

JUDGMENT : Mr Justice Jackson. TCC. 13th June 2006.

1. This judgment is in eight parts, namely part 1, introduction; part 2, the contractual provisions; part 3, the facts; part 4, the present proceedings; part 5 is the present action time-barred; part 6, was the adjudicator right to conclude that there was no dispute capable of being adjudicated arising out of CAMBBA's claim for indirect costs; part 7, were CAMBBA entitled to withdraw any claim which they made for the indirect costs of DC11; part 8, conclusion.

Part 1: INTRODUCTION

2. This action concerns a challenge to the decision of an adjudicator, Mr Nicholas Dennys QC. This is the third action between Midland Expressway Ltd (to whom I shall refer as "MEL") and the CAMBBA Construction Group. The CAMBBA Construction Group is a joint venture comprising four construction companies, namely Carillion Construction Ltd, Alfred McAlpine Construction Ltd, Balfour Beatty Group Ltd and AMEC Capital Projects Ltd. The four joint venture companies are generally referred to by the collective name "CAMBBA".
3. In this action, MEL is first claimant and the Secretary of State for Transport is second claimant. CAMBBA are the four defendants to this action.
4. By an agreement dated 28th February 1992 ("the Concession Agreement") the Secretary of State for Transport granted to MEL the right to design, construct and operate the Birmingham Northern Relief Road. This is a motorway which is now more generally referred to as "the M6 toll road". On 27th September 2000 MEL and CAMBBA entered into a contract ("the D&C contract") for the design and construction of the M6 toll road. CAMBBA commenced work in late 2000 and achieved completion some three years later.
5. The M6 toll road was opened to the public in December 2003. There remain, however, some contractual disputes between the parties. These have been the subject of numerous adjudications and previous litigation.
6. For further background information about the history of the project and the disputes between the parties, reference should be made to *Midland Expressway Ltd v Carillion Construction Ltd* (number 1) [2005] EWHC 2810 (TCC) and *Midland Expressway Ltd v Carillion Construction Ltd* (number 2) [2005] EWHC 2963 (TCC).
7. In this judgment I shall use the abbreviation "DA" for the department's agent. The DA represented the Secretary of State in numerous respects and was empowered to issue instructions on behalf of the Secretary of State. The Highways Agency also acted on behalf of the Secretary of State in relation to the M6 toll road.
8. Occasional reference will be made in this judgment to the "PDS scheme". This is a set of drawings which were prepared after planning approval had been obtained and which formed part of the tender documents.
9. The solicitors for the parties, who will occasionally feature in the narrative section of the judgment, are as follows: Davies Arnold Cooper ("DAC") are the solicitors for MEL, the first claimant. The Treasury Solicitor acts for the Secretary of State, the second claimant. Wragge & Co are the solicitors for CAMBBA, the first to fourth defendants. I shall use the abbreviation "DC11" as a shorthand for department's change number 11.
10. The Housing Grants, Construction and Regeneration Act 1996 will be referred to as "the 1996 Act". The scheme which is set out in the schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 will be referred to as "the Scheme".
11. After these introductory remarks, I must now read out the contractual provisions which are relevant to the present dispute between the parties.

Part 2: THE CONTRACTUAL PROVISIONS

12. Clause 8 of the Concession Agreement deals with department's changes. Clause 8 provides:

"8.1 The department's agent may at any time prior to the issue of the maintenance certificate issue a request in writing to the concessionaire for a department's change ...

"8.1.3 Where, in the opinion of the concessionaire, a department's change would require additional payment to the contractor or the grant of an extension to the period for completion for the purposes of the construction contract or lead to an additional expense to the concessionaire or any associate to whom there has been an assignment pursuant to clause 35.2 or lead to a reduction or delay in revenue from or an increase in the operating or maintenance costs of the project ... the concessionaire shall furnish the department's agent within 28 days of the request or, as the case may be, of agreement or final determination to proceed with the department's change following an objection pursuant to clause 8.1.2 ... with a statement of the order of magnitude of:

"8.1.3.1 The value of the additional payment, if any, to the contractor and/or the concessionaire relating to the proposed works;

"8.1.3.2 The length of any extension of time which the concessionaire believes the contractor would be entitled to under the construction contract and the concessionaire would be entitled to under the concession agreement;

"8.1.3.3 The amount of any direct loss and/or expense to which the contractor may be entitled under the construction contract."
13. It should be explained at this point that payments made to the contractor of the kind described in clause 8.1.3.1 are generally referred to as "direct costs". Payments of loss and expense made to the contractor of the kind described in clause 8.1.3.3 are generally referred to as "indirect costs".
14. Clause 8.1.6 provides: "If the parties are unable to agree the concessionaire's estimates, then either the department's agent shall withdraw the notice or the Secretary of State shall agree to make payment therefor on an interim basis in accordance with the procedures of payment contained in the construction contract and, in the latter case, the concessionaire shall submit the department's change certificate to the department's agent for countersigning by it and the following provisions shall apply:

"8.1.6.1 The concessionaire shall cause the contractor to identify, in any application for an interim payment under the construction contract as a separate item, the amounts claimed in respect of such department's change and, to the extent appropriate, provide vouchers evidencing such amounts. The concessionaire shall also provide to the department's agent relevant documentation evidencing the costs referred to in clauses 8.1.3.1, 8.1.3.4 and 8.1.3.5.

- "8.1.6.2 Evaluation of the value of the department's change shall be made by the department's agent within 21 days of submission of the documents referred to in clause 8.1.6.1:-
- "8.1.6.2.1 Applying the principles contained in the construction contract, including but without limitation, those relating to costs incurred for delay and disruption, if any ...
- "8.1.6.3 Where the concessionaire has proceeded in accordance with clause 8.1.6 the Secretary of State shall pay to the concessionaire the amount determined pursuant to clause 8.1.6.2 or, if the concessionaire shall object to such determination, as determined by the disputes resolution procedure..."
15. Schedule 15 to the Concession Agreement sets out the dispute resolution procedure which is to be followed in the event of a dispute. A revised version of schedule 15 was substituted by schedule 8 to the second supplemental agreement to the Concession Agreement. This has led to some slight confusion in that the relevant schedule is sometimes referred to as "schedule 8" and sometimes referred to as "schedule 15". In this judgment I shall refer to it as "schedule 15".
16. Schedule 15 to the Concession Agreement includes the following provisions:
- "1.1 If a dispute arises, whether before or after the concession commencement date and whether before or after termination of the Concession Agreement, then, except where a dispute is expressly stated in the Concession Agreement to be referable to the dispute resolution procedure, the dispute shall, subject to paragraph 3.1.3 and 1.4, first be referred by notice in writing to the Chairman of the concessionaire and the official of the Department of Environment, Transport and the Regions (DTR) who the Secretary of State shall have nominated for the purpose of paragraph 1 no later than the concession commencement date, who shall meet and endeavour to resolve the dispute. Any joint and unanimous decision of the said Chairman and the said official made in writing to and signed by both shall be binding upon the parties ...
- "2 Referral to adjudicator. If
- "2.1 The Chairman and the official referred to in paragraph 1.1 above or, where applicable, their respective nominees under paragraph 1.2 are unable to agree on any matter comprised in the dispute within 28 days of the reference to them; or
- "2.2 A dispute is expressly stated in the Concession Agreement to be referable to the dispute resolution procedure;
- "then, subject to paragraph 7 or 8, either party may give notice to the other that it intends to refer the dispute to an adjudicator in accordance with the provisions of this schedule 15 ...
- "6.1 The scope of the adjudication of the dispute shall be the matters identified in the notice requiring adjudication, together with;
- "6.1.1 Any further matters which the parties agree should be within the scope of that adjudication,
- "6.1.2 Any matter joined pursuant to the operation of paragraph 7 or 8; and
- "6.1.3 Any further matters which the adjudicator determines must be included in order that the adjudication may be effective and/or meaningful, unless both parties object to any such matter being included.
- "6.2 The adjudicator shall establish the procedure and timetable for the adjudication of the dispute. Without prejudice to the generality of the foregoing the adjudicator may, if he thinks fit ...
- "6.2.10 Review and revise any of his own previous directions;...
- "6.2.13 Rule upon his own substantive jurisdiction and as to the scope of the adjudication;...
- "7.1 In the event of a construction dispute being referred to an adjudicator pursuant to paragraph 2 of appendix 6 to the construction contract --
- "7.1.1 The concessionaire shall forthwith inform and forward to the department's agent copies of all notices served; and
- "7.1.2 Within seven days of service of copies under paragraph 7.1.1, if the Secretary of State in his sole discretion considers that the issues in such reference are or are potentially relevant to the rights and obligations of or issues between the parties to the Concession Agreement, he may by notice served on the concessionaire, the contractor and upon the adjudicator become a party to such reference and have the issues in the reference affecting him determined by the adjudicator ...
- "8.1 In the event of an original notice being served by either party in accordance with paragraph 2, the concessionaire shall forthwith inform the contractor and forward a copy of the notice served to the contractor.
- "8.2 Within seven days of receipt by the contractor of a copy of any reference notice, if the contractor considers that the issues in such reference are or are potentially relevant to the rights and obligations of or issues between the parties to the construction contract, the contractor shall, by notice served on the Secretary of State, the concessionaire and the adjudicator, become a party to such reference and be entitled to have all relevant rights, obligations and issues under the construction contract determined at the same time as the dispute.
- "8.3 A notice served by the contractor under paragraph 8.2 shall include:-
- "8.3.1 A concise summary of the rights and obligations of or the issues between the contractor and the concessionaire, identifying the issues as between the concessionaire and the Secretary of State in the dispute before the adjudicator which are or are potentially relevant thereto; and
- "8.3.2 A statement of the decision requested by the contractor;...
- "9.1 The decision of the adjudicator shall be final and binding on the parties until the dispute is finally determined by:
- "9.1.1 Agreement by the parties; or
- "9.1.2 Legal proceedings in accordance with paragraph 9.2.
- Prior to such final determination the decision of the adjudicator shall be implemented without delay and the parties shall be entitled to such reliefs and remedies as are set out in the adjudicator's decision (and shall be entitled to summary enforcement thereof) regardless of whether such decision is or is to be the subject of any challenge or review.

- "9.2 Subject to paragraph 9.5, a party may, within 60 days after receipt of the determination of the adjudicator, refer any matter comprised in the dispute to the court for determination and the court shall have jurisdiction to determine the rights of the parties in respect of such matters. The court shall have full power to open up, review and revise any endorsement, decision, opinion, instruction, notice, statement of objection, finding, determination, requirement or certificate of the department's agent, the department's representative, the employer's agent or the certifying engineer (as such terms are defined under the construction contract) related to the dispute and any determination of the adjudicator...."
- "9.5 No party shall, save in the case of bad faith on the part of the adjudicator, make any application to the courts whatsoever in relation to the conduct of the adjudication or the decision of the adjudicator until such time as the adjudicator has made his decision or refused to make a decision and until the party making the application has complied in full with any such decision."
17. Let me now turn to the D&C contract. Clause 1.1 of the D&C contract, the definitions clause, includes the following:
"Construction dispute' means a difference or dispute of whatever nature between the employer and the contractor arising under, out of or in connection with this contract and includes, but is not limited to
(a) any claim, demand or assertion as to contractual entitlement under this contract made by either party against the other party, which is neither agreed nor disputed by such other party ...
"Department's change' means a change as to the department's standards or any addition, substitution or omission of any item of infrastructure initiated or implemented by the department's agent in accordance with clause 8 of the Concession Agreement ...
"Dispute' means a difference or dispute of whatever nature between the Secretary of State (and/or the department's agent and/or the department's representative) of the one part, and the employer, of the other part, arising under, out of or in connection with the Concession Agreement..."
18. Clause 32.3 of the D&C contract provides: "The contractor shall constantly use its best endeavours to preclude or mitigate delay and to secure the timely completion of the works. Where the contractor incurs additional expenditure in complying with its obligations under this clause 32.3 in order to mitigate any actual or potential delay arising from a delay event, it shall be entitled to a price adjustment in respect of such additional expenditure subject to and in accordance with the terms set out in clause 40."
19. It should be noted that any payment of mitigation costs pursuant to clause 32.3 falls within the general category of "indirect costs" as that term has been used by the parties to this case.
20. Clause 39 of the D&C contract deals with department's changes. Clause 39.4 provides:
"39.4.1 Where in the opinion of the contractor a department's change would require a price adjustment or the grant of an extension to any completion period or where the employer requests a department's change in accordance with clause 27 (fossils and antiquities), the contractor shall furnish the employer within 14 days of the request or, as the case may be, of agreement or final determination to proceed with the department's change following an objection pursuant to clause 39.3.2 ... with a statement of the order of magnitude of:
"(a) the value of the price adjustment, if any, to the contractor relating to the proposed works;"
"(b) the length of any extension of time which the contractor believes it would be entitled to under this contract; and."
"(c) the amount of any direct loss and/or expense to which the contractor may be entitled under this contract (to the extent not included in clause 39.4.1 (a))..."
"39.4.4 If the parties are unable to agree the contractor's estimates, then either the employer shall withdraw the notice upon withdrawal of the corresponding notice by the department's agent under clause 8.1.6 of the Concession Agreement or the employer shall agree to make payment therefor on an interim basis in accordance with clause 38 (method of payment) and in the latter case the contractor shall submit the department's change certificate to the employer for countersigning by the department's agent and the following provisions shall apply:
"(a) the contractor shall identify in any application for an interim payment certificate as a separate item the amounts claimed in respect of such department's change and, to the extent appropriate, provide vouchers evidencing such amounts. The contractor shall also provide to the employer relevant documentation evidencing the costs referred to in clause 39.6 (valuation of changes);
"(b) the department's change shall be valued by the employer applying the relevant principles contained in clause 39.6 (valuation of changes)...."
21. It will be noted that any payment made to the contractor pursuant to clause 39.4.1 (a) falls into the category which in this case has been referred to as "direct costs". Any payment of loss or expense made to the contractor pursuant to clause 39.4.1 (c) falls into the category which the parties in this case have referred to as "indirect costs".
22. Clause 39.6.2 provides: "Subject only to clause 7 (contractor's rights) and notwithstanding any other provisions of this contract, the contractor's rights to any price adjustment under or in connection with clause 39 (changes) in respect of a department's change shall in no event exceed the amounts, if any, to which the employer is entitled to be paid by the Secretary of State in respect of a corresponding change pursuant to clauses 8.1.3.1 and 8.1.3.3 of the Concession Agreement."
23. Schedule 6 to the D&C contract sets out the dispute resolution procedure. The provisions of this schedule are very similar to the corresponding provisions of schedule 15 to the Concession Agreement. Paragraph 1 of schedule 6 provides for a meeting. Paragraph 2 provides for referral to adjudication. Paragraph 6 of schedule 6 provides:
"6.1 The scope of the adjudication of the construction dispute shall be the matters identified in the notice requiring adjudication, together with:
"6.1.1 Any further matters which the parties agree should be within the scope of that adjudication;
"6.1.2 Any matter joined pursuant to the operation of paragraph 7 or 8;
"6.1.3 Any further matters which the adjudicator determines must be included in order that the adjudication may be effective and/or meaningful, unless both parties object to any such matter being included.

- "6.2 The adjudicator shall establish the procedure and timetable for the adjudication of the construction dispute. Without prejudice to the generality of the foregoing, the adjudicator may, if he thinks fit:-...
- "6.2.10 Review and revise any of his own previous decisions;...
- "6.2.13 Rule upon his own substantive jurisdiction and as to the scope of the adjudication ..."
24. Paragraph 8 of schedule 6 to the D&C contract provides:
- "8.1 In the event of an original notice being served by either the Secretary of State or the concessionaire in accordance with paragraph 2 of schedule 15 of the Concession Agreement, the employer shall forthwith inform the contractor and forward a copy of such notice served to the contractor and confirm by a notice given at the same time whether the employer considers that the issues in such notice served under the Concession Agreement are or are potentially relevant to the rights and obligations of or issues between the employer and the contractor under or relating to this contract.
- "8.2 Within five days of receipt by the contractor of copies of the notice served under the Concession Agreement and the employer's notice referred to in paragraph 8.1 then, unless the contractor in its bona fide opinion disagrees that the issues in such reference are or are potentially relevant to the rights and obligations of or issues between the employer and the contractor under or relating to this contract, the contractor shall, by notice served on the Secretary of State, the employer and the adjudicator, become a party to such reference and agree to have all relevant rights, obligations and issues under or relating to this contract determined at the same time as the dispute.
- "8.3 A notice served by the contractor under paragraph 8.2 shall include:-
- "8.3.1 A concise summary of the rights and obligations of or the issues between the contractor and the employer, identifying the issues as between the concessionaire and the Secretary of State in the dispute before the adjudicator which are or are potentially relevant thereto; and
- "8.3.2 A statement of the decision requested by the contractor..."
25. Paragraph 9 of schedule 6 provides for referral to the courts. The language of paragraph 9 closely follows the language of paragraph 9 of schedule 15 to the Concession Agreement.
26. That concludes my outline of the contractual provisions. I must now turn to the facts.

Part 3: THE FACTS

27. The M6 toll road provides an alternative motorway for drivers who are using the M6 in the vicinity of Birmingham. The toll road diverges from the M6 motorway at junction 3A, which is near to Birmingham International Airport. The toll road heads northwards towards Litchfield. Then it turns westwards and runs roughly parallel to the A5. The toll road rejoins the M6 motorway at junction 11A, which is to the west of Cannock.
28. It is self-evident that particular care needed to be taken in designing the road layouts at the two points where the M6 and the toll road meet. These two points are referred to as the southern tie-in (near Birmingham International Airport) and the northern tie-in (near Cannock). There is no published standard concerning a "three-lane diverge". Nevertheless, it was necessary to design a road layout so that one motorway of three lanes could diverge into two motorways each of three lanes. It was originally planned to add an extra lane to the M6 motorway, but that plan was shelved.
29. During 2001 and 2002 there were discussions between the Highways Agency, the DA, CAMBBA, MEL and various professional advisors concerning the layout which should be adopted for the northern tie-in and the southern tie-in. The arrangement which was finally adopted for the southern tie-in involved widening the M6 motorway for a distance of about 1 kilometre before the tie-in. The road layout then permits a gradual and progressive take off of traffic over that one kilometre stretch. A more complicated layout had to be adopted at the northern tie-in, because the toll road and the M6 motorway are at different levels at the point of the northern tie-in. Taking matters shortly, it was necessary to construct one take-off lane and a large embankment in the region of the northern tie-in.
30. At both the northern tie-in and the southern tie-in white lines had to be placed on the motorway to guide drivers who are diverging or converging, as the case may be. These white lines are said to resemble tigers' tails. Accordingly, the shorthand which has sometimes been used in order to describe compendiously the road layouts required at the northern tie-in and the southern tie-in is "tiger tails".
31. On 24th July 2002 the DA formally issued department's change number 11 (DC11) setting out the detailed road layouts which were required at the northern tie-in and the southern tie-in. On 29th July MEL sent DC11 to CAMBBA and requested a statement of the order of magnitude of any price adjustment or extension of time appropriate to that change. On 15th November CAMBBA sent to MEL a build-up of the order of magnitude of the price adjustment consequent on DC11. This build-up was expressly limited to direct costs. CAMBBA said that they were still assessing the indirect costs and extension of time entitlement associated with DC11.
32. In December 2002 and January 2003 CAMBBA submitted their estimates of the extension of time entitlement attributable to the northern tie-in and the southern tie-in, which MEL duly forwarded to the DA. By letter dated 14th March 2003 CAMBBA informed MEL pursuant to clause 32.3 that they were taking steps to mitigate the delays which would otherwise occur by reason of DC11. CAMBBA estimated that their mitigation costs would amount to £19.25 million. CAMBBA added that they were keeping records of the work carried out pursuant to DC11.
33. There then followed a debate in correspondence and at meetings about the extent of the change which had been effected by DC11. Critical to this debate was the question as to what would have been constructed absent DC11. CAMBBA argued that the layout of the two tie-ins would have been as shown on the PDS scheme drawings. The DA, on the other hand, took the view that a different and more elaborate scheme would have been required in any event. The notional layout of the two tie-ins, which would have been adopted in the absence of DC11, is sometimes referred to in correspondence as "the baseline".
34. On or about 31st May 2003 CAMBBA submitted application for payment number 33. In this application CAMBBA stated that they had done 65 per cent of the work on the northern tie-in and 35 per cent of the work on the southern tie-in. In this application CAMBBA estimated that the direct costs attributable to DC11 would be £6,717,386 and that the indirect costs would be £19.25 million. CAMBBA claimed an appropriate proportion of these sums.

35. In subsequent applications for payment, CAMBBA's estimates of the direct costs progressively increased, but their estimate of the indirect costs remained constant, namely £19.25 million.
36. Whilst this debate was rumbling on, the construction of the motorway was completed. The new M6 toll road opened, no doubt with some well-deserved celebrations, on 8th December 2003.
37. On 12th May 2004 CAMBBA sent to MEL 16 volumes comprising the finalised evaluation of the direct costs of DC11. These amounted to £11,295,814. During this period the debate continued about how the valuation of DC11 should be approached and what should be taken as the baseline.
38. Unfortunately, the correct valuation of DC11 was not the only matter in dispute between the parties. There was a large number of contractual disputes which needed to be resolved, in order to determine what payment was due to CAMBBA. Many of these disputes were referred to adjudicators for decision, pursuant to the dispute resolution procedure. The maintenance period ran for three years, namely from December 2003 to December 2006. Thereafter, CAMBBA would be due to submit their final account.
39. It appears from the correspondence that both parties wanted to resolve the various disputes in an orderly manner before the time came for tackling the final account. See, for example, MEL's letter to CAMBBA dated 6th June 2004. Given the multiplicity of contractual issues which required resolution between the parties, it would have been quite impossible for the parties to tackle all of those issues at the same time.
40. In a letter dated 7th October 2004 MEL wrote as follows to the DA: *"As you are aware, MEL asked the project's technical approval authority (Babtie) to review the PDS layouts of the M6 toll/M6 tie-ins and comment on whether these would have provided a satisfactory interchange layout if the above department's change had not been instructed. This work has now been completed and the following findings have been made:*
Northern tie-in: the PDS layout was reasonable and logical, based on the design standards included in the contract.
Southern tie-in: the PDS layout is not the layout recommended by TD22/92 and a type D mainline lane drop and parallel diverge would have been needed. This layout could be accommodated within the footprint of the PDS layout and is arguably a cheaper solution than the PDS.
"It is now clear that the scope of CAMBBA's work was considerably extended by the instructed change and this included extensive resurfacing work outside the boundary of the site. Babtie are now evaluating the direct costs of the additional work that was needed to implement the change. We will advise you of these costs as soon as MEL has reviewed them. In the interim and further to CAMBBA's letter dated 12th May 2004, which was sent to you with my covering letter dated 14th May 2004, I recommend that you reconsider your evaluation of the cost of this change in time for the next interim payment application."
41. Two points emerge from this letter. First, MEL took the view that DC11 required CAMBBA to carry out extensive extra works. Secondly, MEL intended to tackle the direct costs of DC11 before dealing with the question of indirect costs. It should be noted that at the time of this letter Babtie were evaluating the direct costs of that work.
42. By October 2004 many of the disputes between the parties (although none of the issues concerning DC11) had been the subject of adjudication. Both MEL and CAMBBA had won some adjudications and lost others. On 22nd October 2004 both MEL and CAMBBA issued claim forms in the Technology & Construction Court in order to challenge certain adjudication decisions by which they were aggrieved. These two sets of proceedings were consolidated and I shall refer to them compendiously as "the first action".
43. In November 2004 CAMBBA submitted a claim for indirect costs in respect of numerous events which had caused delay or disruption, including DC11. Since the motorway had opened on time this was a claim for the costs of mitigation measures, which were taken in order to overcome the delay and disruption pursuant to clause 32.3 of the D&C contract. I shall refer to this claim document as "the November claim".
44. The gist of the November claim was as follows: the total actual costs incurred by CAMBBA were set out under a series of headings "Labour and Plant", "Materials", "Subcontractors", and so forth. To these costs there were added 4 per cent for offsite overheads and 6 per cent for profit. The resulting total figure is shown as £549,719,743.
45. There are then set out the costs recovered by CAMBBA under certain headings. The contract sum is shown as item 11 in paragraph 4.2 of the November claim document. Then various adjustments to the contract sum are shown in respect of post-tender events. One of the post-tender events is tiger tails. This produces a total of £493,214,426. This figure is deducted from the actual costs incurred and the difference, namely £56,248,317, is shown as the mitigation cost.
46. The November claim comprised four volumes of material and commentary. Although the November claim was lengthy, detailed and no doubt the product of much industry, it was somewhat optimistic in its conception. It proceeded on the assumption that every event causing delay or disruption would ultimately be held to be the responsibility of MEL. Accordingly, the claimed figure of £56,248,317 was not apportioned as between different events. No specific sum was attributed, for example, to DC11. In short, the November claim was a global claim based upon CAMBBA's total costs.
47. In early 2005 there was correspondence directly between CAMBBA and the Highways Agency concerning DC11. By a letter dated 31st March 2005 the Highways Agency indicated the view that because of a mismatch between the Concession Agreement and the D&C contract, CAMBBA may recover more from MEL in respect of DC11 than MEL was entitled to recover from the Secretary of State.
48. In July 2005 the DA agreed to pay a further sum of £800,000 in respect of DC11. This was in addition to an amount of £700,000 which had been paid previously. Thus, by the summer of 2005 CAMBBA were in receipt of payments totalling £1.5 million. No breakdown of the figure of £1.5 million was provided, but it is clear from the correspondence that this sum related solely to direct costs. My impression is that £1.5 million was a round sum paid on account pending more detailed investigation and debate concerning direct costs.
49. In October 2005 the trial of the first action commenced in the Technology & Construction Court. Although this action embraced many of the disputes between the parties, ranging from buried Roman remains to overhead motorway gantries, it did not include any issue concerning DC11 and tiger tails.

50. On 11th October 2005 CAMBBA served on MEL a notice of intention to refer a construction dispute to adjudication pursuant to appendix 6 to the D&C contract. The construction dispute so referred was CAMBBA's claim for the direct costs of DC11. CAMBBA relied upon the 16 volumes submitted in May 2004 as the build-up of, and justification for, this claim. In the notice CAMBBA asserted that sum due was £9,795,814 (i.e. £11,295,814 less £1.5 million already paid) plus VAT. Mr John Price was the adjudicator appointed to deal with this particular dispute. I shall refer to this adjudication as "the Price adjudication".
51. On 21st October 2005 the DA notified MEL, pursuant to paragraph 7.1 of schedule 15 to the Concession Agreement, that the Secretary of State did not wish to be a party to the Price adjudication. The DA pointed out in his letter of 21st October that there may be a mismatch between the concession agreement and the D&C contract in relation to site boundaries. This could have the consequence that CAMBBA might recover more money in respect of tiger tails than MEL was entitled to reclaim from the Secretary of State.
52. MEL took two steps to protect its own position in relation to this potential problem. First, pursuant to schedule 15 to the Concession Agreement, on 24th October 2005 MEL gave notice of its own separate claim against the Highways Authority in respect of the costs of DC11. Having considered MEL's letter of 24th October in the context of surrounding correspondence, I have no doubt that the matter which MEL was referring to the dispute resolution procedure on 24th October concerned the direct costs of DC11.
53. The second step taken by MEL to protect its position was to commence injunction proceedings against CAMBBA in order to prevent the Price adjudication from going forward. MEL issued its claim form in the injunction proceedings on 31st October 2005. I shall refer to those proceedings as "the second action".
54. On 3rd November 2005 MEL took the initiative in relation to CAMBBA's outstanding claim for indirect costs. In a letter to CAMBBA dated 3rd November MEL stated as follows: *"We refer to the above claim dated November 2004 which you submitted under cover of your letter dated 30th November 2004. We have considered the claim and are of the opinion that it fails to demonstrate an entitlement to the price adjustment that you seek or, indeed, any price adjustment. In the circumstances, the claim is rejected in its entirety."*
55. On the same day MEL served a notice of adjudication on CAMBBA in respect of the same matter. The main section of that notice reads as follows:
- "6. *This dispute concerns CAMBBA's claim dated November 2004 entitled, 'Detailed particulars and proposed calculation of the contractor's entitlement to a price adjustment for additional works involved in mitigation of actual or potential delays arising from delay events' (the claim) which was served on MEL on 30th November 2004.*
- "7. *CAMBBA claims a price adjustment in the lump sum of £56,248,317 being the alleged additional expenditure incurred arising from the mitigation of delay events that allegedly occurred during the design and construction of the M6 toll road.*
- "8. *CAMBBA claim that it is not possible to allocate the individual cost of mitigation attributable to each alleged delay event.*
- "9. *By a letter dated 3rd November 2005 MEL rejected CAMBBA's claim in its entirety and accordingly a dispute has crystallised between the parties.*
- "10. MEL seeks an order and/or declarations that:-
- "10.1 MEL did not:
- "10.1.1 *cause any delay event which prevented and/or impeded CAMBBA from completing their works;*
- "10.1.2 *delay CAMBBA's completion of the works by way of changes and/or omissions;*
- "10.1.3 *render necessary the alleged mitigation measures; and*
- "10.1.4 *prevent and/or impede CAMBBA from executing their contractual obligations with regard to the timely completion of the works.*
- "10.2 *There were no delay events that prevented and/or impeded or potentially prevented and/or impeded CAMBBA from completing their works within the time for completion. In the alternative, any alleged delay events (all of which are denied) did not cause an actual or potential delay to CAMBBA.*
- "10.3 *in the alternative, any delay events that may have prevented and/or impeded CAMBBA from completing their works were department changes and MEL has no liability to make any payment in connection with or arising from any such change other than the amount they receive from the department."*
56. The adjudicator appointed to deal with this matter was Mr Anthony Bingham. I shall therefore refer to this adjudication as **"the Bingham adjudication"**.
57. By letter dated 9th November 2005 DAC enquired of Wragge & Co whether there was anything further which should be passed on to the Secretary of State's representative in respect of CAMBBA's claim concerning DC11. CAMBBA replied that there was not.
58. On 15th November this court gave judgment in the first action between MEL and CAMBBA. If I may take matters very shortly, each party succeeded on approximately half of the issues which it was contesting.
59. On 21st November a meeting took place between the Chairman of MEL and a representative of the Secretary of State pursuant to paragraph 1 of schedule 15 to the Concession Agreement. The principal focus of discussion was CAMBBA's claim for the direct costs of DC11 (the subject of the Price adjudication). However, there was also some discussion about MEL's claim for indirect costs.
60. The penultimate paragraph of the minutes of that meeting reads as follows: *"MEL noted that the mitigation claim that CAMBBA submitted with its letter dated 30th November 2004 included a reference to the costs of mitigating delays or potential delays arising from the implementation of DC11. MEL confirmed that it would ask the adjudicator to decide on what portion, if any, of the alleged mitigation costs were attributable to this department's change."*

61. On 22nd November 2005 the second action between MEL and CAMBBA came on for trial. The trial, including judgment, lasted for three days. The outcome was that MEL failed in its claim for an injunction and the Price adjudication was allowed to go forward.
62. On 28th November 2005 MEL gave notice to the Highways Agency, on behalf of the Secretary of State, that the meeting of 21st November had been unsuccessful. Accordingly, MEL now referred to adjudication the dispute concerning payment for DC11. This notice of adjudication referred to both the direct costs and the indirect costs of DC11. The adjudicator, who was in due course appointed to deal with the matters referred by MEL's notice dated 28th November, was Mr Nicholas Dennys QC. I shall therefore refer to this adjudication as "the Dennys adjudication".
63. On 2nd December 2005, pursuant to paragraph 8.2 of appendix 6 to the D&C contract, CAMBBA gave notice that they would join in the Dennys adjudication. CAMBBA's notice dated 2nd December (which I shall refer to as "the notice of joinder") included the following:
- "(A) matters referred by MEL.*
- "1. Payment for department's change 11 direct costs. CAMBBA seek payment from MEL on an interim basis of its entitlement to the direct costs of work carried out pursuant to department change 11. A summary of the rights and obligations of the parties in respect of payment for department changes is set out in the notice. The key documents and written submissions required to be served with this notice pursuant to clause 8.3.3 of appendix 6 to the D&C contract are the same as the referral notice and documents served in an adjudication before Mr John Price between CAMBBA and MEL (copies served herewith, volumes 1 to 9).*
- "2. Indirect costs of department change 11. CAMBBA do require the adjudicator to determine CAMBBA's entitlement to payment for indirect costs arising out of department change 11. The key documents setting out such costs are set out in CAMBBA's mitigation measures claim dated November 2004 (copies herewith volumes 10 to 13).*
- "(B) matters which CAMBBA refers pursuant to clause 8.2 of appendix 6 of the D&C contract.*
- "3. Alternative claim. In the alternative, if, for whatever reason, some or all of the works carried out by CAMBBA are held not to have been carried out pursuant to a department change, CAMBBA seek payment for such works on the basis that they were carried out pursuant to an employer's change pursuant to the D&C contract. In particular, that it was work outside the boundaries of the site as defined under the D&C contract and for which MEL are responsible for payment following the principles set out in MEL v CAMBBA, unreported 16th November 2005 ...*
- "4. Extension of time. Further, CAMBBA seeks such fair and reasonable extension of time for carrying out the works required by department's change 11 as the adjudicator thinks fit. The relevant right to an extension of time is as set out in clause 32 of the D&C contract ...*
- "6. Declarations. For the avoidance of doubt CAMBBA seek the following declarations: (i) that CAMBBA are entitled to their direct and indirect costs (as explained in paragraphs 1 and 2 above) for work carried out pursuant to department's change 11 in such sum as the adjudicator thinks fit or (ii), in the alternative to (i), that CAMBBA are entitled to their direct and indirect costs (as explained in paragraph 3 above) for work carried out pursuant to an employer's change pursuant to the D&C contract and/or (iii) that CAMBBA are entitled to a fair and reasonable extension of time (as explained in paragraph 4 above) for carrying out the works required by department change 11 as the adjudicator thinks fit..."*
64. Let me now return to the Bingham adjudication. On 8th December DAC wrote to the adjudicator withdrawing from the scope of the Bingham adjudication the indirect costs attributable to DC11. On 12th December Wragge & Co wrote to the adjudicator in the following terms:
- "Following Davies Arnold Cooper's letter of 8th December and the MEL submission, we confirm that Mr Justice Jackson's judgment delivered on 16th November this year clearly affects our client's claim and indeed MEL's response ... Our client's claim made it clear (page 231, paragraph 5.15) that it was a claim based on the current state of agreement and determination of contract price adjustments, i.e. as at November 2004. As such it was only ever an interim claim. It must now be reconsidered in the light of the court judgment, MEL's initiation of the Concession Agreement dispute resolution process in relation to tiger tails (including, at their insistence, the indirect costs) and the progress on recovery of costs since November 2004 (particularly items at 4.3.8.1 and 4.3.8.4 in the claim). It can also now be reconsidered in the light of the helpful response prepared by MEL. Our client had not previously had sight of any of MEL's response served on Thursday. Indeed, since our client submitted its claim in November 2004 the first indication our client had of MEL's response to it was MEL's letter of 3rd November 2005, simply stating that it was rejected in its entirety. Of course the same day MEL served its adjudication notice in this matter.*
- "All that said is by way of background to our being instructed to confirm that our client withdraws/does not intend to pursue its claim of November 2004, the subject of this adjudication. We therefore take the view that there is no purpose to continuing with the adjudication provided that it is clear that our client is not to be taken to have waived any rights that it may have to make further claims following reconsideration in the light of the above new factors..."*
65. It is not necessary for me to trace in detail the later history of the Bingham adjudication. Suffice it to say, that the adjudicator was not favourably impressed by CAMBBA's attempt to withdraw their global claim dated November 2004. This adjudication did not, however, result in any final decision. I am told by counsel that ultimately Mr Bingham's proceedings went into abeyance pending the outcome of the present litigation.
66. Let me turn next to the Price adjudication. Both MEL and CAMBBA served their evidence concerning the baseline scheme and the impact of DC11. On 7th February Mr Price delivered his decision and on 8th February he corrected some slips in that decision. The upshot of the Price adjudication was that MEL was ordered to pay to CAMBBA the sum of £6,898,772 in respect of direct costs attributable to DC11.
67. Let me turn, finally, to the saga of the Dennys adjudication. On 14th December 2004 the Treasury Solicitor, on behalf of the Secretary of State, wrote to the adjudicator as follows:
- "The disputes purportedly referred to adjudication before Mr Dennys relate to MEL's claims for direct and indirect/mitigation measures costs arising out of a department change, department's change 11. In fact, CAMBBA's claim in respect of indirect/mitigation costs has never been raised as a claim by MEL and has not been through the procedure in paragraph 1 of the*

schedule. Therefore, it is not a matter of dispute and paragraph 1.1 of the schedule has not been complied with. For both of these reasons, the indirect/mitigation costs claim cannot be the subject of the adjudication as between MEL and the Secretary of State.

CAMBBA's joinder. By virtue of the joinder procedure in paragraph 8 of the schedule CAMBBA are seeking to include in the adjudication purported claims against MEL (i) for direct and indirect mitigation costs measures arising out of the department change 11; (ii) an alternative claim alleging that an employer's change; (iii) an extension of time for carrying out the works required by department's change 11. I understand that MEL object to the validity of the purported joinder of (ii) and (iii). The Secretary of State objects to the purported joinder of all these claims ...

"As already stated, CAMBBA's indirect costs or mitigation measures claims have never been advanced by MEL against the Secretary of State and have not been referred for consultation under clause 1.1. The same applies to CAMBBA's extension of time claim. Further still (and very importantly), these claims are not in fact related to department's change 11. They are global claims, essentially a calculation of total cost less certified recovery, unrelated to mitigation measures and unrelated to specific delay events. This is apparent from the "details of the amount claims" extracted from CAMBBA's indirect costs/mitigation claim attached hereto at appendix 2. I believe that it is important to establish, without delay, what matters are properly referred within this adjudication and, accordingly (as set out in more detail below) seek a ruling on these issues as soon as possible..."

68. On 15th December CAMBBA sent to the adjudicator a letter which included the following passage:

"5. MEL maintain that they are required to pursue CAMBBA's claim effectively as a pass-through claim to the Secretary of State. They have therefore instigated the adjudication process before you under the Concession Agreement. They have chosen to include in the dispute to be determined a declaration as to the indirect costs of department change 11. This dispute had not been referred to adjudication by CAMBBA. CAMBBA's only claim in respect of the indirect costs of department change 11 was set out in a total cost claim dated November 2004. That claim relied on a number of delay events, some of which have now been determined by Mr Justice Jackson not to amount to delay events. CAMBBA have also recovered further costs during the intervening year since it first put forward its total cost claim. We have confirmed to Messrs Davies Arnold Cooper that the claim of November 2004 is withdrawn. That is because in the light of Mr Justice Jackson's decision and a recent response from MEL in relation to the issues raised in the claim CAMBBA need to reconsider the claim, both in terms of principle and quantum...."

"7. CAMBBA's position is, therefore, that they do not require the indirect costs of department change 11 to be determined at this stage. They take the view that there is currently no dispute between them and MEL as to the indirect costs of department change 11. Such costs had been claimed on a total cost basis in the November 2004 document but that has now been withdrawn following its rejection in its entirety by MEL. They therefore believe that there is no dispute between them and MEL in relation to indirect costs...."

69. At this point in the story the consensus seemed to be emerging that CAMBBA's claim for indirect costs had no place in the Denny's adjudication. Four days later, however, the tide turned. On 19th December DAC wrote to the adjudicator, taking issue with CAMBBA's letter dated 15th December and asserting that any claim by CAMBBA for the indirect costs of DC11 must remain part of the Denny's adjudication. On the same day, the Treasury Solicitor wrote to the adjudicator, abandoning her previous objections and contending that the indirect costs of DC11 must be addressed in the current adjudication.

70. Once the battlelines had been drawn in this way, the parties debated the proper scope of the Denny's adjudication, both in correspondence with the adjudicator and orally in a telephone hearing. On 30th December 2005 the adjudicator ruled that there was currently no dispute as to CAMBBA's indirect costs arising from DC11. The adjudicator gave the following three reasons for his decision:

"1. There is, on analysis, no dispute between MEL and SSE (an abbreviation for the Secretary of State). MEL do not intend in this adjudication to put forward any independent claim as to the proper evaluation of the indirect costs consequent upon DC11. MEL's position is that the total cost claim set out at volumes 10 to 13 is a total cost claim which must fail, and it does not intend to support that claim by evidence or submission. That is also SSE's position.

"2. The November 2004 claim (the total cost claim) is no longer advanced by CAMBBA. CAMBBA accepts that the claim as presently presented needs to be reconsidered in the light of Jackson J's decision and that the current presentation of the claim is inappropriate. It follows that CAMBBA do not presently have any articulated or quantified claim as to the sum to which they may be entitled "in relation to the indirect costs to include mitigation measures, reprogramming and increased resources to ensure that the potential delay effects of department's change 11 were mitigated as more particularly set out in the mitigation claim". There is currently, therefore, no dispute between CAMBBA and MEL and no material presented in the adjudication, or which will be presented in the adjudication, on which I could form a judgment as to the merits of such a claim.

"3. The only issue which it is suggested I could decide is whether the claim in the form in which it was originally submitting the November 2004 (i.e. the total cost claim) could have succeeded in relation to the indirect costs consequences said to be attributable to DC11. This seems to me to be a non-dispute, both because CAMBBA accept that, as presented, that claim would not now succeed and, more particularly, because the dispute as to the recoverability of the sums claimed and the basis of the claim set out in the November 2004 claim is no longer pursued. The apparent purpose of this shadow-boxing was confirmed during the oral hearing as being relevant to any subsequent attempt by CAMBBA to adjudicate a new or revised mitigation costs claim. In other words, it is suggested that if I were to decide that the original claim was, on the basis presented, misconceived, then a subsequent adjudication in relation to a reformulated or new mitigation costs claim would be precluded. I express no views as to the soundness of the premise, except to observe that it is common ground that CAMBBA would not be prevented from litigating such a revised claim but consider it irrelevant. The argument presupposes that a claim, once submitted to adjudication, could not be abandoned or withdrawn. I can see no reason why, in appropriate circumstances, a claim may not be withdrawn or abandoned in whole or in part by a referring party. I do not see any circumstances which make such a withdrawal inappropriate in this case."

71. Thereafter the parties served further evidence and the adjudication proceeded in relation to the matter of direct costs. On 10th February 2006 the adjudicator issued his decision. On 21st February the adjudicator issued his revised decision, correcting certain slips which had occurred in the original version. In this decision the adjudicator confirmed his earlier ruling that the matters for determination were limited to the direct costs arising from DC11. Mr Denny's assessed these costs in the sum

of £6,862,116. After giving credit for sums previously paid, Mr Dennys directed that the outstanding balance should be paid by the Secretary of State to MEL and by MEL to CAMBBA.

72. Both the Secretary of State and MEL were aggrieved by Mr Dennys's failure to address the question of indirect costs flowing from DC11. Accordingly, in order to seek redress for this omission, they commenced the present proceedings.

Part 4: THE PRESENT PROCEEDINGS

73. By a claim form issued pursuant to CPR Part 8 in the Technology & Construction Court on 15th March 2006, both MEL and the Secretary of State applied for the following declarations against CAMBBA in respect of the Dennys adjudication:

"1. A declaration that the decision of Mr Nicholas Dennys QC in the adjudication between the parties begun by the first claimant's (MEL's) notice of intention to refer a dispute to adjudication dated 28th November 2005, by which it was decided that there was currently no dispute which was capable of being adjudicated arising out of the claim by the defendants (CAMBBA) for indirect costs allegedly arising from department's change 11 issued under the design and construction contract executed as a deed between MEL, as employer, and CAMBBA, as contractor, on 27th September 2000 or the Concession Agreement executed as a deed between the second claimant (Secretary of State) and MEL or both was wrong.

"2. A declaration that a dispute had arisen between the parties to the adjudication as to CAMBBA's entitlement and the amount of that entitlement to indirect costs allegedly arising from the department's change 11 and that the adjudicator had jurisdiction to deal with that dispute.

"3. A declaration that the adjudicator should have exercised his jurisdiction and dismissed CAMBBA's claim for indirect costs allegedly arising from the department's change 11.

"4. A declaration that CAMBBA's claim for indirect costs arising out of or in connection with the department's change 11 stands no real prospect of success and should be dismissed in any adjudication or litigation."

74. On 23rd March I gave directions for the service of evidence and written submissions leading up to a trial in June.

75. On 3rd April, at the request of CAMBBA, each claimant served a written clarification of its case in this litigation. MEL in its clarification identified the relevant correspondence which indicated that a dispute had arisen. MEL also asserted that any future claim for the indirect costs of DC11 would be defeated by a plea of **res judicata** or would be an abuse of the process of adjudication or litigation. The Secretary of State in his clarification recounted the history of the dispute between CAMBBA and MEL and between MEL and the Secretary of State concerning the indirect costs of DC11. The Secretary of State advanced a plea of **res judicata** or abuse of process. He also relied upon an implied term of the Concession Agreement and the D&C contract which would prevent any party from pursuing a claim (a) which has been dismissed or (b) which should have been advanced as part of some other claim that has been dismissed.

76. On 20th April the Secretary of State served a clarification of the clarification.

77. The parties served their evidence spanning some 900 pages in all. Each party served, in addition, either two or three sets of written submissions.

78. The trial of this action started on Wednesday, 7th June. The factual evidence was not controversial and no witness was required to give oral evidence. MEL was represented by Mr John Blackburn QC and Mr Darryl Royce. The Secretary of State was represented by Mr David Blunt QC and Ms Claire Packman. CAMBBA were represented by Mr David Streatfeild-James QC and Ms Nerys Jefford.

79. The hearing lasted for two days. The submissions of counsel were wide-ranging and thorough. I am grateful to counsel for their helpful skeleton arguments and their helpful oral submissions.

80. In the course of the hearing the claimants applied for permission to make the following amendments to the claim form: paragraph 4 of the declarations sought should be revised to read: "A declaration that any present or future formulation of CAMBBA's claim for indirect costs arising out of or in connection with the department's change number 11 stands no real prospect of success and should be dismissed in any adjudication or litigation."

81. The second amendment was to add an additional paragraph to the relief claimed reading as follows:

"5. An order under paragraph 9 of the dispute resolution procedure revising that part of the decision of the adjudicator in the adjudication referred to above whereby he declined jurisdiction over a claim for indirect costs allegedly arising from department's change number 11 and substituting, therefor, a decision accepting jurisdiction and dismissing the claim to which it related."

82. Mr Streatfeild-James opposed the applications to amend. It was agreed that I would deal with this matter in the course of the judgment. I have come to the conclusion that CAMBBA are not prejudiced by the late amendment. Counsel should be permitted to argue all the points which they have in fact argued. Permission to amend is granted.

83. In my view the most convenient order in which to tackle the issues that counsel have debated is as follows: (i) Is the present action time-barred? (ii) Was the adjudicator right to conclude that there was no dispute capable of being adjudicated arising out of CAMBBA's claim for indirect costs? (iii) Were CAMBBA entitled to withdraw any claim which they had made for the indirect costs of DC11?

84. Having decided those three issues, I must then consider which of the other matters argued by counsel remain live and require a decision.

Part 5: IS THE PRESENT ACTION TIME-BARRED?

85. Paragraph 9.2 of schedule 6 to the D&C contract provides a time limit for the commencement of litigation. That time limit is "60 days after receipt of the determination of the adjudicator". Mr Streatfeild-James contends that the adjudicator's decision made on 30th December 2005 constitutes "the determination" for the purpose of clause 9.2. Accordingly, the 60-day time limit expired on 1st March 2006. Since the present proceedings were begun on 15th March, they are out of time.

86. On behalf of the claimants, Mr Blackburn and Mr Blunt contend that the relevant decision of the adjudicator is his final decision given on 10th February and revised on 21st February. Accordingly, time started to run on 10th February and the present proceedings are well within time.

87. On this issue I accept the submissions of Mr Blackburn and Mr Blunt and I reject the submissions of Mr Streatfield-James. In my view, "The determination" referred to in paragraph 9.2 of schedule 6 to the D&C contract is the final decision of the adjudicator by which he completes the discharge of his functions. It does not refer to any earlier ruling or decision which the adjudicator may make along the way. I reach this conclusion for three reasons:
- i) That seems to me to be the natural interpretation of the word "determination" in the context of paragraph 9.2.
 - (ii) This interpretation fits with and is supported by paragraph 9.5 of appendix 6.
 - (iii) The adjudication process, as provided for by the 1996 Act and as set out in schedule 6, is intended to be a speedy and efficient procedure. It would be contrary to the purpose of this procedure and it would not make commercial sense if time starts to run under paragraph 9.2 at any point in the course of the adjudication. This might lead to the need for successive actions. It might also lead to the need for litigation while the adjudication is still in progress. Furthermore, such litigation might turn out to be fruitless or unnecessary after the adjudicator has given his final decision.
88. Schedule 15 to the Concession Agreement is in this respect in similar terms to schedule 6 to the D&C contract. In my view, the phrase in paragraph 9.2 of schedule 15 "within 60 days after receipt of the determination of the adjudicator" should be construed as referring to the adjudicator's final decision.
89. Let me now draw the threads together. For the reasons set out above, I reject CAMBBA's defence of time-bar and hold that the claimants are entitled to pursue this action. My answer to the question posed in part 5 of this judgment is "no".

Part 6: WAS THE ADJUDICATOR RIGHT TO CONCLUDE THAT THERE WAS NO DISPUTE CAPABLE OF BEING ADJUDICATED ARISING OUT OF CAMBBA'S CLAIM FOR INDIRECT COSTS?

90. All counsel have taken me through the documents and have urged upon the court the competing interpretations for which their clients contend. In my view, the correct analysis of events is as follows:
- (i) The proper evaluation of DC11 is one of the overarching issues between the parties. It requires identification of the correct baseline. Thereafter, it requires detailed assessment of (a) the direct costs, and (b) the indirect costs. The claim for direct costs is disputed as to quantum. The claim for indirect costs is challenged in its entirety. It is clear that a great deal of work will be required by each of the parties in order to tackle the direct costs of DC11 and also in order to tackle the indirect costs. There are, of course, some common issues between the two, namely: what is the proper baseline? But there are many other issues which are entirely separate and applicable either to the quantification of direct costs or the quantification of indirect costs.
 - (ii) CAMBBA have prepared their detailed case on the direct costs of DC11. This was submitted in 16 volumes both to MEL and to the Secretary of State in May 2004.
 - (iii) Between May 2004 and October 2005 both MEL and the Secretary of State gave consideration to CAMBBA's claim for the direct costs of DC11 as a discrete item. That consideration resulted in payments totalling £1.5 million.
 - (iv) All parties were aware that CAMBBA had a substantial claim for the indirect costs of DC11 and that CAMBBA's entitlement to any such indirect costs was a matter of controversy.
 - (v) CAMBBA have not yet prepared their detailed case on the indirect costs of DC11. CAMBBA's interim applications for £19.5 million made in and after May 2003 could not remotely have been regarded by anyone as CAMBBA's detailed case on the indirect costs arising from DC11.
 - (vi) CAMBBA's global claim made in November 2004 did not apportion any specific sum to DC11. The global claim for indirect costs as formulated in November 2004 was optimistic to say the least. It had no real prospect of success after a number of events causing delay or disruption had been held either by adjudicators or by this court to be the responsibility of CAMBBA. The November 2004 claim was rightly rejected by MEL on 3rd November 2005.
 - (vii) The Price adjudication was expressly limited to the direct costs of DC11.
 - (viii) The notice of dispute served by MEL on the Secretary of State on 24th October 2005 related only to the direct costs of DC11. The notice of adjudication which MEL served on 28th November in order to refer the same dispute to adjudication, referred to both the direct costs and the indirect costs of DC11. However, the reference to indirect costs went beyond what was permissible under paragraph 2 of schedule 15 to the Concession Agreement. This was a point made by the Treasury Solicitor in her letter dated 14th December 2005. I agree with what the Treasury Solicitor said in her letter in that regard.
 - (ix) CAMBBA's notice of joinder served on 2nd December 2005 referred to both the direct costs and indirect costs of DC11. However, the reference to indirect costs went beyond what was permissible under paragraph 8 of schedule 6 to the D&C contract and under paragraph 8 of schedule 15 to the concession agreement. The existing adjudication between the Secretary of State and MEL related only to the direct costs of DC11. Accordingly, the phrase "all relevant rights, obligations and issues" which appears in paragraph 8.2 of both schedules must, in this context, refer to CAMBBA's right to recover the direct costs of DC11.
 - (x) Over the next few days CAMBBA realised that the inclusion of indirect costs in their notice of joinder was a mistake. CAMBBA did not yet have any articulated case on the indirect costs of DC11, which might succeed. CAMBBA communicated this fact to MEL on 12th December and to the adjudicator, Mr Dennys, on 15th December.
 - (xi) Thereafter a tactical battle ensued as previously outlined.
91. Against this background I reach three conclusions:
- (i) At no relevant stage of the Dennys adjudication did there exist a quantified claim for the indirect costs of DC11 which was capable of being disputed. By this time it was self-evident that the November claim could not succeed. In any event, the November claim apportioned no specific sum to DC11.
 - (ii) At the time of the Dennys adjudication there existed a dispute of principle between the parties, namely whether CAMBBA had any entitlement to recover the indirect costs arising from DC11. However, none of the three parties was asking the adjudicator to determine that question of principle in isolation.

- (iii) When the notices and correspondence are read in context and against the background of the dispute resolution provisions, it can be seen that the Dennys adjudication (like the Price adjudication) was limited to direct costs. The various attempts to introduce indirect costs were ineffective.
92. Counsel have helpfully taken me to the authorities on the meaning of the word "dispute". In *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyds Law Reports 265, Mr Justice Saville addressed the question whether a dispute could be said to exist when it is obvious that what one party contends is right and what the other party contends is wrong. Mr Justice Saville held that a dispute does exist in such a situation. He summarised his conclusions pithily at page 268 as follows: *"In my judgment, in this context, neither of the words 'disputes' nor the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated, beyond any doubt, that the one is right and the other is wrong does not and cannot mean that the dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong, does not, in my view, entail that there was therefore never any dispute between them."*
93. In *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291 the Court of Appeal endorsed seven propositions concerning the meaning of the word "dispute". Those propositions include the following:
- "3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
- "4. The circumstances from which it may emerge that claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference....
- "7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."
94. Both Mr Blackburn and Mr Blunt rely upon those authorities. Mr Blunt also submits that the definition of "construction dispute" in clause 1.1 of the D&C contract may have the effect of widening still further the meaning of the word "dispute" in the present context.
95. I accept without reservation the principles stated in those authorities. The definition of "construction dispute" in clause 1.1 of the D&C contract seems to me to be very similar to the exposition of the word "dispute" given by the Court of Appeal in *AMEC*. Nevertheless, even accepting those principles, I think that the adjudicator was right in his conclusion that no dispute existed concerning the indirect costs of DC11.
96. The claimants placed some reliance on the DA's evaluation of DC11 in an e-mail dated 18th November 2005. That evaluation includes an assessment of direct costs but it makes no allowance for indirect costs. In my view, the existence of that e-mail and the fact that CAMBBA did not agree with its contents confirms that there was a dispute of principle between the parties as to whether or not CAMBBA had any entitlement to indirect costs in respect of DC11. However, this e-mail does not take the claimants' case any further than that.
97. Let me now draw the threads together. For the reasons set out above, the adjudicator came to the correct conclusion. My answer to the question posed in part 6 of this judgment is "yes".
98. Let me emphasise that in this section of the judgment I am not laying down any new principle about the meaning of "dispute". Nor am I developing any existing principle. I am simply applying established principles to a somewhat unusual, indeed convoluted, set of facts.

Part 7: WERE CAMBBA ENTITLED TO WITHDRAW ANY CLAIM WHICH THEY HAD MADE FOR THE INDIRECT COSTS OF DC11?

99. Let me now address the position if my analysis in part 6 above is held to be incorrect. Suppose that by early or mid-December 2005 CAMBBA had a disputed claim for the indirect costs of DC11 which fell within the scope of the Dennys adjudication. On that assumption, were CAMBBA entitled to withdraw from the Dennys adjudication their claim for indirect costs? Mr Streatfeild-James contends that CAMBBA were so entitled. Mr Blackburn and Mr Blunt contend that they were not.
100. In litigation, the right of a party to discontinue its claim or certain heads of claim is enshrined in and regulated by the Civil Procedure Rules. Adjudication, however, is a very different process from litigation. Every construction contract contains, either expressly or by statutory implication, a series of adjudication provisions which comply with the requirements of Part 2 of the 1996 Act. The 1996 Act says nothing about the entitlement of a party to withdraw or not to withdraw a claim which has been advanced in adjudication.
101. Having considered the competing submissions of counsel, I have come to the conclusion that it is impossible to read into either the 1996 Act or the Scheme any restriction prohibiting a party from withdrawing a disputed claim which has been referred to adjudication. I reach this conclusion for four reasons:
- (i) There is nothing in the Act or the Scheme which suggests that any such restriction is intended.
 - (ii) Adjudication is an informal process which arrives at an interim resolution of disputes pending final determination by litigation or arbitration. It would be contrary to the statutory purpose to prohibit a party from withdrawing from such a process any claim which it did not wish to pursue.
 - (iii) If there were such a restriction, it would have the bizarre consequence that parties would be forced to press on with bad claims in adjudication. This would lead to wastage of costs and resources on the part of all parties. In my view, this simple consideration outweighs all the policy arguments which have been urged in Mr Blackburn's skeleton argument.
 - (iv) In *John Roberts Architects Ltd v Park Care Homes* [2006] BLR 106, the Court of Appeal stated obiter that a referring party could discontinue an adjudication. See the judgment of Lord Justice May at page 109.

102. Let me now turn to the adjudication provisions in the D&C contract and the concession agreement. These provisions do not expressly prohibit a party from withdrawing a claim from adjudication. I see no basis for implying such a restriction. It therefore seems to me that CAMBBA were entitled, on 15th December 2005, to withdraw their claim, if any, relating to the indirect costs of DC11.
103. If, contrary to my view, the adjudicator's approval was required before CAMBBA could withdraw any claim for indirect costs, it is clear that the adjudicator gave such approval in his decision on 30th December.
104. In my view, the adjudicator was quite right to approve that course. I reach this conclusion for three reasons:
- (i) In the circumstances of this case it would have been quite wrong to force CAMBBA to press on with a claim for the indirect costs of DC11 before that claim had been prepared.
 - (ii) There were numerous contractual issues between the parties. These were being, and had to be, dealt with sequentially and in an orderly manner. It was perfectly logical to deal with the indirect costs of DC11 separately from the direct costs. These were two severable and very substantial topics upon which a great deal of work was required.
 - (iii) All parties to this litigation have been making their way through a minefield. All parties have made tactical errors from which they subsequently sought to escape. MEL included the indirect costs of DC11 in the Bingham adjudication before resiling from that position on 8th December 2005, when the implications became clear. The Secretary of State objected to the inclusion of indirect costs in the Dennys adjudication, but resiled from that position five days later, when the implications became clear. CAMBBA included indirect costs in their notice of joinder, but resiled from that position when the implications became clear. In my view, it would be unduly harsh to hold CAMBBA to the consequences of their mistake.
105. More generally, in my view, both adjudicators and the courts should approach procedural issues in adjudication in a manner which accords with fairness and common sense (as the adjudicator did in this case). Adjudication should not become a game of chess in which the tactical skill of the players determines the outcome.
106. For all of the above reasons I have come to the conclusion that the answer to the question posed in part 7 of this judgment is "yes".

Part 8: CONCLUSION

107. For the reasons set out in parts 5, 6 and 7 above I have come to the conclusion that the adjudicator was correct in his primary decision. In those circumstances, the interesting arguments which Mr Blackburn and Mr Blunt have advanced concerning *res judicata*, issue estoppel, abuse of process and the court's power to "open up, review and revise" an adjudicator's decision do not arise for decision.
108. In relation to these matters Mr Blackburn has cited *Khan v Golecha International Ltd* [1980] 1 WLR 1482, *SCF Finance Co Ltd v Masri* [1987] 1 QB 1028 and *Republic of India v India Steamship Co Ltd*, [1993] AC 410. For my part I would be reluctant to transplant the principles of these cases into the law of adjudication. My reluctance has been increased by the observation of Dyson LJ in *Herschel Engineering v Breen Property Co* [2000] BLR 272 at paragraph 17. In my view it would not be right to shut CAMBBA out from advancing an articulated claim for the indirect costs of DC11, which it has not yet put forward.
109. Likewise, with all due respect to Mr Blunt's persuasive submissions, I do not think it would be right for this court to rewrite the adjudicator's decision with retrospective effect, so that CAMBBA are now barred by the 60-day time limit from ever pursuing their claim for the indirect costs of DC11.
110. These brief comments are obiter because, on my analysis of the facts and the documents, the adjudicator was correct in his decision and the question of remedy does not arise.
111. Let me now draw the threads together. For the reasons set out in parts 5, 6 and 7 above, my decision is that both claimants fail in their claim and this action must be dismissed.

MR JOHN BLACKBURN QC and MR DARRYL ROYCE (instructed by Davies Arnold Cooper) appeared on behalf of the First Claimant, Midland Expressway Limited.

MR DAVID BLUNT QC and MS CLAIRE PACKMAN (instructed by the Treasury Solicitor) appeared on behalf of the Second Claimant, Secretary of State for Transport.

MR DAVID STREATFEILD JAMES QC and MS NERYS JEFFORD (instructed by Wragge & Co LLP) appeared on behalf of the Defendants.