**JUDGMENT : His Honour Judge Richard Seymour QC** : 15th August 2002. TCC.

1. The application before the court is that of the claimant, a company called Hitec Power Protection BV, for summary judgment for the sum of £792,069.65, being the amount determined as due to it from the defendant, a company called MCI Worldcom Ltd., by Robert Gateskell QC, sitting as an adjudicator in a decision dated the 24th July of this year; together with Mr. Gateskell's fee amounting to £9,928.76 which the claimant paid.

2. Enforcement of the decision is resisted on behalf of the defendant on the ground that Mr. Gateskell had no jurisdiction to make any decision that the defendant should pay £792,069.65 or any sum to the claimant because at the date of the notice of adjudication there was no dispute between the claimant and the defendant for Mr. Gateskell to determine.

3. In answer to that contention, Miss Louise Randall - who appeared on behalf of the claimant - submitted, first, that it was not open to the defendant to contest the jurisdiction of Mr. Gateskell because it had participated fully in the adjudication without reserving its position as to Mr. Gateskell's jurisdiction; and, second, that there was, in any event, a dispute between the claimant and the defendant as to the liability of the defendant to pay the claimant the sum claimed.

4. The difficulties to which the present case gives rise have been created almost entirely by the failure of those involved in the adjudication process to recognise the significance of the different corporate personalities involved in relevant contractual arrangements under which the alleged entitlement of the claimant to payment of the sum claimed arises; or the significance of the precise identity of the parties to any particular contractual arrangement.

5. By an agreement, described as 'a purchase framework agreement', dated the 26th May 2000 – and made between the defendant and the claimant – provision was made for the procurement of the design, manufacture, supply, installation, testing and commissioning of certain diesel engine road-free, UPS and HV switch-gear – details of which were set out in a schedule to the agreement and which were referred to in the agreement as the 'equipment'.

6. Recital D to the purchase framework agreement said this: *"Worldcom …"* – which was the expression used to refer to the defendant – *"… enters into this agreement on its own behalf and as agent of the participating affiliates."*

7. Clause 1 of the purchase framework agreement set out various definitions for the purposes of the agreement and included a definition of "affiliate" – the precise detail of which is not presently material but which indicated, in general terms, a subsidiary of the defendant or of a company which controlled the defendant. There was a definition of the expression 'participating affiliate' as follows "an affiliate who issues a purchase order in accordance with the contract".

8. Clause 2 of the purchase framework agreement dealt with the documents incorporated in the agreement. Clause 2.1, so far as is presently material, said this:
   *"The contract between the parties [which was described in the agreement as 'the contract'] consists this agreement, any purchase order issued by Worldcom, or its affiliates to the contractor …"* – there meaning the claimant – *"… and the following documents attached hereto:*
   > *"Schedule A, general conditions which are applicable to all work and services performed hereunder by the contractor pursuant to any purchase order."*

9. Those conditions have been referred to in the purchase framework agreement as general conditions.

10. Clause 3.1 of the purchase framework agreement dealt with the duration of the agreement. It provided that,
    *"The contract shall become effective on the 22nd day of May 2000, ["the commencement date"] and shall – subject to the provisions of the contract – apply in respect of all purchase orders issued within 3 years of the commencement date or within such later date as the parties may agree in writing."*

11. Clause 4 of the purchase framework agreement was concerned with purchase orders. Clause 4.1 provided,
    *"Whenever, during the period referred to in sub-Clause 3.1 of this agreement, Worldcom, or its affiliates, wishes Contractor to undertake the design, manufacture, supply, installation, testing and commissioning of equipment. Worldcom, or its affiliates, may issue an invitation to the Contractor to submit a tender for such works ["an invitation to tender"] in the form of a draft purchase order.*

12. Clause 4.2 went on:
"*Within 5 days of an invitation to tender, the contractor shall prepare and submit to Worldcom, or the relevant affiliate, a tender giving a fixed lump sum price for undertaking the design, manufacture, supply, installation, testing and commissioning of the relevant equipment, ["a tender"], which price will be based upon the schedule of prices and rates set out in schedule C or the relevant revision thereof."*

13. Clause 4.3 provided:
*"If Worldcom, or the relevant affiliate, accepts the tender, it may issue a purchase order to the contractor in the form of the general form of a purchase order and the contractor shall carry out the design, manufacture, supply, installation, testing, commissioning of the relevant equipment in accordance with the Contract."*

14. By Clause 4.7 of the purchase framework agreement, it was provided as follows:
*"Under a purchase order issued by a participating affiliate, an amount which is due and payable by the participating affiliate is not paid when properly demanded, such amount shall be paid by Worldcom on behalf of the participating affiliate within 10 days of written demand by the Contractor to Worldcom. In these circumstances, the contractor acknowledges that Worldcom shall attain all contractual rights and benefits available to that participating affiliate under the purchase order, for example, set off rights to dispute invoiced amounts for non-performance, etc."*

(The text of Clause 4.1, as I have cited it, is as printed but there is obviously a conditional missing at some point in the early part of the clause.)

15. Clause 9 of the purchase framework agreement was concerned with notices and said this:
*"Any notice to be given shall be in writing and shall be deemed to be duly given if it is delivered by hand at, or sent by registered post to, the addresses of the parties noted above or other business addresses for the time being.*

*"In the case of notices sent by registered post, the same shall be deemed to have been received 2 working days after being posted."*

16. The provisions which I have quoted are the relevant provisions of the purchase framework agreement itself for the purposes of the application presently before me. It is quite plain, in my judgment, that Clause 4.7 of the purchase framework agreement provided what was in the nature of a guarantee by the defendant that in the event that a party placing a purchase order for the purposes of the purchase framework agreement did not pay sums due in respect of that purchase order, when properly demanded, it – the defendant – would pay the amount in question subject to there being served upon it a written demand by the contractor (that is to say the claimant) and that in the event that a written demand was served, payment was due within 10 days.

17. Schedule A to the purchase framework agreement set out the model form of general conditions of contract, including forms of tender, agreement, sub-contract and performance bond recommended by the Institution of Mechanical Engineers, the Institution of Electrical Engineers and the Association of Consulting Engineers for use in connection with home or overseas contracts for the supply of electrical, electronic or mechanical plant with erection, 1988 edition.

18. Clause 52 of those conditions made provision for adjudication. Clause 52.1 of the conditions provided:
*"Any dispute, which for the purposes of this Clause shall include any difference, shall be referred to adjudication in accordance with this clause."*

19. Then Clause 52.6 provided:
*"The provisions of Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998, shall, subject to the provisions of this clause, apply to any adjudication pursuant to this clause, provided that if – through no fault of the party giving the notice – the objective of referring the dispute to an appointed adjudicator within 7 days of the notice cannot be achieved, the period of 7 days in paragraph 7.1 of Part 1 of the said regulations, shall be extended as necessary."*

20. Clause 10 of the conditions was concerned with notices. Clause 10.1 provided:
*"Any notice to be given to the purchaser, or to the engineer, under the contract shall be served by sending the same by post, telex, cable or facsimile transmission to, or by leaving the same at, the respective addresses nominated for that purpose in the special conditions."*

21. And then Clause 10.3 provided:
*"Any notice sent by telex, cable or facsimile transmission, shall be deemed to have been served at the time of transmission. The notice sent by post shall be deemed to have been served 4 days after posting."*

22. Pursuant to the terms of the purchase framework agreement, 4 purchase orders were placed. The first related to a project at St. Denis in France and the purchase order seems to have been placed by a company called MK International SA.

23. The second project was a project in Dublin, in the Republic of Ireland, and the purchase order in relation to that project seems to have been placed by a company called MK International Ltd., apparently as agent for the defendant.

24. The third project related to work in Amsterdam, and again the purchase order seems to have been placed by MK International Ltd.

25. The fourth, and final, project was in Milan in Italy and the purchase order seems to have been placed by a company called MK International SRL.

26. It seems various invoices were raised by the claimant in respect of work done and materials supplied under these purchase orders. However, sums claimed were not in all cases paid, and by about June of this year sums totalling £792,069.65 had been invoiced but not been paid in relation to these 4 projects.

27. By letters, each dated the 13th June of this year, which was a Thursday, and sent by registered post to the defendant, the claimant claimed – separately in relation to each of the 4 projects which I have mentioned – payment of the alleged outstanding balance under that contract.

28. For the purposes of this judgment I think the letter, in fact written in relation to the Amsterdam project, can be treated as typical. The material part of that letter said this: "We are writing pursuant to the purchase framework agreement dated the 26th May 2000, between Hitec Power Protection BV and yourselves.

29. "At Clause 4.7 of the purchase framework agreement, it reads …" – *and the Clause is then quoted. "On the 12th May 2000 a quotation was submitted to MK International in accordance with the PFA. The purchase order was received by MKI on the 11th July 2000, a copy of the purchase order is included at appendix A. The purchase order was for the sum of £1,746,085 – that was finally agreed to incorporate variations and result in a final contract value of £2,900,421. "Our company have made the following applications for payment. They have not received, save as specified below, any payment or effective withholding notices, but received only payments by bank transfer for the following payments … Time for payment was 30 days from invoice."*

30. There was then set out in the letter, at some length, a history of applications for payment and what happened to them and the letter concluded in this way:
*"In respect of payments made later or continuing to be outstanding, Hitec qualify for payment of interest under the provisions of the contract with your company at 2% above the base rate. We, therefore, demand on behalf of our client, in default of payment by MK International Ltd., payment of the sum of £128,374.87 together with interest in the sum of £15,853.77."*

31. It is interesting that the letter written in relation to the project in Dublin concludes in this way:
*"We, therefore, demand on behalf of our client, in default of payment by MK International Ltd., the payment of the sum of £261,187.08 together with interest in the sum of £17,650.58."*

32. Those letters having been sent by registered post, the effect of Clause 9 of the purchase framework agreement was that they were deemed to have been delivered 2 working days after despatch. As despatch was on Thursday, 13th June they were deemed to have been delivered on Monday, 17th.

33. On the 14th June a letter was written by a firm of solicitors, Messrs Jeffrey Parker Borne, to the defendant. The letter said this:
*"We act on behalf of Hitec Power Protection BV of …" – an address which was set out – "… We hereby notify you that our clients intend to refer a dispute to adjudication under the provisions of the contract dated the 26th May 2000, between Hitec Power Protection BV and MCI Worldcom Ltd.*

*"Clause 52 states: That the provisions of part 1 of the Schedule to the Scheme of Construction Contracts (England and Wales) Regulations shall apply as stated in Clause 52.6. The adjudicator to be appointed is to be nominated by the Institute of Electrical Engineers.*

*"The dispute concerns your failure to properly evaluate the works and to make payments to our clients on the above project.*

*"MCI Worldcom Ltd. and/or its affiliates – MK International Ltd., MK International SRL and MK International SA – are in breach of the contract and have failed,*

*"(1) To properly evaluate the value of the contract work;*

*"(2) to give notice not later than 2 days prior to the date on which payment becomes due to Hitec Power Protection BV, specifying each ground for withholding and the amount attributable to that ground; and,*

*"(3) To give an effective notice of withholding payment no later than 14 days after receiving an application for payment/invoice from Hitec Power Protection BV.*

*"Our clients seek payment in full of the amounts outstanding in the sum of £792,069.65 including VAT, plus interest or such other sum as the adjudicator decides. For the avoidance of doubt, this letter is our clients' notice of adjudication. We have, as of this date, applied to the Institute of Electrical Engineers for the appointment of an adjudicator."*

34. That letter is marked as having been sent by facsimile transmission. It bears upon it a 'received' stamp indicating the date of receipt as the 14th June of this year. By virtue of the terms of Clause 10 of the conditions incorporated in the purchase framework agreement, the letter was thus deemed to have been received immediately upon transmission.

35. The effect of the provisions as to service which I have mentioned in this judgment is, therefore, that the letter dated 14th June, sent by facsimile transmission, is deemed to have been received by the defendant on the Friday before the Monday upon which the demands under Clause 4.7 of the purchase framework agreement, are deemed to have been received.

36. The terms of the letter dated the 14th June 2002 are extremely odd. Under the purchase framework agreement, the defendant had no obligation whatsoever to make any evaluation of the worth of any work. It had no obligation to give any notice in relation to the withholding of any amount from the claimant. It had no obligation to give any notice in relation to withholding payment after receiving an application for payment/invoice from the claimant.

37. What seems to have happened – at least in the mind of the person writing the letter – is that the defendant, and other companies in the same group, seem to have been combined and the approach which seems to have been adopted is to treat the defendant as indistinguishable from its affiliates and as being under the obligations which particular affiliates might have been under by virtue of having placed purchase orders with the claimant.

38. The letter dated the 14th June contains no reference whatsoever to Clause 4.7 of the purchase framework agreement. It does not contain any assertion that there was any dispute in relation to that clause. It does not contain any assertion that the defendant had failed wrongfully, after demand, to make payments which, in fact, would or might have been due under Clause 4.7 of the purchase framework.

39. The letter was copied to MK International Ltd., MK International SRL and MK International SA, but equivalent letters were not sent to those parties.

40. The approach of treating all relevant companies in the defendant's group as indistinguishable is perhaps understandable in the light of the fact that that seems to have been the approach which the defendant and its affiliates adopted at that time.

41. In a letter dated the 12th June of this year addressed to the 'President of the Institute of Electrical Engineers', Mr. Chambers, a director of MK International Ltd., wrote, so far as is presently material, in the following terms. The letter was headed *"Notice of adjudication purchase framework agreement in relation to diesel engine, rotary, UPS and HB switch-gear":*
*"This letter is to give you notice (and parties to which this notice is copied) in our capacity as affiliate of MCI Worldcom Ltd., the purchaser, of our intention to refer to adjudication disputes with Hitec Power Protection BV, the contractor, on the matters below listed:*

***The final account**. The amounts paid to the contractor and the balance withheld by the purchaser in respect of:*

*(1.1) delay in quantum for liquidated damages;*

*(1.2) incidents and other damages.*

***Defects, liability, outstanding works and continuing obligations. Dates of taking over.***

*"It is hereby notified that is our intention to refer the above matters to adjudication and secure the recovery from the contractor of liquidated damages for delay and to recover unliquidated loss and/or expense, and/or damages incurred by us and attributed to property damage, defects and outstanding works.*

*"In summary, we intend to request the adjudicator to make the following decisions:*

*On the quantum of the final account to be presented in the referral notice to be determined by the adjudicator as is reasonable under all the circumstances before the adjudicator;*

*An assessment by the adjudicator of the delay and that the adjudicator determine the additional time to which Hitec are entitled to complete the works;*

*and that the adjudicator determine the quantum of liquidated damages to which the purchaser is entitled;*

*On the quantum of costs, losses, expense and/or damage incurred by the purchaser and its affiliates, in consequence of Hitec's liability for incidents and incomplete and defective works as the adjudicator, under all the circumstances, shall decide of the liability and responsibility of Hitec and shall be recovered from Hitec;*

*That incomplete and defective works, as specified in the referral notice, are the liability of Hitec;*

*On the dates of taking over for the location of the works specified in the referral notice.*

*"We hereby notify our intention, in our capacity as affiliate of the purchaser, to refer the disputes, as summarised above, to an adjudicator under the provisions of the contract dated the 26th May 2000 between the purchaser and the contractor, Clause 52.*

*"The provisions of Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations shall apply as stated in Clause 52.6.*

*"The referral notice to the adjudicator to be issued by MK International Ltd., as affiliate of the purchaser, within 7 days (or such extension of this period as may be necessary) of the date of this notice."*

42. There were thus 2 references in the letter to MK International Ltd., acting as affiliate of the defendant. What exactly that was supposed to mean is not immediately clear. Some possible illumination is added by numbered paragraph 1.8 of the letter which sets out the names and addresses of the parties to the contract as including Worldcom International Ltd., acting by its affiliate MK International Ltd. (the address of which was then given). It would seem that the intention behind writing of the letter by MK International Ltd. was that it should be acting as agent of the defendant.

43. Following upon the despatch of that letter, Mr. Robert Gateskell QC was appointed as adjudicator. In a letter dated the 17th June of this year, again to the President of the Institute of Electrical Engineers, Mr. Chambers of MK International Ltd. wrote saying this:

*"We thank you for your early response dated the 13th June 2002 to our notice of adjudication under reference …" (which was then set out) "… and confirmed that the requested payment in order for you to proceed with nomination of an adjudicator that has been forwarded under separate cover. We refer to subsequent notification dated the 14th June 2002 as issued by Jeffrey Parker Borne, solicitors on behalf of the respondent, Hitec Power Protection BV, and enclose a copy of Clause 52 of the contract between MCI Worldcom Ltd. and its affiliates and the respondent and draw your attention to Clause 52.5 which provides that "the respondent shall not be entitled to make a separate reference pursuant to Clause 52 in relation to the same dispute".*

*"The dispute referred by Jeffrey Parker Borne, on behalf of its client, is one and the same issue and, therefore, shall be referred to none other than the adjudicator to be nominated under our preceding notice and to which the respondent will, of course, be afforded the opportunity to deliver its own submission. We, therefore, await your notice of nomination of the adjudicator in order for the adjudication to commence."*

44. In fact, that letter was written the same day as Mr. Gateskell himself communicated first with the parties to the present action.

45. Following receipt of Mr. Gateskell's letter of the 17th June, MK International Ltd. wrote on the 18th June to him. It acknowledged receipt of communications from him and then said,

*"There is, however, an immediate issue which we believe needs to be addressed. You have drawn attention in your letter of yesterday to the connection between the adjudication which we began on the 12th June and the adjudication begun 2 days later by Hitec.*

*"Having considered the Hitec notice as best we can, we believe that the dispute which is the subject of Hitec's notice is virtually identical to the delay element of the dispute identified in our notice.*

*"As will be seen at paragraph 1.4 of the particulars contained in our notice, a total of £775,561 exclusive of VAT has been deducted in respect of damages for delays to work at the 4 sites identified. Of these VAT is payable only in respect of the Amsterdam project and with the addition of VAT at 19%, the total sums deducted amount to £788,831.*

*"In their notice, Hitec alleged that we failed to give appropriate notices in respect of sums withheld and seek payment in respect of all sums made of £792,069.65 including interest.*

*"We have not been able to establish the reason for the difference of some £3,200 between these 2 figures, although it may relate to some separate small claim arising from their allegation that we have failed to properly evaluate the value of the contract work.*

*"With the exception of this small amount, however, we believe that the dispute – of which Hitec have given notice – forms part of the dispute which we had already notified."*

46. The letter then referred to a provision of the conditions to which I have already referred in this judgment. The relevant provision says this:
*"When either party has given notice to refer a dispute to adjudication pursuant to this Clause …" – that's Clause 52 of the conditions – "… the other party shall not be entitled to make a separate reference pursuant to this Clause in relation to that dispute unless the first reference is discontinued for any reason."*

47. The letter went on,
"*As you will appreciate, we are anxious to avoid unnecessary duplication and the aborted costs and delay which will result.*

*"In the circumstances, given the requirements of the contract, we believe that it is incumbent upon Hitec to confirm whether, as appears to be the case from their notice, the dispute which they intend to refer is already included in the dispute of which we have given notice. We, therefore, call upon Hitec, by copy of this letter, to explain the position and if their notice of adjudication is caught by Clause 52.5 of the conditions of contract, to withdraw that notice forthwith.*

*"In the meantime, our notice of referral is due to be served by the end of tomorrow. In the interests of minimising time and costs, we believe that before service of our referral notice, it is important for the issue identified above to be resolved. As will be seen from the attached extract from the conditions, Clause 52.6 of the conditions of contract states that "the scheme shall apply to the adjudication …" – and it then sets out the words of the proviso to that clause.* (I needn't read further in that particular letter.)

48. On the 20th June of this year, MK International Ltd. wrote to Messrs Jeffrey Parker Borne. In the letter MK International Ltd. acknowledged receipt of copies of letters from those solicitors addressed to the adjudicator and went on,
*"In our letter to Dr Gateskell QC of the 18th June, we pointed out that in issuing their notice of adjudication of the 14th June, your clients had failed to comply with the requirements of the contract. It is clear from your letters of today that your clients now accept that their adjudication ought not to proceed in tandem with ours; and, in the circumstances, the condition which your client seek to attach to their agreement is unacceptable.*
*"We are not prepared to allow the present unsatisfactory state of affairs to continue. Accordingly, whilst reserving our right to pursue further proceedings as appropriate, we hereby withdraw our notice of adjudication of the 12th June 2002 and call upon your clients to pursue their adjudication in accordance with their notice. We will meet any resultant costs of the adjudicator, although we would respectfully submit to him that in the circumstances, these can properly be treated as costs of your clients adjudication."*

49. On the 21st June, 4 documents describes each as 'referral notice to adjudicator' were issued by the claimant. Each of them was entitled, "Pursuant to the Scheme for Construction Contracts (England and Wales) Regulations 1998, Part 1, adjudication; and pursuant to Clause 52.6 of the general special conditions contained in MF1, attached to the purchase framework agreement dated the 26th May 2000", but the referral notice in each case then identified 1 of the 4 projects which I have already mentioned.

50. It then set out between whom the referral notice was supposed to apply. The referring party was identified in each case as the claimant. The contractor was said in each case to be the defendant and their agents/affiliates and in each case the affiliated company of the defendant who had actually placed the purchase order was then identified.

51. The referral notices were in a similar form, and for the purposes of this judgment I think I may take as typical that which was sent in relation to the project at St. Denis in France. The material part of that referral notice said this:

*"This referral notice concerns a dispute for which a notice of adjudication was issued dated the 14th day of June 2002 but sent on the 17th June 2002. [I interpose that the evidence is that the notice was sent on the date which it bore].*

*This referral notice comprises the following: narrative of events and identification of the documents purporting to form and to be representing the contract between the parties. The claim for payment incorporating the contractual and legal basis for the referring party's claim. Appendices containing the documentation referred to.*

*MCI Worldcom Ltd., Worldcom, and Hitec Power Protection BV entered into a purchase framework agreement (PFA) dated the 26th May 2000 which governed all contracts between the parties and any affiliates of the said Worldcom, as defined by the said PFA. The referring party has requested payment from MCI Worldcom Ltd.*

*On the 12th May 2000, a quotation was submitted to MKI International Ltd. in accordance with the PFA. A copy of the quotation is included at appendix A. In the said quotation a time-scale was attached.*

*A purchase order was received from MK International SA on the 9th June 2000. A copy of the purchase order is included as Appendix B. The purchase order was for the sum of £2,103,277, which was finally agreed to incorporate variations and resulted in the final contract value of £2,223,138.*

*Hitec submit that the said contract is governed by the PFA including the general and special conditions, in particular the MF1 current at the time the contract was formed.*

*The conditions relating the adjudication is contained at special condition 52.1 of MF1 and the condition relating to the body nominated is the Institute of Electrical Engineers and is at Clause 52.4.*

*Details of the adjudicator not contained in the agreement.*

*Further, under special condition 52.6 of the MF1, the said adjudication shall be dealt with under the Scheme for Construction Contracts (England and Wales) Regulations 1998.*

*The form of sub-contract provides for payment in MF1 at Clauses 39 and 40. The invoices from Hitec provide for payment 30 days from invoice. The engineer is required within 14 days after receiving application for payment, to issue an interim certificate. No such interim certificates have been issued by the engineer.*

*Hitec will state that the time for payment is either 30 days from application for payment as provided for within the special conditions and/or as provided under the terms of their invoices. Payments have not been supported by interim certificates, nor have any been issued. Payments have been paid during the said contract, according to the invoice – although late – prior to the defaults in actual payment. The said MKI have performed their obligations as to paying against the invoice.*

*Hitec further submits that Worldcom and/or MK International SA has failed to comply with the terms of the sub-contract of the Act and the scheme, in that it has failed to issue payment notices, to issue withholding notices, to properly evaluate the sum due for payment, to make payment. Hitec have made the following applications for payment, they have not received any payment or effective withholding notices; but received only payments by bank transfer with no enclosures for the following payments. (For the purpose of this reference, the time-scale referred to below may be extended by a further 13 days as referred to at paragraph 10 of this referral.)"*

52. Details were then set out of the various applications for payment and then at paragraph 13.9, the referral notice said this:

*"On the 14th day of June 2002, the referring party requested by letter sent 'demand for payments made in accordance with the PFA'. The referring party seeks payment in default of payment for the balance due to the referring party from MCI Worldcom Ltd., in accordance with the PFA. A copy of the letter is exhibited at Appendix 1."*

53. In the adjudication, the defendant did raise the question whether there was a dispute to be adjudicated upon. In a response to the referral notice, the defendant at paragraph 2.16, under the heading 'no dispute' said this:

*"In the circumstances, and without prejudice to its arguments set out elsewhere in the submission, the referring party would submit that this adjudication must fail as it was initiated at a time when there was no dispute between the parties in relation to notices or interest allegedly owed, as defined by His Honour Judge Thornton QC in the leading case of* ***Fast Track Contractors Ltd.-v-Morrison Construction Ltd. and another****. As Judge Thornton makes clear in his decision in that case,*

> *"A dispute can only arise once the subject matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion. This was not the case here."*

54. That response was served on the 8th July of this year. It followed a letter dated the 25th June of this year, written by MK International Ltd. to Messrs Jeffrey Parker Borne, indicating how it was proposed to deal with the adjudication. The letter, so far as is presently material, said this:
*"Your client's notice of intention to refer dated the 14th June is addressed to MCI Worldcom Ltd. which, as we have explained, is now known as Worldcom International Ltd. No other entity is named as a party to that notice which further refers to your client's intention to refer a dispute to adjudication.*

*"The enclosures to your letter of the 21st June, however, consist of what are expressed to be 4 separate referral notices. These notices are said to concern 4 separate disputes and the parties to those notices appear, on their face, to include not only Worldcom International Ltd. but also MK International Ltd., MK International SA and MK International SRL. It, therefore, appears that the dispute and the parties to that dispute to which reference is made in your clients' notice of intention to refer, are not the same dispute and parties as those indicated in your clients' so-called 'referral notices'.*

*"As you are aware, the dispute which is the subject matter of any adjudication, is effectively defined by the notice of intention to refer. In the circumstances, we are prepared, in the interests of avoiding yet further delay, to treat your clients' so-called referral notices as relating to a single dispute with Worldcom International Ltd. and to treat all references and the notices accordingly.*

*"Please confirm by return whether your clients agree to this approach. If they do not, then, in our view – for the reasons set out above – this adjudication cannot proceed and must be with drawn forthwith."*

55. In fact, the claimant did elect to proceed in the letter dated the 25th June 2000.

56. In a further response to the reply of the claimant in the adjudication, paragraph 21, paragraph 22 and paragraph 23 under the heading "Notices under Clause 4.7 of the PFA", what was said was this:
*"(21) Hitec submits in paragraph 77, that it understands that Worldcom does not suggest that no dispute existed in respect of Clause 4.7 because Hitec's notice of adjudication was premature. This is not accepted.*

*"(22) The notice of adjudication was issued on the 14th June 2002. This was only one day after the letters were issued to Worldcom alleging liability under Clause 4.7 of the PFA …" – which I will refer to at paragraph 2.18 of the response – "As stated in paragraph 2.16 of the response, Judge Thornton has made clear that a dispute cannot have arisen if the opposing party has not had the opportunity to consider, admit, modify or reject the claim being made. The allegation that at the time of the notice of adjudication, a dispute had arisen concerning Worldcom's liability under Clause 4.7 of the PFA must also fail.*

*"(23) As to paragraph 77.3 and 77.4 of the reply, it is Worldcom's case that the adjudication commenced by Worldcom and discontinued, relates to a different dispute to that which is the subject of this adjudication."* [Quote unchecked]

57. The reference to paragraph 2.18 of the response was a reference to the document called *"Response to referral notice"*. And under the heading *"Notice under Clause 4.7 of the PFA"* what was contained in that paragraph was this:
*"There remains the question of how claims arising from alleged failures on the part of participating affiliates are properly directed against the other party." - that's a reference to the defendant – "In that context, Hitec refers at various points in the individual referral notices, for example at paragraph 13.9 in the case of the Paris notice, the references and other notices are identified in the Appendices, to letters which it sent to the other party dated the 13th June 2002 containing demands 'for payments made in accordance with the PFA'.*

*"Reference to the relevant attachment, indicates that these letters have been written in the provisions of Clause 4.7 of the PFA."*

58. Then paragraph 2.19 went on,

*"This provides that where a purchase order is issued by a participating affiliate, and a payment is due and has been properly demanded of that affiliate, the amount concerned is payable by the other party on its behalf. The other party would comment as follows: Clause 4.7 goes on to make clear that in the event of such a demand, the other party shall have all the contractual rights and benefits, including a right of set-off, which were available to the relevant participating affiliate under the purchase order. Such a right, it is submitted, arises here.*

*"The referring party has purported to issue demands under Clause 4.7 of the PFA in respect of all projects subject to this dispute. Where the other party is not the purchaser under a purchase order, it cannot be held responsible for any failure to issue contractual notices on the part of the purchaser, even if the adjudicator were to decide that there has been such a failure.*

*"In the other party's submission, this is the position in relation to the projects in Paris, Amsterdam and Milan."*

59. In the adjudication decision, Mr. Gateskell seems to have proceeded on the basis that the issue which he was being asked to decide was whether the defendant was liable, under Clause 4.7 of the purchase framework agreement to pay the sum of £729,000 odd claimed by the claimant in the adjudication.

60. At paragraph 41 of his decision, Mr. Gateskell says this:

*"In my view, upon the true construction of the PFA, including Clause 4.7, thereof, the position is as follows:*

*"The present adjudication arises pursuant to Clause 52. Clause 52 of the general conditions is within the PFA. The PFA is expressly made between MCI Worldcom Ltd., the respondent in the present adjudication, and Hitec Power Protection BV, the referring party.*

*"Recital D states that Worldcom enters into this agreement on its own behalf and as agent of the participating affiliates.*

*"Ordinarily, where an agent discloses his principal's name to the third party with whom he is dealing, the agent himself is not normally liable on the contract.*

*Accordingly, prime facie the referring party, having entered into the PFA on its own behalf, and as agent of the participating affiliates – who issue purchase orders – would not be liable on their behalf.*

*"Clause 4.7 then sets out the circumstances in which Worldcom does become liable, namely, where a participating affiliate fails to pay an amount due under a purchase order. In such circumstances, such amount shall be paid by Worldcom, on behalf of the participating affiliate, within 10 days of a written demand by the contractor to Worldcom. Further, I accept the referring party's contention at paragraph 76 of its claim, that where an affiliate would be unable to rely upon a set-off because of its failure to serve a withholding notice, Worldcom may not rely on the set-off when a demand is made against Worldcom under Clause 4.7.*

*"I reject an contention to the contrary, since otherwise this would permit a party to benefit from its own wrongdoing. An affiliate could refuse to pay so that Clause 4.7 became operational, so that Worldcom could take advantage of its different status."*

61. Paragraph 42.

*"Further, I reject the contention in the respondent's further response to the reply that no dispute existed between Hitec and Worldcom in respect of Clause 4.7 because Hitec's notice of adjudication was premature.*

*"The respondent relies on the notice of adjudication being issued on the 14th June 2002 – only one day after letters were issued to Worldcom alleging liability under Clause 4.7 of the PFA. The respondent contends that a dispute cannot have arisen if the opposing party has not had the opportunity to consider, modify or reject the claim being made.*

*Paragraph 23: "The respondent contends that it is Worldcom's case that the adjudication commenced by Worldcom and discontinued, relates to a different dispute to that which is the subject of this adjudication. However, I reject that contention by reason of the facts and matters set out above – particularly in paragraph 18 above – since MKI's letter of the 17th June 2002 stated, in the clearest terms, that it considered that Hitec's adjudication notice was dealing with precisely the same dispute as the adjudication notice issued by MKI.*

*"Accordingly, I accept the contention in paragraph 77.3 of the referring party's reply to response, to the effect that Worldcom has waived any condition precedent that there might be to its liability under PFA, Clause 4.7 – that there must first be a written demand and/or that 10 days must elapse thereafter.*

*"Accordingly, the absence of any demand and of the expiry of 10 days, does not avail the respondent herein. Accordingly, in my view, a dispute had arisen between Hitec and Worldcom at the point when – if not before – MKI, on behalf of Worldcom, produced its notice of adjudication which it subsequently described on the 17th June 2002 as relating to the same dispute as that raised in Hitec's adjudication notice."*

62. Now, I am concerned with the reasoning of Mr. Gateskell in relation to the matters considered in paragraphs 41 and 42 of his decision only in relation to the question of his jurisdiction. In those paragraphs, in my judgment, he is considering the question of his jurisdiction. It was submitted by Miss Randall, on behalf of the claimant, that Mr. Gateskell was not there considering the question of jurisdiction but rather the merits of the dispute which had been referred to him, an aspect of which was whether there was a dispute. That, in my judgment, is not a correct construction of Mr. Gateskell's decision.

63. The question whether or not there is a dispute arises, and arises only, in the context of adjudication in relation to whether the adjudicator has jurisdiction to determine the dispute. Put quite simply, unless there is a dispute, there is nothing for the adjudicator to decide. So when a party submits to an adjudicator that there is no dispute, it is plain, in my judgment, that what that party is thereby doing, is raising an issue as to whether the adjudicator has any jurisdiction to decide anything at all. And it seems to me – as I have indicated – plain that in paragraphs 41 and 42 of his decision, Mr. Gateskell was addressing exactly that question. However, with the greatest of respect to Mr. Gateskell, I find great difficulty in understanding why he adopted the approach which he did.

64. The questions arise whether, in any event, the approach adopted by Mr. Gateskell was correct, I should adopt the same approach and reach the same conclusion; and it is in that context, and for that reason only, that I express any view on this part of Mr. Gateskell's decision.

65. I find it impossible to understand how, in relation to the question whether there was a dispute, Mr. Gateskell considered it relevant to ask and answer the question whether the defendant – by the terms of MKI's letter of the 17th June 2002 – had waived reliance upon the terms of Clause 4.7. What Mr. Gateskell's analysis seems to me – with respect to him – to amount to is this: taking the view (which in my judgment in fact was not justified but that's not an observation which is necessary to make for the purposes of this judgment other than in relation to an argument as to waiver, to which I shall come in a moment) that MKI, on behalf of the defendant, had waived reliance upon the terms of Clause 4.7 of the purchase framework agreement, Mr. Gateskell seems to have persuaded himself that the effect of not being able to rely upon a written demand, and 10 days for payment, was to create a dispute at a point before a demand had even been made. That analysis, with respect to Mr. Gateskell, I have the greatest difficulty in understanding.

66. What the approach Mr. Gateskell adopted, seems to amount to is this: that he, taking the view that it was not open to the defendant to say that there was no dispute in relation to the matter which he was deciding, considered the question whether there was any dispute of any sort between the parties; reached the conclusion that there was a dispute under the terms of the various purchase orders as to the sums which were payable under the purchase orders; decided that that was to be treated as equivalent to a dispute as to whether the defendant was liable under Clause 4.7 of the purchase framework agreement to make payment; decided that it was; and decided, therefore, that a dispute existed before any demand had been made for payment under Clause 4.7. In my judgment, that is an impossible analysis.

67. Miss Finola O'Farrell QC, who appeared on behalf of the defendant, submitted that in all of the circumstances there was no dispute between the claimant and the defendant in relation to the matters set out in the notice of adjudication served on behalf of the claimant, that is to say the letter of the 14th June 2002, because the issues there identified did not sensibly arise as between the claimant and the defendant, but rather as between the claimant and those parties who had placed the purchase orders. She further submitted, that there was no dispute between the claimant and the defendant in relation to the demands made under Clause 4.7 of the purchase framework agreement because the notice of adjudication was to be taken as having been served before the demands were to be taken as having been served; and, in any event, the defendant had 10 days in which to consider its position in relation to the demands and to respond to them, and that period had not elapsed at the date of the service of the notice of adjudication.

68. Miss Randall, in support of her submission, that it was not open to the defendant to take that point, referred to a number of authorities. The first was the decision of Mr. Justice Devlin (as he then was) in the case of

**Westminster Chemicals and Produce Ltd. -v-Eikhaussen Nuersa** [1954], 1st Vol. Lloyd's Rep., page 99. She drew attention in particular to a passage in the judgment of Mr. Justice Devlin at page 105, in which he said this:

*"In those circumstances, if there is an agreement and if one of the parties had studied it beforehand and thinks that the dispute is outside it, he can then go before the arbitrator, if he so wishes, and protest. If he protests against the jurisdiction of the arbitrator (which is merely an elaborate way of saying "I have not agreed to abide by your award") if he protests in that form, it is held that he can take part in the arbitration without losing his rights and what he is doing, in effect, is that he is merely saying "I will come before you but I am not, by my conduct in coming before you and arguing the case, to be taken as agreeing to accept your award – because I am not going to do so".*

*"In those circumstances, he may or may not be allowed to take part in the arbitration. Customarily, I think he is, but whether that is so or not, if he protests, it is well settled that he enters into no agreement to abide by the award.*

*"All those fundamental doctrines flow from the principle which, I think, is well established that if a man does not protest, but if – as it called – he submits to the jurisdiction of the arbitrator, he is then bound by the award. There is no doubt that has always been the law and I do not think that it is disputed and the basis of it, as I say, I take to be this, that it is merely an illustration of the general principle that by appearing before an arbitrator and submitting his case for settlement, his conduct necessarily leads to the inference that there is an agreement consenting to the award unless there is something, such as a protest, to negative that agreement."*

69. That statement of Mr. Justice Devlin was considered by the Court of Appeal in the case of **Furniss Withey (Australia) Proprietar Ltd. -v-Metal Distributors (United Kingdom) Ltd.** (a case also called **the Amazonia**) [1990] 1st Vol. Lloyd's Law Reports, page 236. The leading judgment in that case was that of Lord Justice Staughton and at page 243 he considered the statement of Mr. Justice Devlin to which I have just referred and its consideration in other cases, and then said this:

*"It seems to me that the doctrine of Mr. Justice Devlin, thus emphatically endorsed, is good sense and ought to be good law. There are enough hazards in the process of obtaining and enforcing an arbitral award without the additional prospect that the respondent, having taken part all along without a murmur of protest, may at the end argue that there never was an arbitration agreement in the first place. Nor would I wish him to be allowed to do so half way through, when time has elapsed and money been spent on pleadings, discovery and suchlike. The rule ought to be that if a person wishes to preserve his rights by taking part in an arbitration under protest, he must make his objection clear at the start, or at least at a very early stage, otherwise he ought to be sound. Practitioners have acted on that view of the law for many years."*

70. Miss Randall submitted that that principle ought, by analogy, to be applied in cases of adjudication. She submitted that a party who wishes to challenge the jurisdiction of an adjudicator should make that challenge clear at the earliest practicable opportunity. If a party participates without doing so, that party will confer jurisdiction on the adjudicator, or will waive or will be stopped from challenging jurisdiction on any subsequent enforcement.

71. She submitted that the correspondence between the parties (to the relevant parts to which I have referred) shows: first, that the defendant positively asserted that the dispute between it and the claimant was one and the same; second, that there was a positive assertion on the part of the defendant that the adjudicator would determine issues in the adjudication and that the parties would be bound; and, third, that from the defendant's perspective, the only jurisdictional issues raised were those raised by the claimant in relation to the attempt of the defendant to rely upon alleged set-offs.

72. Miss O'Farrell, whilst not challenging the principle and its application, in cases of adjudication, did submit that in the context of adjudication it was necessary to bear in mind that the process was a speedy one, and that it might, therefore, be the case that the process of adjudication had got significantly underway before the time at which it was possible for a reluctant responding party to take the point that the adjudicator had not jurisdiction.

73. She submitted that contrary to the submissions of Miss Randall, the defendant had indeed, in the response to the referral notice, and in the further response to the reply, in the passage to which I have referred, raised the issue of the jurisdiction of Mr. Gateskell. Miss Randall's submission seemed to come down to this, that although there were references to which she, herself, very properly drew my attention to the questions

whether there was or were disputes between the parties, those references were insufficiently clear to raise fairly and squarely for the claimant and for Mr. Gateskell, the question of his jurisdiction.

74. I reject the submissions of Miss Randall on this point. It seems to me to be quite plain from those passages in the response to the referral notice and to the further response to the reply (to which I have drawn attention) that the defendant was seeking to rely upon the absence of any relevant dispute as an objection to the jurisdiction of Mr. Gateskell. There was no other purpose in raising those points. And it is plain, in my judgment, from a consideration of Mr. Gateskell's decision, on proper construction, that he did recognise that the significance of the point was that it went to his jurisdiction.

75. So, it being open, as I find, to the defendant to take the jurisdiction point, does the point, in fact, have substance? Miss Randall, as I have said, submitted that on proper analysis of the correspondence between the parties, it was common ground that there was a dispute between the claimant and the defendant and that that dispute related to the sums which were payable by the defendant to the claimant. In my judgment, that submission is not well founded.

76. The approach which Mr. Gateskell adopted in his decision, as I have indicated, was to consider the liability of the defendant as arising, and arising only, under Clause 4.7 of the purchase framework agreement. He did not decide any broader or wider issue as between the claimant and the defendant; and, in particular, he did not decide that the claimant was entitled to recover from the defendant by virtue of any of the matters which were raised expressly in the terms of the notice of adjudication.

77. The question of the jurisdiction of the adjudicator, in my judgment, is a fundamental one – although it may well be possible for a party so to conduct itself as to be prevented after a decision has been made from relying upon a jurisdictional objection. That seems to me to be a particularly difficult analysis in a case in which the objection to jurisdiction is that there is no dispute to be referred. If one contemplates the possibility of there, in fact, being no dispute but a party being prevented from asserting that there was no dispute, one then has the difficulty of identifying what on earth it is that the adjudicator is supposed to decide. And it is difficult to resist the conclusion that, in those circumstances, one is really entrusting to the adjudicator, the determination of the issue which he is to determine – and that, in my judgment, is a profoundly unsatisfactory state of affairs.

78. Now, in support of her submission that there was a dispute between the parties, Miss Randall drew to my attention a number of authorities. She relied, in particular, upon the approach adopted by the Court of Appeal in **Hauke Shipping Corporation-v-Sopex Oils Ltd.** [1998] 1 W.L.R., page 726 to the question whether there was a dispute between the parties fit to be referred to arbitration. In that case, as is apparent from the passages in the judgments to which Miss Randall drew my attention specifically, the question which arose was whether it could be said that there was a dispute in circumstances in which one party asserted that the other party had no answer to a claim. That is a different issue from the issue which arises before me, but it is the same as the issue which had to be considered by Mr. Justice Saville, in **Haita -v-Nelson and Home Insurance Co.** [1990] 2, Lloyd's Law Reports, page 265 to which Miss Randall also drew my attention.

79. Miss Randall relied heavily upon a Scottish decision, the apparently unreported case of **Karl Construction (Scotland) Ltd. -v-Sweeney Civil Engineering (Scotland) Ltd.,** a judicial review case, which came before Lord Caplan in the Outer House of the Court of Session and in relation to which he delivered his judgment on the 21st December 2000. His judgment was subsequently subject of an appeal heard in the Extra Division of the Inner House of the Court of Session, in which judgment was handed down on the 22nd January of this year. The Inner House of the Court of Session rejected the appeal. The particular passage upon Miss Randall relied was set out at paragraph 22 of Lord Caplan's decision, which was in these terms,

*"A question might arise as to whether, during the course of an adjudication, parties can adjust or change their contentions. Thus it is difficult to see why, when confronted with Carl Construction's response, Sweeney should not – if they had been so advised – have added an esto contention that if they were not due for payment under the terms of the contract, because the contract did not contain a mechanism for determining when payment was due, that they would be entitled to payment under Part 2 of the scheme. Parties continued to correspond after the formal notices and these letters were referred to the adjudicator. The adjudicator had a meeting with the parties relating to valuation questions, but it is surely to be expected in flexible procedures, such as apply here, that the adjudicator herself could raise new*

*questions of fact or law if she thought that they were relevant to the dispute. Thus it is important to distinguish between the dispute, which will turn on the practical implications for the parties and the contentions and support of each party over the material issue which might be adjusted in the course of communications between them."*

80. As I understood it, Miss Randall relied upon that passage in support of the analysis for which she contended that the dispute between the claimant and the defendant was in relation to what sums were payable by the defendant to the claimant and it was immaterial, by analogy with Lord Caplan's analysis that when that dispute started, it was a dispute as to what sums were payable under the purchase orders; and by the time it finished it had become a dispute as to what sums were payable under Clause 4.7 of the purchase framework agreement.

81. In my judgment, that is not a correct analysis. What one is concerned with, in the circumstances of the present case, is not a refinement of arguments in support of a claim which was and remained throughout the same; but rather, putting a claim against the defendant on a completely different contractual basis by the time the matter was determined by the adjudicator as compared with how matters stood at the time the notice of adjudication was given.

82. Miss O'Farrell, in support of her submission, that for there to be something which sensibly could be termed a dispute, there needed to have been a claim which had been made by one party which had been the subject of an opportunity by the other party to consider it and react to it, relied upon a number of decisions, including a decision of my own, in which I reviewed a number of the earlier authorities upon which Miss O'Farrell also relied.

83. My decision was in the case of **Edmund Nuttall Ltd. -v- R.G. Carter Ltd.** in which judgment was handed down on the 21st March this year. Miss O'Farrell reminded me of the contents of paragraphs 26 through to, I think, really 39 of the judgment. (I do not intend for the purposes of this judgment to cite the passage of which I have been reminded.) In the course of that passage, I made reference to an observation of Lord Denning, Master of the Rolls, in **Monmouthshire County Council -v- Costello and Kemple Ltd.** reported in the 5th Vol. of the B.L.R. page 83, at page 89 where Lord Denning said this:
*"The first point is this: was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must, in the first place, be a claim by the contractors. Until that claim is rejected, you cannot say that there is a dispute or difference. There must be a claim and a rejection in order to constitute a dispute or difference."*

84. Miss O'Farrell also reminded me specifically of the judgment of my brother, Judge Anthony Thornton QC, in **Fast Track Contractors Ltd. -v- Morrison Construction Ltd.**, reported in [2000] B.L.R. at page 168, where Judge Thornton expressed similar sentiments.

85. The system of adjudication, whether established by contract between the parties or under Part II of the Housing Grants Construction and Regeneration Act 1996, has a number of imperfections. Parliament has prescribed that in the wider interest, speed of adjudication is important; and it is largely in the quest for speed, that one is likely to find such imperfections in the system of adjudication as there are.

86. However, whilst recognising that there are imperfections, and that such imperfections are – to a degree – an inevitable feature of the system, it is no part of the function of the court to multiply them. Whatever may be the correct approach to the determination of the question what amounts to a dispute fit to be referred to arbitration under an arbitration clause, it seems to me that in the context of adjudication, a dispute is something more than simply a rejection baldly of a claim, or a failure to respond to a claim. What a dispute, in the context of adjudication, amounts to, in my judgment, is a situation in which a claim has been made, there has been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind.

87. While it may be that it can be said that there is a dispute in a case in which party which has been afforded an opportunity to evaluate rationally the position of an opposite party, has either chosen not to avail himself of that opportunity, or has refused to communicate the results of his evaluation, in circumstances such as that of the present case, where the period permitted by Clause 4.7 of the purchase framework agreement for a consideration by the defendant of its position and reacting thereto, where a demand was made, had not

elapsed – it does not seem to me that there can sensibly be said to be a dispute which was fit to be referred to adjudication.

88. In those circumstances, I find that Mr. Gateskell exceeded his jurisdiction in making the decision which he did that the defendant was liable to pay the sum of £792,000 odd which he found under Clause 4.7 of the purchase framework agreement.

89. As an alternative to her main case, Miss Randall submitted that, insofar as a claim was made by the claimant against the defendant in relation to the Dublin project, the position was different from that which obtained in relation to the other projects because in relation to the Dublin project, it was accepted – or at any rate Mr. Gateskell had found – that the purchase order was placed on behalf of the defendant as principal.

90. In those circumstances Miss Randall submitted since it could be identified that the way in which Mr. Gateskell arrived at his total figure payable of £792,000-odd involved including an element in respect of the Dublin project of £261,187.08, I should, in any event, give judgment for the claimant against the defendant for that amount.

91. Miss O'Farrell submitted that that would not be an appropriate course to adopt. She submitted that Mr. Gateskell's award was for a single lump sum of £792,069.65; that, if I found, as I have found, that an award in that amount was in excess of Mr. Gateskell's jurisdiction, I should simply dismiss the application for summary judgment.

92. Miss O'Farrell submitted that I had no power to revise Mr. Gateskell's award and she submitted that it would be wrong in principle for the court to seek to do so. Understandably choosing her language by reference to the position of her client, she submitted that it was no part of the court's function to seek to salvage from the debris of an unenforceable award, or an award unenforceable in total, something for the benefit of the party seeking to enforce, because if one were to do that it would involve revisiting the reasoning process adopted by the adjudicator without affording the party against whom enforcement was sought, an opportunity to challenge that part of the reasoning which the court might be tempted to think led to a particular conclusion.

93. In my judgment, there is great force in that submission and I accept it. It seems to me that it would be quite wrong for the court if it finds – as I have found – that an award has been made in excess of jurisdiction, to enter upon the path of seeking to find for the benefit of the enforcing party and to the prejudice of the party against which enforcement is sought, something which could be salvaged to the benefit of the enforcing party.

94. In those circumstances, I dismiss the application for summary judgment. Although the application is simply for summary judgment – so, theoretically, this action could have an existence notwithstanding the fact that I have refused the application for summary judgment – in fact the issues which I have been invited to consider, and which I have determined, seem to me to mean that this action is bound to fail. Therefore, while I afford counsel an opportunity to address me on this question, what I am minded to do is not merely to dismiss this application, but to dismiss the action.

LOUISE RANDALL (Instructed by Decherts) appeared on behalf of the claimant.
FINOLA O'FARRELL QC (Instructed by Cameron McKenna) appeared on behalf of the defendant