

CA on appeal from Commercial Court (Mr Justice Tuckey) before Millett LJ; Morritt LJ; Potter LJ. 16<sup>th</sup> July 1998.

**LORD JUSTICE POTTER:**

**INTRODUCTION**

1. This is an appeal from the order of Mr Justice Tuckey made on 28th October 1997 declaring that Christopher Clarke QC as arbitrator has jurisdiction to hear and determine certain matters referred to arbitration by the Plaintiff's Notice to Arbitrate dated 7th January 1997, pursuant to an appointment made by the President of the Electricity Supply Industry Arbitration Association on 7th March 1997 pursuant to Clause 26 of a Master Connection Use of System Agreement (the MCUSA) between the Plaintiff and the Defendant in respect of the Plaintiff's Pembroke and Killingholme Connection Sites. The matters referred to arbitration concern the claims of the Plaintiff that it has been overcharged by the Defendant in respect of the "Connection Charges" for two of the Plaintiff's generating power stations at Pembroke and Killingholme.
2. The Defendant (National Grid) owns and operates the national electricity transmission system in England and Wales. The Plaintiff (National Power) is the largest electricity generating company in England and Wales and a User of the transmission system. The connection charges about which complaint is made by National Power are charges for the assets required to connect the power stations to the general transmission system. The complaint concerns (i) the connection charges for the Pembroke site for the year 1991/1992 and subsequent years, which were higher than charges notified for 1990/1991, and (ii) the connection charges for pre-vesting assets for the Killingholme site for the first year of that station's operation (1992/1993) and subsequent years, which were higher than the indicative charges previously estimated. Pre-vesting assets are those assets which were in existence before 31st March 1990, the transfer date appointed under the Electricity Act 1989 ("the Act"). National Power has purported to refer the dispute over the connection charges to arbitration under Clause 26 of the MCUSA.
3. Three main issues arise on this appeal. The first issue involves a jurisdictional question, namely whether, as National Power contends and Tuckey J held, the matters referred to arbitration by National Power are within the jurisdiction of the arbitrator appointed under Clause 26.1 of the MCUSA ("the Arbitrator"), or whether, as National Grid contends, the matters are within the jurisdiction of the Director General of Electricity Supply ("the Director") under Clause 14.7 of the MCUSA and/or under Condition 10C.3 of the Conditions of National Grid's Transmission Licence granted pursuant to the Act and/or under sections 25 and 45 of the Act and thus fall outside the ambit of Clause 26 of the MCUSA.
4. The second issue is whether or not National Power is estopped under the rule in *Henderson -v- Henderson* (1843) 3 Hare 100 from referring the dispute over connection charges to arbitration by reason of references relating to those charges having previously been made to the Director. The reference in respect of the Pembroke charges was made in 1992 and in respect of the Killingholme charges in 1994. By his decisions given respectively in 1994, in the case of Pembroke, and 1995, in the case of Killingholme, the Director did not find any overcharging by National Grid in either case. Tuckey J. decided the second issue in favour of National Power.
5. The third issue concerns the exercise of the court's discretion over the grant of declaratory relief to National Power. National Grid contended at the hearing before Tuckey J that the court should in any event refuse in its discretion to make the declarations sought by National Power on the grounds that (i) the broad principle underlying the rule in *Henderson -v- Henderson* should be applied as a matter of discretion; (ii) National Power's draft Points of Claim in the arbitration were not properly particularised so that it was not clear which matters National Power sought to refer to arbitration; nor was the scope and meaning of the declaration sought made clear; (iii) because Clause 15 of the MCUSA had the effect of excluding any claim for damages for breach of contract in respect of economic loss and any common law or statutory remedies not expressly provided for in the MCUSA, National Power's claims in the proposed arbitration for restitution and/or damages were thus excluded and a declaration as to the jurisdiction of the arbitrator to hear and determine certain claims would be futile. The judge rejected those contentions and held that there could be no objection in principle to the grant of declaratory relief to National Power. Accordingly, he made a declaration on the lines already summarised.

**THE RELEVANT PROVISIONS**

**The Act**

6. Because of the context in which the dispute arises and the arguments raised as to the competing jurisdictions of the Director and the Arbitrator, it is necessary to refer to a number of provisions of the Act.
7. The duties and functions of the Director appointed under S.1 of the Act are set out at length in S.3. They include:  
“(1) ... a duty to exercise the functions assigned or transferred to him by this Part in a manner which he considers is best calculated -  
(a) to secure that all reasonable demands of electricity are satisfied;  
(b) to secure that licence holders are able to finance the carrying on of the activities which they are authorised by their licences to carry on ..”
8. S.6(1) provides for the grant of such licences by the Secretary of State after consultation with the Director, or by the Director in accordance with a general authority given by the Secretary of State.
9. S.7 (Conditions of Licences; General) provides:  
“(1) A licence may include -

- (a) Such conditions (whether or not relating to the activities authorised by the licence) as appear to the grantor to be requisite or expedient having regard to the duties imposed by Section 3 above ...
- (2) Without prejudice to the generality of paragraph (a) .., conditions included in a licence by virtue of that paragraph-
- (a) may require the licence holder to enter into agreements with other persons for the use of any electric lines and electrical plant of his (wherever situated and whether or not used for the purpose of carrying on the activities authorised by the licence) for such purposes as may be specified in the conditions: and
- (b) may include provision for determining the terms on which such agreements are to be entered into.
- (3) Conditions included in a licence by virtue of subsection (1)(a) above may require the licence holder -
- (a) to comply with any direction given by the Director as to such matters as are specified in the licence or are of a description so specified ....
- (c) to refer for determination by the Director such questions arising under the licence as are specified in the licence or are of a description so specified ...
- (5) Conditions included in a licence may contain provision for the conditions to cease to have effect or be modified at such times, in such manner and in such circumstances as may be specified in or determined by or under the conditions."
10. S.9(General Duties of Licence Holders) provides:
- (2) It shall be the duty of the holder of a licence authorising him to transmit electricity -
- (a) to develop and maintain an efficient, co-ordinated and economical system of electricity transmission; and
- (b) subject to subsection (3) below, to facilitate competition in the supply and generation of electricity.
11. S.25-S.28 of the Act are concerned with the Director's powers to make orders for securing compliance with the conditions of licences.
12. S.25 provides:
- "(1) Subject to subsections (2) and (5) and Section 26 below, where the Director is satisfied that the licence holder is contravening, or is likely to contravene, any relevant condition or requirement, he shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.  
["relevant condition" in relation to a licence holder is defined in (8) as "any condition of his licence"]
- (2) Subject to subsection(5) below, where it appears to the Director -
- (a) that a licence holder is contravening, or is likely to contravene, any relevant condition or requirement; and
- (b) that it is requisite that a provisional order be made,  
he shall (instead of taking steps towards the making of a final order) by a provisional order make such provision as appears to him requisite for the purpose of securing compliance with that condition or requirement.
- (3) In determining for the purposes of subsection (2)(b) above whether it is requisite that a provisional order be made the Director shall have regard in particular -
- (a) to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of the relevant condition or requirement, is likely to be done, or omitted to be done, before a final order may be made; and
- (b) to the fact that the effect of provisions of this section and section 27 below is to exclude the availability of any remedy (apart from under those provisions or for negligence) in respect of any contravention of a relevant condition or requirement.
- (5) The Director shall not make a final order or make or confirm a provisional order in relation to a licence holder if he is satisfied -
- (a) that the duties imposed on him by Section 3 above preclude the making or, as the case may be, the confirmation of the order;
- (b) that the licence holder has agreed to take and is taking all such steps as it appears to the Director for the time being to be appropriate for the licence holder to take for the purpose of securing or facilitating compliance with the condition or requirement in question; or
- (c) that the contraventions were, or the apprehended contraventions are, of a trivial nature."
13. S.26 sets out the procedural requirements to be followed by the Director in making a final or provisional order.
14. S.27 (Validity and Effect of Orders) provides that, subject to the right of the licence holder to make an application to the court questioning its validity as set out in subsections (1) and (2):
- "(3) .. the validity of a final or provisional order shall not be questioned by any legal proceedings whatever.
- (4) The obligation to comply with the final or provisional orders shall be a duty owed to any person who may be affected by a contravention of the order.
- (5) Where a duty is owed by virtue of subsection (4) above to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit or instance of that person."
- (7) Without prejudice to any right which any persons may have by virtue of subsection (5) above to bring civil proceedings in respect of any contravention or apprehended contravention of a final or provisional order, compliance with any such order shall be enforceable by civil proceedings by the Director for an injunction or for interdict or for any other appropriate relief.

15. S.28 (Power to Require Information) provides by subsections (1) and (2) that where it appears to the Director that a licence holder may be contravening, or have contravened any relevant condition or requirement, he may serve a notice requiring the person on whom it is served to produce to the director or any person appointed by him any documents specified or described in the notice which are in that persons custody or under his control or to furnish in the form and manner specified by the Director such information as may be specified or described in the notice.
16. By S.45(1), it is the duty of the Director to investigate any matter which appears to him to be an enforcement matter (defined by subsection 4 "as any matter in respect of which any functions of the Director under Section 25 ... are or may be exercisable") which is the subject of a representation made to him by or on behalf of the person who appears to him to have an interest in the matter.
17. By S.47 (General Functions):  
*"(1) It shall be the duty of the Director, so far as it appears to him practicable from time to time to do so -*
  - (a) to keep under review the carrying on both in Great Britain and elsewhere of activities to which this subsection applies [i.e. "any activities connected with the generation, transmission and supply of electricity"] and*
  - (b) to collect information with respect to those activities, and the persons by whom they are carried on, with a view to facilitating the exercise of his functions under this Part"*

#### The Terms of National Grid's Licence

18. The following are the relevant conditions of the licence granted to National Grid by the Secretary of State on 26th March 1990.
19. Condition 1.3 defines "connection charges" as:  
*"Charges made or levied or to be made or levied for the carrying out (whether before or after the date on which the licence comes into force) of works and provision and installation of electrical plant, electric lines and ancillary meters in constructing or modifying entry and exit points on the licensee's transmission system together with charges in respect of maintenance and repair of such items in so far as not otherwise recoverable as use of system charges and in respect of disconnection and the removal of electrical plant, electric lines and ancillary matters following disconnection, or as more fully described in paragraphs 3 and 4 of Condition 10, whether or not such charges are annualised."*  
*"Use of system charges" are elsewhere defined as:*  
*"Charges made or levied or to be made or levied by the licensee for the provision of services as part of the Transmission Business to any authorised electricity operator .... but shall not include connection charges."*  
They are not of relevance for the purposes of this appeal.
20. Condition 4 - 4E inclusive contain "Charge Restriction Conditions" providing for an overall cap on the charges to be made to generators and other Users.
21. Condition 4A (Initial Restriction of Charges) provides that, in setting its charges for the provision of transmission services, National Grid shall use its best endeavours to ensure that in any relevant year the average charge per kilowatt does not exceed the maximum average charge per kilowatt calculated in accordance with a complicated formula therein set out. That formula is related to a basic charge per kilowatt of £17.973 factored up by a formula based on the percentage change in the retail price index in successive years with various other weighting and correction factors applied. It is not specifically related in any way to allocation or valuation of physical assets.
22. Condition 4B (Adjustments to Formula) provides for adjustments to be permitted or directed by the Director according to the level of the average charge per kilowatt actually made in subsequent years as compared with the maximum average charge.
23. Condition 4C (Information to be Provided to the Director in Connection with the Charge Restriction Conditions) provides for forecasts, estimates and other information to be provided by the licensee in connection with any change in charges.
24. Condition 4D relates to allowances in respect of security costs.
25. Condition 4E (Duration on Charge Restriction Conditions) provides that the Charge Restriction Conditions shall apply so long as the licence continues in force, and ceasing to have effect in various circumstances set out which are not relevant.
26. Condition 10 of the licence is headed: *"Basis of charges for use of system and connection to system: requirements for transparency"*.
27. Condition 10.1 provides as follows: *"The licensee shall as soon as practicable and in any event within twenty-eight days after this licence has come into force prepare statements in a form approved by the Director setting out the basis upon which the charges for use of system and for connection to the licensee's transmission system will be made in each case in such form and with such detail shall be necessary to enable any person to make a reasonable estimate of the charges to which he would become liable for the provision of such services and (without prejudice to the foregoing) including the information set out in paragraphs 2 and 3 below."*

The statements provided for are generally known as "LC10 Statements".

28. Condition 10.2 provides: *"The [LC10] statement shall in respect of use of system include:*

- ...
- (d) *The methods by which and principles on which entry and exit charges for connections in operation before the grant of this licence will be calculated.*
29. Condition 10.3 provides: *"The [LC10] statement shall in respect of connections to the licensee's transmission system include:*
- (a) *A schedule listing those items (including the carrying out of works and the provision and installation of electric lines or electrical plant or meters) of significant cost liable to be required for the purpose of connection (at entry or exit points) to the licensee's transmission system for which connection charges may be made or levied and including (where practicable) indicative charges for each such item and in other cases an explanation of the methods by which and the principles on which such charges will be calculated.*
- (b) *The methods by which and the principles on which any charges will be made in respect of extension or reinforcement of the licensee's transmission system rendered (in the licensee's discretion) necessary or appropriate by virtue of providing connection to or use of system to any persons seeking connection ...*
30. Condition 10.4 provides: *"Connection charges for those items referred to in paragraph 3 shall be set at a level which will enable the licensee to recover:*
- (a) *The appropriate proportion of the cost directly or indirectly incurred in carrying out any works, the extension or re-enforcement of the licensee's transmission system or the provision and installation, maintenance and repair or (as the case may be) removal following disconnection of any electric lines, electrical plant or meters; and*
- (b) *A reasonable rate of return on the capital represented by such costs."*
31. Condition 10.7 provides: *"The licensee may periodically revise the information set out in and, with the approval of the Director, alter the form of the [LC10 Statement] .. and shall, at least once in every year this licence is in force, revise such statements in order that the information set out in the statements shall continue to be accurate in all material respects."*
32. Condition 10A (Non-discrimination in the provision of use of system and connection to the system) provides that the licensee shall not make charges for provision of use of system to any authorised electricity operator which differ in respect of any item separately identified in the LC10 statement from those for provision of similar items to any other authorised electricity operator except in so far such differences reasonably reflect differences in the costs associated with such provision.
33. Condition 10B (Requirement to offer terms) provides that on application made by any authorised electricity operator the licensee shall offer to enter into an agreement for use of system, inter alia, specifying the use of system charges to be paid by the operator, such charges to be referable to the LC10 statement.
34. Condition 10C is entitled "Functions of the Director".
35. Condition 10C.1 provides: *"If, after a period which appears to the director to be reasonable for the purpose, the licensee has failed to enter into an agreement with (as the case may be) any authorised electricity operator or any person entitled or claiming to be entitled thereto pursuant to a request under Condition 10B, the Director may, pursuant to Section 7(3)(c) of the Act and on application of such .. operator or such person or the licensee, settle any terms of the agreement in dispute between the licensee and that ... operator or that person in such manner as appears to the Director to be reasonable having (in so far as relevant) regard in particular to the following considerations:*
- (a) *That such authorised electricity operator or such person should pay to the licensee ... (ii) In the case of the provision of connections to the system or modifications to existing connections the whole or an appropriate proportion (as determined in accordance with paragraph 3 of Condition 10B) of the costs referred to in subparagraph (a) of paragraph 4 of Condition 10, together with a reasonable rate of return on the capital represented by such costs."*
36. Condition 10C.3 provides: *"If the licensee proposes to vary the contractual terms of any agreement for connection to the licensee's transmission system or for use of system entered into pursuant to Condition 10B or this Condition in any manner provided for under such agreement, the director may, at the request of the licensee or other party to such agreement, settle any dispute relating to such variation in such manner as appears to the Director to be reasonable."*

#### **The Contract**

37. The contractual obligations between National Grid and National Power in respect of both Pembroke and Killingholme were contained (i) in the MCUSA dated 30th March 1990 which was made between National Grid on the one hand and 19 Users, of which National Power was one, on the other; (ii) a Supplemental Agreement of even date in the case of Pembroke and dated 18th July 1990 in the case of Killingholme, each made between National Grid and National Power and stated in their preamble to be made "pursuant to the terms of the Master Agreement and .. [to ..] .. be governed by them".

#### **The Supplemental Agreements**

38. The Supplemental Agreements are in identical form save in so far as paragraph numbers and various immaterial details are concerned. Subsequent references to the Supplemental Agreement are to the Pembroke Agreement save where otherwise stated
39. The Supplemental Agreement provided, inter alia as follows.
- "3. THE CONNECTION SITE AND NGC ASSETS

The connection Site and NGC Assets ...are more particularly described in Appendix A.

4. CONNECTION CHARGES

Subject to the provisions of Clause 6 .. the User shall .. pay the Connection Charges set out in Appendix B which are calculated by reference to the NGC assets specified in Appendix A in accordance with the provisions of Appendix B ..

6. CHARGING RULES

The provisions of the Charging Rules set out in Appendix E .. shall apply.”

Appendix A identified NGC's assets in connection with the connection charges at Pembroke site,, including in particular two lengths of Double Circuit Overhead Line of 84.6 km and 131.21 km respectively.

Appendix B (Connection Charges/Payment) in respect of Pembroke set out:

“1...

CHARGES: £9,753,000.00 for the period from 1st April 1990 to 31st March 1991 and thereafter as determined in a accordance with the charging rules.

2.

PAYMENT

Charges shall be payable in 12 equal monthly instalments as specified in Clause 14 of the Master Agreement.”

Appendix E set out the Charging Rules

40. The charging rule relevant to this dispute is Rule 2, headed “Revision of Charges” which provided as follows

“2.1. To the extent permitted by the Transmission Licence, NGC may revise its Connection Charges and Use of System Charges or the basis of their calculation including issuing revisions to Appendices B, C and D hereto. On or before 31st October in each Financial Year NGC shall notify the User of the intended basis of calculation ... and shall consult the User concerning the same. On or before 30th November .. NGC shall confirm to the user the basis of calculation .. NGC shall give the user not less that two months prior written notice of any revised charges .. which .. shall specify the date on which such revisions become effective (which may be at any time). The User shall pay any such revised charges and Appendix B, C and /or D as appropriate and shall be amended automatically .. to reflect any changes ... from the dates specified in such notice.

2.2. The User acknowledges that NGC will establish a new asset register during the course of the Financial Year ending 31st March 1991. As a result, NGC shall have the right to vary the asset allocation reflected in appendix A upon giving not less than two months prior written notice provided that ..

(b) the principles of asset allocation are those set out in the [LC10 Statement] .. the form of which has been approved by the Director.”

**The MCUSA**

41. The Master Agreement included the following relevant Clauses. By its Preamble it stated:

“This Master Agreement has the following principal purposes:-

(i) to establish a contractual framework between NGC and all Users pursuant to which Supplemental Agreements will from time to time be made which will provide for, amongst other things:

(a) connection of a User's Equipment at a Connection Site to the NGC transmission system:

(b) the use by the user of the NGC Transmission System in connection with generation or transmission of electricity;

(c) the payment to NGC of Connection Charges and/or Use of System Charges; and

(ii) to provide the enforcement of the Grid Code ...

NGC OBLIGATIONS

8.1 NGC agrees with each User to make a available, plan, develop, operate and maintain the MCC Transmission Systems in accordance with the NGC Transmission Licence ... subject to any Derogations from time to time ..

PAYMENT

14.1 NGC will invoice Users for Connection Charges and/or User of System Charges due under each Supplemental Agreement and the following manner:-

(i) in the case of recurrent monthly charges .. NGC shall despatch an invoice on or before the 15th day of the month of the charges due in relation to that month ..

(ii) unless otherwise specified.. where charges are payable other than monthly NGC shall despatch an invoice not less than thirty days prior to the date of payment ..

14.2 Payment

Users shall pay NGC Connection Charges and or Use of System Charges due under Supplemental Agreement in the following manner ... [monthly dates specified] ..

14.3 All payment hereunder shall be made by the variable direct debit method or such other form of bankers automated payment as shall be approved by NGC ...[In fact, payment by Automatic Bank Transfer was agreed]

14.4 If any party fails to pay on the due date any amount properly due under this Agreement such Party shall pay to the Party to whom such amount is due interest on such overdue amount from and including the date of such failure ...

14.5 All sums payable by one Party to the other pursuant to this Agreement whether of charges interest or otherwise shall (except to the extent otherwise required by law) be paid in full, free and clear of and without deduction, set off or deferment in respect of sums the subject of any disputes or claims whatsoever save for sums the subject of a final

award or judgement (after exhaustion of all appeals if this opportunity is taken) or which by agreement between NGC and those parties may be so deducted or so set off ...

14.7 if, upon the request of a User the Director determines that the NGC Connection Charges and/or Use of system Charges payable by that user (including any variations thereof, have not been calculated strictly in accordance with .. [the LC10 Statements] .. (setting out the basis upon which the charges for use of system and for connection to the NGC transmission system will be made) NGC shall pay to such user an amount in respect of each charging period equal to the amount (if any) by which the user has been overcharged as a result, together with interest thereon from the date on which such charges were paid until the date of payment of such interest ..

#### LIMITATION OF LIABILITY

15.4 the rights and remedies provided by this Agreement to the Parties are exclusive and not cumulative and exclude and are in place of all substantive (but not procedural) rights or remedies express or implied and provided by common law or statute in respect of the subject matter of this agreement, including without limitation any rights any party may possess in tort which shall include actions brought in negligence and/or nuisance. Accordingly, each of the parties hereby waives to the fullest extent possible all such rights and remedies provided by common law or statute, and releases a Party which is liable to another (or others) its officers, employees and agent to the same extent from all duties, liabilities, responsibility or obligations provided by common law or statute in respect of the matters dealt with in this agreement and undertakes not to enforce any of the same except as expressly provided therein.

15.5 save as otherwise expressly provided in this agreement, this clause 15 insofar as it excludes or limits liability shall, override any other provision in this agreement provided that nothing in this clause 15 shall exclude or restrict or otherwise prejudice or effect any of:-

15.5.1 the rights, powers, duties and obligations of any Party which are conferred or created by the Act the Licence or the Regulations; or

15.5.2 the rights, powers duties and obligations of the Director or the Secretary of State under the Act any Licence or otherwise howsoever ...

15.9 for the avoidance of doubt, nothing in this Clause 15 shall prevent or restrict any Party enforcing any obligation (including suing for debt) owed to it under or pursuant to this Agreement.

#### EVENTS OF DEFAULT/DE-ENERGISATION

17.1 it shall be an event of default if; -

(i) a User shall fail to pay (other than by inadvertent error in funds transmission ...) any amount properly due or owing from that user to NGC pursuant to this Agreement and such failure continues unremedied for 7 Business Days after the due date for payment or

(ii) in respect of a User ..

[thereafter various Bankruptcy/Insolvency events are set out].

17.2 Provided that at the time the failure specified in Sub-Clause 17.1(i) is still continuing .. NGC may having given forty-eight hours notice .. De-energise all of the User's equipment which is the subject of a Supplemental Agreement .. or may as appropriate instruct the operator of a Distribution System to De-energise such Users Equipment provided that prior to De-energisation the User may refer the matter to the Disputes Resolution Procedure.

#### 26. DISPUTE RESOLUTION

26.1 Save where expressly stated in this Agreement to the contrary and subject to any contrary provision of the Act, any Licence, or the Regulations, or the rights, powers, duties and obligations of the Director or the Secretary of State under the Act any Licence or otherwise howsoever, any dispute or difference of whatever nature howsoever arising under out of or in connection with this Agreement between any one or more Parties hereto shall be and is hereby referred to arbitration pursuant to the Arbitration Rules of the Electricity Supply Industry Arbitration Association in force from time to time."

#### **The LC10 Statements**

42. National Grid's LC10 Statement entitled "Statement of Charges for use of System and Connection to the System" was issued for the year 1990/1 and subsequent years in terms which were similar for all purposes material to this appeal. In its introductory section it stated that:

"Entry and exit charges are dependent on the value of the assets provided by National Grid Company for the purposes of the connection ...

The terms and charges contained in this statement will be revised at least once each year and any, or all, of the terms and charges are subject to change with two months notice. Every effort has been made to ensure that the contents of this statement accurately reflect ... [the MCUSA] .. in the event of any conflict, however, the Master Agreement will take precedence.

43. Under the heading "Details of Entry & Exit Charges" it dealt with such charges in respect of connections in operation before 31 March 1990 and those commencing operation on or after that date. It provided:

#### "Connections in operation before 31 March 1990

1. National Grid Company has allocated those of its assets involved in connections to its electrical transmission system on 31 March 1990 to specific users. This allocation has been determined on the basis of the assets provided at the connection point with the specific benefit of the user. Where an asset involved in a connection benefits more than one user, the value of that asset has been apportioned between those users.

2. The allocation of assets to existing connection points has been undertaken in a manner which will provide equal treatment with that given to new connection points (described in the next section).
3. Entry and Exit Charges will reflect the costs of providing the National Grid Company assets used for connection including a CCA depreciation charge on a straight line basis, a return on the net CCA asset value, the cost of operating and maintaining the assets involved in the connection, and an appropriate share of National Grid Company overheads ...
7. National Grid Company's costs for operation, repair and maintenance of the assets in their transmissions system will be allocated to particular assets on the basis of their gross CCA value in 1990-91. National Grid Company overheads resulting from the transmission system will also be allocated to assets on the basis of gross CCA value in 1990-91. Both these sets of costs are then included in the Entry and Exit Charge paid by those connected to the National Grid Company transmission system ...

Connections commencing operation on or after 31 March 1990

11. Where any electric circuit or electrical plant is provided or installed or modified by National Grid Company at the request of the party in relation to a connection to the National Grid Company transmission system, an entry and/or exit charge will be levied by the National Grid Company on that party ...
  19. Following an application for either a connection or modification to a connection, National Grid Company will make an Offer to the applicant. This Offer will be based on the expected CCA cost of the connection, and will continue to form the basis of Entry and Exit Charges to the User.
  20. The method of calculating the charge will be identical to that used for existing connections ...
44. The Pembroke power station was a connection in operation before 31 March 1990. The Killingholme power station was a connection which commenced operation after that date.

**THE HISTORY OF THE DISPUTE**

45. In April 1990 NGC's LC10 Statement for the first year of its licence (1990/91) was published in a form approved by the Director. It is common ground that there was no material alteration or revision of its relevant provisions (whether as to allocation of assets or as to the other provisions for calculating the connection charges) either in respect of 1991/92 the period which is the focus of National Power's complaint in respect of Pembroke, or 1992/93, the period which is the focus of complaint in respect of Killingholme. On 30th October 1990 National Grid notified National Power in respect of 1991/92 that: "The charging principles used for 1991/92 will essentially be the same as those used in the current financial year, i.e. as detailed in the Statement of Charges document published in April 1990."
46. There followed correspondence arising from an observation by National Grid that it reserved the right to vary the asset allocation reflected in Appendix A of the Agreements. On 29th November 1990 National Grid confirmed the earlier information as to the 1991/92 basis of charging and on 31st January 1991 gave formal notification of the revised charges. On 9th April 1991 it issued amended appendices A-D to the Supplemental Agreements. On 21st October 1991 National Grid gave notice that the charging principles used for 1992/93 would be essentially the same as those used in the current financial year and stated that: "The connection charges for 1991/92 included an adjustment which was applied for one year in order to mitigate the effects of the introduction of NGC's New Asset Register."
47. On 12th February 1992 following confirmation and notification of the revised charges for 1992/93, National Power complained to National Grid that much of the burden of the charge which fell upon them appeared to be due to the allocation to National Power's sole account of the extended length of two double circuits from Pembroke substation forming the long spur connection to the Pembroke power Station from the Supergrid, whereas in other cases such allocation had been made to grid infrastructure.
- They added: "We are also concerned about the valuation of the assets at Pembroke, which increased by 50% between 1990/91 and 1991/92 but is to be reduced for 1992/93. No satisfactory explanation of these fluctuations in charges has so far been forthcoming, but we believe that they are evidence of changes in charging principle and that if the lines have been overvalued (which we have been unable to verify as NGC has not agreed to provide a copy of the asset register relating to our connection sites or a detailed statement of charging principles which would enable us to check the charges), Pembroke is being discriminated against."
48. By letter dated 18th August 1992 National Power referred to the Director for determination: "the allocation of the transmission circuits presently allocated by NGC as connection assets to Pembroke. "

It complained that:

"The magnitude of the charges falling to Pembroke arises from the allocation to connection of substantial lengths of cables and overhead lines and the transmission loops on which the statements are located. Nowhere else on the system apart from the transmission loop allocated to connection. National Power believes the treatment of Pembroke is not consistent with ... the LC10 Statement .. and is also discriminatory ...

NGC is obliged by Condition 10 of its licence to publish the principles and methods by which it determines its use of system and connection charges. The LC10 Statement produced by NGC describes in the briefest outline the basis of the various charges but is particularly opaque in its description of the allocation rule which determines whether an asset should be charged to infrastructure or connection ...

[It] .. establishes the principle that only assets for the specific benefit of the user will be allocated to connection ... NGC's charges at these stations are inconsistent with its LC10 Statement. Under Clause 14.7 of the Master

*Agreement, we are entitled to seek determination from you regarding the consistency of charges with that Statement. If you determine that the charges are not strictly in accordance with the principles set out in the Statement, NGC is obliged to reimburse NP the extent of the overpayment."*

It was also complained that the fact that Pembroke had not been accorded the same treatment as other power stations in relation to treatment of loops;

*"constitutes discrimination and breach of Condition 10A (paragraphs 1, 2 and 4) of NGC transmission licence. As such, NGC's conduct is an enforcement matter under section 25 and 45 of the Electricity Act 1989.*

*National Power therefore seeks a determination from you as to the appropriate allocation of the circuits which are presently allocated by NGC as connection assets to Fawley and Pembroke."*

49. There followed extended tripartite correspondence between National Grid National Power and the Director in relation to the reference and various matters canvassed between the parties.
50. By his Determination No: TC4/2/94 the Director, who it is plain treated the matter throughout as: "a determination as to the appropriate allocation of the circuits allocated by NGC as connection assets at Pembroke" (Introduction: 1.3)", gave his decision.
51. In his conclusions, the Director stated that the issues he had to consider were:
  - (a) whether National Grid connection charges at Pembroke had been calculated strictly in accordance with the LC10 Statements;
  - (b) if not, whether he should quantify any overcharge either retrospectively or from some future date; and
  - (c) how to respond to National Power's suggestion that National Grid's use of system charges might be discriminatory under Condition 10A of the transmission licence.
52. As to (a) he stated that; *"It is apparent that NGC's Condition 10 Statement is incomplete in several relevant respects and I therefore cannot determine that NGC's connection charges at Pembroke are calculated strictly in accordance with its Condition 10 Statement."*
53. As to (b), he stated that consequently he was unable to quantify an overcharge, but went on to say: *"However, I am satisfied in this case, that before NP on 30 March 1990 entered into the Master Agreement it had been notified by NGC of the proposed allocation of transmission circuits in respect of the Pembroke connection, of the estimated charges for 1990-91, and of the need by 31 March 1991 to remedy defects in NGC's asset register. Therefore, if I were required to quantify any overcharge, I would not be minded in the light of the evidence I have seen to find any overcharge by NGC in respect of the period 1 April 1990 to 31 March 1993."*
54. As to (c), he stated that a number of important issues had been raised and that NGC had accepted that there was a need for it to review the principles underlying its connection charges in order to answer certain questions which arose. He decided that such review, taking into account responses to a consultation paper prepared by the Director, was an appropriate step for National Grid to take to remedy any possible contravention of Condition 10A. He stated that it was therefore not necessary for him to make a specific finding on National Power's asset allocation or to make an enforcement order at that stage.
55. In relation to Killingholme, on 4th January, 1993, shortly after connection, National Grid notified National Power of the renewal connection charges for 1992/93 as follows:

*"Pre-Vesting Exit Charges, October 1992 prices £1,023,751.56*

*This had been calculated on the basis of the apportionment of existing pre-vesting assets at Keadby and the overhead line to Killingholme using 1992/93 asset values and charges. You will be aware that the original forecast figure is based on 1990/91 price levels."*
56. The original forecast figure in respect of pre-vesting had been an indicative charge of £527,000.00 contained in Appendix B to the supplemental agreement of 18th July 1990. The figure for pre-vesting assets which formed part of the annual connection charges actually made for 1992/93 was £894,071.00, an increase of some 60% subsequently reduced to £777,808.00. On 13th July 1993 National Power wrote protesting at the increase and saying that they were minded to refer the level of charge to the Director for his determination. At a meeting on 18th August 1993, confirmed in a later letter dated 14th July 1994, National Grid explained that the indicative charges for Killingholme had been based on a generic line cost. The actual circuit was found to contain more towers than the number assumed for the purposes of the generic line cost and that the December actual figure had been arrived at from a re-valuation.
57. On 2nd November 1994 National Power referred Killingholme charges to the Director, asserting that the assets at Killingholme had been incorrectly allocated and questioning the methodology of apportionment generally; complaining of the omission of sufficient information in, and the lack of clarity of, the LC10 Statements; complaining that the lack of clarity undermined its rights under clause 14.7 of the MCUSA to secure redress from National Grid and asking for enforcement action in the form of a change of wording in the LC Statement and the introduction of a particular method of charge according to a "sub-station test" pursuant to S.25 of the Act.
58. By letter dated 20th March 1995, the Director for reasons described in a draft notice under S.25 of the Act attached to his letter stated that he was not minded to make a Determination under Clause 14.7. His conclusions, as stated in the draft notice included the following:



- “4.1 In the Pembroke Determination published on 25 March 1994 I concluded that NGC’s Condition 10 statement was incomplete in several important respects and that I therefore could not determine that NGC’s connection charges at Pembroke had been calculated strictly in accordance with its Condition 10 Statement. This is also the case in respect of NGC’s connection charges at Killingholme for 1993-4.
- 4.2 I note that on NP’s interpretation of Clause 14.7, there could be an apparent conflict between Licence Condition 10 of the NGC Transmission Licence, which requires that users should be able to “make a reasonable estimate of potential charges from the Condition 10 statement and Clause 14.7 of the Master Agreement which requires the Director to consider whether the charges had been “calculated strictly in accordance” with the terms of Condition 10 Statements. I recommended in the Pembroke Determination, and I now request, that NGC should consider with users whether explicit provision is needed as to the determination of charges if these are found not to be strictly in accordance with Condition 10 Statement, and whether “strict accordance” is necessarily feasible in respect of connection charges.”
59. He went on to request National Grid to prepare and comply with an action plan which would enable users more easily to estimate from the Condition 10 Statement the charges to which they would become liable and to provide a detailed national assessment of the revised demarcation between connection and system assets expected to result from revised allocation rules to be proposed by National Grid. Eventually, a Connection Terms Review Proposals Document was produced by National Grid in January 1996 which was the subject of published proposals by the Director in October 1996.
60. On 7th January 1997, National Power issued a Notice to Arbitrate pursuant to Clause 26 of the MCUSA citing the Pembroke connection charge increase between 1990/91 and subsequent years up to 1995/96, and the increases in the Killingholme connection charge over the indicative charge originally quoted for 1992/93 and subsequent years up to 1995/96. The notice to arbitrate stated:
- “9. A dispute has arisen between the claimant and the respondent under, out of or in connection with the MCUSA and as a result of the increased Connection Charges purported to be levied by NGC ... The Claimant accordingly claims repayment of such amounts as are found to have been overcharged by NGC.”
61. In draft Points of Claim before the court, which Mr Boyd QC for National Power has emphasised are not in final form, National Power alleges in respect of the increased charges for both power stations that, under Paragraph 2.1 of the Charging Rules, NGC’s contractual entitlement to revise their connection charges and issue revision to Appendix B was limited to revisions permitted by their licence and that the purported revisions made were not permitted by the licence and were outside the scope of the contractual entitlement. They also contend that, as the LC10 Statements did not set out the basis upon which connection charges would be made in such a form and with such detail to enable a reasonable estimate of the charges to be made, they did not comply with Condition 10 of the licence so that National Grid cannot rely on the LC10 Statements to justify the increases. It has not been suggested that the cap provisions have been exceeded. Therefore, although not pleaded as such, it appears that the essence of the dispute referred to arbitration will be whether or not, in increasing the level of the charges made for the year 1990/91 at Pembroke to the level charged in 1991/92 and adjusted in subsequent years, National Grid has exceeded the limitations imposed by Licence Condition 10.4. However, I do not decide whether, or to what extent, Licence Condition 10.4 applies to connections in operation before the grant of National Grid’s transmission licence, as this question was not decided by Tuckey J and was not argued before this Court. Any dispute on this point will fall for determination in the arbitration. There is also a dispute as to whether the provisions of Charging Rule 2.1 as to time limits for revision and the obligation to consult were complied with by National Grid. Thus the dispute to be arbitrated is not essentially a dispute as to whether National Grid calculated its charges in accordance with the LC10 Statements. Indeed, because, as the Director has already ruled, those statements lacked information in the form and detail required by the Condition, National Power contend that those statements (whether or not originally approved by the Director) cannot be relied on to justify the increases.
62. In arguing the appeal before us, Mr Boyd has sought to emphasise that, despite the formal inclusion in the Points of Claim of a claim for damages in the amount eventually found to have been overpaid, the claim is not principally put as a claim for breach of the agreement or licence conditions but rather as a claim for restitution for extra-contractual charges to which National Grid was not entitled. Bearing in mind the width of the arbitration clause (“any dispute or difference .. howsoever arising under, out of or in connection with: the Agreement) this does not seem to me a significant distinction so far as the jurisdiction of the arbitrator is concerned, save insofar as it relates to an argument of Mr Grabiner QC for National Grid in relation to Clause 15.4 (Limitation of Liability), to which I refer further below.
63. The claim is not yet further refined or particularised because, as explained by Mr Boyd, discovery has yet to take place and, whilst a series of explanations has been advanced by National Grid since the dispute originated, it has never disclosed its calculation of the charges, nor afforded National Power a view of the Asset Register on the basis of which it is said that the charges were increased; nor does it appear that such disclosure was ever required by the Director in the course of his determination on the question of allocation. It is said that, until National Power is enabled to see the methodology employed by National Grid and to check whether it is consistent with the Licence and such details as do appear from the LC10 Statements, it is unable to supply better particulars than the simple assertion that, following the increase, the charges made were excessive.

64. It is clear from the material before the court that the explanations advanced from time to time by National Grid have varied in a manner which has given rise to the suspicion on the part of National Power that it has yet to receive the full explanation for the increase in charge, or at any rate an explanation which could justify the extent of that increase. This suspicion has been fuelled by a passage in the affidavit of Mr Davies, National Grid's General Manager, which suggests that the relevant asset values and/or the rate of return upon them are arrived at not upon the basis required by Condition 10.4 of the Licence but at whatever level enables National Grid to achieve a "target revenue", which is not disclosed but which would appear to relate simply to National Grid's maximum permitted revenue for the following year under the cap provisions of Licence Conditions 4-4E.

#### JURISDICTION QUESTION

65. The approach advocated by Mr Boyd for National Power, which found favour with the judge, was to treat the matter of jurisdiction as a straightforward exercise in construction of the words of Clause 26, it being prima facie applicable to any dispute over National Power's contractual obligation under Clause 4 of the Supplemental Agreement to pay the Connection Charges set out in Appendix B, as determined in accordance with the charging rules set out in Appendix E.

Clause 26, by its terms, applies to any dispute of whatever nature howsoever arising under, out of or in connection with the Agreement save for certain exceptions

- (i) where expressly stated to the contrary in the Agreement (i.e. the MCUSA and the relevant Supplemental Agreement);
- (ii) subject to any contrary provision in the Act, the Licence or the Regulations;
- iii) subject to the rights, powers, duties and obligations of the Director (or the Secretary of State) under the Act, the Licence or otherwise howsoever.

In relation to those exceptions

- (i) there is no express statement to the contrary in the Agreement. In particular, Clause 14.7 of the MCUSA does not so state. It is no more than a procedure (neither obligatory nor exclusive) which may be invoked by National Power to request the Director to override on grounds of non-compliance with National Grid's LC10 Statement, a charge which might otherwise be payable under the Charging Provisions in the Agreement;
- (ii) there is no relevant contrary provision contained in the Act Licence or Regulations. In this connection, nothing in S.25 or S.45 of the act is "contrary" to arbitration under Clause 26, there being no inconsistency between a regulatory investigation of charges under those sections and arbitration about the contractual validity of those same charges.
- (iii) there is no right, power, etc., of the Director which is in itself at odds with the right to arbitration given by Clause 26 and there has been no exercise of such right, power, etc., inconsistent with it.

66. Mr Grabiner for National Grid argues the case upon a much broader basis and submits that the jurisdictional question falls to be analysed, and Clause 26 to be construed, in the broad statutory and contractual context in which the charging provisions in the Agreement must be placed. He submits that, when this is done, it is plain that the parties did not intend in the MCUSA, which is an industry-wide framework agreement, to set up potentially competing and conflicting jurisdictions on questions concerning National Grid's charges; he says that on a true, and more purposive, construction the provisions of the MCUSA do not have that effect. The steps in his argument are as follows:

- (1) He points out that the Director's powers and duties under the Act include determining whether a licence holder is contravening or likely to contravene any relevant licence condition and, if so, making appropriate enforcement orders (S.25-S.27 of the Act). The Director has a duty to investigate anything which appears to him to be an enforcement matter and which is the subject of a representation to him by any interested person (such as National Power) and, if he makes an enforcement order, whether final (S.25.1)) or provisional (S.25(2)), the obligation to comply with it becomes a duty owed to any person who may be affected by a contravention of the order, which person may in turn take action for loss or damage caused: S.27(4) and S.27(5).
- (2) Under the Licence conditions the Director has powers of intervention in relation to charges. Under Licence Conditions 4-4E, the charge restriction conditions which impose a cap upon the charges to be made, the Director has powers of approval and decision in relation to adjustments to the initial formula (4B.1-4B.3) and in respect of disapplication of the conditions (4E). Under Licence Condition 10.1, the form of the LC10 Statements also requires approval by the Director, as does any alteration in their form (10.7).
- (3) It is the requirement and assumption of Licence Condition 10.1 that the LC10 Statements will set out the basis on which the connection charges are made and will be in such form and detail as necessary to enable a User to make a reasonable estimate of the charges to which he will become liable. Licence Conditions 10.2 and 10.3 further specify that the statement should include
  - (a) the methods by which and principles on which connection charges for connections in operation before the grant of a Licence be calculated (See Condition 10.2(d), under which the Pembroke connection falls);
  - (b) information relevant to future works and the charges for such works, including connection charges for connection subsequent to the grant of a Licence (Condition 10.3 under which the Killingholme connection falls).
- (4) Mr Grabiner submits that, insofar as National Power's current complaint about the connection charges at Pembroke and Killingholme is a complaint that National Grid has not complied with its Licence Conditions in

- setting the connection charges, such a complaint falls within the powers and duties of the Director under the Act to enforce compliance with Licence Conditions and investigate complaints of non-compliance (S.25-S.28 and S.45 of the Act).
- (5) Mr Grabiner also relies upon the provision in Condition 10C.3 which gives power to the Director, at the request of the licensee or other party to the MCUSA, to settle any dispute relating to a proposal of the licensee to vary the contractual terms of any agreement for connection to the transmission system. He submits that National Power's current complaints amount to a dispute relating to a variation by National Grid (exercising its powers of variation in Paragraph 2.1 of Appendix E of the Supplemental Agreements) in the contractual terms (i.e. the actual amount of charges payable) and hence, at the proposal stage each year, each year's charges were again a matter susceptible to resolution by exercise of the Director's powers to settle such dispute.
- (6) Insofar as National Power's current complaint about the level of the connection charges at Pembroke and Killingholme is a complaint that the charges have not been properly calculated in accordance with the provisions of the LC10 Statements (and that, submits Mr Grabiner, is in substance and reality what it is) he asserts that the proper remedy within the MCUSA for such a complaint is by invoking Clause 14.7, which was in fact done without success.
- (7) Mr Grabiner submits that Clause 14 (supported by the payment provisions of Paragraph 2.1. of the Charging Rules) provides a code governing National Grid's rights to payment. Clause 14.5 provides for all sums payable to be paid without deduction or set off on a "Pay now, sue later" basis. The inclusion of Clause 14.7 to enable the Director to determine whether the charges have been calculated strictly in accordance with the terms of the LC10 Statements, when coupled with the requirement of the Licence that full particulars of the charges made should be therein contained, suggests that clause 14.7 is intended to be the exclusive remedy in respect of any "overcharge".
- (8) He supports this construction by reference to the terms of Clause 15 (which, by 15.1 and 15.2) excludes liability for loss arising from any breach of the Agreement save that directly resulting from breach in respect of physical damage to property or for death or personal injury resulting from negligence. Thus it excludes a claim for damages for financial loss resulting from breach of the Agreement. Further, Mr Grabiner submits that under the terms of Clause 15.4, the remedy provided to National Power under Clause 14.7 should be treated as "exclusive and excluding all other substantive rights or remedies" in respect of overpayment of charges pursuant to the Agreement.
- (9) Aided by the presumption, which was accepted by the judge, that one does not readily infer on the part of the parties to a contract an intention to create "overlapping" jurisdictions for resolving a particular kind of dispute, Mr Grabiner submits, in relation to the saving words of Clause 26.1 that:
- (i) Clause 14.7 read in context and coupled with the provisions of Clause 15 should be regarded as an express statement in the Agreement to the contrary of the right to refer to arbitration a dispute as to National Grid's contractual entitlement and/or National Power's right to claim repayment of any asserted overcharge;
  - (ii) the Regulatory Scheme of the Act and Licence should also be treated as amounting to "contrary provision" to similar effect;
  - (iii) the saving that the reference should be "subject to the rights, powers, duties and obligations of the Director under the Act, Licence or otherwise" (i.e. the Agreement) should be read as denying jurisdiction to the arbitrator in any dispute in which it is open to National Power to invoke the exercise of such rights, powers etc. as a means of redress.
67. Powerful as Mr Grabiner's submissions are, I do not consider that they should succeed for the following reasons.
68. I accept that the statutory background and contractual context are of great importance in construing the words of particular contractual provisions, including the ambit of a provision for arbitration. I also accept that the structure and terms of the Agreement (i.e. the Supplemental Agreement) as governed by the MCUSA are part of an overall statutory scheme principally administered and enforced by the Director as the responsible regulator. Nonetheless, the primary obligation of payment of the contractual charges as between National Grid and National Power is contained in a bilateral contract between them pursuant to which, by Appendix B and Appendix E of Charging Rule 2 (Appendix E) the entitlement of National Grid to make charges in respect of the assets listed in Appendix A is limited to the extent permitted by the Licence. In these circumstances, it is to the provisions of the Charging Rules and the Licence to which one must look to see what the basis of the charges should be and to characterise the nature of the dispute proposed to be referred to arbitration under Clause 26.
69. In seeking to perform that exercise, it is apparent that the Licence itself deals with the basis of the permitted charges only in the most general terms. The cap provisions in Licence Conditions 4-4E are of an overall nature relating only to the maximum charge per kilowatt and not condescending to any apportionment as between Connection and System Charges, let alone to allocation of assets in connection with such charges. The appropriate level of charge for Connection Charges is dealt with only by Licence Condition 10.4 which requires the charges to be set at a level which will enable the licensee to recover (and by implication only to recover) the appropriate proportion of the costs incurred in carrying out any works, any extension or refinement of the system etc. plus a reasonable rate of return on the capital represented by such costs. Elaboration of the method by which the licensee proposes to calculate those charges is required to be set out in the LC10 Statements as a "requirement

for transparency” and expressly for the purpose of enabling any person to make “a reasonable estimate of the charges” to which he will become liable. However, the methodology set out in the LC10 Statements as published is not itself contractually binding between the parties; nor is it determinative of whether Condition 10.4 has been satisfied. It is material which (if sufficiently specific) enables one to say whether the licensee has in fact followed the process by which he has announced that he will calculate the permitted charges and provides (or should provide) the particulars for ascertaining whether the Charging Provisions have been complied with.

70. Thus it seems clear to me that, while the matters of dispute in the arbitration will involve consideration of the methodology set out in the LC10 Statements and whether (to the extent that methodology has been made clear) it has been complied with, such an exercise will be no more than incidental to the overall exercise of ascertaining whether or not the Condition 10.4 levels have been exceeded; there will also be subsidiary issues as to whether or not the procedural provisions relating to increases in the Charging Rules have been followed and, if not, what is the effect. I am satisfied that such a dispute falls fairly and squarely within the provisions of Clause 26 unless its introductory saving words are applicable, to which question I now turn.
71. As to Clause 14.7, standing alone, it plainly does not amount to a provision contrary to the right to refer to arbitration disputes arising out of or in connection with the contract. By its express terms, it applies only to charges which are otherwise “payable” by the User i.e. it assumes the contractual entitlement of National Grid to the charge in question. There also appears in the “Pay now, sue later” Clause 14.5 an express saving in respect of “sums the subject of a final award”. Clause 14.7 gives an additional power to the Director, at the request of the User, to determine whether there has been non-compliance by National Grid with the method of calculation set out in the LC10 Statement (the terms of which are not otherwise contractually binding between the parties), with an obligation on National Grid to repay any “overcharge” arising as a result. The exercise which the Director performs in that respect gives “teeth” to what would otherwise be a non-contractual methodology in relation to calculation of charges.
72. It is to be noted that, on the face of it, the Director’s powers are limited to determining whether or not the charges have been calculated in accordance with the LC10 Statements. He is not expressly given any power to quantify the extent of the overcharge or to order repayment. So read (and as submitted by Mr Boyd), this would suggest that the Arbitrator’s prima facie jurisdiction over charging disputes generally under Clause 26 is unaffected. It would be for National Grid and the User to agree the amount of the overcharge to be repaid, failing which the User would refer the matter to arbitration. It seems to me that it is probably inherent in Clause 14.7 that the Director does have power to determine the amount of the overcharge as a result of the exercise which he has performed, although it appears the Director took a contrary view when dealing with the Pembroke reference; but, whether or not that is so, it does not seem to me that Clause 14.7 on its face excludes the jurisdiction of the arbitrator in respect of a dispute as to whether charges are contractually due.
73. Nor do I think this result is achieved by reliance upon Clause 15.1 relating to Limitation of Liability. Mr Grabiner relies upon that part of Clause 15.4 which provides that the rights and remedies provided by the Agreement (which include Clause 14.7) are in place of all substantive (but not procedural) rights or remedies by common law or statute in respect of the subject matter of the Agreement. However, Clause 15.5 provides by way of elaboration that nothing in Clause 15 shall exclude, restrict, prejudice or affect the rights and obligations conferred by the Licence, and Clause 15.9 provides that nothing in Clause 15 shall prevent or restrict any party enforcing any obligation owed to it under or pursuant to the Agreement. While the claim of National Power for restitution and/or an account for monies overpaid is prima facie excluded under Clause 15.4, it seems to me it is nonetheless a means of enforcement of the obligations imposed on National Grid by the Licence and the Agreement preserved by Clauses 15.5 and 15.9. Thus, since Clause 15.4 does not seek to exclude procedural rights, which include the right to refer disputes arising out of the Agreement to arbitration, it ought not to be read as rendering a reference to the Director under Clause 14.7 the exclusive contractual remedy for overcharging.
74. The question of whether or not the terms of Clause 15 amount to a limitation of liability and/or a complete defence to National Power’s claim as ultimately pursued before the arbitrator will of course be a matter for him; but I do not think that by reading Clause 14.7 and Clause 15 together it can be shown that the jurisdiction of the arbitrator is intended to be displaced.
75. Finally under this head, it was a theme of Mr Grabiner’s argument that, when construed in the context of the overall scheme, the Agreement, and particularly Clauses 14 and 15, demonstrate an absolute obligation upon the User to pay the charges laid down as calculated by National Grid in accordance with the LC10 Statement, subject only to the Director’s Clause 14.7 jurisdiction and thus to leave the propriety of the charges made outside the jurisdiction of the arbitrator. I do not think this is correct. As already noted, Clause 14.5 provides for the charges to be paid without deduction etc. save for sums the subject of a final award. Further, the Default/De-Energisation provisions of Clause 17, which acknowledge and reinforce the right of National Grid to be paid amounts “properly due and owing”, include the right of the User to “refer the matter to the Disputes Resolution Procedure” i.e. arbitration during the short window period between Notice and De-Energisation. Mr Grabiner submits that “the matter” referred to means no more than the matter whether or not the Draconian remedy of de-energisation should ensue; it does not refer to the propriety of the charges. Mr Boyd submits to the contrary. I think he must be right. Not only does the Clause 17 machinery relate to sums “properly” due and owing, but it seems to me inherent in a provision which refers to the arbitrator the question of whether or not to de-energise in the face of non-payment, that he is bound to have regard to the circumstances of non-payment. Those

circumstances must sensibly extend consideration of the rights and wrongs of a dispute by the User as to whether the sums are due at all. Thus, I do not detect in the provisions of the MCUSA the intention to exclude the jurisdiction of the arbitrator for which Mr Grabiner argues.

76. Equally, I consider that no express provision is to be found in the Act or the Licence which is contrary, or even directed, to the right of a User to refer to arbitration any dispute arising out of the terms of his contract with the licence-holder. The provisions of S.25-S.28 of the Act represent a scheme for regulatory supervision and enforcement by the Director in relation to contraventions of the conditions or requirements of the licence. While the Director has a duty to investigate any matter which appears to be an enforcement matter under Section 25 upon representation being made to him by any party interested, the machinery is by way of final or provisional order as therein set out. The Director is not bound to make a final order in the circumstances set out in S.25(5); while he has power to make a provisional order in cases where any person may sustain a substantial degree of loss or damage if he does not do so, the exercise of that power is discretionary and it contains no power to make an award for loss caused to a particular user prior to order made. Under S.27(4), no right of recovery arises unless or until an order is made, at which point the licence holder becomes liable only in respect of damage suffered by any person as a result of non-compliance with that order. There is no provision of the Act which suggests to me a statutory intention to preclude recovery by a user from a licence holder where the contract by reference imports various conditions from the licence as the basis for the agreed rates of charge but does not comply with them. Insofar as Mr Grabiner submitted that S.25(3)(b) had such effect, I reject his submission.
77. There remains the argument that the provision in Clause 26 that the arbitral reference should be "*subject to the rights, powers, duties and obligations of the Director under the Act, Licence or otherwise*" amounts to an exclusion of the Arbitrator's jurisdiction in relation to the overcharge. It seems to me that the principal difficulty faced by Mr Grabiner in making that submission is the imprecision of the words used. Plainly the words are intended to have a wider effect than the preceding reservation in relation to "contrary" provisions in the Agreement, Act, Licence or Regulations; however the wording is regrettably imprecise. The question arising is the ambit and bite of the words "subject to". Do the words mean that there can be no reference to arbitration in any case where, under his regulatory rights, powers, etc. the Director has the power or opportunity to deal with disputes or differences between the parties to the MCUSA (whether he exercises it or not)? Or are they simply a provision which gives priority to any enforcement order or decision of the Director actually made in the exercise of his regulatory functions? Put another way, is a user in dispute with the licence holder as to the nature, scope or effect of the Agreement obliged to take the "regulatory route" of initiating an investigation into an alleged contravention of the Licence, (with the discretionary and uncertain results such a process might yield) rather than claiming arbitration?
78. I do not think that can be so. In my view the saving words concerned are included as a recognition that, in relation to disputes as to the rights and obligations of the parties under the contract (whether or not relating to Charging Provisions) there may be potential conflict between the parties' strict contractual entitlement (which is a matter for the determination by the arbitrator as a matter of private law) and some decision, determination or order made by the Director under the Act in pursuance of his public law regulatory functions which might direct (or at least have the effect), that the parties act other than in accordance with that entitlement. In such a case, the arbitrator would be obliged to recognise, and where necessary give effect to, such decision or order in making his award. Conversely, the fact that a reference has been made, or that the arbitrator has determined the parties' contractual rights in a given situation could not prevent the Director from exercising his regulatory functions or making enforcement orders other than in accordance with the parties' 'contractual' rights if he considered it appropriate. Such order as he might make would override the effect of any inconsistent decision by the arbitrator as from the date of the order.
79. In the absence of any prior exercise of the Director's rights, powers, etc. in a manner decisive or pre-emptive of the issues referred to arbitration, it seems to me that there is no contractual or practical reason why the arbitrator should not proceed to adjudicate upon those issues. That seems to be the position in this case.
80. I shall refer briefly to certain further aspects of Mr Grabiner's submissions. First in relation to Step 5 of his argument, I do not consider that his reliance on Licence Condition 10C3 carries the matter further in the context of this case. It seems to me that this is a Condition which gives power to the Director, again in his regulatory role, to settle disputes in any case where the parties cannot agree upon a variation in the terms of an agreement previously entered into pursuant to Condition 10B (an agreement entered into without the intervention of the Director) or Condition 10C (an agreement where the Director has intervened to settle the terms). This is not a case where the revised charges were ever put forward by National Grid as a variation of the contractual terms between the parties; rather they were claimed as charges properly calculated under the existing terms of the Agreement. In any event, neither party ever sought to refer the matter to the Director as a matter of variation, nor did he seek or purport to settle the dispute pursuant to Clause 10C.3.
81. Second, Mr Grabiner identified what he submitted was a compelling reason to regard the Director as the exclusive arbiter of disputes in relation to charges generally, namely the expertise of the Director and his office in considering and deciding the appropriate level and propriety of charges under the formulae provided for in the Licence, including the reasonable rate of return on capital permitted. Third, he underlined the need for consistency of decision within a scheme which provides the general framework for contractual relations in the industry. Fourth, he emphasised the wide nature of the Director's information-gathering powers. None of these further matters

leads me to any conclusion other than that which I have already stated. It does not seem to me that the formulae or principles provided for in the Licence are prohibitively recondite, in the sense that they are beyond the grasp of a skilled accountant or his capacity to explain to the Arbitrator their application and proper effect. Nor does there seem any reason to suppose that the expertise of the Director will be denied to the Arbitrator in the form of a willing and qualified witness from his office, should either side seek such assistance. Thus the views of the Director as to a reasonable rate of return on capital and the proper basis for calculating it, as perceived by him and/or generally applied in the industry, can be made known to the Arbitrator. The availability of such evidence should preclude inconsistency of decision. As to the question of the Director's information-gathering powers, there is every reason to suppose that all the information relevant to National Grid's calculation of the charges and the basis for any increase made is in the hands of, or available to National Grid, as the body which has set the charges and made such allocations and adjustments as it has deemed appropriate in respect of all parties to the MCUSA.

82. Accordingly I consider that the judge was right to decide the jurisdiction issue in favour of National Power.

#### **THE HENDERSON -v- HENDERSON ISSUE**

83. Broadly put, it is the contention of Mr Grabiner that, if the Arbitrator does have jurisdiction to determine the matters referred to arbitration, it is a jurisdiction which overlaps that of the Director under Clause 14.7 and (as Mr Grabiner has contended) under Sections 25 and 45 of the Act, as well as Condition 10C.3. He submits that, in the course of the reference to the Director for determination under Clause 14.7 in respect of the Pembroke and Killingholme sites the question of National Grid's compliance with the LC10 Statements together with additional questions of enforcement under S.25 and S.45 of the Act in respect of discrimination, National Power had ample opportunity to raise (as an enforcement matter) but failed to raise, or at least to press, the issue of the propriety of the charges on wider grounds than misallocation of assets. Thus, although the Director proceeded on those limited grounds in the case of Pembroke and declined so to proceed in the case of Killingholme, Mr Grabiner submits that the rule in *Henderson -v- Henderson* should be applied to preclude any wider or different challenge to the charges and/or the increases before the arbitrator.

84. The first observation to make in respect of that submission is the "short answer" identified by the judge below, namely that the so-called rule operates by way of defence and not as a bar to jurisdiction. Mr Grabiner countered that objection by submitting, and there was strength in his submission, that if it appears clear to this court that such defence would be bound to succeed, we should decline in our discretion to make the declarations sought.

85. Suffice it to say that it is not clear to me that the defence would be bound to succeed. Having examined at length the history of the matter and the issues as they came forward in the course of the dispute, the judge went on to hold that he did not consider that it would be an abuse of process for the issues as now advanced to proceed to arbitration. He said that, in the case of Pembroke, what is now said to be the real reason for revising the charges, did not emerge until after the Director's determination. He might also have added that in relation to Killingholme, within a short time of the reference being made, the Director declined to proceed and make the determination. Like the judge, we have also had conducted before us a lengthy exercise in order to establish the degree to which it appears that the explanations given by National Grid over the period have varied and how far the continuing suspicions of National Power as to the true position may be justified. It does not seem to me appropriate to seek to resolve those matters at this stage. As stated by Somervell LJ in *Greenhalgh -v- Mallard* (1947) 2 All ER (255 at p.257) the rule in *Henderson -v- Henderson* applies to: "issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would have been an abuse of process ... to allow a new proceeding to be started in respect of them".

As stated by Lord Kilbrandon in *Yat Tung Co -v- Dao Heng Bank (P.C.)* [1975] AC 581 at 590E: "the shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to have been earlier raised: moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule."

86. Assuming, as the judge was prepared to assume, that the defence is applicable in circumstances of this kind (that is to say when a first hearing of a regulatory nature is followed by a contractual dispute in judicial proceedings) I nonetheless consider that the outcome of the plea is not appropriate to be decided on this appeal, but that it should be left to the arbitrator to determine the matter when the issues sought to be raised have been properly defined and the basis of the variation in charges clarified.

#### **DISCRETION**

87. The conclusions which I have reached above are largely dispositive of Mr Grabiner's contentions in relation to the exercise of the court's discretion as to the making of the declaration sought by National Power.

88. As in the court below, National Grid have contended that declaratory relief should be withheld on the basis of public policy as to finality in litigation, as exemplified by the rule in *Henderson -v- Henderson*. It is not contended that the reference to arbitration has been made outside any relevant limitation period and, while delay is complained of, no specific evidence or arguments of prejudice have been advanced. Accordingly, having taken the same view as the judge below in relation to the *Henderson -v- Henderson* argument, I see no ground to interfere with the exercise of the court's discretion by Tuckey J in that respect.

89. Mr Grabiner has also criticised the current state of the draft Points of Claim in the arbitration for lack of proper particularity, with the result, as he submits, that the scope and meaning of the declaration sought by National Power is unclear. Those criticisms were largely directed to the question whether, on analysis, National Power was (a) simply further challenging whether the LC10 Statements had been complied with, or (b) challenging the proper basis of the connection charges as defined/permitted by the Charging Rules, and if so (c) by reference to what particular provision of those Rules. In my view, it is clear that National Power's position is that in (b) rather than (a) and that, while it reserves its position on (c), the position can be clarified in the Points of Claim as eventually served and, if necessary, amended following discovery. I do not consider that the present lack of finality or precision in that regard is a good reason to withhold the declaration granted by the judge by reference to National Power's Notice to Arbitrate of 7th January 1997.
90. Finally, Mr Grabiner urged that the terms of Clause 15 of the MCUSA were such as to exclude a claim of the type asserted in the Arbitration (either by way of damages for breach of contract or as a restitutional remedy not expressly provided for in the Agreement) and thus that it would be idle to grant a declaration of jurisdiction for the arbitrator to hear and determine a claim which was bound to fail. I have already indicated in the body of this judgment that, I do not consider that Clause 15 operates to exclude the jurisdiction of the arbitrator. Nor do I consider that the terms of Clause 15 clearly operate to exclude liability as urged by Mr Grabiner. That matter falls to be determined by the arbitrator in the course of the dispute referred to him. It is not the function of this court to usurp his jurisdiction in that respect: c.f. *Hayter -v- Nelson* [1990] 2 Lloyd's Rep 265 and *Halki Shipping Corporation -v- Sopex Oils Ltd* [1998] 1 WLR 726.

### CONCLUSION

91. I do not consider that the judge erred in his conclusions and I would dismiss the appeal.

### LORD JUSTICE MORRITT:

1. The obligation of National Power plc ("NP") to pay connection charges to The National Grid Company plc ("NGC") in respect of the connection of its power stations at Pembroke and Killingholme to the national grid arises under the Supplemental Agreements dated 30th March 1990 and 18th July 1990 (as amended by a further agreement dated 22nd July 1992) respectively. As there appears to be no distinction between them relevant to the issues on this appeal I shall refer to the material provisions of the agreement relating to the Pembroke power station.
2. By clause 4 NP agreed to pay "*the Connection Charges set out in Appendix B which are calculated by reference to the NGC assets specified in Appendix A in accordance with the provisions of Appendix B*". Clause 6 provided that the Charging Rules set out in Appendix E should apply. Appendix A contained descriptions and a diagram of NGC's assets, including details as to their respective ages. Appendix B provided for the Connection Charge to be paid by 12 equal monthly instalments and stated the charge to be "*£9,753,000.00 for the period from 1st April 1990 to 31st March 1991 and thereafter as determined in accordance with the Charging Rules.*"
3. The relevant Charging Rule, as set out in Appendix E, is rule 2.1. So far as relevant it provides: "*To the extent permitted by the Transmission Licence NGC may revise its Connection Charges...or the basis of their calculation including issuing revisions to Appendices B,C and D hereto.....NGC shall give the User [NP] not less than 2 months prior written notice of any revised charges, including revisions to Appendices B, C and D hereto, which notice shall specify the date upon which such revisions become effective...The User [NP] shall pay any such revised charges and Appendix B, C and/or D as appropriate shall be amended automatically...to reflect any changes to such Appendices with effect from the date specified in such notice.*"
4. Notices of revised charges were given by NGC to NP in respect of both Pembroke and Killingholme so as to give rise to substantially increased Connection Charges. In the case of the Pembroke power station NGC sought to increase the connection charge from £9m. for the year 1990/91 to £15m. for the year 1991/92 and subsequent years. NP disputed the right of NGC to such increased charges on the basis that the increase was in excess of "the extent permitted by the Transmission Licence". The question for our determination is what is the machinery by which that dispute is to be resolved.
5. Clause 21 of the Supplemental Agreement provides that, amongst others, clause 26 of the Master Agreement "*shall apply to this Supplemental Agreement as if set out in full herein*". Clause 26 of the Master Agreement provides that "*Save where expressly stated in this Agreement to the contrary and subject to any contrary provision of the Act, any Licence, or the Regulations, or the rights, powers, duties and obligations of the Director or the Secretary of State under the Act, any Licence or otherwise howsoever, any dispute or difference of whatever nature howsoever arising under out of or in connection with this Agreement between any one or more Parties hereto shall be and is hereby referred to arbitration pursuant to the rules of the Electricity Supply Industry Arbitration Association in force from time to time.*"
6. On 7th January 1997 NP gave notice to arbitrate in accordance with that provision. NGC claims that reference of the dispute to arbitration is precluded by the opening words and the provisions of (1) Clause 14.7 of the Master Agreement, and/or, (2) Ss.25 and 45 Electricity Act 1989, and/or (3) Condition 10C.3 of Transmission Licence granted to NGC by the Secretary of State for Energy pursuant to s.6 Electricity Act 1989 on 26th March 1989. The scope, terms and interrelation of the Electricity Act 1989, the Transmission Licence, the Master Agreement and the Supplementary Agreements have been described in detail by Potter LJ. I gratefully adopt his

description. I propose to consider the submissions for NGC in reverse order and start with Condition 10C.3 of the Transmission Licence.

### Transmission Licence Condition 10C.3

7. Condition 10 deals generally with the basis of charges for the use of the Grid and separately for connection to it. It is followed by Condition 10A which precludes discrimination in the provision of connections and use as between one user and another. Condition 10B requires NGC to offer terms for such connection and use to any authorised operator who asks. Condition 10C deals with the functions of the Director.
8. Condition 10C contains three paragraphs. The first deals with cases where an authorised operator seeks terms pursuant to Condition 10B and in the opinion of the Director a reasonable time has elapsed without an agreement having been concluded between NGC and that operator. In such a case paragraph 1 permits the Director "to settle any terms of the agreement in dispute" in such manner as appears to him to be reasonable having regard to various specified considerations. Paragraph 2 obliges NGC to enter into an agreement on the terms so settled if the authorised operator wishes.
9. In that context Condition 10C.3 provides "*If the licensee proposes to vary the contractual terms of any agreement for connection to the licensee's transmission system or for use of system entered into pursuant to Condition 10B or this Condition in any manner provided for under such agreement, the Director may, at the request of the licensee or other party to such agreement, settle any dispute relating to such variation in such manner as appears to the Director to be reasonable.*"
10. In my view it is plain that Condition 10C.3 is not applicable to the circumstances of the dispute with which we are concerned. First, NGC is not, by increasing the Connection Charges, proposing to vary the contractual terms of the Supplemental Agreements; it is seeking to implement them, in particular Charging Rule 2.1 set out in Appendix E. Second, the Supplemental Agreements were not entered into pursuant to Condition 10B or Condition 10C of the Licence but pursuant to clause 2.2 and 2.3 of the Master Agreement. It follows that even if a request had been made to the Director to exercise his powers under Condition 10C.3 this condition could not be "a contrary provision of the Licence" within the meaning of those words in clause 26 of the Master Agreement when incorporated into the Supplemental Agreements.

### Ss.25 and 45 Electricity Act 1989

11. S.45 imposes a duty on the Director to investigate any enforcement matter referred to him by any person prescribed by that section. An enforcement matter is one in respect of which the Director's powers under s.25 are exercisable, namely the contravention of a relevant condition or requirement as defined by s.25(8). Such a condition is, in relation to a licence holder, a condition of his licence; such a requirement is, in relation to a licence holder, any duty or other requirement imposed on him by or under s.9 or ss 16 to 23. It is not suggested that the dispute between NGC and NP involves a breach of any duty imposed by any of those sections. Accordingly this issue arises only if there is a contravention of a relevant condition.
12. If the Director is satisfied there is an actual or threatened breach of a relevant condition then, subject to compliance with the procedural requirements imposed by that and the following section, the Director may by provisional or final order secure compliance with the condition, s.25(1) and (2). The aggrieved licence holder may apply to the court for an order, on specified grounds, quashing such order, but, subject thereto, the validity of the order may not be challenged. s.27(1)-(3). The obligation of the licence holder to comply with the order is enforceable by any person affected by its contravention or by the Director. s.27(4)-(7).
13. It is suggested that this statutory code is such as to amount to a "contrary provision of the Act" sufficient to exclude this dispute from the ambit of clause 26 of the Master Agreement as incorporated into the Supplemental Agreement. It is also argued that the "rights, powers, duties and obligations of the Director under [those provisions of] the Act" are so inconsistent with any arbitration as to exclude the jurisdiction of an arbitrator under clause 26 by virtue of the words "subject to".
14. I do not accept those submissions. It must be borne in mind that the dispute between the parties is whether NGC was entitled pursuant to the terms of the Supplemental Agreements to increase its Connection Charges to the extent proposed. The answer will depend on whether the increase was "to the extent permitted by the licence" as provided for in Charging Rule 2.1. This is essentially a private law matter between NGC and NP. By contrast the procedure for investigation and enforcement provided for by ss.25 to 27 and 45 is designed to ensure compliance with the conditions of the Licence, imposed under s.7, and with the statutory obligations set out in ss.9 and 16 to 23. I do not think that the court should accept without clear statutory indications to that effect that Parliament intended private contractual disputes to be resolved by such an enforcement procedure. Not only are there no such indications, but, in my judgment, there are several pointers in the opposite direction.
15. First, the statutory procedure for enforcement is only applicable "*where the Director is satisfied that a licence holder is contravening or is likely to contravene*" the relevant condition or requirement. But the issue arising under the Supplemental Agreement is whether or not the proposed increase is more or less than "*the extent permitted by the licence*". Even if it is assumed that the permitted extent is comprised in a condition of the Licence the contractual issue between the parties would have to be determined before the Director's statutory powers arose. Thus the resolution of the dispute, prima facie within the arbitration clause, precedes the proper operation of the statutory procedure.



16. Second, assuming the statutory procedure to be operative the Director is not bound to make an order, whether provisional or final. Under the statutory procedure no person has any remedy in the absence of such an order, s.27(4). If the existence of the procedure were sufficient to oust the operation of the arbitration clause then, in the absence of a provisional or final order made by the Director, the only remedy, apart from a refusal to pay, available to a user who considers that he has been overcharged would be an action for a declaration. But that is excluded by Clause 15.4. It cannot have been intended by any of those concerned that a reference to arbitration should be excluded by a procedure which does not necessarily provide its own, alternative, remedy.
17. Third, circumstances might well exist in which NGC wished to establish its entitlement to increase connection charges before doing so. The statutory procedure does not contemplate its activation by the licence holder; indeed s.25(5)(b) would appear to be inconsistent with a "friendly" resolution of such a dispute by an order of the Director.
18. If, unlike this case, the Director has made a relevant order then, pursuant to s.27(3), an arbitrator would be bound to recognise and give effect to it in any award he made. Thus, if the permitted extent of an increase in connection charges was embodied in a condition in the licence, in any reference concerning an increase in Connection Charges the arbitrator would be bound to reach the same conclusion. If the order of the Director was made after the award had been made but before its satisfaction then, I am inclined to think, this subsequent event would provide a defence to the enforcement of the award in accordance with its terms without regard to the provisions of the order.
19. In summary, therefore, in my judgment the existence of the statutory procedure is not "a contrary provision of the Act". Similarly, in my judgment, the rights, powers, duties and obligations of the Director under the Act in connection with that procedure, are matters subject to which the dispute under the Supplemental Agreement is referred to arbitration but do not exclude the reference altogether.

**Clause 14.7 of the Master Agreement**

20. By the conclusion of the oral argument it was clear that this was the provision on which NGC primarily relied. Before referring to its terms it is necessary to put it into context. The Master Agreement was entered into against the background of the Electricity Act 1989 and the Transmission Licence granted by the Secretary of State to NGC. The former set out the basic statutory framework. The latter contained provisions which, amongst other things, imposed a ceiling on the charges which might be required from users as a whole (Conditions 4 and 4A-4E) and the basis on which charges might be made to particular users (Conditions 10 and 10A-10C), to which I shall have to refer in greater detail later. The purpose of the Master Agreement was to set up a contractual framework between NGC and users of the Grid pursuant to which supplemental agreements would provide for connection to and use of the grid, payment of the connection and use charges and enforcement of the grid code. Clause 14 is concerned with payment.
21. Clause 14.1 deals with the times when invoices for connection or use of system charges are to be rendered. Clause 14.2 and 14.3 lay down the times and manner of payment of such invoices. Clause 14.4 provides for the payment of interest on late payments, clause 14.5 excludes set off, deduction or deferment of any sums except those subject to a final award or judgment and clause 14.6 deals with the addition of VAT. Clause 14.7 provides "*If upon the request of any User the Director determines that the NGC Connection Charges and/or Use of System Charges payable by that User (including any variations thereof) have not been calculated strictly in accordance with the terms of the statements prepared for the purposes of Condition 10 of the NGC Transmission Licence (setting out the basis upon which the charges for use of system and for connection to the NGC Transmission System will be made) NGC shall pay to such User an amount in respect of each charging period equal to the amount (if any) by which the User has been overcharged as a result together with interest thereon from the date on which such charges were paid until the date of payment of such interest...*"
22. NGC submits that this provision is one whereby it is "expressly stated in this Agreement to the contrary". It was also submitted that it was a power of the Director arising "otherwise [sc. than under the Act or any licence] howsoever". The consequence contended for in each case was the exclusion of a reference of the current dispute to arbitration. Nothing turns on the identity of the agreement referred to because the definition of "this Agreement" contained in Schedule 2, is equally applicable to the Supplemental Agreements includes both master and supplemental agreements.
23. The provision in Condition 10 in the Transmission Licence to which clause 14.7 of the Master Agreement refers is that contained in Condition 10.1. That paragraph requires NGC to "*prepare statements in a form approved by the Director setting out the basis upon which the charges for...connection to the licensee's transmission system will be made in each case in such form and with such detail as shall be necessary to enable any person to make a reasonable estimate of the charges to which he would become liable for the provision of such services...*"
24. In respect of connection charges paragraph 3(a) requires the statement to include a schedule listing those items "of significant cost liable to be required for the purpose of connection.. to the licensee's transmission system for which connection charges may be made". That sub-paragraph and sub-paragraphs (b)-(e) require the statement to include the methods and principles by which such charges are to be calculated in respect of particular items. Paragraph 4 provides that connection charges for those items referred to in paragraph 3 should be set at a level which will enable the licensee to recover

*“(a) the appropriate proportion of the costs directly or indirectly incurred in carrying out any works, the extension or reinforcement of the licensee’s transmission system or the provision and installation, maintenance and repair...of any electric lines, electrical plant or meters; and*

*(b) a reasonable rate of return on the capital represented by such costs.”*

Paragraph 7 requires the licensee to revise the information set out in the statements periodically and, with the approval of the Director to alter the form of statement.

25. Statements were produced by NGC from time to time in purported conformity with Condition 10. But in a reference to the Director made by NP in August 1992 regarding the connection charges for Pembroke the Director decided, in March 1994, that, though there had been no overcharging, the statements were insufficiently precise. A similar course, with similar outcome, was followed in respect of Killingholme in November 1994 and March 1995.
26. Thus the link between the dispute which NP wishes to be referred to arbitration and the jurisdiction of the Director under clause 14.7 of the Master Agreement is the Transmission Licence. In relation to the contractual obligation to pay the connection charges the Transmission Licence fixes the extent of any permissible increase under Charging Rule 2.1. In the case of the jurisdiction under clause 14.7 it is the Transmission Licence which imposes the obligation to furnish the statements in accordance with which the connection charges must be “calculated strictly” if NGC is not to be liable to repay any overcharge.
27. Plainly the jurisdiction of the arbitrator and the Director may overlap if there is an allegation of overcharging. But in terms of clause 26 of the Master Agreement the question is whether clause 14.7 is an express statement to the contrary so as to exclude the reference of the dispute to arbitration. In my view it is not. It is not “contrary” and, in so far as it might be inconsistent, is not “express”.
28. As I have already pointed out in connection with Condition 10C.3 of the Transmission Licence the Director’s primary function is to police the privatised electricity industry. As such his functions are primarily in the field of public law. It would be surprising, though not impossible, if he were responsible for the resolution of contractual disputes between NGC and a generator such as NP. To my mind this is confirmed by the condition for repayment imposed by clause 14.7 that the overcharge shall be the result of failing to calculate the connection charges “strictly in accordance with the terms of the” Condition 10 statements. This is not the language of contractual entitlement at all. The purpose of the Statements, as shown by the terms of Condition 10.1, is to enable a person, before he enters into an agreement with NGC, to estimate with some degree of accuracy the scale of charges to which he would become liable if he did. The object of clause 14.7 is to enable the Director, in a regulatory capacity, to ensure that the licensee lives up to his forecast, seemingly irrespective of the entitlement of the licensee under the contract concluded in reliance on it. The contractual entitlement, as Charging Rule 2.1 shows, is limited by the licence, not the statement.
29. As in the case of s.25 of the Act Clause 14.7 may only be activated by the User. It would not, in my view, be right to regard this clause as ousting the arbitrator’s jurisdiction when it provides no remedy for one of the parties to the Supplemental Agreement. It is no answer to this objection to point to the provisions of Clause 14.5 requiring payment without set-off as indicating that it will always be the user who seeks to raise a dispute as to the proper contractual connection charge. First, that clause itself enables the set-off of the amount of a final award. Second, it is not impossible for the matter in dispute to be whether the connection charge is high enough. Obviously the user would not raise that question with the Director under Clause 14.7; if NGC sought to do so the Director would be bound to disclaim any jurisdiction pursuant to Clause 14.7.
30. Reliance was also placed on the provisions of Clause 15.4 as indicating that the parties intended that Clause 14.7 should be the only remedy. I disagree. The right to arbitrate is one of the rights conferred by the Master Agreement and the Supplemental Agreement. Moreover it is one which is procedural and therefore expressly excluded from the operation of that sub-clause.
31. Finally it is relevant to consider the result if the user, considering that he has been overcharged, refuses to pay. As NP pointed out in argument such dispute is bound to end up before an arbitrator. NGC could not themselves operate the provisions of Clause 14.7, Clause 26 would prevent them from suing for the money and Clause 17.2 would prevent NGC “denegising” the power station without the user having the right to have the dispute referred to arbitration in accordance with that clause. If the user can, in practice, compel arbitration of a claim to overcharging by NGC then there is no commercial sense in construing clauses 14.7 and 26 as compelling him first to complain to the Director under clause 14.7. As the judge pointed out each party relied on a presumption against finding overlapping jurisdictions for the resolution of a particular kind of dispute. NGC seeks to give effect to that presumption by excluding from the ambit of clause 26 complaints by a user of overcharging by NGC. But, as is shown by the inevitability of arbitration if the user merely refuses to pay, the solution advanced by NGC has the opposite result. To my mind the proper application of the presumption is to recognise, as the judge did, that the provisions of Clause 14.7 are regulatory and directed to ensuring the observance of the public law aspects of connection charges whilst Clause 26 is concerned with the resolution of contractual disputes concerning such charges between the parties (of whom the Director is not one) to the Master Agreement and the Supplemental Agreement. The issues and purposes of Clauses 14.7 and 26 are not sufficiently similar for the presumption to apply to them.

32. For these and the other reasons given by Potter LJ I also conclude that the arbitrator has the jurisdiction to determine the questions of overcharging referred to him by NP. With regard to the questions of issue estoppel and discretion I agree with the conclusions of Potter LJ and his reasons for such conclusions. I too would dismiss this appeal.

**LORD JUSTICE MILLETT:** I agree with both judgments.

**ORDER:** Appeal dismissed with costs. Leave to appeal to the House of Lords refused. (Order not part of approved judgment)

MR A GRABINER and MR A GRIFFITHS (Instructed by Messrs Freshfields, London EC4Y 1HS) appeared on behalf of the Appellant  
MR S BOYD QC and MR D MILDEN (Instructed by Messrs Curtis Davis Garrand, Staines, Middx TW19 7LN) appeared on behalf of the Respondent