HIS HONOUR JUDGE RICHARD HAVERY Q.C. : TCC. 31st July 2006

2. This claim arises out of a contract for the erection of four group homes, a day care centre and associated works at The Lane, Wyboston, Bedfordshire. Under that contract, the defendant, Brookdale Healthcare Ltd. ("Brookdale"), was the employer and the claimant, Redworth Construction Ltd ("Redworth"), was the contractor. It is a claim to enforce the decision of an adjudicator, Mr. Gerard P. Bergin, dated 4th April 2006. By that decision, he decided that Brookdale was to pay to Redworth the amount of £210,576.67 by 12th April 2006. The claim is resisted on the ground that the adjudicator had no jurisdiction to decide the matter put before him.

3. Brookdale submitted to the adjudicator that he had no jurisdiction to decide the matter in issue. In support of that submission, Brookdale said that in so far as the parties entered into an agreement, it was denied that they entered into a contract in the JCT form as averred by Redworth. Further, it was denied that the principal terms of contract that might give rise to any certainty as to a contractual arrangement were ever reduced to writing; or where they were so reduced the writing was inadequate to satisfy section 107 of the Housing Grants, Construction and Regeneration Act 1996 ("the Act").

4. The adjudicator made a non-binding decision as to his jurisdiction. In that decision, dated 8th March 2006, he stated his finding that there was a contract on the terms of the JCT Standard Form of Building Contract with Contractor's Design 1998 ("the JCT terms") which satisfied either section 107(2) or section 107(3) of the Act.

5. The issues before me were:-
   (1) Whether the contract was in writing within the meaning of section 107 of the Act;
   (2) Whether the contract included the JCT terms;
   (3) If the contract did include the JCT terms (which by clause 39A provide for adjudication), whether section 107 of the Act applied;
   (4) Whether Brookdale was party to the contract;
   (5) Whether there was a dispute to refer to adjudication.

6. Before me, it was ultimately common ground that the contract was made on 21st November 2003. I am satisfied on the totality of the evidence that the contract was not subject to the JCT terms. My reasons for reaching that conclusion follow.

7. Mr. Michael McInerney was the controlling director of Brookdale, which was in practice his alter ego. He gave evidence for Brookdale. He gave the following account of the background, which was not controversial. Initially, drawings were prepared by John Dickie of John Dickie Associates. Mr. Dickie traded on his own account and was a member of the Institute of Building Engineers and of the Institute of Architects and Surveyors. Mr. McInerney had initially intended to send the contract out to competitive tender but, because of delays he had encountered in relation to planning, he decided to negotiate the contract with Redworth. He submitted the drawings to Redworth in early 2003. The build was to be undertaken in three phases. Phase 1 was the construction of the Day Centre and Unit 2. Phase 2 was the completion of Units 3 and 4. Phase 3 was the completion of Unit 1. Following discussions between the parties, in April 2003 Mr. Dickie produced a document ("the April 2003 document") entitled Draft Employer's Requirements for the erection of four group homes, a day care centre and associated works at: The Lane, Wyboston, Beds. The document had the reference JSA/00/75/ER.DOC.001. It contained a list of the contract drawings and documents, with the rubric All to be agreed and listed hereunder. It also contained a reference to itself. The site was described. Section A4 of the document stated:

   The form of contract will be the JCT Standard Form of Building Contract with Contractor's Design 1998.....The conditions of contract will be unamended.

   The form was not attached to the April 2003 document, but specific clauses of it were referred to by number in the April 2003 document under the heading "Appendix 1 to the contract will be completed as follows:". The date for completion and the date of possession were blank. Liquidated and ascertained damages were stated to be at the rate of 20k per week. It was stated that the retention percentage was to be agreed. It was stated that the contract would be executed as a deed.

8. On 26th September Mr. Ian Roberts, Redworth's senior quantity surveyor (who gave evidence before me) sent to Mr. McInerney an updated version of the April 2003 document ("the September 2003 document"). The only change to the provisions relating to the completion of Appendix 1 to the contract was that the retention percentage was stated as 5%. The statement that the contract would be executed as a deed remained unchanged. In October 2003 Mr. Howard Rogers, a director of Redworth (who also gave evidence before me), gave to Mr. McInerney a draft bill of quantities dated 3rd September 2003 showing a price of £4.86 million. Mr. McInerney stated that that figure was unacceptable. There were other meetings between the parties before 21st November. On 21st November 2003 a meeting took place at Brookdale's offices in Welwyn Garden City. Those present were Mr. Rogers, Mr. Ian Roberts and Mr. McInerney. The contract was negotiated at that meeting.

9. It was common ground that the negotiations were conducted with reference to the April 2003 document or the September document. No contract was ever executed, either under hand or as a deed, save for a two-line document dated 24th February 2004, to which I shall refer (paragraph 16 below).

10. At the meeting held on 21st November Mr. Roberts handed to Mr. McInerney a revised bill of quantities headed Wyboston 001C showing a price of approximately £4.662 million. At the meeting the price was negotiated down to £4.5 million. Mr. McInerney and Mr. Rogers shook hands on that price. Mr. McInerney stressed that he had only £4.5 million available. He succeeded in persuading Mr. Rogers to agree a penalty or liquidated damages for delay in the sum of £20,000 a week. I say "penalty or liquidated damages" since the witnesses did not use the same terminology in their evidence, though there was no dispute about it. Mr. McInerney alone used the expression penalty. It was also agreed that payments would be made 14 days after valuations. The date for the start of the works was agreed as 5th January 2004. At the meeting it was agreed that the period for the works would be 66 working weeks, equivalent to 68 elapsed weeks including the Christmas break. It was agreed that the completion date for the whole works would be 25th April 2005. The JCT terms were not discussed. I make those findings as to the transactions at the meeting held on 21st November 2003 on the basis of uncontradicted evidence which I accept.

11. At the meeting it was also decided that the day centre and unit 2 would be handed over within 52 weeks. (There was a conflict of evidence whether that required handover before Christmas 2004. Nothing turns on that point). Mr. McInerney said that that was agreed, whereas Mr. Rogers said that it was not a requirement: Redworth was "working to" a period of 52

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved. [2006] EWHC 1994 (TCC)

weeks. In an email of 25th November 2003 to Mr. Dickie, Mr. Roberts said "We are to complete the Day Centre and Unit 2 in 52 weeks for handover". That statement suggests (but no more than suggests) the perception by Mr. Roberts of a contractual obligation.

12. I accept evidence of Mr. McInerney that it was agreed at the meeting that there would be no mark up on variations. It was agreed that the reduction in price from £4.662 million to £4.5 million would be by adjustment to the overheads and profit figure: the rates in the bills of quantities remained the same.

13. Mr. McInerney said that at the end of the meeting there were "lots of things" unresolved. For example, the mechanical and electrical works were outstanding, and needed to be agreed. This was a special hospital, of a kind of which neither Redwood nor Brookdale had experience.

14. At the meeting of 21st November, after the handshake, Mr. McInerney advised Mr. Rogers and Mr. Roberts that Mr. Dickie was making minor amendments to the drawings. Mr. Rogers and Mr. Roberts confirmed that provided the amendments were of a minor nature they would be accommodated within the contract terms agreed.

15. It was put to Mr. McInerney that on 21st November 2003 he had entered into a legally-binding agreement. He accepted that with apparent reluctance. He readily accepted that he was bound to the price by the handshake; and in truth the question of the legal effect of what had happened was not for him. There undoubtedly remained questions as to the specification of the works.

16. Shortly after the meeting, a retention rate of 3% was agreed.

17. On 10th December 2003 Mr. Roberts emailed Mr. McInerney with a revised contract sum of £4.63758 million reflecting amendments to the specification not allowed for on 21st November. Mr. McInerney initially responded negatively to any increase in the price above £4.5 million. But within a few days the matter was compromised at $4.57 million. That compromise was not reduced to writing until 24th February 2004. A letter of that date from Redworth addressed to Mr. McInerney of Brookdale and signed both by Mr. McInerney representing Brookdale and by Mr. Roberts representing Redworth stated:

Care Home, The Lane, Wyboston

This is to confirm that a contract has been verbally agreed between Brookdale Healthcare Ltd. and Redworth Construction Ltd. to construct the above development, in the sum of:

£4,570,000.00

18. On 19th December 2003 Mr. Roberts sent to Mr. McInerney an updated version referenced BHL/RCL/SPEC.001 ("the December 2003 document") of the Employer's Requirements and Contractor's Proposals document. It included reference to the latest drawings by John Dickie, which incorporated all amendments to the specification to that point in time, and further information which had been agreed at the meeting of 21st November 2003 and subsequently. It was in substantially the same form as the September 2003 document. But in addition dates for completion were shown as follows:

Phase 1 (Day centre, Unit 1 + access, Unit 2 garden fencing): 10th January 2005

Phase 2 (Units 3 & 4, + access, Units 3 & 4 garden fencing): 7th March 2005

Phase 3 (Unit 1 + all remaining external works): 25th April 2005.

The dates of 10th January and 7th March were described by Mr. Roberts in evidence as target dates. Date of possession was shown as 5th January 2004. Retention percentage was now shown as 3%.

19. In oral evidence, Mr. Rogers said that he could not recall when he first saw the December 2003 document. He said he saw the dates for completion of phases 1 and 2 as targets or best endeavours. He said he was not sure why the dates were included because they were not correct and were not what had been discussed. He believed that Redworth were, however, committed to completing the works by 25th April 2005.

20. On 30th March 2005, Mr. Roberts wrote, but did not send, a letter to Mr. McInerney. It requested an extension of 9 weeks to the contract period. The grounds for the request were set out with reference to clause 25.4.5.1. The letter also contained a request under clause 26 of the contract for the payment of additional preliminaries costs for the requested extension to the contract period, with reference to clause 26.2.6. Mr. Rogers gave evidence, which I accept, that he asked Mr. Roberts not to send the letter in order to avoid antagonizing the client. The clauses referred to in the letter are evidently clauses of the JCT terms.

21. On 18th May 2005 Mr. Roberts sent a message by email to Mr. McInerney. Paragraph 7 of that message read as follows:

Damages for delayed completion (£40,000.00): we discussed this at length when we last met – in my view it is outrageous to add £942,066 in variations to a contract and neither expect or allow any prolongation of the Contract Period. We agreed to your required build programme on your assertion at a meeting between yourself, Howard and I on 21 November 2003 that there would be no variations on this contract. We have followed the friendly, non-confrontational route and not exerted our contractual right to a formal Extension of Time with costs, which other companies would have done as a matter of course. To now have late completion damages deducted is outrageous. Please find attached a letter I wrote to you on 30 March 2005 requesting an Extension of Time with costs, which Howard instructed me not to send. If late completion damages are going to be deducted, I shall request from Howard that we formally send this to you, as in my view we now have little choice.

22. Mr. Rogers gave evidence that the damages had been deducted by Mr. McInerney in May 2005, and that he (Mr. McInerney) acknowledged that he should not be withholding the damages from Redworth and by further valuations he paid it back. I accept that evidence.

23. I am satisfied that a copy of the letter of 30th March was attached to the email and, on the evidence of Mr. Rogers and Mr. Roberts, that a hard copy was handed to Mr. McInerney at a meeting held on the first floor of the day care centre in September 2005.

24. Mr. McInerney gave evidence, which I accept, that the reason why the JCT terms were mentioned in the documents was that he thought he would require bank funding. The bank would require a formal contract signed as a deed, as had happened in his experience before. At the meeting of 21st November he did say that he needed bank funding, but the JCT contract was not

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved. [2006] EWHC 1994 (TCC)

discussed. After Christmas 2003 it became clear to him that he could fund the contract without assistance from the bank. He explained that to Mr. Rogers and asked him if he wanted to see evidence of funding.

25. On 29th June 2004 Mr. McInerney wrote to Mr. Rogers asking him to arrange for a completed JCT form of contract (by implication, between Brookdale and Redworth) to be forwarded to him regarding the contract at Wyboston. he wrote:

.....I think we are virtually there on contractor warranties but we now need a contract to complete the formalities between us.

His reason for writing that letter was that he had been advised that he needed a legal and binding contract for tax reasons (see paragraph 47 below).

26. On 16th July 2004, Mr. Paul Hughes, Commercial Director of Redworth, sent a draft contract on the JCT terms to Mr. McInerney. The price shown in that draft was £5.02245 million. That was not the contract price but a figure representing the sum of the contract price, the value of variations and some subcontractor's costs. It was common ground that the contract price had been incorrectly stated. The contract was not executed nor was the matter pursued.

27. On 15th September 2005 Mr. McInerney replied to Redworth's final account by deducting the sum of £300,000 by way of "Penalty 15 weeks at 20,000". Mr. Rogers replied on the following day by letter which included the following:

I am amazed by the contents of your letter and feel exceedingly aggrieved by the manner in which we have been unreasonably treated by you especially in respect to the payments.

You may recall we negotiated the project in the spirit of a JCT Design and Build contract, although the design element had been carried out between you and your architect prior to our involvement.....

28. In November 2005 there was correspondence between the parties regarding delay to the occupation of Unit 1 by reason of the fitting of Velux windows. Redworth contended that they were an extra; Brookdale contended that their fitting had been necessitated by reason of the failure of the original steel windows to function. The last paragraph of an email dated 30th November 2005 from Mr. McInerney's secretary to Mr. Roberts reads as follows:

As discussed, the delay in the handover of Unit 1 has major cost implications to us in the order of £20,000 per week. I would therefore appreciate it if you would confirm the date when all outstanding works will be complete and the unit handed over to us.

A snagging list was attached to that email.

29. Mr. Roberts wrote a letter dated 1st December 2005 in reply to that email. I quote that letter in full:

I write in response to your email of 29th [sic] November 2005.

I confirm that we will have all outstanding snagging items and the installation of 5Nr Velux roof windows in Unit 1 complete by Thursday 8th December 2005.

I note your comments regarding the ongoing work in Unit 1 to instal the rooflights and the inferred loss of income. I also note your statement that this work is required through the windows already fitted in these rooms "not functioning". I would make the following comments:

- *We manufactured and fitted these windows exactly as originally designed and approved by Michael McInerney, prior to us becoming involved in this project.*
- *A requirement of this and any construction contract we undertake is that it is built in accordance with Building Regulations. The project designer (John Dickie Associates) has and will confirm that these five windows had to open in the manner we installed them to comply with Building Regulations.*
- *It was Redworth Construction who first brought to everyone's attention that the opening sash of these windows was extremely heavy, due in large part to the type of security glass fitted on this project. Again, I emphasise that this is all as a result of the design of these windows, presented to us as the required design fixed before we became involved in this contract.*
- *I would remind you that the perimeter fencing behind Unit 1 is only temporarily fixed (as instructed) as we have still not been informed whether the footpath realignment has been approved. The fence in its current state cannot be considered secure and cannot have the fence alarm system installed until in its final position.*

There is an insistence on the part of Brookdale Care that this is a Design and Build contract and therefore any design which proves unacceptable or inadequate is the fault and liability of Redworth Construction. We do not accept design liability for this project and have not signed a D&B (or any other) form of contract. The initial design was presented to us as fixed. All major variations have been designed by John Dickie on direct instruction from Michael McInerney <u>without our knowledge</u> and handed to us as instructions. Redworth Construction had no design input in the original design, its development or design variations. Whilst John Dickie's fees have been paid by us as instructed by Michael, we have no Novation agreement with JDA. We were instructed <u>not</u> to include Architect fees within our contract sum as these would be agreed and paid by Brookdale under separate pre-agreed joint agreement between Brookdale and JDA. For accounting reasons we were subsequently paid separate sums by Brookdale through our contract to pay JDA, though we have never been told the sum agreed for JDA's services.

We would contend therefore that this project has absolutely not been administered by Brookdale Care on a Design & Build basis and reject any liability for either the original design or subsequent design variations. We would also re-emphasise that all materials used in this project have been sample approved by Michael prior to their installation.

There is an underlying mindset that all and any design and/or materials problems that have arisen are solely the responsibility of Redworth Construction. We reject this most vehemently.

Thus Mr. Roberts was insisting that Redworth had no design liability, had not signed a design & build, or any other, contract, and that the contract had not been administered on a design & build basis.

30. Mr. McInerney gave evidence, which I accept, the effect of which was that the design was basically done by John Dickie. There was little design from Redworth. Brookdale were indeed making changes without Redworth's knowledge, and then Redworth would make changes afterwards. Both Brookdale and Redworth were giving instructions to John Dickie. Redworth had a design responsibility but it was not cut and dried. Redworth had to build to the specification and the drawings, but they asked for

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved. [2006] EWHC 1994 (TCC)

changes. They wanted to use their structural engineer, and that was done by agreement. He, Mr. McInerney, never insisted that Redworth had total design responsibility. In the case of Mechanical and Electrical work, for example, Redworth had an informal input into the design.

31. The opinion expressed by Mr. Roberts in his letter of 1st December was inconsistent with, indeed contrary to, an opinion that Redworth had entered into a JCT contract with contractor's design. The adjudicator said that the writing of the letter was a knee-jerk reaction of Mr. Roberts. Mr. Roberts gave this evidence about it:

I knew the contractual arrangements. It was not my view that the JCT terms were not applicable. I knew this letter was wrong when I sent it. I sent it out of pure anger and frustration. There had been a number of variations I had agreed with Mr. McInerney. I at least thought I had his agreement that he would pay for these five extra roof lights. We were in the process of getting this work finished when I got the email from Mr. McInerney's secretary on 30th November saying he wouldn't pay. So that I lashed out. I regret that. I regret it at a personal level that I lashed out at his secretary. We designed roof trusses and other things.

At no time did it enter my head until I saw the defence that we weren't in a JCT contract. I just lashed out. I knew this letter was wrong.

32. I found Mr. Roberts to be a sincere witness. I accept his evidence that he was angry when he wrote the letter. But I cannot accept that it did not express his views, save that I accept that his total denial of design responsibility was an exaggeration. The whole letter is rational and coherent. There is no sign in it of Mr. Roberts's anger having affected the reasonableness of the arguments in the letter.

33. Mr. Roberts's statement in his email of 18th May 2005 to the effect that Mr. McInerney asserted at the meeting of 21st November 2003 that there would be no variations to the contract is not borne out by the evidence before me. Indeed, as I have found (Paragraph 11 above) provision was agreed for the valuation of variations. But Mr. Roberts's statement that Redworth agreed to the build programme on the basis that there would be no variations makes better sense if the agreement were an ad hoc oral agreement than if JCT terms were thought to be incorporated. In the latter case, there would be no obstacle to the agreement of the programme since extensions of time would be expressly provided for.

34. Mr. Rogers gave this evidence, which I accept reflects his view of the matter:

The agreement was for us to achieve the project in the contract time. Variations were not foreseen.

35. On the totality of the evidence, I conclude that the JCT terms were not part of the contract. My reasons are these. On 21st November 2003 there was at most a mere intention on the part of the parties to enter into a contract on JCT terms. That intention was never implemented. Mr. McInerney's original reason for requiring a formal executed contract did not materialize. Neither party pursued the matter, save as mentioned in paragraph 24 above. The JCT form of contract was never even signed, let alone executed as a deed. It was not orally agreed, since it was not even discussed at the meeting. Both Mr. McInerney and Mr. Rogers evidently considered the contract between them to be rather informal. Mr. Rogers considered the dates of completion of phases 1 and 2 to be merely target dates. Most of the design was not contractor's design.

36. There was in the papers before me a contemporaneous note of the meeting of 21st November 2003 which had been prepared by Mr. McInerney. One entry in that note was

Ian would be based on site 2/3 days pw.

That is a reference to Mr. Roberts. Mr. McInerney gave evidence that there was a lot of discussion about that at the meeting. He communicated to Redworth how important it was to him. All present thought it would be mutually beneficial to have Mr. Roberts on site 2 to 3 days a week. If Redworth had not been able to give the undertaking he would have had extreme reservations and might not have entered into the agreement.

37. Mr. Rogers's evidence on the point was this:

It was an agreement between us that Ian would be based on site 2 to 3 days a week. And Ian would be working exclusively on this contract after he finished a contract he was on. It was really a matter for his time management. The important thing was that he would work exclusively on the contract once he had finished a project he was on. It was not a requirement that he be on site 2 to 3 days a week.

38. I conclude that it was a term of the contract that Mr. Roberts would be on site 2 to 3 days a week.

39. Before the adjudicator, Brookdale called into question the adjudicator's jurisdiction on the ground that there was no contract between the parties, or no contract in writing that complied with section 107 of the Act. In a non-binding decision, the adjudicator decided that he did have jurisdiction. Redworth's referral notice relied on a single document, the April 2003 document, with the JCT terms incorporated by reference, coupled with the oral agreement made on 21st November 2003. At no point did Redworth rely on the December 2003 document. Mr. Blunt submitted that it chose not to rely on that document, or may have done so, because the sectional completion dates shown in that document might have been damaging to Redworth's case. Be that as it may, I do not think that Redworth can now go beyond the matters it then relied on in the adjudication in order to support the adjudicator's decision that he had jurisdiction. It may be that in this case reliance on the December 2003 document would not have affected, or adversely affected, Redworth's substantive case before the adjudicator. But in these proceedings I cannot consider the merits of the adjudicator's substantive decision. In those circumstances, it is not appropriate (and in some circumstances it might be impossible) for the court to guess what decision the adjudicator would have reached if a different argument had been presented to him.

40. The principle on which I rely in reaching the conclusion that Redworth cannot for present purposes go beyond the matters it relied on in the adjudication is the principle of election. Redworth cannot blow hot and cold, or approbate and reprobate its earlier argument. The proposition supported by many of the cases is that a party who has taken some benefit under an instrument such as a will or an order of the court cannot disavow that instrument so as to obtain a further benefit. Waiver of tort is another example of the principle. Here, Redworth is not seeking to disavow the adjudicator's decision: quite the contrary. It is its submissions that it is seeking to disavow. But the principle is widely expressed by Evershed M.R., with whom Singleton and Jenkins L.JJ. agreed, in ***Banque des Marchands de Moscou (Koupetschesky) v. Kindersley*** [1951] 1 Ch.112, 119, as follows:

The phrases "approbating and reprobating" or "blowing hot and blowing cold" are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined.....From the authorities cited to us it seems to me to be clear that these phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent.

41. It is true that the question underlying that case was a traditional question, namely whether a party who had proved for a debt in the winding-up of a company could defend a claim against it by impugning the validity of the winding-up proceedings. The question before the Court of Appeal was whether the rule against blowing hot and cold applied where the defendant had received no benefit from the winding-up, its proof of the debt having been rejected. Nevertheless, the principle as expressed by Evershed M.R. was not limited to traditional cases.

42. Here, Redworth elected to put their argument in a particular way in order to obtain a benefit, namely, the decision of an adjudicator in their favour, both as to his jurisdiction and substantively. Redworth has in consequence obtained both those benefits. In my judgment, that is so regardless of whether the same benefits could have been obtained by other arguments at any rate where, as here, it is not clear that such benefits could have been so obtained. In my judgment, it would not be just to allow Redworth to resile from that election.

43. Certain terms of the agreement reached on 21st November 2003 were not in writing. The then price of £4.5 million was not in writing. However, the agreement letter of 24th February 2004 could have been relied on consistently with Redworth's case, which depended on the figure of £4.57 million arrived at by amendment. Moreover, the figure of £4.57 million was admitted before the adjudicator by Brookdale. But the documents relied on by Redworth showed no date of possession of the site, no contract period and no date for completion of the works. Nor did they show the term that Mr. Roberts would be on site 2 to 3 days a week. That last point is, I think, irrelevant to the subject-matter of the dispute before the adjudicator.

44. Mr. Blunt relied on ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd***. [2002] EWCA Civ 270. It appears from paragraph 19 of the judgment of Ward L.J. in that case, with whom Robert Walker L.J. agreed, that what has to be evidenced in writing is literally all of the agreement, apart from the trivial. Auld L.J. considered (paragraph 22) that the terms of the agreement material to the issues giving rise to the reference had to be in writing, but not terms unrelated to those issues.

45. The date of possession, the contract period and the date for completion of the works, especially the last-mentioned, are manifestly relevant to the claim before the adjudicator, which was for the recovery of sums withheld because the contract overran the agreed date for completion of the works. I conclude that the contract was not a contract in writing within the meaning of section 107 of the Act. Accordingly, the contract was not a contract to which Part II of the Act applied. In consequence, the adjudicator had no jurisdiction to hear the reference.

46. If I am wrong in concluding that the JCT terms do not form part of the agreement, then the question arises whether the adjudication provisions expressly incorporated by clause 39A of those terms are governed by the decision of the Court of Appeal in the *RJT Consulting Engineers* case. Mr. Taverner submitted that clause 39A was independent of section 107 of the Act and accordingly was not governed by the decision in *RJT*. Accordingly, a party could agree clause 39A whether all the terms of the contract were in writing or not. Mr. Blunt submitted that if that were right it would drive a coach and horses through the Act and the decision of the Court of Appeal in the *RJT* case. Parties could get round that decision by simply agreeing orally to incorporate an adjudication procedure into a construction contract. That would be contrary to public policy. Moreover, submitted Mr. Blunt, clause 39A should be struck down under the provisions of section 13(1) of the Unfair Contract Terms Act 1977. It is unnecessary for me to decide this question, and I decline to do so.

47. There were two other points, not raised before the adjudicator, on the basis of which Mr. Blunt submitted that the adjudicator lacked jurisdiction. First, Brookdale was the wrong party. The proper party would have been another company owned by Mr. McInerney, namely Signia Developments Ltd. ("Signia"), to which company the contract had been novated. On the evidence before me the following facts emerged.

48. On 5th February 2004, Mr. McInerney and his wife Mrs. McInerney made an initial disposal of their shares in the Brookdale Healthcare Limited share incentive plan at a capital gain of some £1.4 million each. They intended then to dispose of more shares, providing them with an ultimate capital gain of more than £5 million shared between them. Mr. and Mrs. McInerney's accountants advised them on the disposal in February 2004, and in about May 2004 identified the expenditure on Milton Park (as I understand it, the relevant land at Wyboston) as a possible way of sheltering their capital gains under the existing legislation by rolling over the gains into a replacement asset. To achieve the capital gains tax relief, it was necessary to capture the rollover expenditure in an established, unconditional contract. All the expenditure had to be spent or unconditionally committed by 4th August 2004. Mr. McInerney instructed his accountants that the relationship he had with Redworth was proceeding on a relatively informal basis without a proper contract. The accountants therefore advised Mr. McInerney to set up Signia, which company would be the main contractor on the Milton Park project. Signia would then employ Redworth. The implication of that is that Redworth would become a sub-contractor of Signia. Signia was incorporated on 8th July 2004. On 30th July 2004 a transfer, necessary to the efficacy of the scheme, of Mr. McInerney's freehold estate in the Milton Park land to himself and Mrs. McInerney was effected. A formal contract in the sum of £3 million on the JCT terms between Mr. and Mrs. McInerney as the employer and Signia as the contractor was prepared and signed as though executed as a deed (though not witnessed) on behalf of Mr. and Mrs. McInerney and Signia on 4th August 2004. No contract was entered into between Signia and Redworth. Pursuant to a request from Mr. McInerney, Redworth invoiced Signia and Signia paid monthly progress payments between September 2004 and March 2005. No change in the contractual structure involving Redworth as contractor and Brookdale as employer took place. Thus Brookdale was not the wrong party. This point as to jurisdiction fails.

49. The other point as to jurisdiction was that there was no dispute. In my judgment, the email of 22nd May 2005 from Mr. Roberts to Mr. McInerney clearly shows the existence of a dispute at that time over the deduction of £40,000 for delay in completion. But that sum was repaid, thereby resolving that dispute. Mr. Blunt submitted that there never was a dispute because there had been no formal application for an extension of time. The letter of 30th March 2005 when it was sent with the email of 22nd May was not sent as an application for an extension of time, having regard to the terms of the email quoted in paragraph 20 above.

50. Redworth submitted their valuation number 20 at 4th August 2005 (Final Handover). In reply, as I have mentioned in paragraph 26 above, Mr. McInerney sent an amended version of that valuation deducting what was described as a penalty of £300,000, calculated as 15 weeks at £20,000. He also deleted a claim for extra preliminaries for 9 weeks and reduced a sum claimed for variations. Mr. Rogers's reply of 16th September, quoted in the same paragraph above, makes it perfectly clear in my judgment that there was a dispute at that time over the deductions. That dispute necessarily involved questions of time overrun and of entitlement to deduct damages or penalty at the rate of £20,000 per week. In the penultimate paragraph of that letter, Mr. Rogers wrote:

I would like to meet you as a matter of urgency upon your return from holiday to try to reach an amicable agreement.....

In my judgment, that statement does not negative the existence of a dispute: it is simply showing willingness to resolve it. The dispute was not resolved before the matter was raised in the notice of adjudication dated 21st February 2006. I thus reject the contention that there was no dispute to go before the adjudicator.

50. Redworth's claim is dismissed.

Mr. Marcus Taverner Q.C. (instructed by Watson Burton LLP) for the Claimant
Mr. David Blunt Q.C. (instructed by Wiseman Lee) for the Defendant