not impose any time limit. The facts of the case were that under an agreement made in 1978 the defendant had agreed to distribute a film and to pay the plaintiff 20 percent of the net receipts as defined in the agreement. The defendant also agreed to keep proper books of account and to allow the plaintiffs to inspect and also to provide copies of certain reports or statements of account. In 1980 the plaintiffs for the first time requested a statement of account from the defendant. The defendant failed to reply and notwithstanding a number of reminders and a visit from a representative of the plaintiffs no substantial response was forthcoming. Accordingly on April 3rd 1981 the plaintiffs commenced an action claiming an account of the net receipts of the distribution of the film and payment of the monies found due on taking of the account. It was held at first instance by the Official Referee that a dispute was in existence when the proceedings were commenced and that the action had to be stayed under s. 1(1) of the 1975 Act. That decision was upheld on appeal.

25. In the **Tradax** case the arbitration clause made a distinction between a claim and a dispute and the decision is a clear authority on the construction of the term "***dispute***" in the Centrocon charter-party to the effect that silence on the part of a recipient of a claim will give rise to a dispute within the meaning of the clause which can then be referred to arbitration.

26. **Ellerine** is an authority upon the construction of the term "***dispute***" in s. 1(1) of the Arbitration Act, 1975. On the evidence before the Court the defendant was clearly prevaricating and failing to deal with the claims the plaintiff was putting forward and in those circumstances it is not surprising that the Court considered that a dispute existed between the parties and that the action was stayed.

27. In the present case the situation is in my judgment very different from that in **Ellerine.** It cannot properly be said that the plaintiff ignored the letter dated October 7th. That letter was replied to on October 11th and a reply was given to the only question which had been asked of the plaintiff's solicitors, namely whether they had authority to accept service of any notice of arbitration. Unlike the situation in any of the three authorities referred to, the plaintiff was not in the letter of October 7th asked to do anything except inferentially to confirm that its solicitors had authority to accept service of a notice of arbitration which it is clear that the defendant was about to serve with a view to commencing arbitration proceedings to protect its own position should the housing association's claims have any substance. The defendant did not identify which houses were alleged to be defective or what those defects were nor did it call upon the plaintiff to put the defects right or to pay compensation. In those circumstances it is not surprising in my judgment that the plaintiff's solicitors in their letter of October 11th 1993 asked for some information – *". . . upon which we can take some specific instructions as our clients are currently unaware of any basis for an alleged claim. "*

28. The letter of October 7th was the first suggestion there might be something wrong with the houses which the plaintiff had built but beyond that the plaintiff's knew nothing more than that the defendant was about to start arbitration proceedings. It is of course right that the plaintiff's solicitors in their letter of October 11th did say that they were not acknowledging or admitting that the defendant had any basis for a claim against the plaintiff but it would in my judgment be wrong to treat that statement as in effect a non-admission by the defendant of a claim thereby putting the plaintiff to proof. A fair reading of the letter of October 11th 1993 is that neither the plaintiff nor its solicitors knew what was going to be alleged against them in the arbitration proceedings and that the acceptance of service was not to be taken as an admission or acknowledgment that there were any

matters which would give rise to a claim against the plaintiff. No such matters had been asserted by the defendant.

29. The words *"**dispute or difference***" are ordinary English words and unless some binding rule of construction has been established in relation to the construction of those words in clause 35 of the JCT contract I am of the opinion that the words should be given their ordinary every day meaning. The decisions in ***Tradax*** and in ***Ellerine*** show that a dispute can be said to exist where a claim in respect of some identified or specific matter has been made and either ignored as in **Tradax** or met with by prevarication as in ***Ellerine*.** Neither of those cases however in my judgment lays down any general principle of construction applicable to all arbitration clauses which contain a reference to disputes or to disputes and differences. In ***Ellerine*** Lord Justice Templeman at p. 183 of the report did say – *". . . there is a dispute until the defendant admits that a sum is due and payable, as Kerr J. said in the **Tradax** case. "*

30. The learned Lord Justice was not in my judgment in using those words laying down a general principle of construction and those words do in my judgment have to be read subject to what the learned Lord Justice had said earlier at p. 1381 where he said: *". . . If on analysis what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement then the applicant is entitled to insist on arbitration instead of litigation. "*

31. The reference to *"**a matter on which agreement has not been reached**"* implies that an opportunity had been given at some stage for an agreement to have been reached on the matter but where a person has not in fact been told and is unaware in what respects he is alleged to have broken his obligations it is in my judgment quite impossible to say that the matter is one on which agreement has not been reached, at least where further information about the matter is being sought. In my judgment on October 11th and on receipt of the notice of arbitration the plaintiff was not in a position either to agree or to deny that there were defects in the houses which the plaintiff had built and indeed that defendant had not in terms so asserted. The plaintiff requested further details but no further information was supplied until after the service of the notice of arbitration. In my judgment it cannot properly be said as a matter of ordinary English that the plaintiff and defendant were in dispute or that a dispute had arisen between them when the notice of arbitration was served. The plaintiff had not denied any liability. It had not ignored the letter of October 7th. No details had been given by the defendant to enable the plaintiff to make any kind of informed decision in relation to any of the matters which were being alleged by the housing association let alone how those allegations affected the plaintiff. I accordingly hold that no dispute or difference existed between the plaintiff and the defendant within the meaning of clause 35 when the notice of arbitration was served and accordingly that notice was in my judgment ineffective to commence a valid arbitration.

32. Mr. Grime has further submitted that if a dispute did exist nevertheless the notice of arbitration itself was defective for lack of particularity. I can deal with that submission shortly. Paragraph one of the notice of arbitration requires that: *". . .the dispute which has arisen between the parties as to the Respondent's liability to the Claimant for the structural defects and non-conformities alleged by NBHAL be referred to arbitration. "*

33. On the footing that a dispute had arisen between the parties, that dispute is in my judgment sufficiently identified as being a dispute relating to the liability under the JCT contract for the structural defects and non-conformities which the housing association had at the date of the notice of arbitration alleged to exist. Those defects are referred to in NBHA2 together with an assertion that similar defects exist in one out of every seven houses built on the development which had not been examined and listed in NBHA2. I do not consider that an arbitrator would have any difficulty in identifying the structural defects and non-conformities referred to by reference to the schedules mentioned in the writ. For this purpose it will not matter whether the defects alleged are defects of construction or defects in design. It will be for the arbitrator to decide whether the individual defects are matters for which the plaintiff is responsible to the defendant. Accordingly I do not consider that the notice of arbitration is itself defective for want of particularity.

34. Mr. Wilmot-Smith finally submitted that the plaintiff had waived any irregularity there may have been in the commencement of the arbitration in respect of site 9. In my judgment the plaintiff has not since the service of the notice of arbitration in respect of site 9 done anything which can properly be regarded as amounting to a waiver of its right to object to the jurisdiction of the arbitrator.

35. Following the service of the notice of arbitration the defendant's solicitors on October 20th 1993 sent a copy of the writ to the plaintiff's solicitors saying: *"We regard the figure of £31,000,000 referred to in paragraphs 10 and 11 of the statement of claim as being excessive. It is also unparticularised and we have today served on the Plaintiff's solicitors a Request for Further and Better Particulars."*

36. A copy of the schedule NHBA1 referred to in the statement of claim was also enclosed. The plaintiff's solicitors did not respond to the notice of arbitration and on December 1st the defendant's solicitors wrote to the RIBA requesting the appropriate forms to apply for the appointment of an arbitrator. A copy of this letter was sent to the plaintiff's solicitors who acknowledged receipt on December 9th. On December 21st the defendant's solicitors wrote to the plaintiff's solicitors asking if they would sign the application form which had now been received or whether – *". . .you require the application to be made unilaterally as is permitted by the arbitration clause. "*

37. In response the plaintiff's solicitors on December 24th 1993 wrote saying that they were awaiting their client's instructions and would make contact as and when those instructions were received and stating that it was a matter for the defendant's solicitors as to whether they should wish to make a unilateral application.

38. In the event the plaintiff's solicitor did not receive any further instructions from the plaintiff and the defendant on February 21st 1994 applied for the appointment of an arbitrator and on March 17th 1994 notification of Mr. Bray's appointment was given to the solicitors. By this time however the plaintiff had changed its solicitors and on March 21st the plaintiff's former solicitors wrote to Mr. Bray telling him that they no longer were acting and suggesting that he contact the plaintiff direct. A copy of this letter was sent to the defendant's solicitors and to the plaintiff. On or shortly before March 29th the plaintiff appointed its present solicitors and on March 29th Mr. Bray wrote to them and to the defendant's solicitors notifying them formally of his appointment and setting out certain additional requirements as to payment of his fees. An aide memoir setting out matters for consideration at a preliminary meeting was also enclosed.

39. On March 24th 1994 the plaintiff's present solicitors wrote to the defendant's solicitors to inform them that they were now acting and seeking information about the progress of the action brought by the housing association. The defendant's solicitors replied on March 31st giving some information about the action including the fact that it had been transferred to the Official Referee in London but that no reply to the defendant's request for further and better particulars had been received. The defendant's solicitors then suggested that the arbitration proceedings should by consent be left in abeyance ***"until such time as we are in a position to proceed".*** There then followed some further correspondence between the solicitors in an attempt to arrange a suitable date for a preliminary meeting with the arbitrator but on April 29th 1994 the plaintiff's present solicitors wrote to the arbitrator taking the point that the arbitration had been invalidly commenced. A copy of this letter was sent to the defendant's solicitors in the ordinary way. On June 20th 1994 the originating summons now before the Court was issued and served. On June 27th Mr. Bray gave directions but that was clearly done without prejudice to the objection to his jurisdiction which had been raised on April 29th. Unless the arbitration has been validly commenced under clause 35 and I have held that it was not, it is clear that unless there has been a fresh agreement between the parties for the matter to be referred to arbitration no valid arbitration can exist. It is clear that no such agreement has been made. Further nothing has occurred since October 11th 1993 and April 29th 1994 which can properly be regarded as a waiver by the plaintiff of its right to object that the arbitration has been invalidly commenced. This is not a case where the arbitration has proceeded and the parties have changed their position on the assumption that the arbitration would proceed and I cannot see that the plaintiff has done anything which could properly be said to amount to an affirmation on its part of the validity of the appointment of Mr. Bray.

40. There will accordingly be a declaration under paragraph 1 of the originating summons but excluding any declaration under sub-paragraph 2(c) of paragraph 1. There will also be declarations as asked under paragraphs 2 and 3 of the originating summons. Under paragraph 4 the plaintiff seeks an order for costs. I have not heard any submissions from Counsel on costs but unless application is made to the Court within 14 days of the handing down of this written judgment for submissions to be made as to costs I shall order that the defendant do pay the plaintiff's costs of the summons and of the purported references to be taxed in the High Court on the standard basis if not agreed. I also direct that the signed copy of this judgment do stand as the transcript. The order will be drawn up 14 days after the handing down of this judgment, subject to any application in relation to costs.

Mr. Stephen Grime, Q.C. (instructed by Messrs. Kershaw Abbott, Manchester) for Cruden
Mr. Richard Wilmot-Smith, Q.C. (instructed by Messrs. Addleshaw Sons & Latham, Manchester) for the Commission.