JUDGMENT : HIS HONOUR JUDGE TOULMIN CMG Q.C. TCC : 6th June 2000:

1. I start this judgment by expressing my gratitude to the parties for their various submissions, including the additional written submissions by counsel, which I received and read yesterday.

2. This is an application issued on the 19th May 2000 by the claimant, John Mowlem & Co. Ltd. ("Mowlem") for a declaration that the adjudicator in a dispute between Mowlem and the defendant, Hydra-Tight Ltd. trading as Hevilift ("Hydra-Tight"), does not have jurisdiction to decide the dispute forming the subject matter of Hydra-Tight's purported reference to adjudication of the 25th April 2000, or any dispute arising out of the subcontract agreed by the parties and forming the subject-matter of the purported reference.

3. Mowlem ask for an injunction forbidding the adjudicator, Mr. Elven, and/or the defendant, from taking any further step in the purported adjudication, and also claim damages against Hydra-Tight for the costs and expenses they have incurred in contesting the purported reference, and in participating (under protest) in the adjudication by Mr. Elven.

4. It is agreed between the parties that on or about the 10th June 1999 the parties agreed to enter into a sub-contract whereby Hydra-Tight agreed to carry out steel erection work at Covered Ways 12 and 58 on the District and Circle Lines in the London Underground railway system. The contract offer letter dated the 7th May 1999 had annexed to it conditions to be included in the sub-contract.

5. A dispute arose between the parties relating to the performance of the contract. It appears that Hydra-Tight had made application for stage payments on the 29th August 1999 & 17th November 1999 which had not been met Hydra Tight are claiming £162,699.65, including VAT & interest (see letter to Mowlem dated 25th April 2000)

6. On the 11th April 2000 Hydra-Tight sent an adjudication notice to Mowlem concerning the dispute and applied to the Royal Institution of (Chartered Surveyors (RICS) for the nomination of an adjudicator. By fax to the RICS on the 13th April 2000 Mowlem objected to the RICS making an appointment on the grounds that, under the terms of their agreement with Hydra-Tight Mowlem was entitled to nominate an adjudicator from its list of approved adjudicators. Mowlem contends that the approved list of adjudicators consists of the members, for the time being, of Atkin Chambers, a set of barristers' chambers in Gray's Inn, London.

7. On the 14th April 2000 the RICS nominated Mr. C.D. Wheeler, MSC, FRICS, FCI.Arb., to serve as adjudicator. Mowlem objected. The RICS told Mowlem that it had no jurisdiction to decide on the objection, i.e., whether or not a nomination should be made by them. The RICS may have been confirmed in its view that this was the only position it could take by a letter from Hydra-Tight's solicitor, faxed that morning, confirming that the RICS did have authority to make a nomination.

8. Mr. Wheeler was, not surprisingly concerned about the challenge to his jurisdiction, and on the 17th April 2000 I wrote to both parties inviting them to make any further representations which they wished to make as to the validity of his appointment by 6 p.m. on the 18th April 2000.

9. He said: "*I therefore conclude that the proper nominating body of an adjudicator under the sub-contract (as amended by Part 1 of the Scheme) is the ICE".*

10. By a letter dated the 20th April 2000 to James R. Knowles (who were acting on behalf of Hydra-Tight) Fenwick Elliott, Mowlem's solicitors, invited Hydra-Tight to write a letter requesting Mowlem to nominate a member of Atkin Chambers as adjudicator.

11. By a letter dated the 25th April 2000 James R. Knowles declined the invitation, saying that the attempt of one party to reserve for itself the nomination of the adjudicator created a potential for bias.

12. By a letter dated the 25th April 2000 Hydra-Tight applied to the Institution of Civil Engineers (ICE) to appoint an adjudicator. On the same day, Mowlem wrote to ICE to say that, under the terms of the sub-contract, the appointment must come from Mowlem's approved list of adjudicators, consisting of members of Atkin Chambers, Gray's Inn, & any purported appointment by ICE would be challenged on the grounds of lack of jurisdiction.

13. On the 28th April 2000 Mr. Elven, a partner in the Anton Gill Partnership in Gillingham, Dorset, wrote to say that he had accepted the appointment from the ICE to act as adjudicator. Mowlem wrote to him on the same day objecting that he did not have jurisdiction to adjudicate.

14. On the 4th May 2000 Mr. Elven confirmed to the parties that, in his view he had jurisdiction. His letter went on:
"I find that the subcontract in On the 19th April 2000 Mr Wheeler notified both parties that he regarded his nomination by the RICS as invalid. question is unworkable since it has not proved possible to appoint an Adjudicator in accordance with the subcontract adjudication procedure. In these circumstances the subcontract, under Disputes and Termination, provides for the President of the Institution of Civil Engineers to choose a new Adjudicator. I have accordingly been appointed to act in this matter."

15. Also on 4th May 2000 Fenwick Elliott wrote to Mr. Elven to put him on notice that they did not accept the validity of his nomination. Making reference to the case of Northern Developments (Cumbria Ltd. V. J. &. J. Nicholl), they said that they would under protest contest the substance of Hydra-Tight's claim. On this basis the adjudication by Mr. Elven has proceeded. Mr. Elven wrote to the parties on 5th May 2000 suggesting that the issue of jurisdiction should be resolved by this court before he proceeded with the reference to adjudication. Mowlem was prepared to agree to this sensible suggestion. Hydra-Tight was not (see letter from James R. Knowles dated 8th May 2000).

16. By fax of 10th May 2000 Fenwick Elliott on behalf of Mowlem confirmed to Mr. Elven that it intended to make the application to this court. There followed a correspondence between Fenwick Elliott and Mr. Elven in which Mr. Elven makes the point (17th May 2000) that Fenwick Elliott had ample time by that date in which to apply to this court and obtain a decision on the jurisdiction issue.

17. **The Atkin Chambers List :** In his first witness statement dated 24th May 2000 Mr. Donnelly, an assistant solicitor at Addleshaw Booth & Co. for the defendants, records that his clients were never supplied with Mowlem's list of approved adjudicators prior to the institution of the proceedings and says that no such actual headed list of approved adjudicators existed before the dispute arose.

18. It is suggested that such a list was required to have been drawn up as such by para.8.l(e) of the Adjudication Procedure which defined the approved list of adjudicators as:
"The list of adjudicators who are considered suitable by the contractor to act in determining disputes under the main contract at the date of notification of dispute compiled by the contractor."

19. The defendant relies on Fenwick Elliott's fax dated 23rd May 2000 which says:
"We enclose as requested a copy of the current list of approved adjudicators. Our clients have not sent such a copy to yours; neither have they been asked to do so. The list is not included with the contract documentation as it is ambulatory until a dispute arises: 8.1(e) Appendix 3, Option 2. refers to the list 'Current at the date of notification of dispute compiled by the contractor'."

20. In his witness statement dated 25th May 2000 Mr. Wadsworth, project quantity surveyor responsible to the applicant for the commercial management of the project, responded by noting that the first time that the contention had been raised was in Mr. Donnelly's witness statement. He said that in mid-1998 he was informed by Bruce Jackson, an in-house solicitor for Mowlem, that he contacted Atkin Chambers and asked if the members were prepared to constitute the approved list of adjudicators. By a letter dated 16th July 1998 the clerk of Atkin Chambers, Mr. Goldsmith, wrote to Mr. Jackson suggesting appropriate wording that the referring party shall request the senior clerk for the time being to nominate the member of chambers to act as adjudicator.

21. A manuscript note makes it clear that there were further discussions between the administrator of the chambers and the in-house staff of Mowlem. The decision to adopt the members of Atkin Chambers as the approved list was made in Mr. Wadsworth's presence on 6th January 1999.

22. It is suggested by the defendant that there was a requirement that a piece of paper should exist entitled *"Approved List of Adjudicators"* which should be physically updated from time to time to reflect new arrivals into Atkin Chambers and departures to retirement or to judicial office.

23. I do not accept this construction. It is clear that the approved list should exist by identification and he able to be communicated on request, as it was to KCF in the course of the same construction contract on 7th June 1999. In my view, there is no difficulty in construing the list of adjudicators under clause 8.1(e) as being the members of Atkin Chambers for the time being. This method of identification is appropriate since the list gives a range of possible adjudicators depending on the availability of potential adjudicators, the size and complexity of the dispute and enables an adjudicator to be appointed who is free from any actual or perceived conflict of interest. It also gives a sub-contractor the opportunity to object to a proposed adjudicator on the grounds of actual or perceived conflict of interest. This does not dispose of the matter. I must now turn to the rather convoluted provisions of the contract and consider the rival contentions of the parties. Fortunately, there is a substantial measure of agreement on the construction of many of these provisions.

24. **The Contractual Provisions :** The starting point is the Definition Section. SUBCONTRACT DATE PART ONE enclosed with Mr. Wadsworth's letter of 7th May 1999, which provides that:
"The conditions of Sub-Contract are the core clauses and the clauses for Option A" (priced sub-contract) "and Y (UK) 2 (published by the ICE April 1998) of the second edition (November 1995) of the NEC Engineering and Construction Sub-contract plus the following Optional Clauses."

25. These include Clause Z, Additional Conditions of Contract It is to be noted that the provision says *'plus*" not "*as modified or supplemented by*". The 1999 sub-contract document also provides that: "The Adjudicator in this sub-contract is selected from the List of Adjudicators in accordance with the sub-contract procedure or where the contractor issues a notification under clause 91.4 is the same person as the Adjudicator for the main contract. The main contract Adjudicator "is to be agreed between the contractor and the employer".

26. The amended procedure, Option Y (UK) 2, published by the ICE in April 1998, is intended to comply with s.108 of the Housing Grants Construction & Regeneration Act 1996 ("the Act) and the Scheme for Construction Contracts (England & Wales) Regulations 1998 SI No.649 ("the Regulations') which brought the Act into force on 1st May 1998.

27. Option Y (UK) 2 deleted clause 90 of the 1995 standard NEC Engineering & Construction Sub-Contract 1995, a core clause, and replaced it with clause Y2.5 headed *"Avoidance and Settlement of Disputes"*. It provided in new clause 90.1 to clause 90.4 a mechanism called a Notification of Dissatisfaction ("Notification of Dissatisfaction") which delays a referral to adjudication for four weeks during which time the parties have an opportunity to meet and resolve their differences. During this time the parties agree that a dispute shall riot have arisen and therefore there is no matter which can he referred to adjudication.

28. Clause 90.4 provides: : *"The Parties agree that no matter shall be a dispute unless a notice of dissatisfaction has been given and the matter has not been resolved within four weeks."*

29. The word dispute (which includes a difference) has that meaning.

30. The parties are agreed that these provisions are illegal. Section 108(1) of the Act defines dispute as "*any difference*" and gives an unfettered right to refer the dispute to adjudication.

31. Clause 90.5 provides: : *"Either Party may give notice to the other Party at any time of his intention to refer a dispute to adjudication. The notifying Party refers the dispute to the Adjudicator within seven days of the notice.*

32. This provision would conform to Section 108(2) (b) of the Act taken on its own but not if taken in conjunction with Clause 90.4.

33. The contract is also subject to Option Z. This is set out in Appendix 3. It provides in Para.16:
"Except for any referral under Clause 91.4 any dispute is resolved in accordance with the ICE ADJUDICATION PROCEDURE (1997) amended as follows.

34. It provides that Para. 3.2 of the scheme should be deleted and replaced with:
"Para.3.2A Where an Adjudicator has.' not been so named or agreed the Contractor shall nominate an Adjudicator from the List of Approved Adjudicators."

35. As I have already set out, "Approved adjudicators" is defined in new para.8.1(e) as:
. . . the list of adjudicators who are considered suitable by the Contractor to act in determining disputes under the main contract, current at the date of Notification of Dispute, compiled by the Contractor.

36. Taken together, Mowlem says that it is clear that the list of adjudicators deemed to be suitable by the contractors is that containing the members of Atkin Chambers, and one of their number and only one of their number should be appointed.

37. They also say that, contrary to the opinion expressed by Mr. Elven this cannot be frustrated by a refusal by Hydra Tight to operate the agreed mechanism for the appointment of an adjudicator.

38. The defendant disagrees. It says that there should be a general referral in accordance with the ICE adjudication procedure & not a referral to Mowlem's list of approved adjudicators. It says, first, that the regime set out in clause 90.1 & following is a mandatory regime for the avoidance & settlement of disputes. This includes the notice of dissatisfaction which is deemed, contrary to the definition in the Act, to fall short of amounting to a dispute.

39. Hydra-Tight says that it is simply illegal to make a provision denying a party an immediate right to refer a matter to adjudication once a dispute has arisen within the definition in the Act. This provision taints the provisions which follow. Therefore it is argued the statutory scheme applies.

40. It is also claimed that Para .3. 2A of the revised ICE procedure is fundamentally flawed in that it merely provides for the contractor to nominate an adjudicator from its list. There is no requirement that this should be done within any particular date or any particular time scale.

41. The defendants say that para.2(1) of the statutory scheme applies and in particular para. 2 (1) (b) which provides:
"If no person is named in the contract or the person named has already indicated that he is unwilling or unable to act and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator."

42. The defendants say that ICE is the specified nominating body arid that in relation to Mr. Elven's appointment it has acted correctly and Mr Elven' s appointment is valid.

43. The claimants say in answer that it was the clear intention of the parties In agreeing Option Z to provide an adjudication procedure that was not flawed and was compliant and that Clause 90.5 of Option Y (UK) 2 should be construed to reflect the common intention which was to put forward a procedure which was in accordance with the Act.

44. **Conclusion** : Section 108 of the Act provides for a right to refer a dispute to adjudication and a mechanism by which it is to be achieved. It defines "dispute" as "any difference" (Section 108 (1))

45. Section 108(1) provides:
"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying, with this section."

46. Section 108(5) provides:
"If the contract does not comply with the requirements of subsections (1) to (4) the adjudication provisions of the Scheme of Construction Contracts apply."

47. This contract does not comply with subsection (1) and subsection (2) (a) since, under Clauses 90.1 to 90.4 of Y (UK) 2 the parties have no immediate right to refer at any time or to give notice of an intention to refer a dispute to adjudication. Under the wording of "***SUBCONTRACT DATA PART ONE***" enclosed with Mr. Wadsworth's letter of 7th May 1999, Y (UK) 2 remains part of the contract. I do not accept Mowlem's argument that "*plus*" in Subcontract Data Part One means "*as modified by*" Optional Clause Z.

48. Having reached this conclusion, it is unnecessary to consider in detail the requirement under Clause 108(2) (b) except to say that I accept the argument that Clause 90.1 and following does not provide a timetable for the securing of the appointment of an adjudicator and referral of a dispute to him within seven days. Therefore, on the plain wording of the statute, the Scheme applies.

49. I have considered whether, if some parts of the subcontract comply with the Act, they can be retained and the Act can be used in substitution for or to fill in those parts of the subcontract which are contrary to the Act. But the words of the Act are clear Either a party complies in its own terms and conditions with the requirements of sections 108(1) to (4) of the Act or the provisions of the Scheme apply.

50. Paragraph 2.1 of the Scheme sets out who is to act as adjudicator as
"(a) the referring party shall request the person (if any) specified in the contract to act.. as adjudicator or (b) if no person is named in the contract or the person named has already indicated he is unwilling or unable to act and the contract provides for a specified nominating body to select a person, the. referring party shall request the nominating body named in the contract to select a person to act as adjudicator."

51. The question is whether there is a person specified in the contract to act as adjudicator. Mowlem says that there is and that the person is to be nominated from the list of members of Atkin Chambers for the time being. The defendants say that there is no single adjudicator named and there is no list.

52. The agreement which the parties entered into in June 1999 was expressed to be the core clauses of the ICE subcontract and the clauses of Option A and Y (UK) 2 published together with Option Z. The contract provides a mechanism for the appointment of an adjudicator who is defined as, . . .the person selected from the List of Adjudicators in accordance with the Sub-contract adjudication procedure, or where the contractor issues a notification under Clause 91.4*" (where the same dispute exists under both the sub-contract and the main contract) "is the same person as the adjudicator for the main contract."*

53. The list of approved adjudicators is defined in para.8.1(e) as, *"... the list of adjudicators who are considered suitable by the Contractor to act in determining disputes under the main contract, current at the date of Notification of Dispute compiled by the Contractor."*

54. The list of members of Atkin Chambers for the time being constitute a list of adjudicators considered suitable by the contractor. The only question which remains is whether this represents a sufficient identification of the adjudicator, or whether the Scheme requires an individual adjudicator to be identified in advance to be able to be on hand to deal with disputes. In my view the Scheme does not so require . The person specified in the contract is the member of Atkin Chambers selected by the contractor as adjudicator at the time when the dispute arises. The adjudication must then proceed in accordance with the Scheme. If I had come to the conclusion that para.2.l(a) of the Scheme did not apply, I should have concluded that under para.2.1(b) of the Scheme the defendant would have been entitled to ask the ICE to select a person to act as adjudicator, as in fact they did.

55. I therefore find for the applicant, Mowlem. It remains to be considered the terms of the relief which I should give.

MR. BRANNIGAN: *My Lord, there remain a number of issues to deal with. The first of course is the one you have just flagged up, which is the precise terms of the relief. The relief which we would ask for is the relief which is set out in the statement of claim, by which I mean the declaration and the injunction.*

JUDGE TOULMIN: *What is the position as far as the present adjudication is concerned?*

MR. BRANNIGAN: *My Lord, my learned friend and myself were debating the merits of that.*

MR. NISSEN: *My understanding, simply as a matter of chronology, is that the decision has not been issued and it is the 11th hour within which it has to be issued, so that is where IL stands at the moment, as I understand it.*

MR. BRANNIGAN: *That is my understanding as well, my Lord.*

JUDGE TOULMIN; *Am I able to grant an injunction against a party that is not present? Presumably not*

MR. NISSEN: *I think that is probably right.*

JUDGE TOULMIN: *And Mr. Elven has not been joined.*

MR.NISSEN: *No. That was a deliberate decision as I understand it Your Lordship may have seen that from the correspondence that there were all sorts of threats against him personally and so on. The decision was made not to join him.*

JUDGE TOULMIN: *So no injunctive relief can be claimed against him.*

MR. NISSEN: *No.*

JUDGE TOULMIN: So he cannot be enjoined from making the decision.

MR. NISSEN: *No. The only thing that my learned friend, I think, can do is an injunction well, I would have thought a declaration that Mr. Elven has no jurisdiction really deals with everything that he needs. I cannot see that there is anything further that he can possibly need.*

JUDGE TOULMIN: *You could ask for an injunction restraining your clients from taking any further action in relation to*

MR. NISSEN: *I suppose he could, though it is difficult to see what that could be if there is a prior declaration that has no effect.*

MR. BRANNIGAN: *I see the force in your Lordship's point. What I would ask for is the declaration as set out In the particulars of claim. My Lord, there is a red bundle handed in which you were using that brown bundle from earlier.*

JUDGE TOULMIN: *I have not got the red bundle, I have been working off the -- but I have got the claimant's application notice.*

MR. BRANNIGAN: *My Lord, that is good enough. You will see about that application, hopefully there will be a claim as part of it.*

JUDGE TOULMIN: *So it is a declaration in terms of para.l?*

MR. BRANNIGAN: *My Lord, yes.*

JUDGE TOULMIN; *Of the application for relief.*

MR. BRANNIGAN: *My Lord, yes. And I would at this stage also ask for an injunction forbidding the defendant from taking any further step in the purported adjudication. Can I address you on that?*

JUDGE TOULMIN. *Before you do, let us see what is said about it.*

MR. NISSEN: *My Lord, I simply say that, as a matter of practicality, it is sufficient for a declaration to be granted that he has no jurisdiction and that an injunction is an unnecessary step because there is nothing further that we can usefully do with anything. This appears to be, for example, precluding us from writing to Mr. Elven saying: "What has happened today?" I do not want to get into all those difficulties of paying Mr. Elven's bill, if we are called upon to do that. All matters of that sort seem to me to be rather unhelpfully within the ambit of the injunction and really met by a declaration that it has no effect.*

JUDGE TOULMIN: *I think they would be entitled to an injunction restraining the defendant from taking any step to implement any award which Mr. Elven might make.*

MR. NISSEN: *Yes, I do not have a difficulty with that.*

MR. BRANNIGAN: *My Lord, can I tell you the concern which I have? I am not asking simply as a matter of form. If my learned friend were to take this matter further and seek to appeal your Lordship, he would be seeking to argue that at all material times in fact Mr. Elven has had jurisdiction. I do not want us to be in a position where we now, the claimant, thinking that your Lordship is right in the decision he has made, simply say: "**Well, there we are, Mr Elven, that is the end of it**", whereas the defendant keeps going; and saying:*

"Well, in fact Mr. Elven, we are going to appeal this. You do have jurisdiction. Please continue". *Now, we do not want that to happen because that would leave us in the rather precarious position where if the defendant were going to continue under protest any competent solicitors would have to, under protest, continue to participate in this adjudication.*

JUDGE TOULMIN: *Well, if I was to say "**restrain from taking any step in the adjudication or to implement any award"?***

MR. BRANNIGAN: *My Lord, to satisfy my learned friend's problems, and I anticipate what **is going to happen, you could put** "save for the communication of this award to Mr. Elven and save for the"*

JUDGE TOULMIN: *But that is not a step in the adjudication.*

MR. BRANNIGAN: *No. On that basis*

JUDGE TOULMIN: *It is not a step in the adjudication. If I simply say "**may not take any step in the adjudication or seek to enforce or implement".***

MR. BRANNIGAN: *My Lord, I am more than happy with that because that will cover I think, all my learned friend's concerns about being keen to pay Mr Elven's bill and so on*

MR. NISSEN: *Yes. I had in mind perhaps your Lordship might like to lift the words from section 9(1), on the stay, of the Arbitration Act "**The step in the proceedings to answer the substantive claim**" . One might be able to use "**take any step in the adjudication to pursue the substantive claim**"*

MR. BRANNIGAN: *Seeking to meet my learned friend's concerns again, I have taken a note of what your Lordship means when you say "step"*

JUDGE TOULMIN: *What I am going to say is an injunction. The claimants are going to have to draw up the order.*

MR BRANNIGAN: *My Lord, yes.*

JUDGE TOULMIN: 1. A declaration in the terms of the relief sought.

2. Injunction restraining the defendant from taking any further step in the adjudication or seeking to enforce or implement any award which Mr. Elven may make without the agreement of Mowlem.

It would be a bit silly not to put in the last bit because if the claimants discovered that the adjudication was going rather well, it would look a bit silly if it was unable to be implemented if it was thought in the end that this was an appropriate resolution of the dispute.

MR. BRANNIGAN: *My Lord, yes. It would also cover the point which I am conscious my learned friend made about the costs of it. If Mr. Elven were to say that the defendant should end up paying his costs, then of course Mowlem would agree to that...*

JUDGE TOULMIN: *So if we put it in that form.*

MR. BRANNIGAN: *My Lord, yes.*

MR. NISSEN: *Can I just persist in qualifying "**step**" by "**substantive step**" which would, I hope, identify that we are talking here about the furtherance of the thing rather than any administrative -- I am concerned, this is an injunction which has its usual consequences, that my solicitors do not get too concerned about taking administrative steps in effect to wind the adjudication down.*

JUDGE TOULMIN: *I will say: "**An injunction restraining the defendant", and then it goes on in the normal way "from taking any substantive step in the adjudication or seeking to enforce or implement any award which Mr. Elven may make without the agreement of Mowlem.***

MR. NISSEN: *I am obliged.*

MR. BRANNIGAN: *My Lord, yes. I have taken a note. I can understand my learned friend's concern.*

JUDGE TOULMIN: *I assume that part of the order when it is drawn up will be shown to the defendants and will be agreed and, if it is not agreed, then we may have to come back and deal with it.*

MR. BRANNIGAN: *And face your Lordship's wrath if it turns out that we cannot*

JUDGE TOULMIN: *But I imagine that will not be necessary because both sides know what the position is and both sides are very sensibly and very prudently concerned about drafting (a) in committee and (b) on the hoof.*

MR. BRANNIGAN: *My Lord, yes. My Lord, that is the first point, i.e. the precise nature of. the relief. The second point is what we do about the remaining claim for damages for breach of contract.*

JUDGE TOULMIN: *Well, that has to be adjourned.*

MR. BRANNIGAN: *My Lord, I was going to suggest adjourned with directions. If necessary it can be simply adjourned at the moment and directions can be sought to be agreed between the parties.*

JUDGE TOULMIN: *I think it should be adjourned at the moment and directions should be sought to be agreed.*

MR. BRANNIGAN: *My Lord, I am content with that.*

MR. NISSEN: *My Lord, yes. I think it is right to make one or two very short observations on it, if I may, at this stage. The first is that, on any view, the sorts of figures that we are talking about are well below the jurisdiction of this court, however interesting questions that might arise from that investigation might be.*

JUDGE TOULMIN: *On the other hand, this would be, I think, the first one.*

MR. BRANNIGAN: *Yes.*

MR. NISSEN: *That is right. I make that point.*

JUDGE TOULMIN: *I would think that this court should retain jurisdiction certainly for the first one on the basis that it is a specialist court dealing with this area.*

MR. NISSEN: *Yes. My Lord, the second point is that in any event we say an assessment would benefit from a deferral at least to this extent. Clearly in the light of the decision, my clients will now seek the appointment of an adjudicator from Atkin Building who will deal with the matter. A necessary issue in the assessment of damages will be assessing by how much the claimants' costs have increased over and above in effect, one adjudication because they would not get their costs in one adjudication since there is no entitlement to costs.*

JUDGE TOULMIN: *What I have said is that I an not going to make any directions today.*

MR. NISSEN: *Right.*

JUDGE TOULMIN: *I think that I will be surprised, to put it at its lowest, if that is the only matter that is left that actually has to come back to the court to be litigated.*

MR. NISSEN: *Yes.*

JUDGE TOULMIN: *I can understand why parties wish to deal with the matter of principle but it would be disproportionate, I would have thought, for the parties to come back to the court to deal with that question of quantum unless there is some serious issue of principle involved which at the moment escapes me. There may be.*

MR. BRANNIGAN: *My Lord, the position may of course be that if the next adjudication does not result in a situation where both parties are satisfied with it, that the whole matter might have to come back before the court, at: which point this would be one part thereof.*

JUDGE TOULMIN: *That is unlikely to be the outcome.*

MR. BRANNIGAN: *I am merely speculating.*

JUDGE TOULMIN: *That is likely to be the outcome in view of the attitude this court has taken to adjudications which have been validly pursued.*

MR. BRANNIGAN: *Oh, no, I entirely understand that and I entirely understand the enforcement provisions, that any award is likely to be enforced. But as to what happens thereafter between these parties as to whether or not they agree that is the end of it. One simply does not know. I am merely speculating.*

JUDGE TOULMIN: *I am, I think, indicating that I would have expected that if there was a properly constituted adjudication, the parties would abide by the results of that.*

MR. BRANNIGAN: *No doubt that is what will happen. As I say, that was the second point and, as I understand it, what your Lordship has done is to adjourn off the claim for damages. To another date.*

JUDGE TOULMIN: *Yes.*

MR BRANNIGAN: *Adjourned generally, I think.*

JUDGE TOULMIN: *Yes.*

MR. BRANNIGAN: *My Lord, the third issue is one of costs and there should be a costs schedule before you. This costs schedule is the costs relating to everything but today.*

JUDGE TOULMIN: *Give me another copy of it, would you?*

MR. BRANNIGAN: *My Lord, yes.*

JUDGE TOULMIN: *I have seen it at one stage but I am not quite sure where it is at the moment. (Same handed) Thank you.*

MR. BRANNIGAN: *My Lord save for observing that to my disgust I am very considerably cheaper than my learned friend, I do not really have any submissions to make on those costs. I suspect it is for my learned friend to indicate whether or not he has got any submissions he wishes to make.*

MR. NISSEN: *My Lord, we simply comment on two categories, looking down the page. Under the heading "**Attendances on counsel** does your Lordship have that?*

JUDGE TOULMIN: *Yes.*

MR. NISSEN: *Our submission simply is this: that amounts to just under eight hours of time attending on my learned friend, and a total of some £1,400. We. say that is simply excessive. Just for your Lordship's information.*

JUDGE TOULMIN: *Are you suggesting the figures are wrong?*

MR. NISSEN: *Not mathematically wrong.*

JUDGE TOULMIN: *Otherwise it is just under seven, not just under eight hours.*

MR. NISSEN: *No, there are two items there.*

JUDGE TOULMIN: *Oh, I see what you mean. Yes, I see what you mean.*

MR. NISSEN: *And we say that counsel has been involved in this case and prepared the pleadings and there is no need for eight hours of conference between my learned friend and his instructing solicitors. For your Lordship's cross-reference, our figure for my instructing solicitor's attendance on me was about £450. So we say that item should be significantly reduced.*

*The second item which we attack is the heading "**Attendance on documents**", where your Lordship will see I think a little over 15 hours of time has been spent at a total of £2,300. Again, we say that is excessive. By comparison we were 11 hours and so at their rate one should take off about £750 from that figure.*

Your Lordship should know that somewhat surprisingly in this case all the contractual documentation came from us. There are was not actually anything submitted by the claimant in Mr. Critchlow's witness statement. My Lord, those are the only points I have.

MR. BRANNIGAN: *My Lord, if I can take those points in reverse order. The contractual documents were not exhibited to Mr. Critchlow's statement because they were appended to the statement of claim. It was felt duplication of them would not be very sensible, or at least they certainly should not be.*

It was thought duplication was not sensible. In any event, it is difficult to understand how that matters.

In relation to the attendances on counsel, the reality is perhaps I need my hand held a little more than my learned friend who is twice as expensive as I am. It is noticeable that if one adds the attendances on me to my fees and compares them to my learned friend's fee plus attendances on

him, ours are perhaps in the region of somewhere between £750, I think, and £1,000 cheaper. They are certainly not more than.

In relation to attendance on documents, that is the time that was spent. My learned friend has had the benefit of both James R. Knowles and solicitors looking through documents. We have just had solicitors. The solicitors have spent a little more time than the solicitors on the other side but that is the time that was spent.

JUDGE TOULMIN: *I think, having listened to the submissions of both sides, that the proper figure for the grand total for costs is £7,000.*

MR. NISSEN: *My Lord, I have, I think, two further matters. The first is in relation to one matter in your Lordship's judgment, a factual matter which I regret to say, although my learned friend and I discussed before the last hearing as something that we would raise with you, I fear that we both forgot to do so.*

JUDGE TOULMIN: *Yes.*

MR. NISSEN: *That is that there was some correspondence from Mr. Elven which he wrote to Fenwick Elliott and asking that those letters should be put before the court. Some of them were in Mr. Critchlow's witness statement, some were not. We in fact agreed that because what we were dealing with was primarily a question of construction that they did not assist.*

I regret, however, that we forgot to pass them up, the additional ones, to your Lordship. It matters not. It does not affect anything that your Lordship has decided.

JUDGE TOULMIN: *If it helps both sides, I can say this: I read a certain amount of correspondence passing between Fenwick Elliott and Mr. Elven, and I took that into account when I wrote my judgment, and he will notice and you will notice that there had been no criticism made at any stage of the way in which Mr. Elven has conducted himself.*

MR. NISSEN: *Yes. My Lord1 I am obliged for that.*

JUDGE TOULMIN: *That is quite deliberate and it takes into account all the matters that have been before me.*

MR. NISSEN: *My Lord, I am obliged for that. It was a particular point in your Lordship's -- I am sorry to just press it but in fairness to him since he is not here.*

JUDGE TOULMIN: *Yes.*

MR. NISSEN: *Your Lordship mentioned that Mr. Critchlow's witness statement, he had a telephone conversation with Mr Elven on 12th May in which Mr. Elven clarified his explanation since Hydra-tight was not prepared to commence an adjudication before Atkin Chambers, the procedure could not be complied with.*

JUDGE TOULMIN: *Yes.*

MR. NISSEN: *The reason I am mentioning this, I have in mind specifically that one of the letters Mr. Elven wrote and I do not know whether your Lordship saw it - was a letter, I think, to the effect that he did have a conversation with Mr. Critchlow but it was not in the manner reported by him in his statement and he would be grateful if - - in fact I have the letter here now. I am sure it matters not*

JUDGE TOULMIN: *What is the date of the letter?*

MR. NISSEN: *25th May. I think that was one that escaped Mr. Critchlow's witness statement.*

MR. BRANNIGAN: *I believe the witness statement was sworn before that letter was received actually, my Lord.*

MR. NISSEN: *Indeed it must have been because he is criticising.*

MR. BRANNIGAN: *Yes, he is criticising the witness statement. (*After a pause)

JUDGE TOULMIN: *I think it is a matter for me, not for you but I think the most convenient way of dealing with it, because I do not think it affects the judgment, is simply to delete the passage where I have referred to Mr. Critchlow's witness statement. Because if I do that*

MR. NISSEN: *I agree.*

JUDGE TOULMIN: *-- I think it does not cause any difficulty either to Mr. Critchlow or to Mr. Elven.*

MR. NISSEN: *I am obliged.*

MR. BRANNIGAN: *That does seem a sensible way of dealing with.*

JUDGE TOULMIN: *Actually I will keep that if I may. May I keep that?*

MR. NISSEN: *Yes. I will have a hard copy somewhere.*

JUDGE TOULMIN: *Thank you.*

MR. NISSEN: *I am obliged. My Lord, that is one matter. The last. matter is the question of permission to appeal.*

JUDGE TOULMIN: *Yes.*

MR. NISSEN: *Can I take your Lordship to the now, I hope, familiar provisions of Part 52.3, p.761 of the Civil Procedure. Putting it shortly, I need to seek permission to appeal and the test is in 52.3(6) which says that permission to appeal will only be given where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. My Lord, that is the test. The point, we say, condenses down to a very short one and it is this: whether, under para.2(l) (a) of the scheme for construction of contracts, the person, if any, specified in the contract, which is the words used, can constitute a group of individuals named in a list or whether the person has to be, as we would respectfully submit, a human being, if I can put it that way, an identifiable body human person.*

JUDGE TOULMIN: *Well, identified person.*

MR. NISSEN: *Yes. And we say that is an important point of principle arid we would respectfully submit that it has a real prospect of success. It is in contrast, we would submit, to (b) of the scheme which deals with the identity of people who could be nominated by a specified nominating body and that Mowlem came nearer that than they do to including a person, but they failed to comply with (b) because they were a party to the dispute. So we say real prospects of success but, alternatively, we say there is a compelling reason for hearing that appeal and in a sense that is, we would submit, self-evident. It is a new area and clearly calls to be clarified 50 that parties in the industry will know whether or not 2(1) (a) of the scheme must constitute a human being. I did not take your Lordship through 2(1) (b) in any great detail before. If your Lordship wants me to just take that a little slower*

JUDGE TOULMIN: *No, I have the point.*

MR. NISSEN: *I am obliged*. (After a pause)

JUDGE TOULMIN: *Is it the 6th today?*

MR. BRANNIGAN: *My Lord, it is.*

JUDGE TOULMIN: *Mr. Brannigan, have you any observations you want to make?*

MR. BRANNIGAN: *My Lord, it is always difficult in this situation. There is only so much one can say. It simply cannot be right to say that any decision arising from the adjudication procedure is one which should trouble the Court of Appeal. Your decision is based largely on the particular facts of this case and the particular sort of list which was constructed which was not a general list but a list of identifiable parties. In my submission, my learned friend quite simply does not have a realistic prospect of success and, as I say, it cannot be right that the catch-all of any other good reason to actually have the appeal can apply for every situation where this question arises about the construction provisions relating to adjudication and this scheme itself. My Lord, those are my observations.*

JUDGE TOULMIN: *Thank you. I am going to allow the defendant's application for leave to appeal on the question of whether, under para. 2(1) (a) of the scheme "person" can constitute a person nominated out of those named in a list or must be a previously identified and named individual person. This is a*

novel and important point for the construction industry because I suspect that this is not the only case where the identification of adjudicators is from lists The scheme in question is the Scheme for Construction Contacts (England and Wales) Regulations SI 1998 No.649.

MR. NISSEN: *I am obliged. Your Lordship defined the question. I am afraid I did not get all of it.*

JUDGE TOULMIN: *The question of whether, under para.2(l) (a) of the scheme "person" can constitute a person nominated out of those named in a list or must be a previously identified and named individual person.*

MR. NISSEN: *I am obliged.*

MR. BRANNIGAN: *My Lord, forgive me on that basis if my learned friend is going to appeal, and forgive my ignorance in this matter but I have never actually been faced with the situation since the new rules have come in where permission has actually been granted in court and opposed to thereafter. If my learned friend is going to appeal, then I would seek to appeal on grounds as well. I am not sure whether or not I actually need to seek leave at this point for that or whether that is something that can be done by way of a counter notice.*

JUDGE TOULMIN: *Well, that is a matter for you. If you are making an application, unless you can find some proper grounds, then I shall refuse it. But if you want to make it, you have to make it to the Court of Appeal.*

MR. BRANNIGAN: *My Lord, there is at least one ground I wish to make the application on now, and that is on this ground. It will involve you actually looking at the scheme again for just a moment. If one looks at the scheme and one looks at para.2 thereof, you will note that before one gets to either (a) , (b) or (c) , under the paragraph before that, para.2(l) itself, it says:*

"Following the giving of notice of adjudication and subject to any agreement between the. parties to the dispute as to who shall act as adjudicator Then it goes on to (a) , (b), (c) My Lord, you will remember on the previous occasion there was quite a bit of argument before you as to what that meant, i.e. the phrase "subject to any agreement between the parties to the dispute as to who shall act as adjudicator".

My Lord, that is not something you have addressed particularly in your judgment, but I would seek to also have your judgment upheld if my learned friend carries on with this appeal on the basis that even if you were somehow wrong in your interpretation of 2 (a) , there was clearly an agreement in place between the parties to the dispute as to who shall act as adjudicator I would seek to have your judgment upheld on that basis. So it is not actually seeking to appeal your judgment in that effect it is simply to have it affirmed on different grounds.

The second point I would seek to appeal on is the substantive part of your judgment before one actually gets to consider the scheme in particular whether it is right, whenever a party uses the patch, as I call it, of Y (UK) 2, and then seeks thereafter to put forward an entirely different: alternative adjudication/resolution procedure under specifically negotiated and agreed terms, whether it is right that the effect of both those together can be to leave the avoidance mechanism of Y (UK) 2 still there in the contract to actually taint the alternative procedure which is put forward. I would seek to appeal on that ground as well

JUDGE TOULMIN: *Well, I am going to refuse your application on the cross-appeal. It does not seem to me that the second ground has any real prospect of success, and as far as the first one is concerned, the first one is included, it seems to me, in so far as it needs to be, in relation to 2.1(a) in that if there is no person as required in 2. 1 (a) , it seems to me that you are in difficulty in succeeding in the general provisions of 2.1. It seems to me that 2.1 and 2.1(a) for this purpose stand or fall together.*

MR. BRANNIGAN: *So be it, my Lord. As I say, without hunting through it at this point I am not sure whether I needed to make that application. I made it out of an abundance of caution, It may be that I simply do not need such permission in any event, but I am grateful for you hearing the application.*

JUDGE TOULMIN: *Thank you very much.*