**JUDGMENT : His Honour Judge Bowsher :** 27th November 2002. TCC.

1. This action is brought to enforce an award of an adjudicator under the Housing Grants, Construction and Regeneration Act 1996 (the Act).

2. By a decision made on the 24th September 2002 the adjudicator, Mr. Gwyn Peredur Owen, decided that the defendants should pay the claimants £7,451,320, plus VAT. The claimants apply for summary judgment in that amount. The defendants apply for summary judgment on their counterclaim for declarations:
   *"(a) That no relevant construction contract was concluded between the parties within the meaning of and for the purposes of Sections 107 and 108 of the Act.*
   *(b) That no relevant or adjudicable dispute was in existence between the parties at the date of the Notice of Adjudication.*
   *(c) That the provisions of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 were not applicable to the Primary Claim made by the Claimant in the reference."*

3. The agreement between the parties contains no provision for adjudication, and so if there is any provision for adjudication it is under the statutory scheme.

4. The defendant (referred to as DML- the initials apparently refer to Devonport Management Ltd.) owns and occupies Devonport Royal Dockyard. In 1997 the Ministry of Defence engaged DML, effectively as a main contractor, to upgrade the dockyard.

5. DML retained the claimants (Carillion, then Tarmac) as subcontractor to upgrade No. 9 dock and provide new buildings with associated infrastructure. The contract was contained in two documents, a form of Sub-Contract Agreement and an Alliance Agreement, both dated the 10th March 1999.

6. Those agreements provided that:
   a. *The Alliance Agreement took precedence over the subcontract and wholly superseded many of its important provisions;*
   b. *Carillion was to be paid its "Actual Costs", plus accruals, and a fee. The Actual Cost was determined in accordance with Appendix C.*
   c. *A "Gainshare" agreement arrangement was made by which any overspend of "Target Cost" should be shared by DML and Carillion (60 per cent. and 40 per cent. respectively).*
   d. *The target cost, originally £56 million, was to be adjusted in certain circumstances.*
   e. *An "Alliance Board" was set up comprising two representatives of the parties, with "full authority" to act. It had "power and authority to make decisions".*

7. Carillion proceeded with their work, but the cost went substantially above the Target Cost. This was accepted as not being the fault of Carillion because the Target Cost was amended six times between September 2000 and December 2001 up to £100 million.

8. Discussions took place in 2001 with a view to revising the payment provisions. A meeting of the Alliance Board took place on the 30th October 2001. Carillion say, and the adjudicator decided, that at that meeting there was a binding agreement reached whereby the payment basis was to become cost reimbursable without the "Gainshare" restriction. The parties could not agree on the fee but did agree to leave it to the Star Chamber, to which differences were to be brought. The Star Chamber did not agree on the level of fee to be allowed. It has never been agreed.

9. If the adjudicator had jurisdiction then his decision would be binding on the parties pursuant to s.108(3) of the Act until the dispute is finally determined by legal proceedings, arbitration or agreement. But DML submit that the adjudicator does not have power to decide his own jurisdiction and the question whether there was an oral agreement is a step in deciding his jurisdiction, though not decisive.

10. After the alleged oral agreement Carillion submitted its Application No. 33 on the 16th April 2002 to DML in the following terms:
    *"Application No. 33 in respect of Costs and Fee following achievement of Milestone 33 £121,522,511.29*
    *Less previously certified £110,000,000.00 Total (excl VAT) £11,522,511.29."*

    *That was questioned by DML. Nothing was paid on that application. On earlier applications DML had paid £110 million.*

11. Carillion gave notice of adjudication on the 6th August 2002 seeking the sum outstanding on Application No. 33.

12. Mr. Owen was duly appointed the adjudicator on the 12th August 2002. Following exchange of documents, witness statements and expert reports, a hearing being dispensed with by consent, Mr. Owen issued his decision on the 24th September 2002 deciding that (i) a binding agreement was concluded on the 30th October 2001, that the project would become cost reimbursable; (ii) DML should pay £7,451,320, plus VAT, within 18 days; (iii) DML should pay Mr. Owen's fees of £13,942.92, plus VAT.

13. That decision has not been honoured. DML contend that the decision is not binding on them because the adjudicator had no jurisdiction to make it. For DML it is submitted that both the application for summary judgment and the claim will fail if the following two issues are resolved against Carillion:

(i) whether, as Carillion contend, an oral agreement that varies the term of a written construction contract is not required to be made or evidenced in writing, such that a statutorily appointed adjudicator has jurisdiction to determine any dispute relative to that oral agreement, including the existence of such an agreement and any claim said to arise pursuant to that oral agreement;

(ii) whether, as DML contend, the alleged oral agreement was not made or evidenced in writing, irrespective of whether an oral agreement was in fact concluded between the parties.

The submission continues:
*"Carillion can only be entitled to enforce the adjudicator's decision if the adjudicator had jurisdiction to make that decision. By Section 108(1) of the 1996 Act only a party to "a construction contract' has the right to refer disputes to adjudication. The adjudicator cannot, in the absence of agreement of the parties, decide his own jurisdiction:* ***Project Consultancy Group v. The Trustees of the Gray Trust*** *[1999] B.L.R.377 at 380."*

15. For the purposes of the relevant part of the Act a construction agreement must be in writing.

16. Section 107 of the Act is in the following terms:

*"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.*
*"The expressions "agreement', "agree' and "agreed' shall be construed accordingly.*
*(2) There is an agreement in writing -*
*(a) if the agreement is made in writing (whether or not it is signed by the parties),*
*(b) if the agreement is made by exchange of communications in writing, or*
*(c) if the agreement is evidenced in writing.*
*(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*
*(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.*
*(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged."*

That section is based on s.5 of the Arbitration Act 1996 and sub-sections (2), (3) and (4) of section 107 of the Act are identical to corresponding sub- sections of s.5 of the Arbitration Act 1996.

17. Counsel for DML summarises DML's case by saying:
*(1) no oral agreement was reached on the 30th October 2001 and/or DML have a real prospect of so establishing at trial; (2) even if there was an oral agreement it had to be evidenced in writing to confer jurisdiction on the adjudicator; (3) the alleged oral agreement was not evidenced in writing and Carillion have no real prospect of so establishing, and, accordingly, the application and the claim ought to be dismissed and the declarations sought at paras.4.8.1, 4.8.3 and 4.8.4 of the counterclaim granted. Alternatively, there is a real prospect of DML establishing at trial that the alleged oral agreement was not evidenced in writing.*

18. Counsel for DML continue:
*"If it is necessary to go further, DML also contend that they have a real prospect of establishing at trial:*
*(i) That all the necessary or essential terms have not been agreed and therefore, necessarily were not, but were required to be evidenced in writing.*
*(ii) That no dispute had arisen in relation to the alleged agreement as at 6th August 2002, when Carillion served their Notice to Refer."*

19. The dispute about the meeting of the 30th October 2001 appears to be that (a) Carillion says that it was agreed that their costs would be reimbursable with the issue of the fee to be referred to the Star Chamber, and (b) DML says that it was agreed that cost reimbursable would be recommended to the Star Chamber, leaving it to the Star Chamber to decide.

20. Counsel for both parties agree that, on an application for summary judgment, that issue cannot finally be determined but, nonetheless, each urge that their client's view is to be preferred. Each party refers to indications in the documents, but there is no contemporaneous note of the meeting supporting Carillion's case.

21. Some reliance has been placed on a meeting between the parties on the 12th December 2001 and subsequent correspondence. There was nothing in those letters about an agreement of the 30th October 2001. On the 14th December 2001 DML recorded that at the meeting of the 12th December 2001 it had been agreed that:
*"The result of the Star Chamber meeting was that (subject to suitable agreement on fee) the Project would become cost reimbursable, save as to the agreement of a fair and reasonable fee (overhead and profit)."*

    It is not suggested that there was ever any agreement on the fee. On the 7th January 2002 Carillion wrote:
*"We are pleased to note your confirmation that the Project would become cost reimbursable save as to the agreement of a fair and reasonable fee for overhead and profit."*

    On the 16th January 2002 DML replied:
*"We refute your statement that we have confirmed that the contract would become cost reimbursable and that the outstanding agreement between us was subject to a determination of a fair and reasonable fee to be paid for the execution of the work."*

    None of this provides any evidence of an unconditional agreement made on the 30th October 2001.

22. Assuming that there were an oral agreement to the effect found by the adjudicator, would it be, within the meaning of the Act, an agreement in writing? Section 107 provides that an oral agreement may be treated as an agreement in writing (a) if the agreement is evidenced in writing (s.107(2)(c)); or (b) where parties agree otherwise than in writing by reference to terms that are in writing, they make an agreement in writing (s.107(3)).

23. Section 107(3) has to be read in conjunction with the whole of the first section of s.107(1) of the Act:
*"The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing."*

24. Counsel for DML submit that the provision relating to "any other agreement" in s.107(1) is consistent with the general rule of contract, that a contract required by law to be made or evidenced in writing may only be varied in writing: **Chitty on Contracts**, 28th edition, vol.1, para.23-033.

25. What is meant by the requirement that an oral agreement should be evidenced in writing was considered by the Court of Appeal in **R.J.T. Consulting v. D.M. Engineering** [2002] B.L.R.217. I agree with Mr. Furst Q.C. that that decision is authority for the following propositions, per Ward and Walker L.J.J.: (a) a contract is not evidenced in writing merely because there are documents which indicate the existence of a contract; (b) all the terms of the oral agreement must be evidenced in writing. And per Auld L.J.J., (c) the material terms of the agreement must be evidenced in writing.

26. The judgment of Auld L.J. differs in terms from the judgments of Ward and Walker L.J.J., but it is unnecessary for the purpose of the case before me to consider whether Auld L.J. was actually differing from his brother judges or merely explaining and elaborating on what they said. The difference, if any, is immaterial for my purpose in this case. The whole point of the alleged agreement was that the contract would become cost reimbursable. Within the context of Auld L.J's judgment, it was a material term and therefore must be evidenced in writing.

27. I do not propose to go through all the documents to which I have been referred. It is sufficient to say that those documents (a) do evidence the fact that there was a discussion whether the contract should become cost reimbursable and about the fee; (b) do not evidence that there was an oral contract made in any terms because the documents are conflicting, so the documents do not even indicate the existence of an

unconditional contract; (c) do not evidence any agreement as to the definition of "cost reimbursable"; (d) do not evidence any agreement about the fee.

28. So far as I am aware, the words "cost reimbursable" are not terms of art sufficiently clear to be enforceable without further definition.

29. It is worth repeating my words in **Grovedeck Ltd. v. Capital Demolition Ltd**. [2000] B.L.R.181, approved by both Ward L.J. and Walker L.J. in **R.J.T. v. D.M. Engineering**:
*"Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by Adjudicators under the Act ..."*

As Walker L.J. said:
*"No doubt the general purpose of Part II of the 1996 Act is to facilitate and encourage the process of adjudication. But it is intended to be a swift and summary process, as is apparent from the time limits in section 108(2). Parliament evidently decided (as Judge Bowsher noted in the passage cited by Ward L.J.) that it was inappropriate for an Adjudicator to have to deal with the disputes which often arise as to the terms of an oral contract."*

Those considerations are particularly important here where the adjudicator formed a view about the disputed oral agreement vital to his decision on the basis of conflicting documents without hearing oral evidence though, in fairness to him, I stress that the parties agreed that there should be no hearing.

30. I find that the agreement found by the adjudicator was not evidenced in writing within the meaning of s.107(2)(c).

31. I turn to consider s.107(3):
*"Where parties agree otherwise than in writing by reference to terms that are in writing they make an agreement in writing."*

32. Mr. Furst pointed out that this sub-section reproduces the words of section 5, sub-section (3) of the Arbitration Act 1996. The provision in the Arbitration Act refers to the requirement that an arbitration agreement must be in writing. The effect of the provision in the Arbitration Act is that if, in an oral agreement for a project, the parties agree on vital terms like price and performance and make that agreement orally, and also agree that the contract shall be on the terms of some standard form of agreement, then an arbitration agreement contained in those standard terms would satisfy the requirement of an agreement in writing. One can understand that in the context of the Arbitration Act in relation to standard terms where a provision for arbitration is regarded as a separate agreement. But standard terms of any construction agreement would not include vital terms, like definition of work to be done, price, time and so on, so I am not sure what situation is envisaged by s.107(3), unless it be a rare situation where party A approaches party B with a draft written agreement containing all the vital terms, they read it, and then shake hands on it as an agreed deal. But that might seem to be covered by s.107(2)(a). For the claimant, it is submitted that s.107(3) covers the present case. It is said that the oral agreement was made "by reference to terms that are in writing". But the Act, like the Arbitration Act, uses the words "by reference to terms that are in writing", not "by reference to a previous agreement that is in writing". If the claimants' construction were to be adopted, the intention of the Act that an adjudicator should not have to decide on the existence and terms of oral contracts would be defeated. I am satisfied that the Act does not provide for adjudication in relation to an alleged fundamental variation of a construction contract made orally and without writing. Any contention to the contrary is directly inconsistent with s.107(1) of the Act.

33. Against that view, counsel for the claimants cite a passage from a judgment of His Honour Judge Thornton Q.C., supported by the Court of Appeal in a later case. His Honour Judge Thornton Q.C. said, in **R.G. Carter Ltd. v. Edmund Nuttall Ltd.** (unreported) 21st June 2000:
*"Thus so long as it is either established or agreed that there is a contract in existence between the parties, that it is a construction contract ... any other dispute as to the terms of the construction contract is as much a dispute arising under the contract as would be a dispute as to the working through of any terms as to the valuation machinery."*

The Court of Appeal in **R.J.T. Consulting v. D.M. Engineering** [2002] 5 B.L.R.217 supported that judgment:
*"Once jurisdiction to refer the matter to arbitration was established the Judge held, and in my judgment rightly held, that it was proper within that adjudication to decide whether or not a particular term had been incorporated into the*

*contract. The scheme would be emasculated if a party were able to deprive the Adjudicator of his power to decide simply by putting up an argument that some term was or was not incorporated into an agreement that otherwise was accepted to be in writing."*

34. It is a simple proposition, and easy to accept, that once a construction agreement in writing is before an adjudicator he has the jurisdiction to construe its express terms and to decide what, if any, terms are to be implied or incorporated by reference. But it is quite a different thing to suggest that once a construction agreement is before an adjudicator he has jurisdiction to decide on the existence of an oral agreement not evidenced in writing just because it follows and amends the written agreement. I am not considering what in the construction industry would come under the normal heading of "Variations made pursuant to a term of the contract". What is in issue is an alleged oral agreement that radically changed the written agreement (if it was made). I do not believe that the citations from the judgments of Judge Thornton and the Court of Appeal were intended to or did apply to the sort of agreement now under consideration.

35. I therefore find that the adjudicator did not have jurisdiction to enter on the adjudication. In saying that, I express no view as to whether there was or was not an oral agreement in the terms alleged. To determine that question requires oral evidence and cross-examination.

36. There is a further point taken on jurisdiction, namely whether a relevant or adjudicable dispute in relation to the claim now sought to be enforced had arisen by the 6th August 2002, the date of Carillion's notice of adjudication.

37. DML say that Carillion arguably asserted the claim advanced in the adjudication by its letter dated the 5th July 2002, received by DML on the 9th July 2002. DML contend that this letter did not assert that reliance was made on an agreement allegedly reached on the 30th October 2001, and nor did Application 33 on its face suggest that it was presented in reliance on any oral agreement. DML say that there then followed an exchange of correspondence between the parties in which DML sought clarification of and further information in relation to the claims made against it, and time in which to consider those claims. Carillion, it is said, nevertheless served its notice on the 6th August 2002 without providing the clarification, information and time requested by DML, and therefore without affording DML any proper opportunity of considering and accepting or rejecting the claims first made on the 5th July 2002.

38. Carillion say that Application 33 was disputed by DML by letter of the 7th May 2002. Application 33 was in very general terms, as set out in para.10 of this judgment. The letter on the 7th May 2002 was in the following terms:

*"1. DML are not yet in receipt of a Formal Cost Certificate to allow a satisfactory audit of cost. On receipt of the formal cost certificate DML shall be able to commence suitable audit.*

*2. To date we have been unable to agree the method of evaluation of the Target Cost. Until we reach agreement on the method it is not possible to evaluate what the sums are payable under the Alliance Agreement. It should be noted that we await the issue of the findings of the independent review, the result of which shall be published in the next 10 days.*

*3. It is, in DML's opinion, not appropriate to certify any further sums on account bearing in mind the proximity of Completion, and those issues detailed above.*

*"We trust you will appreciate our position at this time and await the information at reference 1 above to assist us in any future calculation of sums due."*

At that point DML knew that Application 33 was in respect of reaching milestone 33. It was not disputed that milestone 33 had been reached, but it was said that DML did not have enough information to know what was the appropriate amount to pay, and therefore no payment would be made until that further information was received.

39. Carillion wrote a letter giving them more detail on the 8th May 2002, and the parties met on the 9th May 2002. On the 14th May 2002 Carillion wrote giving yet more detail, and saying:

*"We appear to be in dispute on this matter."*

On the 16th May 2002 DML responded in some detail and referred again to the proximity to completion and "costs that remain outstanding". On the 17th May 2002 DML suggested a meeting with the Alliance Board, but asked for "an evaluation of your entitlement before the meeting". After further letters there was a meeting with the Alliance Board on the 11th June 2002, and Carillion wrote a position paper about that

meeting, which was sent to DML on the 12th June 2002. That position paper made no reference to any agreement of the 30th October 2001. DML also produced a position paper which also did not mention any agreement of the 30th October 2001.

40. On the 5th July 2002 Carillion wrote to DML a letter that did include reference to a meeting on the 30th October 2001. It is a long letter, ending by suggesting adjudication, but I reproduce only one paragraph:

*"As you know, our primary position is that following a meeting on 30 October 2001 the Alliance Board recommended to the Star Chamber that the project become cost reimbursable with the Star Chamber to resolve the level of the fee. At the subsequent Star Chamber meeting on 1 November 2001 this position was accepted although no agreement on fee was reached. Consequently, the original Subcontract/Alliance Agreement payment regime was modified, alternatively replaced by a separate agreement, such that the project became cost reimbursable (which reflected the previous payment history) albeit that the level of fee was to be agreed or determined separately. This agreement was evidenced in writing by, amongst other documents, DML's letter of 14 December 2001."*

It may be said that that statement of the primary position does not support the case now put forward by Carillion, but at least at this stage DML knew that Carillion were making a claim based on a meeting of the 30th October 2001.

41. On the 11th July 2002 DML asked for further time to respond to the complicated issues raised in the letter of the 5th July 2002:

*"... some of which in our opinion have been raised for the first time."*

Carillion granted them until the 18th July 2002.

42. DML replied that they wanted to take professional advice, and on the 12th July 2002 they asked for a further 28 days. On the 15th July 2002 Carillion refused that extra time, and on the 17th July 2002 DML replied:

*"Your letter imposes an unreasonable timetable and with the best will in the world 5 days is too short a time in which for us to respond. Further, the letter, as we understand it, sets out a claim that the detailed contractual provisions for payment in the Alliance Agreement have now been replaced as a result of agreements made orally with the consequence that we are required to pay on a cost reimbursable basis. We need to take professional advice just as you have clearly done."*

43. On the 25th July 2002 Carillion replied with another long letter, in which they said:

*"There is clearly a dispute between us as to our entitlement in relation to Milestone 33."*

And they also wrote:

*"Our case is as stated in our letter of 5 July 2002. The Alliance Board agreed on 30 October 2002 ..."*

And I interject that is plainly a mistyping for 2001:

*"... that the project should become cost reimbursable and recommended this to the Star Chamber who were asked to resolve the level of fee. As you know the Star Chamber was unable to resolve the level of fee but accepted the position reached by the Alliance Board at their meeting on 1 November 2001. Our case is that the agreement was reached on 30 October 2001, or at the latest on 1 November 2001 and is evidenced in writing by, amongst other documents, your letter of 14 December 2001. It is not our case that further ratification and/or a formal document was required and we are surprised you imagine this could be part of our case. Your current failure to formally recognise our entitlement to reimbursement of our costs, by way of amendment to the Target Cost, beyond Amendment No. 6 in December 2001 has resulted in a refusal to pay any sum against Milestone 33."*

44. By letters of the 26th and 29th July 2002 Carillion threatened adjudication proceedings.

45. On the 1st August 2002 DML responded, heralding the jurisdictional point of no dispute now put forward to the court. Their long letter included the following:

*"However, we also point out that before any such adjudication can take place, you will need to establish that there is in fact a dispute in existence to be referred to the adjudicator. Unless this can be clarified there is a significant danger that issues may not be addressed and/or that jurisdictional disputes may arise - something which we think that both parties would prefer to avoid. That is why we have sought to reach a clarification of what it is that you consider to be in dispute. Your letter of 25 July does not provide such clarification and does not enable us to identify what it is that might be in dispute between us.*

*"It seems from your letters that you pursue two basic themes. The first of these is that you say there was an agreement at some time in October or November 2001 to vary the payment terms of the contracts between us. As to this agreement, we suggest that if you are to avoid any jurisdictional dispute you will need at the very least to identify for us:*

1. *Why you say there was such an agreement;*
2. *What you say was agreed;*
3. *Whether such agreement was subject to any further ratification; and*
4. *Whether such agreement was subject to the preparation and execution of further formal documents.*

*Until you identify these matters, we cannot take advice on the question whether the agreement that you allege is a fact or not. If this matter were simple and if your allegations were free from doubt and confusion, we suggest that you would be able to identify these matters very quickly. Your current correspondence on this issue does not make any steps towards promoting the spirit of co-operation which the parties have sought to foster hitherto."*

Then later in the letter we read:

*"... the repeated assertion that a dispute exists is no more than an assertion designed to put commercial pressure on us by means of the veiled threat of an adjudication. Put briefly, you will need to identify why it is that the further expenditure by you listed in support of your Application for Payment No. 33 entitles you to further payment from us, rather than just allege the fact of expenditure by you and take the fact that we have not yet paid you in turn as evidencing a crystallised dispute. If you explain this point, and we agree with you and we consider we are obliged to pay, we shall do so."*

46. The notice of adjudication followed on the 6th August 2002 without Carillion dealing further with the points raised by DML.

47. Mr. Furst, for DML, says that although there had been a refusal to pay on Application 33, subject to the giving of further information, it was not until the 25th July 2002 that Carillion put forward anything like the basis on which they now claim, and on the 1st August 2002 DML asked for further information that was not given before the notice of adjudication. Until that information was given Carillion could not know whether or what to pay.

48. For guidance on whether there was a dispute, I turn to decisions made in arbitration. Those decisions were not cited to me and, for that reason, I am content to treat this part of my judgment as provisional if counsel should wish to address me further on those decisions. However, whatever my decision on this point, it will not affect the overall result having regard to the finding I have already made on lack of jurisdiction.

49. It has been suggested that if a claim is made and is simply ignored there is a dispute entitling the claimant to start arbitration proceedings. In **Tradax International S.A. v. Cerrahogullari T.A.S** [1981] 2 Ll.Rep.169 at 163 Mr. Justice Kerr said:

*"Where an arbitration clause contains a time limit barring all claims unless an arbitrator is appointed within the limited time, it seems to me that the time limit can only be ignored on the ground that there is no dispute between the parties if the claim has been admitted to be due and payable. Such an admission would in effect amount to an agreement to pay the claim, and there would then clearly be no further basis for referring it to arbitration or treating it as time barred if no arbitrator is appointed. But if as here, a claim is made and is neither admitted nor disputed but simply ignored then I think that a time limit clearly applies and that the claimant is obliged (subject to any possible extension of time) to appoint an arbitrator within the limited time. The fallacy in the plaintiff's argument can be seen at once if one considers what would have been the position if the plaintiffs had in fact purported to appoint Mr. Barclay as their arbitrator within the time limit of nine months. They could clearly have done so and indeed any commercial lawyer or businessman would say that that is what they should have done under the clause to enforce their claim. Arbitrators are appointed every day by claimants who believe-- rightly or wrongly--that the claim is indisputable. However on the plaintiff's own argument Mr. Barclay would have had no jurisdiction since there was then-- as they now say--no "dispute' to which the arbitration clause could have applied. In my view this argument is obviously unsustainable."*

50. In **Ellerine Bros. (Pty.) Ltd. v. Klinger** [1982] 1 W.L.R.1375 at 1381 Lord Justice Templeman said, in reference to s.1(1) of the Arbitration Act 1975:

*"... by the light of nature it seems to me that section 1(1) is not limited either in content or subject matter; that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a*

*dispute. It is not necessary for a dispute to arise that the defendant should write back and say 'I don't agree'. If on analysis what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."*

Then at p.1383 Lord Justice Templeman quoted the statement of Mr. Justice Kerr, to which I have referred, and said:

*"... as I understand it, the judge is saying--and I agree--that silence does not mean consent. If you can point as was the case in **London & North Western & Great Western Joint Railway Cos. v. J.H. Billington Limited** [1899] A.C.79, to an express or implied agreement to pay a particular sum then there is no dispute and the action can proceed. But the fact that the plaintiffs make certain claims which if disputed would be referable to arbitration and the fact that the defendant then does nothing--he does not admit the claim, he merely continues a policy of masterly inactivity-- does not mean that there is no dispute. There is a dispute until the defendant admits that the sum is due and payable as Kerr J. said in the **Tradax** case."*

51. Now this present case is obviously different. DML did not just ignore Application 33, they asked for further information. That is an every day occurrence in the construction industry and if every request for information was regarded as a dispute leading to adjudication there would not be enough adjudicators to go round.

52. The decisions in **Tradax** and **Ellerine** were considered by His Honour Judge Gilliland Q.C., sitting as an Official Referee, in **Cruden Construction Ltd. v. Commission for the New Towns** [1995] 2 Ll.Rep.387 at 393. He said:

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

*"... there is a dispute until the defendant admits that a sum is due and payable, as Kerr J. said in the **Tradax** case.'*

*"The learned Lord Justice was not in my judgment in using those words laying down a general principle of construction and those words do in my judgment have to be read subject to what the learned Lord Justice had said earlier at p.1381 where he said:*

> *"... if on analysis what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement then the applicant is entitled to insist on arbitration instead of litigation.' "*

Judge Gilliland continued:

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

> *"I accordingly hold that no dispute or difference existed between the plaintiff and the defendant within the meaning of cl.35 when the notice of arbitration was served and accordingly that notice was in my judgment ineffective to commence a valid arbitration."*

53. I entirely agree with Judge Gilliland's statement of principle and with his application of principle to the facts of that case, but how should the principle be applied to the facts of this case? It would be most undesirable if a practice grew up of examining in minute detail the terms of letters between the parties to ascertain the precise details of any dispute there set out, and then compare those details with the details of what was put before the adjudicator.

    I can see that some lawyers might be tempted to take that course. A broader approach is required. Application No. 33 was made and it was not paid. Is that enough to make a dispute? In one sense there was a dispute. The paying party was denying that payment was due at least until some verification was forthcoming. But DML were not denying the claim outright, nor were they ignoring it; they were asking for clarification. The best approach to clarification that they got was so close in time to the notice of adjudication that they had no opportunity to respond to it. The conduct of the adjudication indicates that, if given a reasonable opportunity to respond, there would have been a dispute, but that is not the point.

54. This is not as plain a case as the one before Judge Gilliland, but I take the view that, in the words of Judge Gilliland, this is a case where DML at the date of the adjudication notice:

    *"... has not in fact been told and is unaware in what respects it is alleged to have broken his obligations."*

55. I therefore find that on this additional ground the adjudicator was lacking in jurisdiction. I have considerable sympathy with the adjudicator on this point. He could only have discovered lack of jurisdiction by a great deal of reading, which could only have taken place after he had embarked on the adjudication and, in any event, he had no power to decide his jurisdiction.

56. For all these reasons, I reject the claimant's application for summary judgment. In my judgment, the declarations prayed in the counterclaim are unnecessary, and I do not make them. I express no view as to what might be the final outcome of any trial on the merits.

57. Subject to further argument, it seems to me that this action as a whole ought to be dismissed. This is an action founded on the adjudicator's decision, not on the underlying facts. Dismissal of this action would not prevent a further action being based on those underlying facts.

**Mr. AKENHEAD**: I *assume Mr. Furst will say something before me?*

**JUDGE BOWSHER**: *I was assuming that too.*

**Mr. AKENHEAD**: *Unless I have heard wrong!*

**Mr. FURST:** *My Lord, the obvious application is for costs, but I just want to take instructions about the question of the counterclaim in the light of your Lordship's last observations. Your Lordship found it was unnecessary, and the query in my mind is therefore should we consent to have that dismissed or, since your Lordship has not expressly dismissed it, it remains live. So I wonder if your Lordship would just give me five minutes for that, and I suspect there are one or two other points that we might usefully clarify.*

**JUDGE BOWSHER**: *Yes, very well. I take it that you do ask for the application to be dismissed?*

**Mr. FURST**: My Lord, yes, and for the action ----

**JUDGE BOWSHER**: *And I take it that you ask for the action to be dismissed, and Mr. Akenhead may or may not object to that, and I do not know whether counsel for either party wish to direct further argument on the point which I suggest that they might wish to do. Then there is the question of costs.*

*You have not had advance notice of the judgment, and I know that nowadays counsel are not used to dealing with hearing judgments read out, as used to be done in the old days, and making up their minds instantly.*

*So I will rise to give you time. Shall we say five past eleven?*

**Mr. FURST:** *And if we are ready earlier we will let your Lordship know.*

**JUDGE BOWSHER:** *If you are ready before then let me know, and if you are not ask for more time. I have plenty of other things to do.* (Short adjournment)

**Mr. FURST:** *My Lord, I am grateful for that time. We have managed to sort ourselves out. The short answer is that we do ask for the application and the action to be dismissed. So far as the counterclaim is concerned, we would ask for leave to discontinue the counterclaim.*

**JUDGE BOWSHER**: *You wish to continue it?*

**Mr. FURST**: *Discontinue it--leave to discontinue the counterclaim.*

**JUDGE BOWSHER**: *Leave to discontinue it, yes.*

**Mr. AKENHEAD**: *That is not opposed.*

**JUDGE BOWSHER**: *Not opposed, right.*

**Mr. FURST:** *That brings us to costs, and of course we ask for costs of the ----*

**JUDGE BOWSHER**: *Before we go on to costs, let me just formulate it in terms of an order.*

1. *This order to be drawn up and served by the solicitors for the claimants.*
2. *Application dismissed.*
3. *Leave to defendants to discontinue counterclaim.*
4. *--what about the action?*

**Mr. FURST:** *The action should be dismissed.*

**JUDGE BOWSHER**: *Very well; action dismissed. 5, costs?*

**Mr. FURST:** *Costs, yes.*

**JUDGE BOWSHER:** *Liability, you cannot dispute that, can you?*

**Mr. AKENHEAD:** *No. I accept there should be an order for costs against my clients. The only question would be as to whether your Lordship should assess those costs or, since it is the whole action effectively that is being dismissed, the costs should be left to be assessed.*

**JUDGE BOWSHER**: *Yes. The defendants to pay ----*

**Mr. FURST:** *My Lord, the claimants.*

**JUDGE BOWSHER**: *I beg your pardon, an easy mistake to make.*

**Mr. AKENHEAD**: *I was not going to put it right!*

**JUDGE BOWSHER:** *The claimants to pay the defendants' costs; no order as to costs on counterclaim. I do not think the counterclaim actually adds anything at all in terms of the amount of costs. And 6, assessment of costs.*

*First of all, should they be assessed by me summarily or should they be sent off to the costs judge?*

**Mr. FURST:** *My Lord, obviously the usual order for a one-day hearing is the costs of the application should be assessed. Since the action is a little bit more than just the application, although there are costs associated with the action as opposed to the application, we would urge your Lordship to assess them, simply from the point of view of saving the parties time and costs.*

*Both parties did in fact put in a costs assessment on the basis of the action as well as the application, and, my Lord, I would have thought that the points to be taken are fairly short and to the point. I do not know exactly what points have been taken, and perhaps your Lordship will get a better idea if you hear my learned friend's objections, if any, to the costs bill. But it would clearly be quicker and easier if it was dealt with here and now rather than going off for detailed assessment.*

*Can I just check your Lordship does have our, so to speak, latest--both parties updated them in the light of what has happened. There should be one ----*

**JUDGE BOWSHER**: *I have certainly got yours. In fact I have yours by e-mail and in hard copy, which came today.*

**Mr. FURST:** *Yes, one of the costs of the entire action, and one of the costs of the application.*

**JUDGE BOWSHER:** *Yes, that is right, I have got that.*

**Mr. FURST**: *And the equivalent, I think, from Carillion.*

**JUDGE BOWSHER:** *I was just looking and trying to remind myself, whether I have not got an older one of yours. I do not think I have one from the claimants. (After a pause): Yes, I do have the claimants'.*

**Mr. FURST:** *My Lord, may I leave issues on the question of costs to my learned Junior.*

**JUDGE BOWSHER:** *Yes. Mr. Akenhead?*

**Mr. AKENHEAD:** *My Lord, what we are concerned about is the disparity between the two bills, or sets of bills. Although they are not far apart vis-a-vis the application, my clients' application and action costs total £43,955, whilst Messrs. DML and their solicitors' bill for the whole action is something like £6,000, and their costs of the application are £47,000.*

*My Lord, the differences are in the rates charged for the--I do not want to get too involved in the merits of the point to begin with, but if one takes Herbert Smith's statement of costs for the whole action--it is probably simpler to look at it there--the rates they have charged are £350 for grade A partner--I would have thought that all partners are grade A at Herbert Smith--but the other three gentlemen, two assistants and the court clerk, at £225 an hour, compared with Messrs. Masons, whose charge for a partner is £225 an hour, senior associate solicitor £170 an hour, and a more junior but qualified solicitor £135 an hour.*

*So we have major differences between the parties on that, and these sort of differences may, frankly, be better dealt with by the costs judge who has particular experience. Of course one is comparing a city firm, a London firm, with Masons in Manchester, who have been handling this, so there may be what one might call a geographical difference which may be reflected in those rates.*

*The other place where there are major differences between the parties is the amount of hours spent on what are called attendance on documents. On p.2 of Messrs. Herbert Smith there are some 95 or 96 hours claimed, attendance on documents--I think that means going through documents--compared with Carillion, who had, so to speak, more of the conduct of this, who have claimed something-- not quite a third of that, but 37-and-a-half hours, and these are differences which we would suggest are not obviously explicable, and, rather than your Lordship hearing summarily from us why we are probably right and the other side are probably wrong to charge so much time at much higher rates, apart from it being possibly unseemly to do so, it may, we would suggest, be better if that were left to the costs judge. Those are the reasons we would suggest that the costs be assessed.*

*One could not oppose some costs account be paid of some sum, in the £30-40,000 area be paid. Certainly my solicitors, one would imagine, on any taxation or review of the costs, would be saying that the total costs of the action that Herbert Smith should have should be in the region of £40,000 or so without some proper and full justification of the hours spent and the rates charged.*

*I am not in a position to address your Lordship today on why we are obviously right and Messrs. Herbert Smith are obviously wrong to charge as much as they do, but there is a wide disparity. Both are obviously put forward, I accept, in good faith by both sets of solicitors, and no doubt those represent that which they do charge their clients. But, in the circumstances, we would urge that costs should be assessed, remain to be assessed, rather than summarily today.*

**JUDGE BOWSHER:** *Yes, Miss Randall.*

**MISS RANDALL:** *Mr. Akenhead has pointed out two points of objections, the charge out rates and time spent on documents. So far as the charge out rates are concerned, your Lordship is in a position to deal with that. Can I hand up to your Lordship an extract from the Supreme Court Costs Office, which provides your Lordship with average charge out rates for the year 2001, and if your Lordship goes to the last page ----*

**JUDGE BOWSHER**: *I have never seen this before.*

**MISS RANDALL:** *I confess I have not seen it before, until those instructing me provided me with it.*

**JUDGE BOWSHER**: *The 2002 edition. When was it brought out? It says in the front cover of that thing somewhere I suppose. Could I have a look at your book?*

**MISS RANDALL:** *Yes.* (Book handed to the Judge)

**JUDGE BOWSHER** (After a pause): *Where did you get this, Miss Randall, from your solicitors?*

**MISS RANDALL:** *I did not, my Lord--Herbert Smith gave it to me.*

**JUDGE BOWSHER:** *Herbert Smith had it. I think it is pretty awful if I have been assessing costs throughout the year 2002 so far not to have the guide to tell me how to do it. I was not even aware it existed. Nobody else has shown it to me.*

**MISS RANDALL**: *I am told it is used by Herbert Smith's tax costs department to prepare their bills of costs.*

**JUDGE BOWSHER**: *I dare say it is, and it should be used by everyone.*

**MISS RANDALL:** *It was provided to Herbert Smith from their own costs department. Beyond that, presumably HMSO, or the like ----*

**JUDGE BOWSHER:** *Designed by the Court Service Publications Branch. You would think that somebody would have sent this round to all the judges. I have never heard of it. So which part do you want to look at?*

**MISS RANDALL:** *Your Lordship will probably find it easier to use the photocopy. If your Lordship goes to the last page, which is p.41 of the pamphlet itself, you will see the 2001 charge out rates for the City of London, and Herbert Smith are City of London solicitors, and if you compare those charge out rates with the ones that appear on Herbert Smith's schedule and allow for the fact--what your Lordship will see is that our charge out rates, with the exception of Michael Davis's rate, who is a partner, are in line with those that you see in the pamphlet. Indeed, so far as the assistants' costs are concerned, they are less, and indeed so far as Mr. Davis's rate is concerned, one should allow some uplift for the fact that the rates that your Lordship is looking at from the Supreme Court Costs Office are 2001 rates, whereas we are in 2002, and that, in my submission, would merit some uplift.*

*So taking into account that Herbert Smiths' assistant charge out rates are less, it can be seen that the rates point made by my learned friend is not a good point. Ironically, for what it is worth, if your Lordship turns back to the preceding page and compares the Manchester rates with those that are being put forward by Masons, you will*

*see that the only party who is actually putting forward charge out rates which are not in line with the Supreme Court Costs pamphlet are Masons, not Herbert Smith.*

*My Lord, that leaves the point on documents. Obviously I accept there is a disparity between the time spent by Herbert Smith and the time spent by Masons on documents. At face value, it is quite a substantial disparity, but I do ask your Lordship to bear this in mind, that when a defendant of course is faced with proceedings of this nature to enforce, and an application of this nature, it is necessarily required to pay close attention to all the documentation, and indeed to review all that documentation, and is not something which falls to the claimant, which is far more able to pick and choose, as it were.*

*Mr. Furst reminds me of course your Lordship has seen the 12 files that contain the totality of the documentation that was before the adjudicator, which necessarily, in order to meet the claim made in these proceedings and to prepare for this application, has to be gone back through, and indeed I am instructed was gone back through in minute detail.*

*So your Lordship can see that, so far as Mr. Akenhead's first point is concerned, it is a matter that your Lordship can deal with today and, in my submission, should deal with.*

*So far as the second point is concerned, your Lordship is well placed to deal with the time included on my cost schedule for summary assessment on documents, and your Lordship is perhaps better placed than would be the case for a taxing judge since your Lordship has seen first-hand the level of documentation and the complexity of this case.*

*So I would ask your Lordship to summarily assess the costs, and, so far as the charge out rate is concerned, to make no deduction at all, and, so far as documents are concerned, to either make no deduction at all, or a minimal deduction.*

*If, however, your Lordship is not prepared to summarily assess the costs today, but will order that they should be the subject of a detailed assessment, I do not understand my learned friend to resist an order that there should be an on account payment made, and, given the amount that he has indicated to your Lordship that he would expect Herbert Smith to secure as a minimum on a detailed assessment, I would ask your Lordship to order an on account payment in the sum of £40,000 payable within 14 days, in accordance with the rules.*

**JUDGE BOWSHER**: *Yes. Do you wish to say anything more, Mr. Akenhead?*

**Mr. AKENHEAD:** *My Lord, I am taken by surprise by this. I have not seen it before. We would suggest that there does seem to be an enormous disparity between Central Manchester and at least the City of London, and it is said in the notes, in the photocopy I have got, at p.37, that the guideline rates for solicitors are broad approximations only, and it may well be that this needs to be looked at where there is such an enormous disparity. Obviously one knows the City of London is going to be more expensive than most other parts of this country, but where it is more than double Central Manchester, which some would describe, those who live there at least, as the second city of England, it does seem extraordinary, and those are the sort of figures-- I am not from Manchester, although I have been there, and we would suggest that the fairest solution is a payment on account, and, with a bit of luck, the solicitors will sort it out between themselves, but if they cannot then those sort of disparities should be investigated.*

*But even on the figures that have been put forward in this little clip, the grade C and grade D are being overcharged for by--I am not saying overcharged for but by reference to those they are being charged more for.*

*So far as the documents are concerned, I had only taken a couple of examples just to explain why they should be assessed rather than summarily assessed. But the 12 files, with the 12 files before the adjudicator, and your Lordship will appreciate that all these documents would have been fresh in both sets of solicitors' minds having been looking at them in August and September, and again the disparity in the hours is one particularly marked on that, but there are other differences between the solicitors, which would suggest that an assessment, which will not be a very long one, would be an appropriate course.*

**JUDGE BOWSHER:** *I think that there should be a detailed assessment. The order will be the costs will be subject to a detailed assessment; claimants to pay on account of costs £40,000 by 4 p.m. on the 11th November 2002.*

*As to the assessment, I would only say this, that I cannot remember any London City firm charging as much as £350 for an hourly rate, or indeed more than £300. The figure of £225 charged for assistants on this statement seems to be more in keeping with what partners from City firms tend to charge, but I may be wrong and, in the light of this booklet, I obviously am.*

*The other thing I would say is that the 12 files, whatever else may be said about them, were not looked at all over once in this court. If they were already prepared for the adjudicator then presumably there should be no copying costs, or maybe there were some copying costs to get some clean copies for the court, but that really should be taken into account. And Mr. Akenhead's point about whether it was necessary for the claimants to read all*

*those 12 files all over again for the purposes of this action has some force in it, but I think that that should be put before the costs judge.*

*Is there any other application?*

**Mr. AKENHEAD:** *Yes, my Lord--an application for permission to appeal. My Lord, whilst we are very sorry it may be that your Fridays may turn up a different type of business following this decision, we do suggest that the two areas of your Lordship's judgment (1) the extent to which an oral variation must be in writing is certainly, and a variation must be writing, and (2) the question of dispute, both raise matters of some importance. I addressed your Lordship in argument on Friday as to why it was important, the oral variation. As your Lordship appreciates, on construction contracts there may well be, and there are undoubtedly, a substantial number of oral variations, to a greater or lesser degree of importance. Some may be relatively unimportant, some may be important, and the effect of your Lordship's judgment, although I appreciate your Lordship is limiting it to material oral variations, and your Lordship correctly found that it was a material oral variation.*

*The difficulty for what I might call the adjudication industry which has grown up is this, that if your Lordship is right, and obviously your Lordship considers he is right, then the effect may well be to seriously undermine adjudication.*

*I do not mean that your Lordship is undermining it as such, but the effect will be that it could be argued on virtually any adjudication that at some stage there has been an oral variation, either material or immaterial. If material, and it is not been evidenced in writing, then the effect of your Lordship's decision and* ***RJT*** *could well be that the adjudicator no longer has jurisdiction because a term has not, albeit a variation term, been evidenced in writing.*

*So if one applies the majority in* ***RJT****, and your Lordship's logic, it could well be the case, and we would say it probably is the case, that the adjudicator then has no jurisdiction because at least one term, if it is a material term, has not been evidenced in writing, and if the majority in* ***RJT*** *is applied it would apply to immaterial terms as well, immaterial variations, and that could have the effect of so completely undermining adjudication in this country that it may substantially disappear. Certainly academic writers will be extremely interested in your Lordship's judgment in this case, and will doubtless say that it could well have this effect.*

*So, my Lord, we would apply for permission to appeal in relation to the issue as to whether an oral variation of a written construction contract needs to be in writing on that issue on two grounds. One is there is a realistic chance-- and I appreciate I am preaching to the unconverted on this--that your Lordship may be wrong. It is quite a difficult issue, and it is one which may well undermine adjudication. For all the reasons I have put forward, I would suggest that there is a realistic chance your Lordship might be wrong, although obviously your Lordship thinks he is right.*

*Secondly, the alternative ground, that there is some other reason; the other reason is that this is a matter of some public importance in the light of its likely effect on adjudication, because one has absolutely no doubt that the defendants, particularly in adjudication, will or may well be tempted to jump on the bandwagon of saying oral variation, material or immaterial, you, adjudicator, have got no jurisdiction. And if that be the law, so be it, but then Parliament may well be extremely interested in amending the legislation. There is already talk about amending the legislation to take into account various court judgments that have been issued already. So there is some public importance attached, and that is genuinely felt on this side.*

*So far as the issue about the dispute is concerned, which is the other aspect of your Lordship's decision, I make no complaint of course about your Lordship referring to the Judge Gilliland decision or the two other decisions your Lordship referred to. Indeed one of the authorities which was in the bundle, which was a decision of Judge Seymour, yet another of the series* ***R.G. Carter v. Nuttall,*** *but the one in front of Judge Seymour, which we put in our authorities bundle, refers to the Judge Gilliland decision, and so we cannot say that we were completely taken by surprise by your Lordship's references to the other authorities.*

*But the problem here then is the distinction between the* ***Tradax*** *and* ***Ellerine*** *cases your Lordship referred to, and the Judge Gilliland decision, the* ***Cruden*** *decision, and the issue of some importance is whether in a case like here, where an application for payment--and it was accepted--was disputed prior to the 6th August, and it was always accepted in Mr. Nell's witness statement was in dispute, whether with that background, where an agreement is put forward, as it was, at least in sufficient terms on the 5th July, in circumstances where it cannot really be that difficult for the defendant to have said to himself, "Well, did we agree anything at the Alliance Board meeting on the 30th October?"--it is a fairly simple question to ask their individual directors, "Was there an agreement reached?"; and, secondly, look at any contemporaneous documentation, for instance the position papers. Was it really that difficult for them to consider the extent to which there was a dispute, and whether it is just sufficient to seek clarification, as they did on at least two or three occasions between early July*

*and early August, and whether a more broad brush approach is to be preferred than that which your Lordship has in fact adopted in this case.*

*I say this obviously with a genuine and deferential respect, appreciating what your Lordship has already decided. But I said to my learned friend before that if the decision had gone the other way I would certainly not have opposed leave to appeal, and, although it is obviously a matter for your Lordship and not a matter for counsel, and these are matters of some importance obviously to the parties, but also, we would say, to the industry at large, and, for those reasons, we would ask for permission to appeal.*

**JUDGE BOWSHER:** *Mr. Akenhead, may I just say one thing on the matter of variations. I was not so concerned with the immaterial variations, because if it is immaterial I cannot see that it has got any relevance at all. But I did say that I was not talking about variations made under the terms of the contract, and so if somebody says, "We'll have blue marble instead of green marble"--I was not talking about that, even if that was a variation which the contract required to be in writing, and was made orally. That happens in every contract virtually, but that was not what I was talking about.*

**Mr. AKENHEAD:** *No, I appreciate your Lordship was not talking about that. The concern here is that obviously there may be a distinction between a contract which has a variation clause and so to change red to green, and it may or may not be the case that if a contract permits that to be made orally that an oral variation may not have the effect that the variation in the agreement here had.*

*But assuming, however, that there is an oral variation of a term as opposed to possibly of the work, the difficulty is that although your Lordship was directing your remarks to the question of a material variation--you rightly held that the payment change, if it happened, was material and important--but applying the logic of **RJT**, of the majority of **RJT**, it may be that there is no distinction between a material and what might be called an immaterial variation, because the majority in **RJT** talk about all the terms of the contract must be evidenced or contained in writing, and Lord Justice Auld does not go that far. The concern then is to what extent oral variations should need to be evidenced in writing, and if there is a distinction between immaterial and material then the Court of Appeal need to say it. If there is no distinction then the argument could go either way on that in the Court of Appeal, if there is an underlying written construction contract, which there was here.*

*So, my Lord, for those reasons, we would ask for permission to appeal.*

**JUDGE BOWSHER:** *Yes, Mr. Furst.*

**Mr. FURST:** *My Lord, as my learned friend indicated, he said he would not oppose an application were I to lose, and I similarly indicated the same were I to succeed. So we leave it to your Lordship to decide whether or not permission should be granted.*

**JUDGE BOWSHER:** *Very well. Permission to appeal.*

**Mr. AKENHEAD:** *We hope your Lordship has a more varied diet for Fridays than possibly hitherto, and we are very grateful to your Lordship for coming back so promptly with the judgment. It is very much appreciated.*

**JUDGE BOWSHER**: *I wonder if I might borrow this document because I do want to chase it up. Thank you very much indeed for showing it to me.*

**Mr. AKENHEAD:** *My Lord, so far as the transcript is concerned, can we ask whether your Lordship would order that the judgment be transcribed today, and the copy be provided to your Lordship and to the parties. There may be a couple of places where there are what might be called typographical errors. Obviously my clients will consider processing an appeal and they would need a transcript anyway, which your Lordship might wish to have corrected.*

**JUDGE BOWSHER:** *The transcript in the ordinary way would be sent to me for approval before being used on appeal. But, yes, I think it would be helpful if the transcript were to be provided to counsel at the same time as being provided to me for consideration, for details of that sort. Yes, I can understand that I may have got some dates wrong or said "claimants" instead of "defendants", or things of that nature.*

**Mr. AKENHEAD:** *They will, on any count, be immaterial. But for accuracy's sake.*

**JUDGE BOWSHER:** *Thank you very much for your help.*

Mr. R. AKENHEAD Q.C. and Mr. S. LOFTHOUSE (instructed by Messrs. Masons, Manchester) appeared on behalf of the Claimant.
Mr. S. FURST Q.C. and MISS L. RANDALL (instructed by Messrs. Herbert Smith) appeared on behalf of the Defendant.