

NEUTRAL CITATION NO: [2005] EWHC 2963 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Thursday 24th November 2005

Before:

MR. JUSTICE JACKSON

Claim No.HT-05-310

B E T W E E N :

MIDLAND EXPRESSWAY LIMITED

Claimant

- and -

- (1) **CARILLION CONSTRUCTION LIMITED**
- (2) **ALFRED McALPINE CONSTRUCTION LIMITED**
- (3) **BALFOUR BEATTY GROUP LIMITED**
- (4) **AMEC CAPITAL PROJECTS LIMITED**
- (5) **JOHN E PRICE**

Defendants

(No.2)

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Counsel for the Claimant: MR J BLACKBURN QC and MR D. ROYCE
Counsel for the First, Second, Third and Fourth Defendants: MR D STREATFEILD-JAMES QC
and MS N JEFFORD

JUDGMENT

1. MR JUSTICE JACKSON: This judgment is in nine parts, namely Part One - Introduction; Part Two - The Relevant Contractual Provisions; Part Three - The Facts; Part Four - The Present Proceedings; Part Five - Is there a Construction Dispute between CAMBBA and MEL?; Part Six - Does Clause Seven of the D&C Contract prevent CAMBBA from pursuing their adjudication claim at the present time?; Part Seven - Are CAMBBA entitled to press on with their claim for interim payment against MEL, before the dispute resolution procedure under the concession agreement has been fully operated?; Part Eight - Is MEL entitled to any of the relief which it seeks?; Part Nine - Conclusion.

Part 1 - Introduction.

2. This is a claim for declarations and injunctions to prevent the defendant building contractors from pursuing a reference to adjudication. The claimant is Midland Expressway Limited, to which I shall refer as 'MEL'. The defendants are (1) Carillion Construction Limited, (2) Alfred McAlpine Construction Limited, (3) Balfour Beatty Group Limited, (4) AMEC Capital Projects Limited, (5) Mr J E Price.
3. The first four defendants are working together in a joint venture which is known as the CAMBBA Construction Group. Throughout this case, the first four defendants have been collectively referred to as 'CAMBBA', and I shall use that abbreviation.
4. By an agreement, dated 28 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 27 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. I gave judgment last week in litigation between MEL and CAMBBA concerning 15 different issues. The background facts were fully set out in that judgment. I shall not repeat those background matters today. Although a number of interim certificates have been issued to CAMBBA, the resolution of payment matters has not yet reached the stage of finalising the final account, or the issue of a final certificate.
6. 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.
7. One statute which is relevant to the present litigation, is the Housing Grants Construction and Regeneration Act 1996 ('the 1996 Act'). Section 104 of the

1996 Act provides "(1) In this part, a 'construction contract' means an agreement with a person for any of the following: (a) the carrying out of construction operations, (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise, (c) providing his own labour, or the labour of others, for the carrying out of construction operations; (2) References in this Part to a construction contract, include an agreement (a) to do architectural design or surveying work, or (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations."

8. Section 108 of the 1996 Act provides '(1) 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. For this purpose 'dispute' includes any difference. (2) The contract shall (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication, (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of such notice, (c) require the adjudicator to reach a decision within 28 days of referral, or such longer period as is agreed by the parties after the dispute has been referred, (d) allow the adjudicator to extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred, (e) impose a duty on the adjudicator to act impartially, and (f) enable the adjudicator to take the initiative in ascertaining the facts and the law. (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration), or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute...; (5) If the contract does not comply with the requirements of subsections (1)-(4), the adjudication provisions of the Scheme for Construction Contracts apply'.
9. Section 113 of the 1996 Act provides '(1) A provision making payment under a construction contract, conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.'
10. It is not necessary to refer to any other statute. The next task therefore is to go through the relevant contractual provisions.

Part 2 – The Relevant Contractual Provisions.

11. The general structure of the contracts made between the Secretary of State for Transport, MEL and CAMBBA was set out in the judgment

which I delivered last week in the earlier action. I shall now set out the specific provisions of those contracts which are of particular relevance to the present dispute.

12. Clause 8.1 of the Concession Agreement provides '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 an 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 the revenue from, or an increase in the operating and/or maintenance costs of the project, or where a department's agent requests a department's change in accordance with clause 29 (Fossils and Antiquities), 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 (or within such period as may be agreed between the concessionaire and the department's agent), 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... 8.1.6.1 the concessionaire shall cause the contractor to identify in any application for an interim payment certificate 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, (or in the event of the appointment of the independent costs consultant, the department's agent shall accept the figures prepared by the independent costs consultant)...
13. Schedule One to the concession agreement contains a number of definitions. The definition of "change" in schedule One reads as follows. 'Change means a variation in the design, quality, or quantity of the works, and may include additions, substitutions, alterations in design, and variations in the technical requirements. A

change shall either be a concessionaire's change, or a department's change, as the case may be.'

14. A dispute resolution procedure was set out in schedule 15 to the concession agreement. A new schedule 15 to the concession agreement was substituted by schedule 8 to the second supplemental agreement, made between the Secretary of State and MEL. This dispute resolution procedure is sometimes referred to as 'schedule 8' (because that is where it is to be found in the second supplemental agreement). It is sometimes referred to as schedule 15, because that is the schedule number allocated to it by the concession agreement. For simplicity, I shall always refer to it as schedule 15. Schedule 15 provides for a meeting in the first instance between representatives of the department and MEL in an endeavour to resolve any dispute which arises. If such meeting does not lead to a resolution, then schedule 15 provides for a referral of the dispute to adjudication.
15. Paragraph 7.1 of schedule 15 reads as follows. "Disputes Between Concessionaire and Contractor. '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 a 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 in a similar manner as if he had been joined to a High Court action under the provisions relating to third party and similar proceedings, and to have such rights, obligations or issues determined at the same time as the construction dispute.'
16. Section Nine of schedule 15 provides for referral of the dispute to the courts, in the event that either party is dissatisfied with the decision of the adjudicator.
17. The D&C contract begins with a number of definitions which are set out in Clause 1.1. These definitions include 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, (b) any dispute as to any decision, opinion, instruction, direction, certificate or valuation of the employer, the employer's agent or the certifying engineer (whether during the progress of the works or after their

completion and whether before or after the determination, abandonment or breach of this contract).'

'Equivalent project relief means a benefit or relief under the concession agreement to which the employer is or becomes entitled from time to time, pursuant to or under the concession agreement (or would have become so entitled but for a default or omission of the employer under the concession agreement, save to the extent that the same was caused or contributed to by the contractor) to the extent that it is equivalent to a benefit or relief claimed by the contractor under this contract in respect of the same circumstances.'

'Project relevant event means any of the following:

(a) Any act of prevention or breach of contract by the Secretary of State in respect of its obligations under the concession agreement

(b) Any department's change

(c) Any other event under the concession agreement whereby the employer is or becomes entitled to compensation, reimbursement, indemnification or other payment by the Secretary of State under the concession agreement.'

18. Section Seven of the D&C contract is entitled 'Contractors' Rights', and it includes the following provisions: '7.1.1 The contractor shall, subject to clauses 7.1.1(a) and 7.1.1(b) be entitled to such proportion of any equivalent project relief as may in all the circumstances be fair and reasonable, but... 7.1.3 Notwithstanding any other provision of this contract, in the case of a project relevant event, the contractor shall only be entitled to payment or recovery by any other means (including means of set-off or abatement) of any price adjustment to the extent that the following conditions precedent have, subject to clause 7.1.4, been satisfied. (a) An agreement has been made between the Secretary of State and the employer, or a determination has otherwise been made under or in connection with the concession agreement, establishing that the employer is entitled to equivalent project relief in respect of such price adjustment for such project relevant event, and (b) the employer has received the price adjustment funds or has certified that it has funds available to it for the purposes of payment of such price adjustment, provided always that if the employer has received or has available to it part only of the funds necessary for the payment of such price adjustment, the employer shall be obliged to make payment only to the extent of those funds available from time to time.'...

7.2 'The employer shall use all reasonable endeavours to pursue under the concession agreement such rights and remedies as may relate to the works or the contractor's other risks and obligations hereunder...'

7.4 'Subject to clause 7.2 (Enforcement of Rights under Concession Agreement), 7.4.1 pending the determination, agreement or resolution of any equivalent project relief under the concession agreement, the contractor shall take no

steps to enforce any right, benefit, or relief under this contract to the extent that such right, benefit, or relief relates to the same circumstances as those to which the project-relevant event to which that equivalent project relief relates.'

7.4.2 'Following the determination, agreement or resolution of the equivalent project relief under the concession agreement, the contractor shall be conclusively deemed to have waived any rights, benefit, or relief under or in connection with this contract in respect of the project relevant event that gave rise to the entitlement to equivalent project relief in excess of those arising from such determination, agreement, or resolution. Accordingly, the contractor shall not take steps under the disputes resolution procedure, or otherwise, with the objective that the project relevant event should be resolved under this contract in any different manner from that under the concession agreement, and the contractor hereby waives any right to do so.'

7.5 'Save as provided in this clause (7), the employer shall have no liability to the contractor in respect of any project relevant events'.

7.6 'To the extent of any inconsistency between the provisions of clause (7) and any other provisions of this contract, the provisions of clause (7) (Contractor's Rights) shall take priority.'

19. Section 37 of the D&C contract is entitled 'Terms of Payment' and it includes the following provisions: 37.1 'Subject to the terms of this clause 37 (Terms of Payment) and clause 38 (Method of Payment) the contractor shall be entitled to payment of the amount set out in the schedule of prices as follows...' 37.2 'Subject as provided in clause 37.3 (Limit on Payments) each month the contractor shall be entitled to be paid 37.2.1 the amount calculated in accordance with clause 37.1 (Payment of Items in the Schedule of Prices), and clause 38.2 (Monthly Measurement) and 37.2.2, all such other amounts to which the contractor has become entitled during that month in accordance with the express terms of the contract.'
20. Section 38 of the D&C contract is entitled 'Method of Payment'. These provisions provide for the measurement of work done. Such measurement is to be done monthly and there are to be monthly applications for payment made by CAMBBA. Clause 38.4 then provides 'within 14 days following the receipt of an application for payment referred to in clause 38.3 (Monthly Application for Payment), the employer shall issue to the contractor an interim payment certificate certifying 38.4.1, the cumulative amount payable to the contractor in accordance with clause 37.2 (Payment of the Contract Price)...'.
21. Section 39 of the D&C contract is entitled 'Changes'.. The word 'change' in the D&C contract has the same meaning as the word 'change' in the concession agreement.
22. Clause 39.1 provides 'the employer may at any time prior to issue of the maintenance certificate issue a request in writing to the contractor, for a department's change.'

23. There then follow provisions setting out the procedure to be followed in respect of a department's change. Clause 39.4 provides as follows: '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 to 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 (or within such other period as may be agreed between the parties) 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)). 39.4.2. If the employer shall within 28 days of receipt of the contractor's statement of order of magnitude, give notice that further details are required, then the contractor shall proceed to preliminary design of the department's change, together with a more detailed costing and estimate of the matters set out in Clause 39.4.1(a), 39.4.1(b) and 39.4.1(c), and shall submit the same to the employer as soon as reasonably practicable. 39.4.3. The employer and the contractor shall take reasonable steps (and if so requested by the employer in consultation with the department's agent) to agree such price adjustment and/or extensions of time and/or amount of any direct loss or expense as may be reasonable in the circumstances. Any agreement so reached shall be binding upon the employer and the contractor upon receipt of the countersigned department's change certificate, whereupon the contractor shall implement the department's change and the employer shall grant an extension of time under Clause 32 of the agreed length (if any) and the contract price shall be adjusted accordingly (where applicable). 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 (Value 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).

39.4.5 Subject to any rights which the contractor may have under Clause Seven (Contractor's Rights) in respect of a project relevant event, the employer shall bear no risk or liabilities whatsoever arising from a department's change, and accordingly, the employer shall have no liability to make payment in connection with or arising from a department's change, other than as either agreed pursuant to Clause 39.4.3 above, or in accordance with Clause 39.4.4, or Clause 39.4.6.

39.4.6 The employer may withdraw the request for a department's change at any time prior to the issue of a department's change certificate countersigned by the department's agent, but in the case of a withdrawal after a request pursuant to Clause 39.4.2 above, the contractor shall be entitled to be paid its reasonable costs incurred in the preparation of the design and estimates."

24. Clause 39.6 provides "39.6.1 subject always to Clause 39.6.2 and except as agreed between the parties, or as otherwise provided expressly in this contract, the price adjustment in respect of department's changes or employer's changes shall be ascertained as appropriate by the employer as follows, (a) Using the unit rates and prices set out in the schedule of rates, and (b) Where a schedule of rates does not contain rates and prices for the work to be valued, the work shall be valued at rates and prices based on the rates and prices set out in the schedule of rates insofar as it is reasonable and practicable to do so, failing which a fair valuation shall be made by the employer. 39.6.2. Subject only to Clause Seven (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 to a corresponding change pursuant to Clauses 8.1.3.1 and 8.1.3.3 of the Concession Agreement."
25. Clause 39.7 provides, "The contractor shall be entitled to have included in any interim payment certified by the employer pursuant to Clause 38 (Method of Payment) such amount in respect of any department's change or employer's change as the employer may consider due to the contractor, provided that the contractor shall have supplied sufficient particulars to enable the employer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim the contractor shall be entitled to payment in respect of such part of the claim as the particulars may substantiate to the satisfaction of the employer."
26. Clause 53 of the D&C Contract provides, "Except where expressly provided to the contrary, any construction dispute shall be resolved in accordance with the disputes resolution procedure."

27. The disputes resolution procedure is set out in appendix six to the D&C Contract. The provisions of appendix six are in many respects similar to the provisions of appendix 15 to the Concession Agreement. Section one of appendix six to the D&C Agreement provides for a meeting, in the first instance, at which representatives of MEL and CAMBBA shall endeavour to resolve their dispute. If such meeting does not have an agreed outcome, the dispute shall then be referred to adjudication in accordance with the provisions of section two and following of appendix six. Paragraph 6.1 provides that the scope of the adjudication shall be the matters identified in the notice requiring adjudication together with certain further matters. Section seven of appendix six mirrors in many ways the provisions of section seven of appendix 15 to the Concession Agreement.
28. Section eight of appendix six 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 two 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 eight, then, unless the contractor in his 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."
29. I intervene at this point in my recital of the contract provisions to note that section eight of appendix six requires the contractor in certain circumstances to become a party to a tripartite adjudication, when the adjudication has been commenced by the parties to the Concession Agreement. However, the various contractual provisions do not compel the Secretary of State to become party to a tripartite adjudication when such adjudication has been commenced by MEL or CAMBBA. The provisions give the Secretary of State an option whether or not he wishes to take part in such a tripartite adjudication. It can therefore be seen that it is inherent within the contractual scheme that there is at least the possibility of two different adjudications running at the same time.

30. Section nine of appendix six to the D&C Agreement provides that if either party is dissatisfied with the adjudicator's decision, that party may refer the dispute in question to the courts for a decision. Paragraph 9.5 of appendix six provides, "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."
31. Section 11 of appendix six provides as follows, "11.1. Notwithstanding any other provisions of this contract to the contrary, where a construction dispute arises and either the employer or the contractor intends to refer such construction dispute for resolution or determination (as the case may be) under the preceding paragraphs of this appendix six, then, save where paragraph eight applies, the employer or contractor (as the case may be) shall by notice in writing to the other party 11.1.1 confirm its intention to make such a reference, and 11.1.2 summarise the issues in such construction dispute. 11.2. The employer may in any notice given by it under paragraph 11.1 or within three business days of the receipt of a notice from the contractor under paragraph 11.1 by notice in writing to the contractor, confirm that the issues referred to in the said contractor's notice or the said employer's notice (as applicable) relate to or may potentially relate to a project relevant event specifying such event."
- 11.3: "Where the employer gives a notice to the contractor in accordance with paragraph 11.2., 11.3.1: the employer shall if he has not already done so, promptly refer the project relevant event for resolution or determination (as the case may be) under the concession agreement in accordance with the provisions of schedule 15 thereof. 11.3.2: unless the Secretary of State shall have served notice in accordance with paragraph 7.1.2 the contractor shall serve notice in accordance with paragraph 8.2. 11.3.3: The contractor shall not take any steps to enforce any of its rights under this contract which may prejudice or be inconsistent with the operation of paragraph 8. 11.4: to the extent of any inconsistency between the provisions of paragraph 11 of this appendix 6 and any other provisions of this appendix 6 or of this contract the provisions of paragraph 11 of this appendix 6 shall prevail."
32. That is a sufficient recitation of the contract terms for present purposes. It is now necessary to outline the facts.

Part 3 - The Facts.

33. 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 Lichfield. 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.

34. 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).
35. 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.
36. During 2001 and 2002 there were discussions between the Highways Agency, the DA, CAMBBA, MEL and various professional advisers concerning the layout which should be adopted for the northern tie-in and the southern tie-in.
37. The arrangement which was finally adopted for the southern tie-in involved widening the M6 motorway for a distance of about 1km before the tie-in. The road layout then permits a gradual and progressive take off of traffic over that 1km 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 on a large embankment in the region of the northern tie-in.
38. 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 is used in order to describe compendiously the road layouts required at the northern tie-in and the southern tie-in is 'tiger tails'.
39. On 14 July 2002 the DA formally issued the department's change number 11, setting out the detailed road layouts which were required at the northern tie-in and the southern tie-in. This change instruction was binding both upon MEL and upon CAMBBA. CAMBBA duly constructed the two tie-ins in accordance with the drawings annexed to department's change 11.
40. There is no dispute that CAMBBA are entitled to extra payment for complying with department's change 11. However, the amount of that extra payment is not agreed. CAMBBA has made applications for interim payment in respect of tiger tails totalling £11,295,814 plus VAT. The interim payments made in respect of tiger tails amount to £1.5 million plus VAT. That money was paid by the department to MEL and by MEL to CAMBBA. The payments made by MEL to CAMBBA are shown in interim certificates numbers 31, 34 and 53A. CAMBBA assert that a further sum of

approximately £9.8 million plus VAT is due to them in respect of this aspect of the works.

41. On 11 October 2005 CAMBBA served on MEL a notice in the following terms:

“Notice of intention to refer a construction dispute to adjudication (tigers tails). We hereby give notice of an intention to refer the following construction dispute to adjudication namely CAMBBA’s entitlement to an interim payment in respect of department’s change 11 dated 14 July 2002 as more particularly set out below ... 5. CAMBBA have submitted ‘sufficient particulars to enable the employer to determine the amount due’ in respect of department’s change 11. In particular CAMBBA refer to their application for payment/claim submission dated 12 May 2004. 6. CAMBBA have disputed that MEL had properly certified their entitlement to payment for department’s change 11. 7. Accordingly CAMBBA now seek the resolution of the construction dispute by adjudication pursuant to clause 53 of the contract. 8. CAMBBA therefore seek a decision from the adjudicator for a declaration that, 1, MEL pay CAMBBA the price adjustment they are entitled to resulting from department’s change 11 in the further sum of £9,795,814 plus VAT or such other sum as the adjudicator shall think fit and, 2, interest on any such sum pursuant to the adjudicator’s inherent power or as damages and/or 3, any payment certificates which have included an assessment/payment of costs for department’s change 11 be opened up and revised to reflect the adjudicator’s decision as to the value of the department’s change 11 that should have been certified earlier and/or 4, such other relief as the adjudicator thinks fit.”

42. On 13 October 2005 MEL’s solicitors sent a letter to CAMBBA’s solicitors in the following terms:

“We refer to your letter of 11 October to our clients Midland Expressway Limited (MEL) enclosing a notice of intention to refer a construction dispute (tiger tails) to adjudication. As referred to in clause 7.1.1 of appendix 6 of the contract a copy of your client’s notice has been sent to the department’s agent in accordance with the provisions of paragraph 7.1 of schedule 8 of the second supplemental agreement to the concession agreement. We wait to hear whether the Secretary of State wishes to become a party to your client’s reference. Should he wish to do so then as you are aware the Secretary of State will give notice to our respective clients within the next seven days. In the event that the Secretary of State does not wish to become a party and as your clients are claiming payment in respect of a department’s change, then in accordance with the provisions of clause 7.2 our clients will use their reasonable endeavours and seek to enforce your clients’ rights under the concession agreement by immediately initiating the dispute resolution procedure under the concession agreement.”

43. On 21 October 2005 the DA wrote to MEL a letter as follows:

"I have sought advice from the Highways Agency to determine if the Secretary of State under clause 7.1.2 of the concession agreement wishes to be party to this matter. I have now been advised that they do not. However at this stage I would reiterate again that in our opinion under the concession agreement the site is defined as 'the land, spaces, waterway, roads and any surface required for the project facilities an indication of the general area of which is provisionally identified in the drawings' and as such any work required outside of the provisional indication does not of itself necessitate a department change. If under your contract with CAMBBA there is a defined site boundary, giving rise to different contractual implications, then this is a matter for yourselves to determine. I await the outcome of the adjudication in due course."

44. Three points emerge from this letter. First, the Secretary of State declined to take part in the adjudication. Secondly, rightly or wrongly, the Secretary of State took the view that his liability to MEL in respect of department's change 11 may not necessarily be the same as MEL's liability to CAMBBA. Thirdly, the Secretary of State anticipated that the adjudication between MEL and CAMBBA would proceed and he awaited notification of the outcome of that adjudication.

45. On 24 October MEL served a notice on the Highways Agency under paragraph 1.1 of schedule 15 to the concession agreement. The relevant part of this notice reads as follows:

"I regret that I am obliged to take this action but as you are aware the contractor (CAMBBA) claim that they are entitled to more money than has currently been certified and has recently instigated an adjudication under the provisions of the construction contract. Pursuant to clause 7.2 of the construction contract MEL are obliged to use all reasonable endeavours to pursue under the concession agreement such rights and remedies as may relate to the works for the contractor's benefit. I would be pleased to hear from you as to when you are available to meet in accordance with the provisions of paragraph 1.1 of the procedure in order to see whether we are able to resolve the dispute."

46. On 31 October 2005 CAMBBA served upon MEL its referral notice in the adjudication previously foreshadowed. The principal parts of this referral notice read as follows:

"5. Pursuant to clause 39.7 of the contract CAMBBA are 'entitled to have included in any interim payment certified by the employer pursuant to clause 38 such amount in respect of any department's change as the employer may consider due' Clause 39.6 sets out MEL's obligation to value the price adjustment as defined in the contract required in respect of the department's change. 6. MEL wrote to CAMBBA on 10 June 2004 ... confirming that they were 'obliged to formally value any claimed department change. We now propose to do so.' To date MEL have not valued the department's change. Instead, MEL seem to be operating a 'pay when

paid' approach and have paid CAMBBA £1.5 million for department's change 11 being the sum they themselves have been paid by their employer, the Secretary of State.

7. No detailed valuation seems to have been carried out by the department's agent and only an arbitrary and unallocated sum of £1.5 million has been paid in two tranches, £800,000 prior to CAMBBA's detailed claim of 12 May 2004 and £700,000 on 16 September 2005 (exclusive of VAT).

10. CAMBBA know of no issue that prevents MEL valuing their claim. They are aware that MEL and the DA are debating whether under the concession agreement the scope of work of the southern tie in required by department change 11 was required of MEL in any event. MEL have the benefit of Jacobs Babbie's report showing what they believed should have been constructed but for department change 11. They therefore have all the information they need to value the southern tie in works caused by department change 11. The fact that they cannot persuade their employer of what the southern tie in would have required but for department change 11 is a matter for them and their employer. On an interim basis CAMBBA's entitlement to payment is clear. Clause 39.7 refers. Whether or not MEL pursue their entitlement under the concession agreement is a matter for them. In the event that it is established that MEL are not entitled to payment from their employer for any monies they may have paid to CAMBBA on an interim basis for the department change, then such overpayment will have to be repaid pursuant to the final certificate as envisaged by clause 38.5.2 of the contract or corrected in a later interim certificate pursuant to clause 38.4.3. The present position of MEL waiting for their employer to value and pay for the work is not what the contract requires of MEL."

47. In their notice, CAMBBA go on to claim opening up and revision of the relevant certificates and payment of £9,795,814 plus VAT and interest. MEL was aggrieved by the service of this referral notice. Accordingly MEL commenced the present proceedings.

Part 4 - The Present Proceedings.

48. By a claim form issued on 31 October 2005 under Part 8 of the Civil Procedure Rules, MEL applied for declarations and injunctions against CAMBBA, who were joined as the 1st, 2nd, 3rd and 4th defendants and against the adjudicator who was joined as 5th defendant. The relief claimed in the claim form is as follows:

"1. A declaration that on a true interpretation of the design and construction contract executed as a deed between the claimant and the 1st, 2nd, 3rd and 4th defendants on 27 September 2000 those defendants are not entitled to proceed as claimants in the adjudication begun by the notice of intention to refer a construction dispute to adjudication dated 11 October 2005.

2. A declaration that the 5th

defendant has no jurisdiction as adjudicator in the above adjudication. 3. An order restraining the 1st, 2nd, 3rd and 4th defendants whether by themselves or by their directors, officers, employees or agents or otherwise howsoever forthwith from proceeding as claimants in the above adjudication. 4. An order restraining the 1st, 2nd, 3rd and 4th defendants from beginning any further adjudication as claimants in respect of the same subject matter as that of the above adjudication. 5. An order restraining the 5th defendant forthwith from proceeding as adjudicator in the above adjudication.”

49. On 2 November a directions hearing was held. At that hearing MEL undertook not to proceed against the 5th defendant, the adjudicator, without further order. As between the claimant and the other defendants I gave directions for the service of evidence and the exchange of written submissions. All parties were anxious for an early resolution of the issues. Accordingly an early trial date was fixed. The trial commenced on Tuesday 22 November, which was the day before yesterday.
50. The issues which have been argued at the trial may be formulated as follows: 1. Is there a construction dispute between CAMBBA and MEL? 2. Does clause 7 of the D&C contract prevent CAMBBA from pursuing their adjudication claim at the present time? 3. Are CAMBBA entitled to press on with their claim for interim payment against MEL before the dispute resolution procedure under the concession agreement has been fully operated? 4. Is MEL entitled to any of the relief which it seeks?
51. No witnesses were called at the trial. The factual evidence comprises a witness statement made by Mr Jonathan Pawlowski and a witness statement made by Mr Paul Neal. Mr Pawlowski is a solicitor employed by MEL’s solicitors. Mr Neal is employed as project director by CAMBBA. Both Mr Pawlowski and Mr Neal helpfully set out the factual history, which is not the subject of dispute. They also helpfully exhibit the relevant documents which this Court needs to see, in order to address the issues of law which arise.
52. Detailed written submissions were served on behalf of each party. In addition I have heard counsel’s oral submissions on the legal issues over the last two days. I am indebted to both leading and junior counsel for their considerable assistance. I will now give my decision on the issues.

**Part 5: Is there a construction dispute
between CAMBBA and MEL?**

53. It will be recalled from part two of this judgment that the definition of “construction dispute” which is set out in clause 1.1 of the D&C contract begins with the following words:

“A construction dispute means a difference or dispute of whatever nature between the employer and the contractor arising out of or in connection with this contract ...”

54. Mr David Streatfeild-James QC on behalf of CAMBBA submits that CAMBBA's disputed claim for additional payment in respect of tiger tails constitutes a “construction dispute” within that definition.
55. Mr John Blackburn QC on behalf of MEL asserts the contrary. Mr Blackburn submits that pursuant to the D&C contract the valuation of department's changes is to be determined exclusively under the provisions of the concession agreement. In making this submission Mr Blackburn relies in particular upon the following provisions of the D&C contract: clause 1.1 (definitions of 'equivalent project relief' and 'project relevant event'), clause 7.1.3(a), clause 7.4, clause 39.4.5, clause 39.6.2 and section 11 of appendix 6.
56. Accordingly, submits Mr Blackburn, the dispute as to the proper valuation of department change 11 is a dispute between the department on the one hand and MEL plus CAMBBA on the other hand. Another way that Mr Blackburn puts this is that MEL is merely a cipher or conduit through which the claim from CAMBBA and the payment from the department passes.
57. The only exception which Mr Blackburn acknowledges to this analysis is that in some cases the Secretary of State may elect to take part in a tripartite adjudication commenced by CAMBBA under the D&C contract concerning the valuation of a department's change. However, that is not this case, because the Secretary of State has expressly declined to do so.
58. On this issue, I accept Mr Streatfeild-James's submissions and I hold that CAMBBA's claim for additional payment in respect of tiger tails constitutes a “construction dispute” within the meaning of clause 1.1 of the D&C contract. I reach this conclusion for four reasons:
 - (1) The definition of “construction dispute” is broad and compendious. Subparagraphs (a) and (b) which are tacked onto that definition do not cut down its breadth.
 - (2) The concession agreement and D&C contract together establish an elaborate machinery whereby (a) the department changes may be valued under the concession agreement, and (b) the sums found to be due may be passed down the line to CAMBBA. However, that procedure has exceptions as set out in clause 39.4.4 and in the last two lines of clause 39.4.5.
 - (3) In the present case CAMBBA rely upon clause 39.4.4 and, accordingly, contend that their claim for payment falls outside the scope of clause 39.4.5. Mr Streatfeild-James has explained why CAMBBA assert their entitlement under clause 39.4.4 against the employer, but I need not delve into that explanation

for present purposes. CAMBBA may be right in their claim against MEL under clause 39.4.4. CAMBBA may be wrong in that regard. But whether CAMBBA are right or wrong, the fact remains that CAMBBA are making a disputed claim against MEL qua Employer. That disputed claim falls squarely within the definition of "construction dispute."

(4) CAMBBA further contend that if and insofar as any provisions of the D&C contract prevent CAMBBA from pursuing their present claim or receiving payment until the mechanisms under the concession agreement have been operated, and/or MEL have received further payment from the department, those provisions fall foul of sections 108 and 113 of the 1996 Act. Accordingly, CAMBBA are entitled to press on with their present claim for payment despite those provisions. In my view these assertions made by CAMBBA (albeit in response to MEL's current stance) themselves give rise to a separate construction dispute between MEL and CAMBBA. Whether CAMBBA are right or wrong in these assertions, they clearly give rise to a dispute "in connection with this contract".

59. It follows from the foregoing analysis that a construction dispute or construction disputes exist between MEL and CAMBBA, which fall within the ambit of the dispute resolution procedure [see paragraphs 1.1 and 2.1 of appendix 6 to the D&C contract].
60. At the same time I should address a related question, namely whether there is a dispute between CAMBBA and MEL for the purposes of section 108 of the 1996 Act. In my judgment, there is such a dispute. CAMBBA's claim against MEL for an interim payment is disputed and it arises under the D&C contract. Therefore it falls within the ambit of section 108.
61. For all of the reasons set out above my answer to the question posed in Part 5 of this judgment is yes.

**Part 6. Does clause 7 of the D&C contract
prevent CAMBBA from pursuing their adjudication
claim at the present time?**

62. Mr Blackburn relies upon clause 7.1.3 as fitting in with and supporting the general scheme of the D&C contract for which he contends. Nevertheless, Mr Blackburn conceded in his opening speech that clause 7.1.3(a) does not prevent the contractor from taking his claim to adjudication under appendix 6. This concession must be correct. At best clause 7.1.3(a) would be a defence in the adjudication, not a bar from proceeding at all.
63. Let me turn next to clause 7.4 of the D&C contract. MEL contends that this clause expressly debars CAMBBA from pursuing any claim in respect of the evaluation of a

department's change before the value has been determined under the concession agreement. In answer to this contention, CAMBBA contend that insofar as clause 7.4 purports to fetter CAMBBA's right to an immediate adjudication, that clause is contrary to section 108(2) of the 1996 Act. Accordingly, either clause 7.4 must be narrowly construed, or alternatively the adjudication provisions in the D&C contract fall away altogether and the Scheme for Construction Contracts must be substituted [see paragraph 14 of CAMBBA's second written submissions].

64. In support of this contention CAMBBA rely upon the decision of Judge Toulmin in *John Mowlem & Co Plc v Hydra-Tight Limited* (transcript 6th June 2000) and the decision of Judge Thornton in *R G Carter Limited v Edmund Nuttall Limited* (transcript 21st June 2000).

65. In my view CAMBBA's contention is well founded. In both *Mowlem* and *Carter* there was a construction contract, which contained a perfectly sensible provision deferring for a modest period the time at which the contractor could commence an adjudication. In each of those cases it was held that the contractual provision in question was contrary to section 108. I have studied the reasoning of Judge Toulmin in *Mowlem* and the reasoning of Judge Thornton in *Carter*. I respectfully agree with the reasoning in both of those cases. It seems to me that the same process of reasoning applies to clause 7.4 in the present case. Clause 7.4 of the D&C contract does not and cannot bar CAMBBA's right to proceed immediately to adjudication. There are therefore two possibilities. These are as follows:

(1) Clause 7.4 must be construed narrowly and in a manner which is compatible with the 1996 Act.

(2) Clause 7.4 of the contract is contrary to s. 108 of the 1996 Act. Accordingly the contractual provisions for adjudication fall away and the Scheme for Construction Contracts is substituted. This scheme confers a right upon the contractor to go to adjudication at any time.

66. It is not necessary for me to decide which of these two possible analyses is correct and neither Counsel have invited me to do so in the event that CAMBBA's primary contention should prevail. Whichever of the two analyses is followed, however, the result is the same. Clause 7 of the D&C contract does not and cannot bar CAMBBA from pursuing their claim in adjudication at the present time.

67. My answer to the question posed in part 6 of this judgment is no.

**Part 7. Are CAMBBA entitled to press on
with their claim for interim payment against MEL
before the dispute resolution procedure under the concession agreement has been
fully operated?**

68. Clauses 37, 38 and 39 bear directly upon CAMBBA's entitlement to interim payments.
69. Mr Blackburn submits that the D&C contract contains provisions which debar CAMBBA from pursuing their claim for interim payment in respect of department change 11, before that claim has been evaluated under the concession agreement. In support of his argument, Mr Blackburn relies upon the clauses which I have previously mentioned, but in particular clause 39.4.5. This shuts out, says Mr Blackburn, any claim in respect of tiger tails beyond what the department has agreed to pay to MEL. The exceptions contained in clause 39.4.3, clause 39.4.4 and clause 39.4.6 do not apply.
70. Mr Blackburn submits that any claim by CAMBBA based upon clause 39.4.4 is doomed to fail at this stage for this reason: the employer's valuation under clause 39.4.4. must be carried out in accordance with clause 39.6. One therefore goes to that clause and focuses upon clause 39.6.2. That provision restricts any price adjustment in CAMBBA's favour to the amounts which MEL is entitled to be paid under clause 8 of the concession agreement.
71. In response to this argument Mr Streatfeild-James contends that CAMBBA has a properly arguable claim against MEL for interim payment in respect of tiger tails under clause 39.4.4. If and insofar as clause 39.6.2 would debar that claim from being pursued in adjudication, clause 39.6.2 is ineffective by reason of s. 113 of the 1996 Act. In my view this submission is well founded for six reasons:
- (1) On some occasions the assessment made by the DA under clause 8 of the concession agreement, albeit in good faith, may be too low.
 - (2) On those occasions MEL can secure that the sum which is properly due is evaluated and paid to MEL by operating the dispute resolution procedure in schedule 15 to the concession agreement. The schedule 15 procedures will, by one means or another, result in a correction to the original evaluation under clause 8.6. The corrected evaluation may result from a meeting under paragraph 1 or from adjudication under paragraphs 2-8 or from litigation under paragraph 9.
 - (3) The effect of clause 39.6.2 is two-fold: (a) CAMBBA cannot be paid any money in respect of the department change until MEL has established its entitlement to be paid under clause 8 of the concession agreement. (b) If the original evaluation under clause 8 is in error, CAMBBA cannot be paid the correct sum due until the dispute resolution procedure under the concession agreement has been operated.
 - (4) The practical consequence of clause 39.6.2 is that CAMBBA will not be paid for department's changes unless and until MEL has received a corresponding sum from the department. This is so even in cases where CAMBBA has established or could establish an entitlement to payment or additional payment under the dispute

resolution procedures of the D&C contract. This state of affairs is precisely what s. 113 of the 1996 Act is legislating against.

(5) Clause 39.6.2 uses the phrase "the amounts ...to which the employer is entitled to be paid" rather than "the amounts which the employer is paid." In my view, this particular choice of language cannot save the clause. Contracting parties cannot escape the operation of s. 113 by the use of circumlocution.

(6) If I am wrong in the previous sub-paragraph, then I consider that clause 39.6.2 must be read in conjunction with clause 7.1.3. Save in those rare cases where the employer certifies that it has funds available, clause 7.1.3 in conjunction with clause 39.6.2 constitute express and ineluctable "pay when paid" provisions.

72. At first blush it may be surprising that the parties have used any contractual provisions which are ineffective under the 1996 Act. There is, however, an explanation for this which Mr Streatfeild-James gave in the course of his submissions. The D&C contract is based on PFI contract forms. PFI contracts are outside the scope of the 1996 Act. Therefore PFI contract forms have not been drafted with a view to compliance with those provisions.

73. Let me now return to the issue addressed in this part of the judgment. For the reasons set out, I have come to the conclusion that clause 39.6.2 does not debar CAMBBA from pressing on with its claim for interim payment under clause 39 of the D&C contract, even though the dispute resolution procedure under the concession agreement has not yet been fully operated.

74. My answer to the question posed in part 7 of this judgment is yes.

**Part 8. Is MEL entitled to any of the relief
which it seeks?**

75. The first matter, which I must address under this rubric, concerns the effect of section 11 of appendix 6 to the D&C contract. Mr Blackburn contends that paragraph 11.3.3 precludes CAMBBA from pursuing the present adjudication. Mr Streatfeild-James resists this contention on two grounds:

(1) MEL has not served any written notice under paragraph 11.2 of appendix 6.

(2) Paragraph 11.3.3 of appendix 6 conflicts with s. 108 2(a) of the 1996 Act. Therefore either that paragraph must be narrowly construed or, alternatively, the Scheme for Construction Contracts applies and displaces the adjudication provisions set out in appendix 6.

76. Let me deal with those two matters separately. So far as the notice point is concerned, Mr Blackburn relies on the letter from MEL's solicitors dated 13th October 2005. In my judgment that letter does not constitute notice under paragraph 11.2.

First, the letter does not purport to be a notice under paragraph 11.2. Secondly, the letter does not contain an assertion that the issues referred to in the contractor's notice relate to or may potentially relate to a project relevant event.

77. I turn now to the second point. Paragraph 11.3.3, on Mr Blackburn's interpretation, has the consequence of postponing the point in time at which CAMBBA are entitled to commence an adjudication. This is directly contrary to s.108 of the 1996 Act. The earlier decisions of this court and the process of reasoning which I mentioned in part 6 of this judgment, are equally applicable to paragraph 11.3.3. Again, there are two possible analyses:

(1) Paragraph 11.3.3 must be narrowly construed so as not to deprive CAMBBA of their entitlement to adjudication at any time.

(2) Paragraph 11.3.3 of appendix 6 is contrary to s. 108. Accordingly, the contractual provisions for adjudication fall away and the Scheme for Construction Contracts is substituted. This confers an immediate right on the contractor to proceed to adjudication at any time.

78. Whichever of these two analyses is followed, the result is the same. Paragraph 11.3.3 of appendix 6 does not and cannot prevent CAMBBA from pursuing their claim in an adjudication at the present time.

79. Let me now stand back and look at the issues in this case more broadly. I have come to the conclusion that MEL is not entitled to the relief which it seeks for five separate reasons:

(1) There is a construction dispute between CAMBBA and MEL. Appendix 6 to the D&C contract permits CAMBBA to take that dispute to adjudication now. The Secretary of State had a contractual right to join in the adjudication, but he chose not to exercise that right. Therefore the adjudication will go ahead without him. The adjudicator has jurisdiction to decide that dispute on the interim basis which is inherent in all the adjudications and which is spelt out in paragraph 9 of appendix 6.

(2) There is a dispute between CAMBBA and MEL arising under the D&C contract. It is common ground that this is a "construction contract" within the meaning of the 1996 Act. Accordingly, CAMBBA have a statutory right to refer that dispute to adjudication and the adjudicator has jurisdiction to deal with that dispute. The D&C contract does not and cannot cut down: (a) CAMBBA's statutory right to refer the dispute to adjudication or (b) the adjudicator's power to deal with the dispute.

(3) It is the duty of this court to uphold and support the adjudication system, and to give effect to the intention of Parliament as expressed in the 1996 Act.

(4) The various arguments advanced by MEL in this litigation are, at least in part, available to be put forward as defences in the adjudication. However, those arguments cannot be used to stop the adjudication going ahead at all.

(5) Paragraph 9.5 of appendix 6 prohibits MEL from claiming relief of the kind set out in the Claim Form. That paragraph requires that the adjudication should be completed before there is litigation to challenge the adjudication.

80. For each of these reasons, my answer to the question set out in part 8 of this judgment is no.

Part 9. Conclusion.

81. For the reasons set out in parts 5, 6, and 7 above, I have come to the conclusion that CAMBBA are entitled to proceed with their adjudication. MEL is not entitled to any of the declarations or injunctions which it seeks.

82. As in the previous case I must conclude this judgment by thanking the lawyers on both sides for their remarkable efficiency and expedition. The solicitors have assembled the relevant evidence with speed. Counsel on both sides have prepared detailed and comprehensive written and oral submissions. Although this action has proceeded from commencement to judgment within the space of four weeks, each party has done full justice to its case.

83. In conclusion, and as indicated above, MEL's claim must be dismissed.