JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR Q. C. : TCC : 1st December 2003.

Introduction

1. In this action the Claimant, a company now called Galliford Try Construction Ltd., but called Galliford (UK) Ltd. at the time of the matters giving rise to the action, sought to enforce a decision (*"the Decision"*) of Mr. Brian Eggleston, purporting to act as an adjudicator, dated 14 October 2002. It is convenient to refer to the Claimant as *"Galliford"* no matter what its name in fact was at the time of which I am speaking.

2. By the Decision Mr. Eggleston determined that the Defendant, Michael Heal Associates Ltd. (*"Heal"*) should pay to Galliford the sum of £722,586. He also decided that Heal should pay his fees for acting as adjudicator. As Galliford had already paid half of those fees, a sum of £10,589.50, a consequence of the Decision was that Heal should pay that sum to Galliford in addition to the sum of £722,586.

3. Heal is now in voluntary liquidation. Before going into liquidation it practised as structural engineers.

4. The adjudication which resulted in the Decision arose out of a project (*"the Project"*) for the redevelopment of the former Wellesley Hotel in Wellington Road in Leeds as residential apartments. The Project was initiated by a company called Country & Metropolitan Homes (Northern) Ltd. (*"C & M"*). At the end of 1999 C & M engaged Heal to provide various pre-tender services in connection with the Project. It is convenient to refer to that engagement as *"the Pre-Tender Appointment"*.

5. Some time prior to about the beginning of September 2000 the interest of C & M in the Project was transferred to Taywood Homes Ltd. (*"Taywood"*).

6. Taywood wished to undertake the Project as a design and build scheme, and, for that purpose, to engage a contractor who would be prepared to take it on. Galliford tendered for the Project and its tender was successful. By a letter dated 1 September 2000 to Galliford Taywood expressed its intention of entering into a contract with Galliford for the undertaking of the Project.

7. By the beginning of September 2000 Heal had completed the services required under the Pre-Tender Appointment, and thus was well-placed to secure appointment to provide the post-tender structural engineering services (*"the Post-Tender Services"*) required in connection with the Project.

8. It was the case of Galliford in this action that it did in fact enter into a contract with Heal for the provision of the Post-Tender Services. That was disputed on behalf of Heal. As matters stood before me, it was Galliford's case that the contract for which it contended did not incorporate any express provision for adjudication, but that it was a *"construction contract"* within the meaning of *s. 104(1)* of *Housing Grants, Construction and Regeneration Act 1996* (*"the 1996 Act"*) and was *"in writing"* within the meaning of *s. 107* of the 1996 Act, with the result that, by virtue of the operation of *s. 108(5)* of the 1996 Act, the *Scheme for Construction Contracts* (*"the Scheme"*) contained in the *Schedule* to *Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 1998 No. 649, and in particular the provisions as to adjudication in *Part 1* of the *Schedule*, were incorporated into the alleged contract between Galliford and Heal. Although that was how Galliford's case as to a contract between it and Heal in relation to the Post-Tender Services was put before me, that was not how it was put when the question of an adjudication concerning alleged breaches of contract on the part of Heal first arose, or how it was put during the adjudication itself. I shall return later in this judgment to how the case was put at earlier stages. Before me Heal's case was that if, contrary to its primary case, it had entered into a contract with Galliford in relation to the provision of the Post-Tender Services, that contract was not *"in writing"* within the meaning of *s. 107* of the 1996 Act, and therefore the provisions of the Scheme were not incorporated into the contract.

9. Before me Heal contended that the Decision was not enforceable against it because Mr. Eggleston had not had jurisdiction to make it, in the absence of there being any contract, alternatively a contract in writing, between Galliford and Heal in relation to the provision of the Post-Tender Services. Mr. Adrian Williamson Q.C., who appeared on behalf of Galliford, contended that if, which was not accepted, there was no contract, or no contract in writing, between the parties concerning the provision of the Post-Tender Services, nonetheless solicitors acting on behalf of Galliford and on behalf of Heal, respectively Messrs. Masons (*"Masons"*) and Messrs. Beachcroft Wansbroughs (*"BW"*),

had agreed that the dispute as to whether Heal was in breach of contract should be referred to adjudication. Mr. Justin Mort, who appeared on behalf of Heal, accepted that there had been exchanges of correspondence between Masons and BW, to which I need to refer later in this judgment, about the possibility of adjudication, but that BW on behalf of Heal had reserved its position as to whether any adjudicator appointed would have jurisdiction in relation to the dispute concerning the provision of Post-Tender Services. Mr. Williamson, in his turn, did not accept that, and contended that on proper construction of the exchanges between Masons and BW, which were all in writing, BW's concern, and that in relation to which it reserved its client's position, was whether there should be one adjudication or two. The question whether there should be one adjudication or two arose because the Pre-Tender Appointment was the subject of a deed of novation (*"the Deed"*) dated 3 September 2001 made between (1) C & M (2) Heal and (3) Galliford and it was alleged on behalf of Galliford that Heal was also in breach of the Pre-Tender Appointment. Mr. Williamson contended that in any event, by virtue of the exchanges between Masons and BW, Heal was estopped by representation or convention from denying that it had agreed to submit the disputes in relation to the Post-Tender Services to adjudication. Mr. Mort originally contended that, if an agreement had been made between Masons and BW that disputes concerning the Post-Tender Services should be submitted to adjudication, both parties in entering into such agreement had been labouring under a mistake, namely that there was a contract between Galliford and Heal which incorporated the provisions of the standard form Association of Consulting Engineers Conditions of Engagement, 1995, Agreement B(1), second edition 1998 (*"the 1998 ACE Conditions"*), which contain provision for adjudication. However, the mistake alleged was not borne out by the evidence led before me and I need say no more about that point.

10. Mr. Mort did, however, rely heavily upon the fact, which was plainly the case, that the contract in relation to the Post-Tender Services asserted on behalf of Galliford during the adjudication proceedings before Mr. Eggleston was different from the contract contended for before me. In particular, the contract contended for before Mr. Eggleston was said to have incorporated the provisions of the 1998 ACE Conditions, and the case advanced was that Heal was in breach of some of the provisions of those conditions, as Mr. Eggleston found. Before me Mr. Williamson accepted that the contract for which Galliford now contended did not incorporate the 1998 ACE Conditions. Mr. Mort submitted that in those circumstances there had not existed any dispute as to whether Heal was in breach of any of the provisions of the 1998 ACE Conditions at the date of the notice of adjudication (*"the Notice"*) given by Masons on behalf of Galliford. Mr. Williamson countered, robustly, that there had been a dispute at the date of the Notice, that Mr. Eggleston had decided the dispute identified in the Notice, and that it was nothing to the point that it was now recognised on behalf of Galliford that the bases of claim advanced before Mr. Eggleston were unsustainable.

11. In these circumstances the matters which I have to decide in order to reach a conclusion as to whether the Decision is enforceable against Heal are:-
    (i) whether a contract was concluded between Galliford and Heal in relation to the provision by Heal of the Post-Tender Services;
    (ii) if so, whether that contract was a contract *"in writing"* within the meaning of *s. 107* of the 1996 Act, it being accepted by Mr. Mort that any contract would have been a *"construction contract"*;
    (iii) if not, whether Masons and BW agreed to submit disputes in relation to the Post-Tender Services to adjudication without there being any reservation of a right on behalf of Heal to contend in any adjudication proceedings that the adjudicator did not have jurisdiction because either no contract had been made between Galliford and Heal in respect of the provision of the Post-Tender Services, or any such contract had not been *"in writing"*;
    (iv) as an alternative to (iii), whether Heal was estopped by representation or convention from denying that the adjudicator had jurisdiction to determine disputes as to the performance of the Post-Tender Services;
    (v) what, if anything, was the significance of the fact that Galliford had changed its position as to the contract alleged between the parties and no longer contended for a contract incorporating the provisions of which Mr. Eggleston found Heal to be in breach.

12. I consider in turn the matters identified in the preceding paragraph.

Was a contract concluded between Galliford and Heal in relation to the Post-Tender Services?

13. The case advanced before me on behalf of Galliford by Mr. Williamson was that a contract had been concluded, following exchanges of correspondence, by the acceptance by conduct by Heal of an offer contained in a memorandum dated 20 October 2000 written by Galliford to Heal. Mr. Williamson accepted that after the despatch of that letter discussions continued between the parties as to the terms of a contract, but he submitted that those discussions related to an anticipated formal contract which was never executed and did not affect the preliminary agreement for which he contended. Mr. Mort, by contrast, submitted that it was plain from the relevant exchanges between the parties that they always intended to make a formal contract incorporating the first edition of the 1998 ACE Conditions (*"the 1995 ACE Conditions"*) and did not intend to make, and had not made, any preliminary agreement. He further submitted that the agreement for which Mr. Williamson contended was too uncertain as to the services which Heal was to provide to have given rise to a binding agreement.

14. There was no real dispute as to the principles of law which I should apply to determine the question whether a contract was concluded between Galliford and Heal in relation to the provision of the Post-Tender Services. I was reminded of the well-known passage in the judgment of Lloyd LJ **in *Pagnan SpA v. Feed Products Ltd.*** [1987] 2 Lloyd's Rep 601 at page 619:-

"*As to the law, the principles to be derived from the authorities, some of which I have already mentioned, can be summarised as follows:*

(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole (see Hussey v. Horne-Payne*).*

(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.

(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see Love and Stewart v. Instone*, where the parties failed to agree the intended strike clause, and* Hussey v. Horne-Payne*, where Lord Selborne said at p.323:*
"…The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only ***, and without the settlement of which the parties had no idea of concluding any agreement*** *[My* [Lloyd LJ's] *emphasis]*

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see Love and Stewart v. Instone *per Lord Loreburn at p. 476).*

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle

which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement"…"

15. Mr. Williamson also reminded me of the oft cited passage in the judgment of Steyn LJ **in *G. Percy Trentham Ltd. v. Archital Luxfer Ltd.*** [1993] 1 Lloyd's Rep 25 at page 27:-
"*Before I turn to the facts it is important to consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See* **Brogden v. Metropolitan Railway** *(1877) 2 AC 666;* **New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co.** Ltd. *[1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E;* **Gibson v. Manchester City Council** *[1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See* British Bank for Foreign Trade Ltd. v. Novinex *[1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See* **Trollope & Colls Ltd. v. Atomic Power Constructions Ltd**. *[1963] 1 WLR 333.* "

16. The evidence led before me indicated that contact was first made between representatives of Galliford and representatives of Heal on about 18 September 2000. At all events minutes of a meeting held on that date were put in evidence and Mr. Michael Heal of Heal agreed in cross-examination that he believed that that meeting represented the initial contact between the two sides. Subsequently Galliford produced what was described as a *"Design Information Required Schedule"* dated 22 September 2000. Mr. Heal accepted that that schedule, on which various items of design information to be provided either by Messrs. Brown Smith Baker (*"BSB"*), the architect retained for the purposes of the Project, alone or by BSB in conjunction with Heal, or by Heal alone, were identified was provided to Heal. On the schedule the involvement of Heal was limited to collaborating with BSB in the provision of information concerning grid layout, drainage layout, padstone/steel levels, brickwork/blockwork setting out, roof glazing to atrium, roof plan, spiral stairs, and lift shaft details, and to providing on its own the foundation design, a reinforcing bar schedule and the steelwork design.

17. In a letter dated 26 September 2000 to Mr. Paul Hammond of Galliford Mr. Heal wrote as follows:-
"*Following our meeting in your offices last Monday, we have now had an internal meeting and we are now progressing with the design, as far as we are able to at this stage.*
For your information, although I will be involved, John Ruddy will be responsible for the day-to–day running of the job, working alongside Paul Easingwood (Engineer) and William Hird (Senior Technician). Any one of these three can be contacted with respect to queries or information.
Would it be possible to have a letter of appointment in the near future? Also, it would be extremely helpful to have a copy of your anticipated programme, together with a schedule of your requirements. Whilst we would make every effort to meet your schedule, we would like to re-assure you, and ourselves that we are able to meet your target dates. (Better to examine this now, rather than leave it until it is too late to do anything about it!)"

18. The response to Mr. Heal's letter dated 26 September 2000 was a memorandum dated 2 October 2000 written by Mr. Peter Coleman of Galliford to Mr. Heal. That memorandum was in these terms:-
"Following instructions from Taywood Homes Ltd. we have pleasure in confirming our intention to appoint you as Structural Consultants for the above project, subject to the Client's confirmation of Galliford Northern as Main Contractor.
You will be aware that we are working on a letter of intent from the Client dated 1st September 2000, a copy of which is enclosed, and you will note that they have placed a limit on expenditure until such time as a formal contract is completed.
The conditions of the Client's letter of intent will be applicable to this instruction and no other conditions will apply.
The ACE Form will be the basis of the Contract between us. Fees will be in accordance with the sums stated in the Tender Documents in the sum of £35,000 with stage payments to be agreed.
There will be a requirement to provide a Design Plan for the project to meet out QA Procedures. If you are ISO9001 accredited this Plan can be in accordance with your own procedures, but if you are not ISO9001 Accredited you will be required to assist in the preparation and implementation of the Plan in consultation with our team.
We look forward to working with you on this project and to a successful outcome for all parties."

19. Mr. Heal replied to Mr. Coleman's memorandum dated 2 October 2000 in a letter dated 9 October 2000:-
"*Thank you very much for your fax of 2 October 2000 confirming your intention to appoint us as Structural Consultants for the above.*
As you know we are well underway with Detail Design and we are scheduled to meet the agreed dates for delivery of information, particularly the steelwork.
I note there is a requirement to provide a Design Plan for the project. We are not currently ISO9001 accredited (although we are working towards this) and so I confirm that we are prepared to assist when required in the preparation and implementation of that plan.
As far as fees are concerned, you will appreciate that we are already incurring costs, but I do appreciate there is currently an upper limit on all costs, until the Contract is formalised.

Nevertheless, I would like to propose a schedule of stage payments, based on the 14 month programme, bearing in mind that the greater part of our work will be in the early stages of the Project. I am suggesting a monthly schedule, which I trust you are agreeable to:

October 2000	*£6000*
November 2000	*£8000*
December 2000	*£8000*
January 2001	*£3000*
February 2001	*£4000*
March 2001	*£2000*
April 2001	*£1000*
May 2001	*£1000*
June 2001	*£1000*
July 2001 -August 2001	*£1000*
September 2001 - October 2001	*£1000*
November 2001 -December 2001	*£1000*
Total	***£35,000***

It would be our intention to invoice on or around the 20th of each month, and, subject to your own arrangements with Taywood Homes, we would expect payment within one calendar month.

This is a project we feel very excited about, given its location and the fact that we are effectively restoring a building that has suffered greatly throughout it's [sic] *life.*

Also, I personally am very keen to continue to forge links with Galliford's [sic] *who I see as making a positive contribution to construction in this area.*"

20. The breakdown of fees set out in the letter dated 9 October 2000 in fact totalled not £35,000, but £37,000. Mr. Craig O'Brien, who was employed at the time by Galliford as a Senior Quantity Surveyor,

gave evidence that, although generally having no role in dealings between Galliford and Heal, he noticed the discrepancy in the breakdown in the letter and drew it to the attention of Mr. Heal at the end of a design meeting held at Heal's offices on 16 October 2000. Mr. O'Brien told me that Mr. Heal did not attend the main part of the meeting, but just came in at the end. Mr. Heal, according to Mr. O'Brien, agreed to produce a version of the letter dated 9 October 2000 with a corrected breakdown. Mr. Heal, in his evidence, told me that he did not recall the meeting of which Mr. O'Brien spoke, but he agreed that Mr. O'Brien had raised the discrepancy with him and he did agree to produce, and did in fact produce, a version of the letter dated 9 October 2000 with a corrected breakdown. Mr. Heal thought that he did this following Mr. O'Brien raising the matter with him on the telephone. It probably does not matter much who is right about how the correction of the letter dated 9 October 2000 came about, but I accept the evidence of Mr. O'Brien on the point.

21. The memorandum dated 20 October 2000 to which I have already referred was written by Mr. Coleman to Mr. Heal. It said this:-
"*You will be aware that we have received a letter of intent from Taywood Homes Ltd. for the full Contract Sum. We were not in agreement with the wording of that letter and have proposed an alternative to one particular paragraph.*
This alternative has been accepted verbally and, in order to avoid any further delays in instructions, we are working on this agreement.
We can now instruct you to proceed with design work to meet the required procurement programme. This instruction is based on the content of Taywood Homes Ltd. letter appended, dated 5th October 2000, as amended by Galliford.
All references to cost reimbursement contained in the letter will apply equally to this instruction. We will inform you when formal Contracts are signed and will prepare ACE Forms for your agreement.
We trust this instruction is sufficient to enable you to proceed, Should you have any problems it would be best to discuss these with Derek Norfolk who is carrying out negotiations with the Client."

22. The letter dated 5 October 2000 written by Taywood to Galliford of which a copy was appended to Mr. Coleman's memorandum dated 20 October 2000 to Mr. Heal was mostly concerned with the position as between Taywood and Galliford. However, about cost reimbursement it said:-
"*In the event that the works do not proceed prior to entry into the contract or for any reason, except for the reasons stated in the following paragraph, you are not required to enter into the contract, you will be reimbursed by us in accordance with the provisions of payment to be contained within the contract documents for all the services and/or works that you have properly carried out in compliance with this letter up and until the date you are advised in writing that the works will not proceed or that you will not be required to enter into the contract. The level of reimbursement shall be agreed with the Employer's Agent, Burtenshaw Associates, and shall be based on the rates and prices contained within the Contract Sum Analysis. Reimbursement shall not include any resultant consequential losses or loss of overheads recovery and/or profit.*"

23. Heal did not reply in writing to the memorandum dated 20 October 2000. However, towards the end of November 2000 Mr. Heal met Mr. O'Brien on site and they had a discussion about the fact that Heal had not received any appointment documents. Mr. O'Brien, as was common ground, then produced and gave to Mr. Heal copies of two documents, one described as a *"Warranty Agreement"* and the other entitled *"Structural Engineer's Appointment"*. The former document was in form a document contemplating that it would be executed by a sub-contractor, a main contractor and an employer. The latter identified as the *"Client"* a company called Taylor Woodrow Developments Ltd. and contained various provisions relating to the obligations of an unidentified *"Consultant"* to the *"Client"*, including performance of the services set out in Appendix 1 to the 1995 ACE Conditions. It seemed from the evidence of Mr. Heal and Mr. O'Brien that they were somewhat at cross-purposes at the time as to what was the intended significance of the documents of which Mr. O'Brien provided copies. He intended to provide Mr. Heal with an opportunity to consider what he understood would be forms of agreement which Taywood would expect Heal to conclude with it. Mr. Heal understood that the documents represented terms which Galliford was proposing as terms of an agreement between Heal and Galliford. Having that understanding, Mr. Heal commented upon the documents in a letter dated 29 November 2000 to Mr. O'Brien and made reference to provisions of Appendix 1 to the 1995 ACE

Conditions. For present purposes what is material about Appendix 1 to the 1995 ACE Conditions is that it set out at length a description of the *"Normal Services"* which a structural engineer entering into a contract incorporating that appendix would provide. Those services were considerably more extensive than simply undertaking design work. There was no Appendix 1 to the 1998 ACE Conditions, but provisions as to *"Normal Services"* were contained in section C of that document.

24. Although it seems that there was intermittent discussion about the need to finalise terms, the matter of a contract between Galliford and Heal and its terms did not loom large after the end of November 2000 until disputes arose in about March 2001 as to what exactly it was that Heal should have done in connection with the Project.

25. In his written Opening Note Mr. Williamson set out Galliford's case as to the contract for which it contended before me in this way:-

> *"21. Galliford do not, for a moment, dispute the proposition that these parties negotiated after October 2000 with a view to nailing down the detailed terms of their agreement and that these negotiations never resulted in agreement on those matters. However, it is Galliford's case that the arrangements entered into in October 2000 were sufficient for there to be a provisional contract ("heads of agreement" in Lloyd LJ's analysis) which the parties intended to replace in due course with a more formal arrangement.*
>
> *22. In particular, the following matters had been agreed by 20.10.2000:*
>
> *(1) Parties*
> *These were to be Galliford and MHA* [that is, Heal].
>
> *(2) Price*
> *A fee of £35,000 to be paid in agreed monthly instalments and on 28 day terms, and subject to the terms as to cost reimbursement set out in the letter of 5.10.2000.*
>
> *(3) Time*
> *To meet the required procurement programme.*
>
> *(4) Scope*
> *Design works of a detailed, post-tender nature as structural consultants.*
>
> *23. Moreover, MHA by their conduct in performing their post-tender works, receiving fees in the sum of £35,000 on a monthly basis and so on have made it easier for the Court to resolve any uncertainty arising in the October negotiations:* ***Archital Luxfer.***"

At paragraph 15 of his Opening Note Mr. Williamson seemed to rely in particular on the attendance of Heal at monthly progress meetings and at regular design meetings, the fact that it corresponded with Galliford on design matters and the fact that it raised regular invoices for fees as conduct evincing acceptance of the memorandum dated 20 October 2000.

26. In support of his submission that the memorandum dated 20 October 2000 was not intended as an offer Mr. Mort relied upon the fact that on its face it was only an instruction to Heal to proceed with design work, not with the other services included within *"Normal Services"* in the 1995 ACE Conditions or in the 1998 ACE Conditions which the parties had envisaged Heal would undertake and which it did in fact undertake. He submitted that the services to be provided by Heal were set out with insufficient clarity in the memorandum dated 20 October 2000 to give rise to any sensible obligations on the part of Heal. He also relied upon the fact that the memorandum did not, contrary to what Mr. Williamson seemed to be submitting, involve any suggestion that Galliford would pay Heal £35,000, rather than reimburse costs in the manner contemplated in the letter dated 5 October 2000 written by Taywood to Galliford. Moreover, submitted Mr. Mort, the ascertainment of an amount of costs in respect of which Heal could be reimbursed by reference to the Contract Sum Analysis, in which a lump sum of £35,000 for structural engineer's fees appeared, was, if not impossible, at least very difficult. Put shortly, Mr. Mort's submission was that as at 20 October 2000 the parties were still in negotiation.

27. It is plain, in my judgment, that in fact no contract in relation to the provision of the Post-Tender Services was concluded between Galliford and Heal. It seems to me that neither party had any intention as at 20 October 2000 of entering into a binding agreement. There had been negotiations

before that date which had contemplated that a formal contract would be made between the parties which would incorporate some version of the ACE Conditions, probably the 1995 ACE Conditions. If those conditions were incorporated into a contract they would set out in some detail exactly what it was that Heal was to do. In the absence of the specification of the services to be provided in detail, exactly what was to be done remained uncertain. That uncertainty seems actually to have lain at the root of the disputes which subsequently arose concerning the Post-Tender Services, but that merely illustrates the problem. It is not in itself a reason not to conclude that a binding contract had been made, if that were otherwise the correct conclusion. The principal reason for my view that no contract was concluded on or shortly after 20 October 2000 is that it seems to me to be clear from the terms of the memorandum itself, and from the objective circumstances prevailing at that date, that Galliford was not intending to commit itself to obtain from Heal, and to pay £35,000 for, services which it did not know it would definitely require until it had entered into a binding contract with Taywood to undertake the Project. There was in terms no commitment to pay £35,000, only whatever might be due under the cost reimbursement regime contemplated in Taywood's letter dated 5 October 2000. The request in the memorandum was not to proceed with all of the Post-Tender Services, but only with design work. It is obvious, as it seems to me, that the request in the memorandum dated 20 October 2000 was intended as the minimum sufficient to prompt Heal to continue work in anticipation of a contract, and not itself an offer to enter into a contract at all. If one considers the first of Lloyd LJ's tests in ***Pagan SpA v. Feed Products Ltd.***, it is clear from what happened after 20 October 2000 that no contract had been concluded in the present case, even if, which is not the case, a contrary impression might have been gained by stopping the clock artificially at 20 October 2000. In ***G. Percy Trentham Ltd. v. Archital Luxfer Ltd.*** Steyn LJ in terms said that where, as in the present case, a contract was said to have been made by an exchange of correspondence, the mechanism of contract formation was offer and acceptance. Quite simply, in my judgment the memorandum dated 20 October 2000 was not intended to be, and was not on proper construction, an offer, but a request of the kind now commonly and deliberately used in the construction industry considered by Robert Goff J in ***British Steel Corporation v. Cleveland Bridge and Engineering Co. Ltd.*** [1984] 1 All ER 504. If it had been an offer it would not, as it seems to me, have been accepted by Heal continuing with the design work which it had commenced prior to 20 October 2000, for the continuation of that work would not have been referable to the offer. Moreover, the attendance by Heal after 20 October 2000 at progress meetings and design meetings, matters relied upon by Mr. Williamson as conduct indicating acceptance of an offer in the memorandum dated 20 October 2000, cannot logically be relied upon as being such, for such attendance was not requested by the memorandum.

28. It was not suggested that a contract between Galliford and Heal in relation to the Post-Tender Services was concluded other than in the way for which Mr. Williamson contended.

Was any contract concluded between Galliford and Heal an agreement *"in writing"* within the meaning of *s. 107* of the 1996 Act?

29. In the light of my conclusion that no contract at all was made it is not necessary to consider this question. However, it does seem to me that it may be necessary to consider carefully the effect of *s. 107* of the 1996 Act as interpreted by the Court of Appeal in ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd.*** [2002] BLR 217 in a case in which it is found that an alleged agreement which has been performed can be completed so as to result in a binding contract by some such implication of terms as was postulated by Steyn LJ in ***G. Percy Trentham Ltd. v. Archital Luxfer Ltd.*** The majority of the Court of Appeal in ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd.*** decided that *s. 107* of the 1996 Act requires that, as Robert Walker LJ put it at page 223, *"It is the terms, and not merely the existence, of a construction contract which must be evidenced in writing"*. The Court of Appeal did not expressly consider what the position would be if a contract included terms which were to be implied. The focus of the concerns of the majority (Ward LJ at page 222 and Robert Walker LJ at page 223) was that Parliament had decided that it was inappropriate for an adjudicator to have to deal with finding the terms of an oral contract. It may be that the mischief which Parliament was anxious to avoid does not arise in a case in which terms fall to be implied into a contract as a matter of law, regardless of the actual intention of the parties. However, it could arise in

an acute form if it were suggested that a contract, not otherwise complete, could be completed after it had been executed by the implication of terms which were said the represent the actual, but unexpressed, intention of the parties.

Did Masons and BW enter into an agreement to submit to adjudication disputes in relation to the Post-Tender Services without there being a reservation of a right to Heal to contend that the adjudicator lacked jurisdiction?

30. As I have endeavoured to explain, the issue is not so much whether an agreement was made as whether, by virtue of making it through BW, Heal became disentitled from disputing the jurisdiction of the adjudicator in respect of the matters referred to him. Both Mr. Williamson and Mr. Mort agreed that the answer depends solely upon construction of the relevant exchanges of correspondence between Masons and BW. To those exchanges I now turn.

31. Masons wrote a letter of claim dated 12 March 2002 to Heal. In that letter of claim it was asserted that Heal was in breach of both the Pre-Tender Appointment and a contract relating to the provision of the Post-Tender Services. In relation to the Pre-Tender Appointment it was contended that Galliford was entitled to complain of alleged breaches by virtue of the Deed. About the Post-Tender Services the letter said:-

"*1.5 By way of an exchange of correspondence, Galliford and MHA entered into agreements in October 2000 regarding detailed design work and post-contract services ("the post-tender appointment"). Galliford asked MHA to* "commence the detailed design of the work" *and moreover to* "proceed with design work to meet the required procurement programme" *for the project. The correspondence refers to the ACE Conditions of Engagement. …*

6.3 The second contract is the post-tender appointment dated October 2000. This contract incorporates the ACE Conditions of Agreement version B1. In accordance with clause B9.2 [in fact in the 1998 ACE Conditions and not in the 1995 ACE Conditions] *either party may refer any dispute arising under the contract to Adjudication in accordance with the Construction Industry Council Model Adjudication Procedure. Again, please confirm that you agree with this interpretation.*"

32. BW responded to Masons' letter dated 12 March 2002 in a letter dated 10 April 2002. The text of that letter was:-

"*We refer to your letter of 12 March 2002 to Michael Heal Associates Ltd. and to the more recent telephone conversation (Roberts/Davis) on 27 March. We are considering your requests regarding adjudication but require further clarification from you in order to be able to respond in detail.*

At paragraph 1.6 of your letter, you refer to an executed Deed of Novation. Michael Heal Associates Ltd. has never been provided with a copy of the executed deed. We will need to consider this document to be able to determine whether there is indeed any construction contract with your client in connection with the pre-tender work. Could you provide us with a copy of this document.

At paragraph 2, you have set out the dispute which appears to be that the pre-tender design concept was inadequate. As a result, a revised design was commissioned during construction which you claim led to delay and expense to your client. The dispute, therefore, appears to be regarding the adequacy of the pre-tender design but at paragraph 6.4 you refer to "both disputes". We note that at paragraph 5 you believe that there may be further claims but you indicate these do not form part of the dispute referred to in your letter. Therefore, could you clarify in precise detail what you consider to be the second dispute and explain why it is separate and does not flow from the issues regarding the pre-tender design."

33. BW wrote a further letter dated 11 April 2002 to Masons which I need not quote. Essentially it just sought more time to respond to the letter of claim. Masons provided some comments in reply to BW's letter dated 10 April 2002 in an open letter dated 15 April 2002. However, for present purposes what is material is the terms of a *"without prejudice"* letter which Masons also wrote to BW on 15 April 2002. Those terms were:-

"*We refer to our without prejudice telephone conversations on 11 and 12 April (Harris/Roberts).*

We are instructed to pursue an adjudication in order to determine the liability of your client in respect of breaches of two consultancy appointments, the details of which have already been provided. The Notice of

Adjudication, Referral Statement and supporting documents are prepared and collated. We have asked for your client's consent to determine matters arising under both agreements and from a common factual matrix in a single adjudication before a single adjudicator. Without the consent sought we will invoke two adjudications and seek the appointment of a single adjudicator to determine both.

To date you have failed to give the consent sought and instead you have asked for more time to investigate the matter.

Notwithstanding the position outlined above our client recognises the merits of exploring all of the matters arising (both liability and quantum) in a neutral non-binding fashion. We note that your client is of a similar view.

Accordingly, we write to confirm the proposal that we have formulated as a consequence of our recent discussions. Our client is prepared to postpone (and indeed hopefully avoid) commencing an adjudication(s) on the understanding that our respective clients submit to mediation in respect of all outstanding issues between them. This proposal is made strictly on the basis that we agree the following immediately:-

1. *to the extent that it is necessary, all disputes between the parties will be determined by reference to a single adjudicator;*
2. *disputes under both appointments will be determined by a single adjudication;*
3. *the parties will agree the identity of an adjudicator for these purposes. The adjudicator will be a solicitor or barrister with construction experience;*
4. *the parties will agree an appropriate adjudication procedure to be applied; and*
5. *the mediation will take place by no later than 17 May 2002.*

To the extent that you are able to agree to all of these matters (without qualification) by close of business tomorrow we are instructed to refrain from instigating an adjudication, allow access to site for your client's expert (under supervision) and seek to agree a mediator.

If we unable [sic] *to agree any of the preconditions we are instructed to withdraw the proposal to mediate and to commence adjudication proceedings without further delay.*

We look forward to hearing from you."

34. BW responded to Masons' *"without prejudice"* letter dated 15 April 2002 in a *"without prejudice"* letter of the following day:-
"*We refer to your without prejudice letter of 15 April 2002.*

We have discussed the options with our client for progressing this matter and in particular the proposals set out in your letter.

We have repeatedly asked for a copy of the executed Deed of Novation referred to in your letter of claim dated 12 March 2002 but have not yet received a copy of this document. Without this document, we cannot advise our client regarding the assertions that there are two appointments. We are therefore, not in a position to be able consider [sic] *whether any disputes arising under separate appointments can be determined by a single adjudication.*

Without prejudice to our contentions on jurisdiction, we agree it would be sensible for disputes to be considered by the same person. However, before we can obtain our client's full instructions regarding your proposals we require a copy of the executed Deed of Novation.

Notwithstanding the above, we see no legitimate need to jump into an adjudication at this stage, especially without giving mediation the opportunity to work. We therefore, welcome the proposal that a mediation take place no later than 17 May 2002. We agree that the mediation should be in respect of all outstanding issues between the parties. The precise details of the mediation and the identity of the mediator can be agreed in due course.

However, we also put forward the proposal that prior to the mediation taking place, the parties and their respective engineering experts could meet to determine the main issues and the areas of disagreement.

Furthermore, in order to resolve all outstanding issues through mediation we would welcome details of the breakdown of the quantum of your client's claim. If appropriate, a meeting could then be held between the respective quantity surveying experts to narrow the issues.

We believe the parties will incur significant unnecessary costs if the matter is referred to adjudication at this stage. We trust your client will accept our agreement to refer the matter to a mediation to be conducted within the timescale put forward by your client of 17 May 2002.

We look forward to hearing from you. "

35. The relevant correspondence continued with a letter from Masons dated 19 April 2002:-
"*We refer to your without prejudice letter of 16 April 2002.*

Please find attached a copy of the executed Deed of Novation. We trust you are now in a position to advise your client regarding the two appointments.

With regard to your proposed meeting between the parties and their experts, we would suggest that the mediation would be the best venue for this, in the interests of saving costs.

Our letter of 15 April 2002 outlined our client's proposals regarding a possible postponement of an adjudication(s) on the understanding that our respective clients submit to mediation in respect of all outstanding issues between them. The proposals are:

1 to the extent that it is necessary, all disputes between the parties will be determined by reference to a single adjudicator;

2 disputes under both appointments will be determined by a single adjudicator;

3 the parties will agree the identity of an adjudicator for these purposes. The adjudicator will be a solicitor or barrister with construction experience;

4 the parties will agree an appropriate adjudication procedure to be applied; and

5 the mediation will take place no later than 17 May 2002.

You have failed to agree proposals 1-4 and we are consequently instructed to initiate adjudication proceedings unless the proposals are agreed immediately.

With regard to your request concerning access to site and discussion of quantum information, we see this as part of the adjudication/mediation process and as and when the matters set out above are agreed we can discuss this further.

We look forward to hearing from you."

36. BW replied to Masons' letter dated 19 April 2002 in a letter marked *"without prejudice"* dated 22 April 2002:-
"*Thank you for your letter of 19 April 2002 and for providing us with a copy of the executed Deed of Novation. We have taken our client's further instructions and are able to respond to your client's proposals regarding a possible postponement of an adjudication.*

We agree that, to the extent that it is necessary, all disputes that are referred to adjudication should be referred to the same adjudicator.

However, we do not agree that disputes arising under separate appointments should be dealt with by way of a single adjudication. Any disputes that arise from separate appointments should be dealt with by separate adjudications. There will be different issues arising from different forms of appointment and it is essential, to avoid any confusion and to ensure all matters can be dealt with fairly, that separate notices are issued. We consider this is the most appropriate way of dealing with this matter, particularly as the same adjudicator can deal with all adjudications and therefore may only need to deal with common issues once which should avoid any inconsistency. However, there is a significant risk that dealing with all issues under a single adjudication will lead to confusion and could affect the adjudicator's decision.

Your client's claim is a claim for professional negligence by a structural engineer. Therefore, the allegations are best assessed by a fellow professional of the same discipline. If your client has concerns regarding contractual issues, there are a number of engineering adjudicators who are experienced in dealing with contractual issues. One such person is David Loosemore of Arups. He is on the adjudication panel of the Institution of Civil

Engineers and we enclose a copy of his CV. We confirm that, to the best of our knowledge, neither our client nor ourselves have any connection with him, save for requesting a copy of his CV.

In respect of the adjudication procedure to be applied, we are prepared for any dispute to be dealt with under the terms of the Construction Industry Council Model Adjudication Procedure, second edition.

We trust your client will agree to the slight amendments to the proposals and we can now seek to agree a procedure for a mediation of this matter.

We look forward to hearing from you."

37. A slight pause followed the despatch of BW's letter dated 22 April 2002. The next round of the correspondence was Masons' letter dated 30 April 2002:-
"*We refer to previous correspondence.*
We write to confirm our agreement as follows:
1. to the extent that it is necessary, all disputes between the parties will be determined by reference to a single adjudicator;
2. the disputes under both appointments to be determined by separate adjudications;
3. the parties agree the appointment of Brian Egglestone [sic] *as adjudicator (this is subject to availability and to any comments you have; we enclose a copy of his CV for your information);*
4. the adjudication procedure will be the Construction Industry Council Model Adjudication Procedure; and
5. the mediation will take place no later than 17 May 2002.
We propose Lawrence Kershen Q.C. as the mediator and will contact him for details of his availability if you agree to his appointment.
We look forward to your response."

38. The final relevant letter was BW's response to the letter dated 30 April 2002. That was in a letter dated 3 May 2002:-
"*Thank you for your letter of 30 April 2002.*

We confirm our agreement that any disputes that are referred to adjudication may be dealt with by the same adjudicator. We also reiterate our view that any disputes arising under separate appointments can only be determined by separate adjudications.

We have no objection to the appointment of Brian Egglestone to act as adjudicator, subject to confirmation from you that neither you nor your client have had or have any connection with him. We are prepared to agree that the conduct of any adjudication will be under the Construction Industry Council Model Adjudication Procedure.

We note the timescale within which a mediation is to take place but in order for it to be productive you must provide us with further details of your client's claim. As previously requested, it would greatly assist the understanding of your client's claim if you could provide us with a copy of your client's expert's report and any report or assessment undertaken by your client's checking engineer during the contract. It would then be sensible if our expert could visit the site and meet with your expert to discuss the technical aspects with a view to narrowing the issues.

We also require details of the quantum of the claim including a breakdown of the elements of the costs and how they have been incurred. We will be grateful if you could provide this information to us as soon as possible. We can agree the formal mechanism for conducting the mediation in due course.

We do not consider that a barrister would be the most appropriate mediator. We have contacted two organisations that specialise in conducting mediations, the ADR group and CEDR and asked them to provide us with the CV's of appropriate mediators with experience in the construction industry. We anticipate receiving those details today, and will forward them to you as soon as they are received.

We are pleased your client is taking a pragmatic approach to resolving this dispute and look forward to hearing from you. "

39. Mr. Williamson submitted that the effect of the correspondence which I have quoted in full, as did he in his Opening Note, was clear and was that Masons and BW agreed that if the mediation was unsuccessful, as it proved to be, the disputes between Galliford and Heal would be submitted to the

adjudication of Mr. Eggleston. He submitted that BW did not, on proper construction of the correspondence, reserve the right on behalf of Heal to object, once there had been a reference to adjudication, that the adjudicator lacked jurisdiction.

40. Mr. Mort relied upon a number of expressions which appeared in BW's letters as amounting to the reservation for which he contended. He relied heavily on the use of the expression, *"without prejudice to our contentions on jurisdiction"* in BW's letter dated 16 April 2002. He also relied on the sentence, *"We agree that, to the extent that it is necessary, all disputes that are referred to adjudication should be referred to the same adjudicator"* in BW's letter dated 22 April 2002. Finally he relied on the sentence, *"We confirm our agreement that any disputes that are referred to adjudication may be dealt with by a single adjudicator"* in BW's letter dated 3 May 2002. He submitted that the expression upon which he relied in the letter dated 16 April 2002 was a general reservation of a right to take jurisdictional points. I do not agree. In the context of the letter it seems to me that the comment was directed to contentions which were known to the recipient of the letter, and specifically to the point made in the letter as to the need for there to be separate adjudications in relation to separate appointments. There was no point in writing about *"our contentions"* unless it was known to the recipient of the letter what those contentions were. In any event, as it seems to me, the reservation, such as it was, in the letter dated 16 April 2002 was overtaken by the subsequent course of the correspondence. What Mr. Mort sought to make out of the other two references upon which he particularly relied was that the contemplation was that a reference to adjudication was not *"necessary"*, and no disputes should be referred to adjudication, to the extent that the adjudicator did not have jurisdiction to deal with them. That point strikes me as quite hopeless. The first reference, in contemplating that a reference to adjudication might not be necessary was, as it seems to me in the context, envisaging that the disputes might be resolved in the mediation, at least to some extent. The second reference cannot sensibly bear the weight which Mr. Mort sought to place upon it.

41. In the result I accept the submissions of Mr. Williamson on this issue and find that Masons and BW did agree to submit to adjudication without qualification any disputes between Galliford and Heal which were not resolved in the mediation. That agreement had no purpose if it remained open to BW on behalf of Heal to contend, after a reference to adjudication, that the adjudication could not proceed because the adjudicator lacked jurisdiction.

42. There is no reason in law why parties to a dispute may not agree, if they wish, to submit disputes which have already arisen to adjudication, even if otherwise the agreement between the parties made no provision for adjudication and the provisions of the 1996 Act were inapplicable. Adjudication may be a useful means of seeking to resolve disputes in areas quite outside the construction industry. However, it remains to consider what is the effect in law of agreeing to submit to adjudication disputes which have already arisen. In other words, what exactly is it that parties agree to if they agree to submit disputes to adjudication?

43. In the context of the exchanges between Masons and BW to which I have referred, that is to say, against the background of the contentions that the contract alleged between Galliford and Heal was a *"construction contract"*, that one of the 1995 ACE Conditions or the 1998 ACE Conditions was applicable, and the agreement that any adjudication should take place under the terms of the Construction Industry Council Model Adjudication Procedure, it seems to me that that to which the parties were agreeing was the process of dispute resolution which was required to be provided for in a *"construction contract"* by *s. 108(3)* of the 1996 Act, namely one under which:-

"*…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.*"

In other words, in this case the parties were agreeing to accept as binding the decision of Mr. Eggleston until the disputes referred to him were finally determined by legal proceedings, arbitration or agreement.

Was Heal estopped by representation or convention from denying that Mr. Eggleston had jurisdiction to make the Decision?

44. This issue does not fall for consideration in the light of my conclusion that Galliford and Heal agreed, through Masons and BW, to submit to Mr. Eggleston disputes which had arisen in relation to the Post-Tender Services. In reality the estoppel arguments were simply a different legal analysis of the correspondence in which I have found the relevant agreement was made.

What, if anything, is the significance of the fact that Galliford has changed its position and no longer contends for a contract containing the terms of which Mr. Eggleston in the Decision found Heal to be in breach?

45. The Notice was dated 15 August 2002. In it the contract contended for between Galliford and Heal was called *"the Post-Tender Appointment"*. Paragraph 7 of the Notice was in these terms:-
"*The Post-Tender Appointment was made between the parties in October 2000 and incorporates the ACE Conditions of Agreement version B1. In accordance with clause B9.2, either party may refer any dispute arising under the contract to adjudication in accordance with the Construction Industry Council Model Adjudication Procedure. In any event, the Construction Industry Council Model Adjudication Procedure, 2nd edition, has been agreed between the parties. The parties have further agreed to nominate Mr. Brain* [sic] *Eggleston as adjudicator for this dispute and indeed another dispute arising under a separate appointment ("the Post* [sic]*-Tender Appointment").*"

46. Under the rubric *"Brief Description of Dispute"* in the Notice appeared the following which is presently material:-
"*9. Galliford asserts that MHA has breached express and/or implied and/or tortious obligations concerning the performance of its investigation and design duties owed to Galliford under the Post-Tender Appointment.*

10. Galliford appointed MHA to advise and prepare a detailed design on behalf of Galliford. In undertaking its duties under the agreement MHA failed to advise on the further investigations necessary and failed to check the adequacy of the outline design. Crucially, Galliford assumed that the design was adequate during its negotiations with the employer and in adopting design responsibility.

11. Part way through construction the existing roof slab was found to be inadequate to support the additional floors safely and the design had to be substantially changed, following MHA's failure to produce design or structural calculations (or indeed any other evidence) to support its design. The amendments to the design resulted in a 24 week critical delay to the project and £2,118,332.14 additional direct and time-related cost. Other amendments to the design were required with regard to the infill steel work and it was discovered that steel work strengthening and structural repairs were required, which had not been provided for.

12. Galliford alleges that in carrying out or commissioning investigations and subsequently in preparing the outline and detailed design (including where necessary the requirement to review the design and advise on its sufficiency) MHA has failed to discharge its obligations to the degree required by contract or common law. Galliford has obtained an independent expert's report which supports this view.

13. Galliford asserts that if MHA had discharged its obligations to the required standard the various changes to the design and resulting delay and additional costs would not have been incurred in so far as the additional time and cost required would have been identified and incorporated in the original contract price. Alternatively, the parameters of the revised design would have been known to Galliford prior to entering into contract and the roof design could have been adequately priced in the contract sum."

47. Unlike in the case of ***Joinery Plus Ltd. v. Laing Ltd***. [2003] BLR 184, to which my attention was very properly drawn by Mr. Williamson, and which was relied on by Mr. Mort, the Notice did not identify, in its formulation of the dispute referred, particular alleged contractual provisions. It merely set out the effect for which it contended of provisions generally described which were alleged to be terms of the contract alleged.

48. At paragraph 22 of the Decision Mr. Eggleston set out the express and implied terms which it was contended on behalf of Galliford in the adjudication were terms of the contract for which it contended. The terms quoted included nine the origin of which was the 1998 ACE Conditions. As was clear from paragraph 23 of the Decision, the case which Galliford advanced in the adjudication, notwithstanding the reference to tortious duties in the Notice, was that, by reason of the matters complained of, Heal was in breach of contract. Seven of the nine matters complained of were breaches of the terms

allegedly incorporated into the contract contended for by reason of the incorporation of the 1998 ACE Conditions. At paragraph 35 of the Decision Mr. Eggleston explained that Galliford's claim was based upon problems encountered with four elements of the construction work, respectively the existing sixth floor roof slab, the infill steel for the new build in the low level area between the north and south wings, steelwork strengthening to existing floors and structural repairs to the existing building. At paragraphs 36 and 37 of the Decision Mr. Eggleston found that the problems with the first two of these elements did amount to breaches of the express or implied obligations of Heal under the contract contended for- see paragraph 36.6, 36.7 and 37.4. He found that there was no liability in respect of the other problems. At paragraph 42 of the Decision Mr. Eggleston stated that:-

"*I am satisfied that in principle GALLIFORD is entitled to recover damages suffered as a result of MHA's breaches of contract and that such damages can be assessed by reference to its proven costs.*"

49. As I have already recorded, Mr. Mort's submission, in the light of the fact that it was not contended before me that the contract which it was said had been made between Galliford and Heal in relation to the Post-Tender Services incorporated any version of the ACE Conditions, was, as he put it at paragraph 20 of his skeleton argument:-

"*On Gallford's case as now advanced the dispute which it purported to refer to adjudication never existed. In the circumstances the adjudicator's decision resolving such dispute must be without validity.*"

50. Mr. Williamson's response in his Opening Note to that point was:-

"*40. At paragraph 4 of the Decision* [in fact in dealing with the supposed contractual provision for adjudication], *the Adjudicator stated that the post-tender appointment incorporated the (1998 version) of the ACE Conditions: …*

41. However, this does not invalidate the Decision. It is clear from the appellate authorities (in particular ***Bouygues v. Dahl-Jensen*** *[2000] BLR 522* ***and C&B Scene Concept Design v. Isobars*** *[2002] BLR 93) that the key jurisdictional issue is whether the Adjudicator has answered the question he was asked to decide.*

42. Here the question was essentially whether MHA were liable to Galliford in damages for breach of the provisions of the post-tender appointment: see Adjudication Notice Para 15 [which was concerned with "Nature of Redress Sought"] *…The Adjudicator answered that question:* ***see Decision*** *paras. 50* [which summarised the effect of the Decision] *and 51* [which merely ordered payment of a sum of £722,586] *…The fact that, in passing, he made reference to a clause in the ACE Conditions which, it is accepted, is not applicable, is neither here nor there.*"

51. In support of his submissions Mr. Williamson reminded me that in ***C&B Concept Design Ltd. v. Isobars Ltd.*** [2002] BLR 93 the leading, and only substantive, judgment had been that of Sir Murray Stuart-Smith and that in his judgment Sir Murray had said:-

"*29. But the adjudicator's jurisdiction is determined by and derives from the dispute that is referred to him. If he determines matters over and beyond the dispute, he has no jurisdiction. But the scope of the dispute was agreed, namely as to the Employer's obligation to make payment and the Contractor's entitlement to receive payment following receipt by the Employer of the Contractor's Applications for interim payment Nos. 4, 5 and 6 … In order to determine this dispute the adjudicator had to resolve as a matter of law whether clauses 30.3.3 –6 applied or not, and if they did, what was the effect of failure to serve a timeous notice by the Employer. Even if he was wrong on both these points that did not affect his jurisdiction.*

30. It is important that the enforcement of an adjudicator's decision by summary judgment should not be prevented by arguments that the adjudicator has made errors of law in reaching his decision, unless the adjudicator has purported to decide matters that are not referred to him. He must decide as a matter of construction of the referral, and therefore as a matter of law, what the dispute is that he has to decide. If he erroneously decides that the dispute referred to him is wider than it is, then, in so far as he has exceeded his jurisdiction, his decision cannot be enforced. But in the present case there was entire agreement as to the scope of the dispute, and the adjudicator's decision, albeit he may have made errors of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination."

52. The problem which arises in the present case is not that which Sir Murray Stuart-Smith was addressing in the passage to which Mr. Williamson drew attention. It is not a case here of it being said that Mr. Eggleston made some error of law in reaching his conclusions expressed in the Decision. Rather the position is that, having referred a dispute and had it determined partially in its favour by reference to a contract containing one set of terms, of which in detail Heal was said to be in breach, in seeking to resist an objection to enforcement that no contract was concluded between the parties, so that Mr. Eggleston in fact had no jurisdiction to entertain the dispute, Galliford has changed its ground and abandoned the contention that the contract upon which it succeeded in the adjudication was ever made. Galliford thus seems to be playing fast and loose with the process of adjudication, shifting its ground opportunistically to meet the challenge of the moment. No Court can be expected to treat phlegmatically a case in which a successful party to an adjudication comes before it saying, *"I know that I succeeded in the adjudication on a basis which I now recognise was wrong in law, but the adjudicator decided what he was asked to decide and it is just tough luck for the Defendant."* That attitude seems to come very close an abuse of the process of adjudication.

53. It is not necessary in the present case for me to do more than to consider whether, as matters now stand, the Decision is enforceable in favour of Galliford. Wider concerns about potential abuse of the process of adjudication can be left to be dealt with as and when they may arise. I have already found that there was in fact no contract between Galliford and Heal in relation to the Post-Tender Services. From that it follows that it has been decided in legal proceedings in a manner binding upon the parties that the Decision, being based upon a conclusion that there was a contract between the parties of which Heal was in breach, was wrong. As Robert Goff J pointed out in ***British Steel Corporation v. Cleveland Bridge and Engineering Co. Ltd***. at pages 510-511, if there is no contract there can be no question of a party to a transaction being in breach of an obligation of the type which can only arise under a contract. I have also found that what Masons and BW agreed which gave Mr. Eggleston any jurisdiction at all to determine disputes between Galliford and Heal in relation to the Post-Tender Services was that his determination should be binding until, and only until, the disputes were finally determined. By this judgment that has now happened. Consequently, the Decision is no longer binding and I decline to enforce it.

54. I should, perhaps, stress, that my conclusion in this case is not to be regarded as indicating any willingness on the part of the Court in any circumstances not to adopt the approach to alleged errors of law made by adjudicators indicated by Sir Murray Stuart-Smith. What made the present case unusual was that, in the context of the attempt to secure enforcement of the Decision, I had to revisit the very issue upon which the correctness of the Decision in law depended, and had to revisit it in circumstances in which Galliford itself was no longer contending that the contract upon which Mr. Eggleston based his conclusions had actually been made.

Conclusion

55. For the reasons which I have given the claims made in this action fail and the action is dismissed.

Adrian Williamson Q.C. (instructed by Masons for the Claimant)
Justin Mort (instructed by Beachcroft Wansbroughs for the Defendant)