IN THE MATTER OF AN APPOINTMENT BY THE PRESIDENT OF THE LAW SOCIETY UNDER CASE REFERENCE AAAA

IN THE MATTER OF THE RESPONDENTS' PARLIAMENTARY UNDERTAKINGS TO THE CORPORATION OF THE CITY OF LONDON, DATED 21ST JUNE 1991 AND 2ND DECEMBER 1991, CONCERNING THE CONSTRUCTION OF THE EXTENSION TO THE JUBILEE LINE AND CONCERNING THE LONDON UNDERGROUND (SAFETY MEASURES) BILL AND THE UNDERGROUND BILL IN PARLIAMENTARY SESSIONS 1990-91 AND 1991-92

IN THE MATTER OF AN EXPERT DETERMINATION
BETWEEN

THE MAUVE GROUP PLC

Claimant

- and -

LONDON UNDERGROUND LIMITED

Respondent

EXPERT DETERMINATION

1. Pursuant to my Appointment, on 24th March 2000, as an Independent Expert by the President of the Law Society, it has been agreed by both parties, on the one hand, and me, on the other hand, that I should conduct the resolution of this dispute as an Independent Determining Expert in accordance with my Orders for Directions of 19th April 2000. To this end I, the Claimant, the Mauve Group Plc, and the Respondent, London Underground Limited, have agreed and signed the terms of my Appointment as Determining Expert (also dated 19th April 2000) and my said Orders for Directions.

Accordingly I have acted thereafter, with the agreement of both parties, as a Determining Expert.

2. The dispute between the Claimant and the Respondent arises out of construction work in the vicinity of London Bridge and London Bridge Station on the south bank of the River Thames relating to the extension of the Jubilee Line and the re-building of the London Bridge Underground Station. One of the properties affected by these construction works is the property situated at 3-5 South Street which appears previously to have been a Bank and is now the 'Jolly Farmer' Public House.

3. Shortly after receiving Notice of my Appointment I visited the 'locus in quo', on 5th April 2000, and was able to view the subject property in this dispute and was able to ascertain, as stated herein, that it is now the 'Jolly Farmer' Public House. Nothing arose, during the course of my visit to the site of this dispute, upon which I needed any assistance or comment from either the Claimant or the Respondent. Thus I did not seek assistance or comment from the parties relating to my site visit. It was, however, helpful to me to see the layout of the newly built London Bridge Underground Station and its proximity to 3-5 South Street.

4. In acting as the Determining Expert, I have had put before me the Parliamentary Undertakings (dated respectively 21st June 1991 and 2nd December 1991 and hereafter called the "First Undertaking" and the "Second Undertaking") made by the Respondent to the Corporation of London relating respectively to the London Underground (Safety Measures) Bill and to the London Underground Bill. I have also had put before me the written reference which the Claimant submitted with its Application to the President of

the Law Society of 11th January 2000 - the Application which resulted in my Appointment as the Determining Expert. By agreement between myself and the parties this written reference has been treated as the Claimant's Claim herein. I have also had put before me the Respondent's Defence, dated 11th May 2000, together with supporting documents attached as Appendices 1, 2 and 3, and the Claimant's Reply, which I received on 6th June 2000 and to which were attached some copy letters, in Appendix 1 and a Schedule of Fees of Red Associates in Appendix 2. Finally I have had put before me some further submissions of the Respondent, dated 19th June 2000, to which was attached one further document. Together these documents have constituted all of the submissions and evidence upon which I am basing this Expert Determination.

5. At the time of the Parliamentary Undertakings the subject property, 3-5 South Street, was in the ownership of the City of London Corporation. It was, therefore, one of the buildings concerning which the Respondent, as the Promoter of the London Underground (Safety Measures) Bill and the London Underground Bill, gave a number of undertakings to the City of London Corporation. On receipt of these undertakings, the City of London Corporation, being one of the Petitioners on these two Private Bills, agreed to withdraw its Petitions and refrain from further opposition on the passage of these two Bills through Parliament. Subsequently some time in 1995 (I have not been given the precise date) the Claimant purchased the freehold interest in the subject property and remained the owners of it until some time in late 1998 (again I have not been given the precise date) when the Claimant sold the subject property to another party. In clause 19 of the First Undertaking and in clause 15 of the Second Undertaking the Respondent, as the Promoter of each Bill, agreed, in the event of any of the properties, which were subject to the undertakings contained in each Undertaking, being disposed by the City of London Corporation to

other parties, that all benefits contained in the Undertakings should pass to those other parties. Therefore, as set out in paragraph 6 of my Orders for Directions of 19th April 2000, the Claimant and the Respondent have agreed that all rights and obligations, relating to the subject property, have been assigned, during the period of the Claimant's ownership of it, by the City of London Corporation to the Claimant. It was also agreed, as also recorded in paragraph 6 of my Orders for Directions of 19th April 2000, that, for the purpose of the conduct of this Expert Determination, that Messrs Red Associates should be deemed to be "The Engineer" pursuant to clause 1 of the First Undertaking and clause 1 of the Second Undertaking.

6. In the First Undertaking the Respondent, as the Promoter of the Bill, gave undertakings (relating to the subject property, the structures and foundations of London Bridge and to a number of other properties) to monitor and draw up schedules of defects, so that a clear record could be made of any damage to any property caused by subsidence, settlement or movement arising out of the construction of the extension of the Jubilee Line and the rebuilding of the London Bridge Underground Station. At a later stage the Respondent, as the Promoter of the second Private Bill, wished to carry out further works relating to a new escalator and therefore gave further undertakings which, on the escalator being built, affected the subject property. Although there were some differences, these undertakings were broadly the same as the undertakings given in the First Undertaking.

7. Therefore, the issue before me, in this Expert Determination, is whether the Respondent should repay to the Claimant the amounts contained in two invoices submitted by Red Associates to the Claimant dated respectively 6th November 1998 (in the total sum of £ XXX) and 8th January 1999 (in the total sum of £ YYY). The Claimant paid both of

these invoices but sought repayment of them from the Respondent in invoices addressed to it and respectively dated 9th November 1998 and 26th January 1999. Thus, as set out in paragraph 3 of my Orders for Directions of 19th April 2000, it is my task as the Determining Expert, to construe clause 12 of the First Undertaking and clause 10 of the Second Undertaking under which the Respondent is under an obligation to repay to the Claimant "all reasonable and proper costs, charges and expenses reasonably incurred" by the Claimant relating to "the inspection of [the subject property] by The Engineer or any consultations by the Engineer" relating to any of the undertakings contained in both the First and Second Undertakings.

8. **For the reasons set out below, it is my Expert Determination that the Respondent is under an obligation under clause 12 of the First Undertaking and clause 10 of the Second Undertaking to repay to the Claimant some of the monies contained in the invoices of Red Associates of 6th November 1998 and 8th January 1999. However, for the further reasons which I set out below, I determine that the Respondent is only under an obligation to repay one third of the total of these two invoices, namely the sum of £ ZZZ.**

SUMMARY OF REASONS

9. The basic test, as contained in clause 12 of the First Undertaking and clause 10 of the Second Undertaking, is whether the costs in these two invoices were "reasonable and proper costs" which were "reasonably incurred" by the Claimant. To ascertain whether

the costs in these two invoices fall into this category, it is necessary to identify the role of The Engineer (hence Red Associates) in the two Undertakings. For the purposes of this dispute, The Engineer's role, as identified in clauses 4(b) and 4(c) of the First Undertaking and in clauses 5(b), 5(c) and 5(e) (on the basis that the escalator works were carried out) of the Second Undertaking was fundamentally to 'monitor' the 'monitoring' of the Respondent. While, therefore, the Respondent is correct in paragraph 9(3) of its Defence to state that the decisions on monitoring, including when it should cease, "was ultimately a matter for" it, the role of The Engineer (Red Associates) was not limited to just "being consulted and receiving monitoring results". Under clause 4(c) of the First Undertaking and clauses 5(c) and 5(e) of the Second Undertaking, The Engineer (Red Associates) had the further responsibility of having to acquire sufficient information and knowledge to enable it to exercise its duties under these three clauses of the Undertakings and to make requests in writing (which in each case had to be 'reasonable') to oblige the Respondent to prepare further schedules relating to defects in the subject property which arose out of subsidence, settlement or movement causing damage to the subject property. Moreover, pursuant to clause 5(c) of the Second Undertaking The Engineer (Red Associates) was under an obligation sufficiently to carry out its inspections, relating to the subject property, to enable (if needed) the Claimant to make a written request to the Respondent for the recommencement of monitoring if it (The Engineer) could "reasonably demonstrate" that settlement movement had started again at any time up to "2 years from the date of opening for public traffic of" the extension to the Jubilee Line.

10. For these purposes it was necessary for The Engineer (Red Associates) to monitor the information provided by the Respondent (in its monitoring readings of the subject property) and to make its own readings and investigations. If The Engineer (Red

Associates) did not do this it would have been in no position to issue its requests under clauses 4(c) and clause 5(e) of the First and Second Undertakings. Similarly the Claimant, without The Engineer carrying out this monitoring of the subject property, would not have been in any position to make its written requests under 5(c) of the Second Undertaking. However, in my view the Respondent is correct in asserting in paragraph 9(2) of its Defence that the "settlement movement" which The Engineer (Red Associates) had to demonstrate under clause 5(c) of the Second Undertaking, meant "differential settlement movement that is significant because of the risk it will cause damage to overlying structures". Similarly in order for The Engineer to make a "reasonable request" under clause 4(c) of the First Undertaking and clause 5(e) of the Second Undertaking, it had to produce evidence that there was sufficient settlement movement which was causing damage to the subject property or could reasonably be expected to cause damage to the subject property.

11. The difficulty which faces me in this Expert Determination, a difficulty over which the Respondent consistently, and, in my view, rightly complained, is that Red Associates have never identified properly what were the services which they were providing and for which they sought payment under the invoices of 6th November 1998 and 8th January 1999.

12. The Claimant asserts in paragraph 3.03 of its claim that The Engineer's "Monitoring equipment was installed within 3-5 South Street, mainly within the basement and ground floor areas…. [and] ….checked on a periodic basis by the Engineers engaged by London Underground and settlement readings were provided to Red Associates". In its Reply the Respondent agrees with this assertion but does not agree with the further assertions given

by the Claimant in paragraph 3.04 of its Claim in which the Claimant asserts that Red Associates inspected the subject property "regularly, check[ed] the monitoring results provided by London Underground check[ed] the condition of the property for evidence of any settlement and carr[ied] their own calculations to verify those provided by London Underground…. [and] ….prepared their own graphs of settlement movements".

13. Also in paragraphs 1.06 and 3.01 of its Reply, the Claimant mentions that " a number of internal cracks within the property were noted and tell tales fixed in the basement and sub-basement areas" and refers to the "essential duties" of The Engineer "such as inspecting the property, monitoring cracking, carrying out Engineering assessments, inspecting the works, corresponding with [the Respondent's engineers], seeking further information and determining when to request final schedules". These assertions may or may be right but Red Associates, itself, despite numerous requests from the Respondent, never gave more information than the general description of its services in its letter of 25th September 1996 to the Claimant and, in giving sight of its work sheets, gave no more information than the persons, at Red Associates, who had carried out the work and the time spent on that work. It is possible that Red Associates did give some more information but the copies of its letters to the Respondent of 9th June 1997, 21st September 1997, 12th November 1997 and 6th October 1998 (as referred to in the correspondence) have not been put before me. Similarly the letter of Red Associates to the Claimant of 4th September 1998 has also not been put before me.

14. It is also right that I take note of the views expressed by Red Associates to Green & Partners recorded in the letter of Green & Partners of 5th May 1995 to the Claimant, in which it is stated, as early as in 1995, that Red Associates ‘did not consider the ground

settlements' would be 'significant' and thought that during [in a direct quotation] "the remaining construction and the period of 2 years following the running of the trains, ... in the absence of design or construction errors,…..the probability of any significant damage due to conventional tunneling should be low."

15. It is also right that I should take into account the settlement readings produced by the Respondent on page 34 of Appendix 3 of its Defence which show that in a period beginning 31st January 1997 and ending on 11th January 1999 that while there was some settlement movement *it was*, at least from September 1997 onwards, *minimal*.

16. However, none of this lack of information nor the anticipated and actual minimal settlement takes away from The Engineer its duties under clauses under clause 4 of the First Undertaking and clause 5 of the Second Undertaking which I have identified in this Expert Determination. The minimal settlement movement did put The Engineer onto a lower diligence level in that it needed to carry out less inspections at longer intervals, but this, nor the lack of information on the services it was providing, removed its *basic duty to inspect and carry out investigations* at the subject property in order for it (The Engineer) to be in a position to decide whether it should make requests under clause 4(c) of the First Undertaking and under clause 5(e) of the Second Undertaking. Similarly The Engineer had to carry out <u>*some*</u> *inspections* and <u>*some*</u> *investigations* in order to exercise its duty under clause 5(c) of the Second Undertaking to require the Respondent to recommence the monitoring on the grounds that further significant "settlement movement" was taking place after monitoring had ceased [under the terms of 5(b)] up to "2 years from the date of opening for public traffic" the extension to the Jubilee Line.

17. It does not, however, follow that the Respondent is under a duty to repay to the Claimant the full amounts contained in Red Associates' invoices of 6th November 1998 and 8th January 1999. Against the background of minimal settlement movement, the hours spent by Red Associates' Principal Engineer (Mr. A. Red), Senior Engineer (Mr. P.K. Pink) and Technician (Mr. B. Orange) must be deemed to have been excessive for the performance of their role, as I have identified it in this Expert Determination. It follows, therefore, that under clause 12 of the First Undertaking and clause 10 of the Second Undertaking that *all of these costs* were not "reasonable and proper costs, charges and expenses reasonably incurred".

18. I should mention, in asserting this 'reasonable' test that the Respondent submitted in paragraph 22 of its Defence that "it was not reasonable for Mauve to have paid Red Associates' invoices…" to which the Claimant responded in paragraph 4.04 of its Reply that the Respondent "…must demonstrate clearly no reasonable person receiving such a bill would have paid it…" Although, whether or not the Claimant should have paid the Red Associates' invoices, has some bearing on the 'reasonable' test in clauses 12 and 10, it is *NOT the test that I should apply in this Expert Determination.* For all I know there may have been *other reasons* why it was reasonable for the Claimant to pay these invoices: viz it was concerned to preserve a working relationship with Red Associates.

19. There are a number of ways, under which the *right level* of services of Red Associates could be ascertained in order to identify the "reasonable" costs for which the Respondent is ultimately liable. It would be possible, for example, to remove altogether the fees of Red Associates' Principal Engineer on the basis that his services were not needed for the level of inspection and investigation required of Red Associates for the proper function of

their role under the two Undertakings. However, it may be the case that the services of the Principal Engineer were required while not those of its Senior Engineer and/or Technician. It would also have been possible for me to get the Claimant and Respondent to make further submissions to me so that I could more exactly identify the reasonable costs which I determine should be repaid by the Respondent to the Claimant.

20. It seems to me, however, that this dispute should be brought to an end without further incurrence of my fees and without further cost and time being imposed upon either the Claimant or the Respondent. I think, therefore, the most sensible determination for me to make is to hold that the Respondent is only liable to repay to the Claimant one third of Red Associates' invoices of 6th November 1998 and 8th January 1999.

21 In coming to my conclusion that two-thirds of the Red Associates invoices are not recoverable from the Respondent I am, in no way, impugning the integrity of Red Associates. In paragraph 2.07 of its Reply the Claimant suggests that the Respondent is "in effect…[claiming that the Red Associates]….time sheets and therefore [their] bills are dishonest". I do not understand that to be the way the Respondent is presenting its case and, in any event, that is *not* a finding which I am making. In truth I think the real problem of Red Associates is that they did *not correctly* understand what was their role. This comes out, for example, in their letter of 3rd July 1995 to the Claimant (see Appendix 1 Reply), where they are anticipating a more exacting role for a three and half year project than I find in the Expert Determination to be the case.

DETERMINATION

22. **ACCORDING I DETERMINE, UNDER CLAUSE 12 OF THE FIRST UNDERTAKING AND CLAUSE 10 OF THE SECOND UNDERTAKING, THAT THE RESPONDENT SHOULD REPAY TO THE CLAIMANT THE SUM OF £ ZZZ.**

COSTS

23. Under paragraph 16 of my Orders for Directions of 19th April 2000, I have also the responsibility to direct, as I think fair and reasonable, which or both parties should be held responsible for paying the fees of the Law Society, in the sum of £ PPP and my fees and expenses in the sum of £ WWW plus VAT. Under the 'rule of costs following the event' all of the fees paid to the Law Society and all of my fees should be paid by the Respondent. THAT, THEREFORE, WILL BE MY DIRECTION unless, on receiving written submissions from the Respondent, and written comments upon its submissions from the Claimant, I am persuaded to make a different direction.

24. Accordingly I give the Respondent 14 days to make Written Submissions to me on this issue and the Claimant 14 days thereafter to make Written Comments to me on those Submissions. If the Respondent does not take up this invitation, then, within 14 days of the receipt by it of this Expert Determination, MY DIRECTION THAT THE RESPONDENT SHOULD PAY ALL OF THE FEES OF THE LAW SOCIETY AND ALL OF MY FEES AND EXPENSES BECOMES FINAL AND BINDING ON IT.

25. If the Respondent does take up this invitation to make written submissions to me upon my Direction on these fees, I will (whether or not the Claimant makes written comments on those submissions to me) make MY FINAL DIRECTION on costs within 35 days of the date when the Respondent receives this Expert Determination.

CONCLUDING COMMENT

26. I should like to end this Expert Determination by expressing my thanks to both parties for the care which each party took in making its submissions to me and for the assistance which each party, in the person of Mr. Donald Blue, for the Claimant, and Mr. Sam Yellow, for the Respondent, has given to me. In expressing these thanks I have been particularly grateful for each party keeping to the timetable set out in my Orders for Directions of 19th April 2000 and am only sorry that I have not been able earlier to issue this Expert Determination.

DAVID HACKING **12th September 2000**

Determining Expert