JUDGMENT : HIS HONOUR JUDGE THORNTON QC: TCC. 23rd January 2006.

1. **Introduction**

1. This claim and counterclaim are concerned with a building project which was carried out for the Defence Housing Executive ("DHE") during 2001 - 2002. This project involved the construction of houses for service personnel and their families in four areas, known as North and South Avon and East and West Wylie, at the Mathew and Avon Estates, Tidworth, Wiltshire. This project was originally to be undertaken as a design and build package by a contractor known as Davies Middleton & Davis ("DMD") whose tender was submitted in late 1999. This tender incorporated the design work of the claimant, CFW Architects (A Firm) ("CFW"), who are architects who DMD had engaged to form part of the design team it had assembled as part of its proposal to undertake the work. DMD's tender was accepted but it soon afterwards ran into financial difficulties and, as a result, the defendant, Cowlin Construction Limited ("Cowlin") was asked to submit a tender for the work. Cowlin invited CFW and the other members of DMD's design team to join it as the team to undertake the design and construction work involved.

2. The way that the project was to be carried out was that the DHE, as employer and as the ultimate client for whom the work was being undertaken, employed a multi-disciplinary professional practice, Pick Everard, to act as the lead consultant and Project Manager. The other principal member of this team was the firm of architects, Shepheard Epstein Hunter ("SEH") who was responsible for undertaking the architectural design review. Under Pick Everard, an outline specification was prepared which identified the parameters within which the subsequent detailed design would be carried out. Indeed, sufficient of the design work was identified in that specification and accompanying outline drawings that the design and build package was described by Mr Clark, Cowlin's contract manager responsible for this project, as a "detailing and build" rather than a "design and build" package. What the project required was the demolition of existing buildings and the construction, on four different sites, of a large number of paired dwellings of two principal types with associated external works, consisting of roads, hard standings, retaining walls, and garden areas with their associated paving, fencing and ground works.

3. The outline specification was then used as the basis for the preparation of a tender which identified what work was proposed and how it was to be undertaken. The tender was prepared for the contractor by a design team appointed by the contractor although the fees would ultimately be recovered as part of the design and build contract sum. Once the tender had been accepted, the complete detailed design was worked up by the contractor's design team and submitted for approval to Pick Everard who then, in conjunction with the other members of DHE's professional team, undertook a peer review so as to ensure that the proposed detailed designs were compatible with the outline specification. The design and build contract only allowed Cowlin to begin construction work on any one of the four sites once the complete detailed design had been approved by the peer review process for that site. Cowlin's design team was headed by CFW who both undertook all the architectural design and co-ordinated all the other design work of the other members of Cowlin's design team into a coherent design package.

4. The contract came to an end on 30 August 2001, with the design work unfinished, when CFW purported to terminate it by accepting Cowlin's alleged repudiation of the contract. Cowlin, in return, alleged that it had not repudiated the contract and that it was therefore CFW that had repudiated the contract by stopping work under the contract and failing to resume work following it's purported reliance on Cowlin's repudiation which had not in fact occurred.

5. Cowlin engaged other architects to complete the design work and completed the project. However, it contended that CFW had caused it loss in three general respects. Firstly, it had, in breach of contract, delivered the completed designs of the first two sites late, thereby causing it loss. Secondly, the repudiation and consequent premature cessation of work had caused Cowlin's completion of the contract to be delayed with consequent loss, particularly a large sum by way of liquidated damages that Cowlin had to pay DHE. Thirdly, CFW is alleged, by its negligence, to have caused two relatively small additional heads of loss.

6. The dispute has become both bitter and personal and has spawned a plethora of alternative dispute resolution attempts by way of three adjudications and one adjudication enforcement action heard by Judge Kirkham in the TCC in Birmingham. The first adjudication, whose decision was published on 24 October 2001, decided that CFW had repudiated the contract and that that repudiation was wrongful. The second

adjudication, whose decision was published by a different adjudicator on 5 July 2002, decided that CFW should pay Cowlin damages in the total sum of £276,211.51 plus VAT as a result of its failure in breach of contract timeously to provide the designs for the first two sites. This decision was ordered to be enforced by Judge Kirkham's judgment handed down on 15 November 2002. The third adjudication, whose decision was published by a third adjudicator on 23 January 2004, decided that Cowlin had failed to establish that the breaches of contract it relied on had caused the contract to overrun by 14 weeks or had caused it the loss it was claiming. In consequence, no further damages were awarded to Cowlin.

7. CFW initiated these proceedings on 23 October 2003 claiming the return of £335,243.14 that it contended had been paid wrongfully to Cowlin as a result of the erroneous decision of the second adjudicator and in interest and costs incurred in that adjudication and in the subsequent enforcement proceedings. Cowlin counterclaimed various sums totalling a little over £1 million and contended that no part of the claim was due.

8. The effect of the claims and counterclaims in these proceedings was to throw into issue each decision of the three different adjudicators that had arisen out of these proceedings and also the reasoning of Judge Kirkham in relation to the jurisdiction of the second adjudicator. Although for different reasons, both parties accepted that no decision of the adjudicator was final and that I was able to determine all issues arising in these proceedings without reference to, or being affected by, any part of the three adjudication decisions or Judge Kirkham's judgment.

9. These proceedings essentially involved six separate issues. These related to: (1) the terms of the contract, particularly the terms relating to CFW's obligation to deliver design drawings timeously to Cowlin; (2) whether CFW was in breach of contract and had caused loss in relation to the alleged lateness in delivering to Cowlin the design drawings for the first two sites; (3) who repudiated the contract; (4) the heads of loss that CFW's repudiation, if there had been one, caused Cowlin; (5) the loss and damage any breach of contract relating to CFW's delayed issue of drawings or its repudiation of the contract caused Cowlin; and (6) two separate small claims arising from separate acts of negligence in particular details shown on the design drawings prepared by CFW. I will determine each issue separately and then determine what the consequences should be of my findings by way of an award of damages to either CFW or Cowlin.

10. I should finally summarise the trial. This was conducted with commendable speed and clarity by Mr Sean Brannigan, counsel acting for Cowlin, and Mr Ian Pennicott QC, counsel acting for CFW. The parties agreed that Cowlin should be regarded as having the burden of proof and it opened the case and gave its closing submission last. The witnesses called by Cowlin were Mr Michael Spiller, Cowlin's commercial director; Mr Colin Clark its contracts manager; Mr Leighton Roberts, the regional director of White Young Green, the consulting engineers appointed to act as engineers in the design team headed up by CFW; and Mr Anthony Searle, who was not required to attend for cross-examination, the regional supervisor of the dry lining subcontractors engaged by Cowlin. The witnesses called by CFW consisted of four of its five partners, being Mr Darren Payne, Mr Timothy Worsfold, who ceased to be a partner of CFW on 19 March 2001; Mr Jeffrey Murray; and Mr Neil Campodonic. Each party instructed an expert programming witness. CFW instructed Dr John Keane and Cowlin instructed Mr Francis Backhouse. Both were briefly cross-examined on the few remaining issues on which they had expressed differing opinions. Each party also instructed a quantity surveyor expert. Cowlin instructed Mr Alan Taylor and CFW instructed Mr Paul Edwards. These experts produced joint statements in addition to their reports which obviated the need for them to be cross-examined.

2. Issue 1: What Were the Relevant Contract Terms and Obligations Relating to the Timing and Programming of the Production of Design Drawings?

11. **Contract terms.** There was an extended negotiation concerned with the terms of CFW's engagement. This started soon after CFW's services in relation to the project were adopted by Cowlin soon after it was first approached by the DHE to negotiate a design and build contract for the project using DMD's tender as the starting point for those negotiations. CFW had not succeeded in finalising a contract with DMD although it had done a significant amount of design work for use in its tender. It had also submitted a fee proposal and a definition of the scope of its services to DMD in a letter written by Mr Worsfold on 28 November 1999. This proposal included suggestions that the appointment should be on the RIBA Standard Form of Agreement for the Appointment of an Architect (SFA/99) together with the Design Build Contract Amendment (DB2/99);

that CFW would complete the design in accordance with the Employer's requirements and DMD's proposals and provide all drawings required to complete the project.

12. It is of significance, and a common factual basis for the subsequent negotiations between CFW and Cowlin, that the DB2/99 document required the architect to identify any key dates that the client contractor had to, or wished to, achieve under the terms of its contract with the employer and to produce any designs in a timely manner to enable the contractor to meet these dates, provided that they are reasonable and achievable.

13. After the initial meeting between CFW and Cowlin on 15 March 2000, Mr Worsfold proposed to Mr Natt of Cowlin that they agreed a fee and payment schedule as quickly as possible and sent him a copy of the letter previously sent to DMD as a basis for starting such discussions. Mr Worsfold was under some pressure to agree acceptable terms for CFW's engagement because his partners had expressed considerable displeasure to him at having allowed CFW to earn a substantial fee entitlement for DMD with no contract having been agreed prior to DMD pulling out of the project because of its financial difficulties. These unpaid fees were, in effect, being recouped from Cowlin since CFW was only releasing its lien on the design work it had already undertaken in return for engagement by, and payment from Cowlin who would be adopting this work as part of the services it was contracting for from CFW.

14. The negotiations were protracted and ran on to June 2000 largely because Cowlin was proposing a reduction in the lump sum that it would pay CFW compared to the proposed lump sum that CFW had suggested to DMD. In the meantime, CFW and Cowlin had lengthy meetings with DHE and its consultants, Pick Everard, at which the details of the design and build contract were finalised. These discussions involved, in part, discussion and agreement to the detail of Cowlin's proposed construction programme. This was in bar chart form and showed the period during which the phased construction of each pair of dwellings would take place. CFW, in participating in these discussions, would have been aware that Cowlin's ability to achieve this or any revised programme would be dependent, in part, on timeouts receipt from CFW of CFW's detailed design drawings following their approval by Pick Everard under the design peer review, or auditing, arrangements contained in the design and build contract.

15. CFW and DHE reached agreement on the design and build contract package, in the sum of £19.38 million, on 20 April 2000. The agreement was incorporated into the contract documents which were backdated to 6 April 2000. The finally agreed programme had been submitted as part of Cowlin's tender and, under the terms of the design and build contract, became the contract programme under that contract.

16. On 6 June 2000, Cowlin's project manager, Mr Wilmington, sent Mr Worsfold a proposed programme covering the design and peer review elements of the project for "information and action". The programme, in bar chart form, did not show dates but merely sequences and lengths of time on the various proposed discrete chunks of design activities. At the same time, he sent copies of three contract programmes showing the proposed construction periods for each pair of houses to be constructed and the construction sequence for the two principal house types. Neither Mr Payne nor Mr Worsfold recalled receiving the construction programmes but they are dated 6 June 2000 and the design production programme was clearly intended to be Cowlin's proposal as to how CFW would produce the design drawings by dates and in a sequence that would enable Cowlin to proceed with its contract programme. I am satisfied that all five bar charts, being the two design programmes and the three construction programmes, were sent to CFW together on 6 June 2000.

17. Meanwhile, somewhat acrimonious correspondence was taking place about the payment arrangements and amounts that CFW would be subject to under the contract with Cowlin.

18. By 8 June 2000, the discussions and negotiations had produced an agreement in principle. This agreement was reached on the telephone between Mr Payne of CFW and Mr Natt of Cowlin and had been precipitated by Mr Payne informing Mr Natt on 5 June 2000 that CFW would not be able to attend the first Design Team meeting scheduled for 13 June 2000. The agreement involved splitting the difference between the two as to the overall size of CFW's fee. This agreement was recorded in a fax from Mr Payne which stated: *"Further to our telephone call yesterday. I am pleased and relieved that we have reached agreement regarding our appointment details, I will prepare the appointment documents and forward them to you for signature, I confirm the following basic points:*

1. Lump sum fee of £277,000.00

2. *CFW to propose the payment instalment.*
3. *Form of appointment to be the standard RIBA Standard Form of Appointment for Design & Build*
4. *Appointment to include up to 40 site visits.*

The instalment breakdown will be subject to the programme of design information, the details of which will no doubt become clearer at the meeting on [13 June 2000]; it is therefore probable that I won't be able to issue the appointment document to you until week commencing 19 June 2000 as I am on leave next week."

19. What is clear about this summary of the agreement in principle that had been reached was that the payment instalment arrangements would be dovetailed to the programme for the production of design information and that the proposals for instalment payments that CFW would make would await, and then be tailored to, the programme for the production of design information once that had been finalised at the Design Team meeting to be held on 13 June 2000. The second obvious feature of this summary is that the engagement would be subject to the standard RIBA conditions of engagement for the provision of architectural services to a design and build contractor, namely the SFA/99 and DB2/99 documents.

20. The first Design Team meeting occurred on 13 June 2000 and Mr Worsfold and Mr Campodonic attended on behalf of CFW. The minutes record that the draft programmes that had been issued by Cowlin were referred to. Given the context of this discussion and the documents that Cowlin had already forwarded to CFW, I am satisfied that that reference was to both the three construction and two design production programmes, which were intended to be complementary to each other.

21. There was then a discussion about the programme for the presentation of design drawings to Pick Everard for the purposes of peer review and it was stressed by Cowlin that it was important that the design team undertook their design work so as to restrict the number of presentations of the design packages to Pick Everard for peer review to two. This proposal was reflected in the draft design production programme and not dissented to by any of those present. The minutes then recorded that it was agreed that the first Monday on the programmes, which in context was a reference to both the construction and design production programmes, would be 12 June 2000.

22. The final relevant matter raised at this meeting was raised by Mr Spiller who was minuted as having stressed to all, including CFW, the importance of achieving the submission dates for peer review in order that Cowlin would obtain payment for design fees within the first valuation under the design and build contract. Cowlin was being reimbursed by DHE sums to cover the fees it was paying to the various members of its design team and Cowlin had linked the payment it was to make to CFW to the sum it was to receive from DHE for architectural services. Mr Spiller was clearly indicating to the professional team that the payment it was to receive for design services would not be obtained until the peer review process had been completed and that, by the same token, the professional team would themselves not expect payment of the relevant instalments of their fees until that peer review process had been completed. Again no-one demurred to Mr Spiller's statement on this topic.

23. Cowlin contended that the design production programmes were agreed at that meeting and became contract documents. Mr Spiller thought that that was what had been agreed to. Neither Mr Campodonic nor Mr Worsfold remembered any discussion about design programmes but both regarded programming matters to be the responsibility of Mr Payne who was not present since he was on leave that week.

24. I am clear that no final agreement was reached as to the contractual programme to which CFW would work to but that Cowlin had made it clear that both programmes, being the design production and the construction programmes would be adhered to. This was on the basis that the two were complementary to each other. No-one demurred and the meeting left programming matters on the basis that those programmes would be the ones to be worked to.

25. Unfortunately the design production programme, which was still in the draft from in which Mr Wilmington had prepared it, was not complementary with the construction programme. It is for that reason, as I find, that CFW produced a payment schedule on 20 June 2000 which was linked to the construction programme. This schedule was produced by Mr Payne on his return from leave. The accompanying fax, which was addressed to Mr Spiller, reads: *"Further to my fax to Ian Natt of the 8th June 2000, I have now liaised with the team in our office that will be producing the drawing information to suit your building programme, and have prepared a draft Architects*

Appointment Document which I will forward to you for signature. However we are still to agree the instalment schedule for our stage payments, which will be recorded in the Appointment Document. I therefore propose the following: [a list of 24 small monthly payments from June 2000 to May 2002] …".

26. This fax was replaced by a second fax later that day which reads: *"Further to my fax earlier today, I have again liaised with the team in our office who will be producing the drawing information, and confirm that we will discuss/agree the 'milestone' payments at our meeting tomorrow, however I propose the following which perhaps you could give some thought to prior to tomorrow:*

10 July 2000 - £75,000 > see notes below for definition of milestone stages
7 August 2000 - £75,000 > leading up to completion by 30th October 2000
4 September 2000 - £30,000 >
2 October 2000 - £30,000 >
30 October 2000 - £30,000 >

[a list of 19 small monthly payments from November 2000 to April 2002] …

Month 1 – 10 July 2000

- *general arrangement plans for sites 1, 2 & 3*
- *general arrangement house sections for sites 1, 2 & 3*
- *sit layouts for sites 1, 2 & 3*

Month 2 – 7 August 2000

- *block elevations for sites 1, 2 & 3*
- *general arrangement plans for site 4*
- *general arrangement sections for site 4*

Month 3 – 4 Sept 2000

- *site layout for site 4*
- *external works details for sites 1, 2 3 & 4*
- *external fabric details for sites 1, 2, 3 & 4*

Month 4 – 2 Oct 2000

- block elevations for site 4
- *miscellaneous details/kitchen layouts for all four sites*

Month 5 – 30 Oct 2000

- completion of miscellaneous details
- *overall completion on checking of production information"*

27. Both Mr Spiller, Mr Campodonic and Mr Payne agree that they met on 21 June 2000, although the meeting and its contents were not documented. Mr Payne and Mr Spiller agreed that they agreed the contents of the second fax set out above. However, Mr Spiller asked to be able to check with DHE that these dates fitted in with the payment dates for design fees provided for in the design and build contract. Mr Spiller telephoned Mr Payne later on 21 June 2000 and informed him that these dates did tie into the design and build contract. Both these principals accepted that nothing further was left to agree and, on 6 July 2000, Mr Payne sent to Mr Natt the promised Appointment Document with a covering letter which read: *"Following the agreement of the 'milestone' stage payments of our lump sum fee with Mike Spiller, I have been able to complete the Appointment Document and attach two copies. Please complete as follows and return one copy for our use, and retain one for your records:-*

a. Insert the date of the building contract on page A
b. Execute as a deed on page G
c. Initial the foot of each page adjacent to my initial
Many thanks."

28. The document was never returned and no copy of the enclosure survives so that the contents of the enclosure were not adduced in evidence. In his cross-examination, Mr Payne accepted that, in accordance with the milestone schedule set out above, the design of the works for sites 1, 2 & 3 had to be finished at some time before 7 August 2000.

29. In the light of that history, there is no doubt that the parties concluded a contract on 21 June 2000. There was no intention or expectation that any agreement would be subject to, and would not take effect unless, a formal signing and executing of a written contract. Thus, the failure of Cowlin to execute the draft submitted to it by Mr Payne is not fatal to a contract of engagement coming into existence since the accompanying letter sent with the unexecuted contract by Mr Payne makes it clear that the contract is to be the in the same terms as those agreed at and before the meeting on 21 June 2000 and that there is nothing left to agree. That contract incorporates, amongst other documents, the JCT standard conditions applicable for the supply of design and build services to the contractor, the JCT SFA/99 and DB2/99 standard forms of contract, and the payments schedule set out above.

30. I conclude, therefore, that the conditions of engagement incorporated the JCT SFA/99 and DB2/99 standard forms of contract and the revised payment schedule dated 20 June 2000. The DB2/99 document was stated to be, and was in fact, a document that provided a series of amendments and additions to the SFA/99 document. The DB2/99 document contained express terms that the architect was to undertake the preparation and collation of the tender documentation and the preparation of the production information required both for the tender submission and for construction. The conditions also included condition 1.5.1 which provided that either party should advise the other upon becoming aware of the need to vary the services and the Project timetable.

31. **Obligation imposed by payments schedule.** CFW contended that the payments schedule was only applicable to the interim payments arrangements for the payment of its fees and merely identified what payments would be made and when they would be made. The schedule did not, additionally impose on CFW any contractual obligation to undertake its design work in accordance with any programme or to complete any particular package of design work by a particular date.

32. Cowlin contended that the effect of the payment schedule, being one that contained a definition of the milestone payments associated with the design work CFW was to undertake, was that the necessary design work of the kind referred to in the payment schedule that would be needed to enable Cowlin to construct the work in accordance with the contract programme had to be produced in an agreed and final form by the milestone date that that design information was associated with. In other words, the contract programme, the milestone schedule and the payment element of the milestone schedule had to be read together so as to provide the dates by which the completed, co-ordinated design had been approved by Cowlin and by Pick Everard. Those dates had to be such as to allow Cowlin to start and progress construction in accordance with the contract programme.

33. There are two ways in which the dates and design information in relation to sites 1, 2 and 3 set out in that document could have had contractual effect. The first would arise from the meaning of the words and programmes set out in the contract documents and from any inference or implication arising from those technical documents. The meaning would have to be deduced from a construction of the contract documents and that construction process would have to be undertaken using as an aide to construction the objective meaning of the words used construed against the common factual background known to both parties at the date of the contract on 21 June 2000. The second way would be by a process of implication, the necessary terms arising as a matter of necessity or by virtue of the clearly intended meaning of the contract and so as to give it business efficacy. Cowlin contends that the obligation it alleges was created by the milestone schedule arose as a result of a combination of interpretation and implication.

34. **Interpretation.** It is clear from the face of the fax dated 20 June 2000, when read against the common factual background that the document provided for two related obligations: CFW's obligation to produce drawing and design information by defined dates and Cowlin's obligation to pay, in return, specified instalment payments. Thus, the expression "milestone stages" set out in that document meant the content of a particular design package forming part of the overall design, the date by which that design package was to be completed and the date on which payment for that package would be made. The completion date and the payment date for each package was to be the same and the payment of any particular instalment would not fall due until the specified work relating to that payment had been completed.

35. This reading of the document arises from a number of different features of the common factual background known to both parties at the date of the contract. These included the facts that the parties were engaged in a

design and build collaboration, that they intended to contract using a form of contract that provided for an agreed programme for the production of design information linked to the building contract programme and that they both intended that there should be a link between the timing of the instalment payments of CFW's design fee with both the approval of the designs by the peer review process and the subsequent start of work on site. Moreover, and critically, Mr Payne stated in his fax of 20 June 2000 that the milestone payments to be made to CFW would be defined as milestone stages which were in turn defined by their design work content.

36. Overall, the parties, throughout their negotiations and discussions, had always closely linked the contract programme for the design and build construction work with the programme for the production of design information and with both CFW's instalment payment programme and the corresponding instalment payment programme to be made to Cowlin by DHE.

37. **Implication.** The second of the three adjudications that arose out of this contract was concerned with a dispute as to whether CFW had caused Cowlin loss by failing to carry out its design services by delay in the delivery of design drawings resulting in a delay in Cowlin starting construction work. This required the adjudicator to determine the same issue as now arises, namely what were its obligations as to time with regard to the production of the drawings.

38. The adjudicator determined as follows:

> *"11. The services that were to be performed by CFW were as described in SFA/99 with Amendment DB2/99. As part of these services, the architect is to identify any key dates that the contractor client wishes to achieve and to advise on the consequences of any subsequent changes on cost and programme. [The adjudicator referred to Note 3 and E5 of DB2/99]*
>
> *12. There is both an express and an implied duty on the architect that he will actively seek out the key dates, advise if these are achievable and notify the contractor of the consequences if these dates are changed or are failed to be met. The architect is therefore under a duty to produce the information that he has been commissioned to produce in a timely manner that will meet the contractor's programme, provided always that such a programme is reasonable and achievable."*

39. This finding is supported by the background facts leading up to the contract being entered into. This is one where Cowlin had made it clear, and CFW had accepted, that CFW's payment instalments were to be subject to the programme of design information which was to be clarified and agreed between CFW and Cowlin. This programme was itself derived from the contract programme taken from Cowlin's contract with DHE. The contract programme that was discussed at the first Design Meeting was one which CFW stated they had no problems with and CFW then drafted and redrafted the payment milestones schedule based on the contract programme since it was by then obvious that the design information programme was not compatible with that underlying and fundamental document.

40. Against that factual background, and given that the contract conditions required CFW to identify the key dates that Cowlin had to achieve and, by necessary implication, do all that it reasonably could to enable Cowlin to achieve those dates, it goes without saying and is necessary to give business efficacy to the contract to imply a term that CFW will carry out its design obligations so as to not only deliver the drawings by, at the latest, the dates provided for in the milestone schedule but also to deliver them in a way and in accordance with a delivery timetable that would enable Cowlin to comply with its contractual obligations provided for in the contract programme.

41. **Revised contract programme.** On 6 July 2000, Cowlin issued a revised contract programme the principal change on which was a delay in the start of work on site by two weeks from 24 July 2000 until 7 August 2000. This had no substantial effect on CFW's obligations since the milestones schedule was not changed as a result. However, the implied term requiring CFW to carry out its own design work so as to enable Cowlin to comply with the contract programme related, after 6 July 2000, to this revised programme with its slightly later start date.

42. **Meaning of contract terms.** The meaning to be given to those provisions may therefore be summarised in this way:

(1) The payment schedule was to be read with the contract programme, being the revised version of that programme issued on 6 July 2000.

(2) The general arrangement plans and sections and block elevations for sections 1, 2 and 3 would be prepared, completed and approved by, respectively, 10 July 2000 and 7 August 2000;

(3) The designs for sections 1, 2 and 3 would be prepared and made available for approval by Pick Everard at times that would enable the drawings to be made available to Cowlin having been approved at times that would enable Cowlin to start construction work on 7 August 2000; and

(4) The design information would be provided in a form, to the necessary level of detail and by the necessary dates as would reasonably allow all necessary pre-construction consents to be obtained and for the starting and completion of the units in accordance with the contract programme. This required the designs to be presented in a form that meant that the overall design was substantially complete;

(5) Each separate instalment would be paid on the stipulated date but it was a condition precedent to each payment that the work attributed to that payment had been completed so that any delay in completion would lead to a corresponding postponement of the payment obligation.

43. CFW contended that the only contractual obligation with regard to the timing and programming of its design work was that it had to exercise reasonable skill and care in carrying out the design work it undertook. In other words, it had to perform its design services in accordance with the generally accepted standards of the profession with regard to the content of its designs, the manner in which it carried out its design work, the timing of the issue of any designs and the time taken to perform any design services.

44. CFW's submission was, in summary, that the provision of professional services were ordinarily only subject to this general obligation to exercise reasonable care and skill. The obligation contended for by Cowlin was a contractual obligation involving strict liability and amounted to a warranty that it would perform its design services by the stipulated time and within the stipulated timescale whether or not this was possible or feasible. Such an obligation could only arise from an express and directly imposed contractual obligation but no such obligation had been agreed to.

45. Moreover, CFW contended that it was not the master of its own destiny in relation to the finalisation of its designs. This was because the completion and approval of any of its designs was susceptible to the outside influence of a number of different sources. The principal such sources were the design input that was required from other consultants to enable the overall design to be completed and co-ordinated; the approval process imposed by Cowlin who initiated many changes and variations to the design work it provided; the cost-saving measures Cowlin had provided for when reducing the size of its tender, many of which CFW was only made aware of during the approval process; and the unduly onerous peer review process initiated by Pick Everard which was both prolonged and involved many further changes to the designs.

46. CFW relied on **Greaves (Contractors) v Baynam Meikle**[1] in support of its submission that strict liability is rarely imposed on a professional and, where it is, these results from both clearly expressed contractual obligations that arise in the unusual situation where there is a perceived necessity for such a provision. In that case, a contractor, subject to a design and build obligation in relation to a warehouse, engaged a structural engineer to design the structural floor. The floor was known to be required to support the movement of fork-lift trucks but the design was inadequate to take their weight and cracked. It was held that the structural engineers' contract contained an implied term, implied by virtue of the actual intention of the parties, that the floor, as designed, would be fit for the purpose of supporting the movement of fork-lift trucks both across and on it. Lord Denning MR explained that it would not be reasonable to imply, as a matter of law, a strict obligation of that kind into a professional relationship involving the provision of professional services. However, in this case, he stated: *"… the evidence shows that [the parties] were of one mind on the matter. Their common intention was that the engineer should design a warehouse which would be fit for the purpose for which it was required. That common intention gives rise to a term implied in fact."*[2]

47. In this case, the evidence showed that both parties were of the same mind, namely that the design work should be carried out in a way that would facilitate Cowlin's carrying out of the work so as to accord with its contract with DHE. Mr Payne's critical faxes dated 20 June 2000 which he sent to Mr Spiller, stated that CFW would be producing the drawing information to suit Cowlin's building programme. Mr Spiller accepted in evidence that that document was the primary document to which CFW was working and that Cowlin was

1 (1975) 4 BLR 4, CA.

2 at page 61.

concerned to ensure that CFW would perform its design work so as to comply with both the design setup programme and the contract programme. Mr Payne, in cross-examination, said this: *"… what we needed to put in our appointment document was a schedule of drawings and dates when they would be completed by. So that became our design programme which was attached to our appointment document."*[3]

"Q. You at least accept that, in accordance with your schedule, this milestone schedule, the design works had to be finished at some time before 7th August 2000 for areas one to three?

A. For the items listed there, yes."[4]

48. It follows that both parties were concerned to ensure that CFW's obligations with regard to the timing of design production would enable Cowlin to perform its contractual obligations. At the Design Team meeting, CFW had had the opportunity to raise any difficulties that might arise to make the proposed contract programme difficult to achieve as a result of any difficulty in meeting the target dates it created for the production of design information. Moreover, Mr Worsfold had attended the meetings held on 17 March 2000, 12 April 2000 and 20 April 2000 held by DHE and attended by representatives of both Pick Everard and Cowlin, at which the details of Cowlin's contract, including its proposed contract programme and the savings and specification changes, were all discussed at length and the details agreed. CFW, therefore, must have considered that it could achieve a drawing production programme which would tie in with and facilitate Cowlin's proposed programme of construction.

49. It follows that the parties, in fact, contracted on the basis that CFW would perform its design services so as to enable Cowlin to carry out the contract programme and a term to that effect is readily to be implied into its engagement.

50. CFW would, of course, be susceptible to events outside its control as a result of the need to incorporate into its designs and its design production timetable the input of other consultants, Cowlin and Pick Everard. That does not invalidate the implication of the term in question since, like any other strict obligation as to time, the obligation is negatived by any act of prevention outside CFW's control. In other words, to adopt CFW's own submission: *"In accordance with well-known and settled principles, therefore, any time obligation would be set at large by any prevention event. CFW would simply have an obligation, in these circumstances, to complete its design within a reasonable time taking into account the impact of the acts of prevention."* [5]

51. **Conclusion.** It follows that CFW's contract of engagement included the express, inferred and implied terms set out in paragraph 42 above. Cowlin had, in its pleaded case, pleaded that the critical programme that CFW was to comply with was the design production schedule. This was, on Cowlin's case, based on and compatible with the contract programme. At the trial it became clear that the critical programme which CFW was to work to was the contract programme and that was accepted by the witnesses. Moreover, the design production programme, which had only ever been issued in draft, was not compatible with the contract programme. Cowlin made it clear in its closing submissions that it was relying on the contract and not the design production programme and, in the circumstances of the case that I have just outlined, I considered that Cowlin was entitled to adapt its case in that way without formally amending its pleadings and CFW did not contend that that possible change of case was not open to Cowlin.

52. **Implied term as to reasonable skill and care.** Although Cowlin did not rely on this term, CFW's engagement also had implied into it, both by statute and by the general law, an implied term that it would use reasonable skill and care in carrying out all its professional services for Cowlin. Furthermore, the scope of those services included carrying out all design work so as to enable Cowlin, so far as was reasonably possible, to carry out and complete its contract with DHE. This requirement did not qualify or modify the express, implied and inferred terms set out in paragraphs 42 above that Cowlin relied on. These terms set out in paragraph 42, therefore, had to be complied with irrespective of whether or not reasonable skill and care had been used by CFW, so long as CFW was not prevented from performing them by the acts or omissions of others for whom it had no contractual responsibility.

53. It follows that CFW, as part of its overall duty of care, owed Cowlin a duty to carry out its design work, so far as reasonably possible, at a time, pursuant to a programme and in a manner that would enable Cowlin to

[3] Day 4/44/12 – 17.

[4] Day 4/63/1 – 7.

[5] Written opening submission, paragraph 10.

complete its contract with DHE in accordance with its terms both as to the work executed and as to the timing provided for in that design and build contract.

3. Issue 2: Did CFW Breach the Terms of Its Engagement in Failing to Produce the Drawings Necessary to Allow Construction to Commence on North and South Avon Until Shortly Before 20th October 2000?

54. **Introduction.** The contract programme provided that the contract period of 102 weeks would start with the order to proceed on 6 June 2000, that the final design for the north and south Avon sites would be completed by 23 June 2000 and that the peer review and approval of the design would be completed by 14 July 2000. South Avon was to be the first site on which construction work was to start and on which 24 units were to be constructed. At that site, the pre-construction work on site, which would include site investigation work, the setting up of the site, temporary fencing construction, the location of external services and the construction of temporary roads, would be undertaken in the period starting on 26 June 2000 and construction would start on 7 August 2000. At North Avon, the second site at which work was to start, the pre-construction work was to start on 17 July 2000 and construction work on 7 August 2000.

55. Cowlin's contract with the DHE was clear, it provided that; *"[Cowlin to] Complete the design and detailing of part(s) of the Work as specified and provide complete production information (including, as appropriate, fabrication/installation drawings, all design calculations, specifications etc.) based on the drawings, this specification and other information provided, liaising with the [Project Manager] and others as necessary to help ensure co-ordination of the work with related buildings and services.*

All drawings should be provided at 1.50 scale with 1:5 details of all building envelope elements. All design work is to be substantially complete before the Contractor will be allowed to commence work on site. Production details for North and South Avon Estates is to be provided as part of the tender package.

When preparing the Programme make reasonable allowance for completing design/production information including submission to the Planning Supervisor for comment, inspection by the PM, and any subsequent amendment(s) and reinspection(s). A minimum of 2 weeks should be allowed for the PM to respond to any query or document etc."

56. It was clear, therefore, that work could not start at either site until the peer review process had been completed and Pick Everard gave its consent to construction work starting, which would not be forthcoming until the peer review process was completed satisfactorily. This process was unduly prolonged and Peer Everard was not prepared to give consent for construction work to start at South Avon until 20 October 2000 and at North Avon on 30 October 2000. This consent was notified to Cowlin by letter dated 20 October 2000.

57. This delay in approving the drawings was, according to Cowlin entirely attributable to CFW's failure to produce drawings in conformity with the contract specification and consequent peer review approval. This failure by CFW therefore amounted to a breach of its engagement and resulted in a delay of 10.5 weeks between 7 August and 20 October in the start of the construction work on these two sites. In that period, Cowlin's site establishment was effectively idle and caused approximately £31,000 of unrecovered costs since these resources were not working productively or earning any turnover. A further approximately £54,000 was lost because the construction work was pushed into the winter months and was less productive in consequence. This resulted in further loss of turnover.

58. **CFW's case.** CFW's starting point was that it had no obligation with regard to the dates by which it had to produce the designs for South and North Avon. If, contrary to that case, it had to produce designs for these two sites so as to enable Cowlin to obtain peer review approval and permission to commence work by 7 August 2000, any delay in achieving these milestones was caused by a series of related difficulties which all amounted to acts of prevention:

(1) It was not possible in the time available to produce the necessary detail and, in any case, this timetable was even more onerous than the contractual timetable;

(2) There were delays in receiving much needed detail from other design team members;

(3) The approval process was unduly and unreasonably prolonged, whether as a result of Cowlin or Pick Everard or both;

(4) Pick Everard insisted on a series and continuing number of changes which were not, as suggested, needed corrections to allow the designs to accord with the contract specification and drawings but were variations to that outline scheme. These needed time to incorporate into the designs;

(5) Cowlin also insisted on a series and continuing number of changes which, again involved further time to incorporate them. These included changes required to reinstate details provided for by the contract specification which CFW had reasonably omitted as part of its obligation to attempt to make reasonable cost savings by changes to or omissions from the contract specification or other design engineering methods. Cowlin also was late in supplying essential details needed from its subcontractors and suppliers to enable the design to be completed; and

(6) Pick Everard was unreasonable in not allowing construction work to start on site at both South and North Avon until 20 October 2000.

59. **Cowlin's case.** Cowlin responds by both procedural and factual reposts. Procedurally, it contends that none of CFW's submissions or lines of defence were pleaded on issues on which CFW had the burden of proof. Factually, it contended that the entire cause of the delayed start was as a result of CFW's breaches of contract and actions which, in summary were:

(1) The information being produced by CFW was substantially lacking in detail;

(2) Often, what detail there was failed to accord with the tender specification and drawings which had to be worked to. The result was substantial changes were demanded by Pick Everard, a stance it was entitled to take;

(3) The various changes demanded were reasonably needed to correct CFW's errors of design and were not needed to correct design details reasonably provided by Cowlin. These change instructions were not actioned sufficiently speedily by CFW and, on occasion, were not actioned at all by CFW;

(4) CFW did not have adequate resources on the job, it allowed the project to be led and managed by a partner who lacked the capability to undertake those roles and it failed to provide adequate resources. This was a particularly glaring omission since CFW had had a detailed involvement in the initial production of the construction programme and in the planning for the necessary design programme needed to enable the implementation of that construction programme; and

(5) Cowlin attempted as best it could to assist CFW by attempting to persuade Pick Everard away from insisting upon its entitlement to peer review a completed design substantially in accordance with the contract and to refuse to permit a start of construction work on site until the designs were substantially complete, in both cases with only limited success.

60. **Pleading and burden of proof.** I must first determine whether any or all of CFW's case was sufficiently pleaded and on whom the burden of proof lies in establishing the cause of the apparent delay between 7 August 2000 and 20 October 2000 in starting construction work on site at South and North Avon. As to the pleading issue, I ruled during the trial that a general case of prevention had been pleaded by CFW following objection by Cowlin to lines of cross-examination on this topic being advanced by counsel for CFW.

61. My ruling was based upon passages in CFW's reply document in both its previous and in its finally amended form which asserted that such delay as had occurred was caused by acts of prevention for which CFW was not responsible. Such delay as had in fact occurred was caused by input into CFW's design work which it was not responsible for, particularly input from Cowlin, other consultants and from the peer review approval process including any variations required as a result of that process. Although particulars had been sought of these generalised allegations, none were provided save for six instances of alleged late provision of details by Cowlin which all occurred some weeks after the necessary approval for construction work to start had been provided by Pick Everard on 20 October 2000.

62. **Procedural ruling.** On the second day of the trial, I ruled as follows: *"I do regard there [as] being advanced [by CFW] a general case that the finalisation of the design drawings to be produced pursuant to the design set up programme were dependent upon the input from, amongst others, DHE's approval [and to] to variations as pleaded … . Those are, however, very general allegations that do not identify in any way what the nature of the variations were and how that approval process delayed any particular set of drawings, and in the absence, as apparently there is, of expert evidence, I regard the case at the moment as being one which is only being advanced in very general terms. If, therefore, reliance is sought in closing submissions on a great deal of detail to make good in any more detailed way than the general way I have summarised, I regard that as not being within the ambit of the present pleadings and that that more detailed case is not currently open to be advanced."*

63. **Burden of proof.** CFW did not seek during the trial to advance any more detailed a case than that summarised and therefore its case that it advanced in closing submissions remained open to it. What it did submit, however, was that the case advanced by Cowlin was open to the same objection, namely that without a fully particularised case as to why the failure to start work until 20 October 2000 was attributable to CFW's design delays, Cowlin's case failed at the outset. CFW contended that Cowlin, if it was to be allowed to advance a positive case that CFW's breaches of contract caused the delay in question, was required to plead a case which identified each particular drawing that was finally produced late, each respect in which the drawings that were produced were deficient or ignored Pick Everard's requirements and each relevant date. Moreover, Cowlin should have provided particulars of all acts or omissions by CFW that amounted to failures by CFW to comply with its contractual obligations. None of this particularisation had been provided. Moreover, no expert evidence was being advanced on any of these matters, a fatal objection to Cowlin's advancement of this case.

64. Cowlin's riposte to these submissions was that they were misconceived since they amounted to a submission that Cowlin had to prove a negative, namely that it had not prevented CFW's due performance of its design programme. It also submitted that although the overall burden of proof lay on Cowlin to establish both breach and its direct link to Cowlin's claimed loss, it could discharge that burden, in general terms, and, if it did so, the evidential burden of proof passed to CFW to show that, in fact, the delay was caused by acts of prevention beyond CFW's control or risk. That required detailed evidence but no such detailed case had been pleaded or advanced.

65. **Conclusion, pleading and burden of proof.** I conclude that I was right to rule that CFW was entitled to advance and rely on a general case that it was prevented from performing its contractual obligations by acts of prevention outside its control but could not seek to fill out that general case with detailed particulars culled from the documentary or oral evidence advanced at the trial. Equally, CFW is entitled to seek to discharge any evidential burden thrown upon it relating to acts of prevention in the same way and with the same limitations. For its part, Cowlin may advance a case by detailed particulars culled from the evidence but may succeed in its case if the generalised evidence supports it and the resulting shift of the evidential burden of proof passing to CFW is not then discharged by the generalised evidence CFW relied upon.

66. In reaching this conclusion, in relation to the state of the pleadings and the burden of proof in relation to both the causal nexus contended for by Cowlin and to any response by CFW that the loss contended for by Cowlin was not attributable to CFW's breaches of contract since it resulted from acts of prevention outside its control, I have in mind this reasoning from the decision of Judge Humphrey LLoyd QC in **Bernhards v Stockley Park**[6]

"(1) Whilst a party is entitled to present its case as it thinks fit and it is not to be directed as to the method by which it is to plead or prove its claim whether on liability or quantum, a defendant on the other hand is entitled to know the case that it has to meet.

(2) With this in mind a court may – indeed must – in order to ensure fairness and observance of the principles of natural justice – require a party to spell out with sufficient particularity its case, and where its case depends upon the causal effect of an interaction of events, to spell out the nexus in an intelligible form. A party will not be entitled to prove at trial a case which it is unable to plead having been given a reasonable opportunity to do so, since the other party would be faced at the trial with a case which it also did not have a reasonable and sufficient opportunity to meet.

(3) What is sufficient particularity is a matter of fact and degree in each case. A balance has to be struck between excessive particularity and basic information. The approach must also be cost effective. The information may already be in the possession of a party or readily available to it so it may not be necessary to go into great detail."

In this case, the general nature of each party's case is clearly pleaded, the nature of the case, that in general terms causation is or is not established on defined grounds, is also clearly pleaded and any further information either party fairly needed to advance its respective contentions was readily available to it and no further detail was needed.

67. **Relevant evidence.** The history of CFW's involvement with the project started in about March 1999 when CFW had been invited to act as DMD's architects on the design and build project that it was proposing to submit a tender for. From the outset, Mr Worsfold was the CFW partner who led the CFW team working on

[6] (1997) 82 BLR 39, at page 76.

the Mathew and Avon Estates project. During the rest of 1999, Mr Worsfold received the full tender documentation relating to architectural matters and prepared an architectural statement which DMD included in its tender submission which was submitted in January 2000. This showed that CFW had obtained a detailed knowledge of the project and of the amount of architectural design work that would be required, particularly since the submission listed in some detail the drawings that would be prepared. CFW then assisted DMD to prepare savings from the tender which involved further detailed work on the architectural aspects of the project. At that point, in March 2000, DMD went into receivership and CFW's involvement with the project lapsed, with the practice having carried out work to the value of £22,524.75, none of which had been paid. This fee was for what CFW described in a contemporary internal document as being where *"some 90% of a project had been completed"*.

68. CFW was approached by Cowlin to become the lead design consultant in the project since Cowlin had agreed to take over DMD's tender, rework it and resubmit it with the intention of Cowlin taking over the project. The intention was that CFW, with its detailed knowledge of the project, could take over and build on that knowledge so as to minimise the further time that Cowlin would need to negotiate and complete a tender for and enter into a contract with DHE.

69. Following that approach from Cowlin, Mr Worsfold attended meetings with Cowlin and DHE and its consultants and assisted in the successful, detailed negotiations leading to the agreement of a successful tender which involved further significant reductions in the scope of work, all of which Mr Worsfold provided architectural advice in relation to the omissions and their effect on cost and time so as to enable Cowlin, through Mr Spiller, Mr Clark and other relevant members of its management team, to conclude the negotiations. The tender included a draft contract programme which had been devised with input from Mr Worsfold who advised on what further design input would be required and the time that that work would take CFW to perform.

70. Once CFW obtained a firm indication that it would be appointed the lead consultant, once Cowlin's tender was accepted in later April 2000, design work started and the discussions needed to finalise the terms of its engagement continued and were concluded. The next significant event was the first Design Team meeting held on 13 June 2000 attended by Mr Worsfold and Mr Campodoic on behalf of CFW. CFW had received, before that meeting, a copy of the proposed contract programme and a design production programme that Cowlin had prepared. These programmes were clearly intended to be the basis of a discussion and agreement by all members of the design and construction team as to how the project was to be undertaken.

71. By the time of that meeting, Mr Spiller had provided Mr Worsfold with a copy of the reissued specification that Pick Everard had issued which contained all amendments to the original tender documentation introduced during the tender reduction negotiations conducted both by DMD and Cowlin. CFW is minuted as not anticipating any problems with regard to this programme. That view must have been based on Mr Worsfold's advice, itself based on his detailed knowledge of the project. Since Mr Worsfold would have been aware of the critical features of the project whereby the complete design had to be submitted to Pick Everard and approved as part of the peer review process and that construction work would not be allowed to start until that process had been completed, Mr Worsfold must be taken to have considered and accepted that there was sufficient time between that meeting and the then projected date for the completion of the South and North Avon designs, the 23 June 2000, the date shown on the draft programme, to enable Cowlin to submit appropriate design package to Pick Everard by 30 June 2000, a date also provided for on the draft programme.

72. There was a further slight delay and a revised contract programme was issued on 6 July 2000 which merely moved the various dates shown on the first version forward by one week. There was no alteration to the design period provided for on the contract. However, the CFW milestone dates set out in the engagement had been agreed by 6 July 2000 and these showed that the relevant designs for South and North Avon would be completed by 7 August 2000, no doubt to coincide with the projected start of construction work at those sites shown on the revised construction programme. This was an obligation that CFW clearly accepted that it could comply with and it also undertook to do so since it responded to, and accepted, Cowlin's offer to contract with an acceptance which included this confirmation: *"I have now liaised with the team in our office who will be producing the drawing information to suit your building programme …"*.

73. It is clear, taking into account the factual background to this engagement and the detailed involvement of Mr Worsfold throughout, that the obligation to complete design work by 7 August 2000 and the corresponding obligation to carry out its work so as to enable Cowlin to comply with its own contractual obligation could be read together since what was referred to in the milestone document as completion of the general arrangements and block elevations was completion of the design process including any amendments necessitated by the peer review process such that the entire design package had been approved in time to allow for a start on site on 7 August 2000.

74. It is also clear that it rapidly became obvious to both CFW and Cowlin that the complete design package for South and North Avon would not be ready for a complete submission for peer review by late June 2000. Instead, the design package was submitted in stages. Sufficient drawings were issued to allow a peer review process to start and be completed by 24 July 2000 and a Peer Review Report was issued on that date. The peer review team concluded that: "On the basis of the information provided, we are unable to confirm that the design will achieve the quality, functionality and performance of the brief." In consequence, CFW was urged to review all the drawings issued and to finalise the outstanding details and schedules and Mr Worsfold promised these by 7 August 2000.

75. CFW is a small partnership in which all the working architects are partners. The design work was split between three of the partners who used Computer Aided Design, or CAD, methods. The site layouts were undertaken by Mr Payne, the sections and detail by Mr Murray and the floor plans by Mr Campodonic. Mr Worsfold led the project team and was CFW's point of contact with Cowlin. This was a full-time job, certainly in the early months, given the volume of meetings, drawing issues, tracking sheets and general liaison that had to be undertaken. Mr Payne estimated that the three partners undertaking the drawing work spent 75% of their time between June and October on this project but the records of the partnership adduced in evidence suggested that the other work they were doing was sufficient that they could not have spent anything like that amount of time on the project. This view was supported by the evidence of Mr Clark who regularly went to CFW's offices where the partners all shared an open plan office and which therefore gave him every opportunity to confirm with his own eyes the impression he obtained from observing the progress of the design work. His comment, based on innumerable visits to those offices, was that the problem was that there were not enough people involved in the design and checking process, in other words he observed that the delays were down to a resource problem within CFW's organisation. This view was confirmed by Mr Worsfold, particularly as shown from comments he made to Mr Clark whilst the design crisis that had led to an inability to start work was at its height. These comments were to the effect that he was not being given anything like sufficient backup or help by his partners.

76. At an early stage in the design process, Pick Everard started to send back to Cowlin adverse comments about many of the details shown on the drawings the peer review team were receiving from CFW via Cowlin . Mr Clark explained that as soon as the first comments came back to him, he initiated a tracking sheet procedure in which he carefully examined each comment to decide whether it related to an apparent departure in the CFW design from the contract documentation, or was a comment which was misconceived or was a request for a variation or extra. Only comments in the first category were transcribed onto a tracking sheet and sent on to CFW to implement by amending the relevant detail on the next issue of that drawing.

77. Mr Clark was pressed in cross examination with the suggestion that many tracking sheets contained comments about drawings that had already been revised and reissued and that many more amounted to variations in the scope of work being instructed by either Pick Everard or Cowlin. This large number of instructions did delay the execution of the design process, it was suggested, but were acts of prevention since they were attempting to vary and add to the work they related to. Mr Clark was adamant, clear and cogent in answering these general suggestions. The tracking sheets contained only those comments made about earlier drawings which had not been picked up and which raised genuine concerns or complaints about a departure from the contract specification or a contract drawing. The large number of tracking sheets was necessitated by the often repeated instances of CFW not taking into account the comments they contained and a consequent reissue of a defective or incorrect drawing.

78. On 11 August 2000, CFW was provided with a long list of outstanding design work urgently required. This included details of the windows, thresholds and front doors, garages, drainage layouts, an updated

specification, completion of site layouts and elevations and, finally, somewhat plaintively, "Everything else!!". Throughout August, CFW struggled to deal with the large number of tracking sheets but it failed to complete the task. This was partly because many of the amendments being made were themselves unacceptable. A typical comment was made by White Young Green, the design team's engineers, to Mr Worsfold in a letter dated 15 August 2000 where it was stated that the updated North and South Avon drawings had failed to incorporate the advice that that practice had already in an earlier letter dated 26 July 2000 that related to joist centres shown on earlier revisions of the relevant drawings.

79. A further set of drawings was issued for approval by CFW and were the subject of a meeting held on 22 August 2000. This issue led Cowlin to ask Pick Everard for permission to formally take occupation of the site but permission was refused in a letter dated 29 August on the grounds that the designs in the relevant areas was not complete and, as a subsidiary ground, that the peer review process was, in consequence, also incomplete. This led to a huge argument within the CFW practice. The three partners who were doing the design work were incensed and clearly attributed this, as they saw it, unwarranted rejection of their drawings, to a combination of unreasonable review work by Pick Everard, a request for further variations by Pick Everard and Cowlin and Mr Worsfold's interference in the drawings by himself amending them erroneously and in not providing them with full, up to date and accurate versions of the design criteria shown on the prevailing version of the specification and drawings. Evidence of this tension was preserved in a note written by Mr Campodonic to Mr Worsfold and left for him at the office just before the August Bank Holiday weekend. This note read:

"Tim

TIDWORTH

Regarding the above, Jeff, Darren & I managed to achieve the target of 22 August 2000 after some very long & arduous days drawings.

*Colin [Clark] rang us to express his views that if the 22nd August package is not enough to enable Cowlin to start then they must be f***ing barmy.*

However, on a far more serious note, if you come into the office over the bank holiday weekend, it is essential that you DO NOT touch the Tidworth drawings. We, (all 5 of us) must sit down with you and discuss, amongst other things, the technical standard & accuracy of your drawing work. Many hours were spent last week correcting your work, and as a practice, I feel (and I am sure that the other 4 feel also) that we cannot continue in this manner for the next 10 years, and therefore it is vital that you acknowledge there is a serious problem which must be properly addressed.

I have saved several of these if you require examples, but there have unfortunately been too many discovered to save them all.

For the sake of the Practice and everyone's sanity, we must all speak soon regarding this.

Neil."

80. The significance of this disagreement was somewhat downplayed by the CFW witnesses. However, it was clear that the other partners regarded Mr Worsfold as being significantly responsible for the difficulties that CFW were experiencing in completing the drawings satisfactorily, both by virtue of his own unsought contributions to the design work and by virtue of his having brought onto the practice's shoulders a drawing commitment in a timescale which was not achievable.

81. The enormous effort provided by CFW in August did not have the desired result. Pick Everard did not consider that the designs were sufficiently complete or accurate to allow for peer review approval or for a start on site. A second peer review report was issued on 25 August 2000 and this was very much in the nature of an interim report since it reported that CFW was currently progressing the design to achieve the original scheme proposals and that it had responded to many of the points raised by the peer review but the review was unable to confirm whether they had all been actioned. This was followed by a letter from Pick Everard to Cowlin dated 29 August 2000 which confirmed that construction work could not start on either site because of the amount of incomplete and unsatisfactory outstanding design work that still remained.

82. At the Design Team meeting held on 12 September 2000, CFW stated that a complete set of construction drawings would be issued for North and South Avon by 14 September 2000. This intention was not achieved because, on 29 September 2000, Pick Everard wrote to Cowlin and informed it that construction work could still not start on site because a significant amount of design work remained outstanding in terms of details,

schedules, internal layouts as described in the Architectural Method Statement included in the tender and contract which, of course, CFW had largely drafted.

83. The work of finalising the drawings at both sites continued and, at a Design Meeting held on 18 October 2000, the revisions to the South Avon drawings were appraised so that an approval to start on site could be given. Pick Everard recommended to DHE at the meeting that all the information that had been presented was now acceptable and that Cowlin should be allowed to start on that site. A similar appraisal was undertaken on the North Avon drawings and Pick Everard stated that it could give an answer by the middle of the following week. That led to the letter of 20 October 2000 from Pick Everard confirming permission for Cowlin to start construction on the South Avon site and requiring CFW to agree road and housing layouts DHE by 27 October 2000. That agreement would enable work to start on the North Avon site on 30 October 2000.

84. **Findings.** There is no reliable evidence to be found in the contemporary documentation that any of the delay in finalising the designs and obtaining approval from Pick Everard was associated in any way with Pick Everard's unreasonable failure to approve the submitted designs or to insist on more design work than was necessary to enable peer review approval to be obtained and for work to start. Furthermore, there is no credible suggestion in that documentation that time was taken up providing revised designs to accommodate late changes of mind or variations, whether instigated by DHE, Pick Everard or Cowlin. Finally, there is no evidence that CFW was held up in any way by the late receipt of design input from other members of the design team with a consequent difficulty in co-ordinating the designs or finishing the architectural designs. The whole tenor of the correspondence, minutes and evidence of Cowlin's witnesses was to the effect that the only reason for the delay in obtaining permission was that the designs were incomplete when first submitted prior to 24 July 2000 and that they remained substantially incomplete when submitted in late August 2000 following the CFW 'blitz' in the preceding four weeks or so to enable the South and North Avon drawings to be substantially completed as soon as possible. There was then a lengthy period between that date and about 18 October 2000 when the designs were slowly finalised and corrected and the many and repeated changes called for to correct errors or omissions through the tracking sheet process were slowly accommodated. When finally substantially completed in late October, 2000, Cowlin was able rapidly to obtain peer review and Health and Safety permissions for the designs and to start work on site.

85. It is also highly significant that CFW did not point to any specific unreasonable failure to approve, any particular variation or amendment that was required that did not amount to the correction of an error, to any particular instance of delay caused by Pick Everard, Cowlin or any other member of the design team or to any requirement to reinstate a cost saving omission from CFW's designs.

86. It follows that the evidence overwhelmingly points to the entire period from 7 August 2000 to 20 October 2000 as being a period when Cowlin should have been working on site at South and North Avon but were prevented by not receiving the relevant permission from Pick Everard. That permission was delayed from a date towards the end of July 2000 until 20 October 2000 exclusively by CFW's failure to produce an acceptable design package. CFW did not seek to contend that it could not have produced such a package in time for peer review approval to be obtained by 24 July 2000 and, indeed, it presented a package of design details to Pick Everard for such approval to be obtained in time for the initial peer review process to be completed by that date. It follows that there was a breach of contract leading to the whole period of delay and that no act of prevention occurred to obviate or ameliorate that apparent breach. CFW are liable for the cost consequences of the delay of 10.5 weeks in Cowlin starting construction work at both South and North Avon.

4. Issue 3: Did CFW or Cowlin Repudiate the Contract in August 2001?

87. **Introduction.** CFW purported to terminate its contract with Cowlin in a letter dated 29 August 2001. The letter indeed purported to achieve that termination by accepting what it contended was Cowlin's repudiation of the contract in withholding payment of two invoices, in imposing a variation to the payments schedule, in seeking to exercise a right of set-off when that was excluded by the terms of the contract and by virtue of the professional relationship between the parties having broken down, by inference due to Cowlin's behaviour. Cowlin, through its solicitor, immediately thereafter, in a letter dated 31 August 2001, made a proposal that CFW should immediately resume work and refer the dispute between the parties as to payment to adjudication. CFW replied to that letter by its solicitor's letter dated 3 September 2001 accepting that the

dispute between them should be referred to an adjudicator but declining to provide any further services under the contract.

88. The first issue arising from this termination is, therefore, whether Cowlin had repudiated the contract on or before 29 August 2001 in a way that entitled CFW to accept that repudiation and, if not, whether CFW's erroneous assertion that it was accepting a repudiation by Cowlin and declining to carry out further services under the contract itself amounted to a repudiation of the contract by CFW.

89. **Relevant evidence.** Once work started on the South and North Avon sites on 20 October 2000, there remained significant design details to be finalised, approved and issued. Furthermore, the two remaining sites required their designs to be carried out, completed and approved. Under the milestone payment schedule, the completed designs for these two sites, at West and East Wylie, should have been completed in 3 stages by 2 October 2000. Construction work was programmed to start at West Wylie by 14 August 2000.

90. On 24 October 2000, Cowlin made a milestone payment of £30,000 but Mr Spiller made it clear, in a covering fax, that this payment was not contractually due to CFW since all the design work on which it was dependent had not been completed. The payment was being made as a gesture of good will to Mr Worsfold personally in appreciation of the work that he had put into the project. This was in contrast, as he explained in evidence, to the other CFW partners who had by then largely stopped working on the Tidworth project

91. Mr Worsfold provided a list of dates for the remaining design details to be supplied at South Avon in a letter dated 31 October 2000 but on 19 November 2000, Mr Clark wrote in strong terms protesting at what he regarded as yet further failures by CFW to meet its contractual commitments. Meanwhile, Pick Everard was persuaded that sufficient progress towards completion of the designs at West Wylie had been achieve and gave Cowlin permission on 10 November 2000 to commence demolition works on that site on 13 November 2000.

92. Cowlin was becoming more and more concerned at the continuing lack of progress in completing the design work on all four sites. On 1 December 2000, Mr Clark wrote to Mr Worsfold complaining about the services being provided, the resources being applied, the defects in the design works actually undertaken and what seemed to him to be the ever lengthening delays in completing the design work. Mr Worsfold's response was to indicate that the current month's milestone payment should be made before Christmas 2000 in a fax dated 7 December 2000. In response, on 8 December 2000, Mr Spiller informed Mr Worsfold in a letter that Cowlin was unable to make further payments to CFW because the design work on which they were dependant had not been finished. The letter suggested that CFW was seeking to apply commercial blackmail in an attempt to obtain payments to which it was neither contractually nor commercially entitled.

93. Cowlin soon afterwards informed CFW that it needed all construction drawings for East Wylie by 22 January 2001. At this point, a bitter partnership dispute between all partners except Mr Worsfold and Mr Worsfold broke out. The partnership was a singularly unauthoratarian one since no partner had senior partner status. The trigger for this fresh outpouring of bitterness was somewhat unclear from the evidence of all the partners but the contemporary documents throw much more light on it.

94. The immediate cause was clearly the partners' continuing and growing frustration and anger at the way the Tidworth project was going. They could see that there were continuing and escalating problems in getting the designs finished, growing problems as to getting any more payment, growing frustration at what was clearly a huge loss-making contract which was continuing to drain the partnerships limited resources and on-going and escalating anger at Mr Worsfold's personal and professional conduct. Mr Worsfold had, as he accepted at the time and in evidence, a drink problem which the partners regarded as affecting his professional performance. He could not use the CAD method of producing drawings and much of the design work he did the partners regarded as being suspect and unreliable. They also clearly felt that he had lied to them repeatedly about the problems that the Tidworth contract was experiencing, had made serious errors in agreeing to a design programme that could not be delivered with the partnership's stretched resources and that it was only by their efforts, at the expense of their other work, that the South and North Avon designs had been carried out.

95. The dispute had been simmering since at least August 2000 but it blew into the open at various meetings held in the weeks leading up to 14 December 2000 and then at meetings held on 14 December 2000 and 18 January

2001. These meetings were held purely to discuss Mr Worsfold, the other partners' adverse views about his performance within the partnership and many other matters of concern about him. The meeting on 14 December 2000 had been preceded, not long before by three-way meetings between Mr Campodonic, Mr Murray and Mr Worsfold and by separate meetings by the four partners other than Mr Worsfold.

96. No doubt, the recently received letter from Cowlin that no further fees would be paid whilst the design work was outstanding was one of the catalysts for these meetings, particularly that held on 14 December 2000. Only the two later meetings were minuted. What is clear from the informal minutes that were taken of these two later meetings is that relations between Mr Worsfold and the other partners had already irretrievably broken down by the 14 December 2000 and that the meetings were, in effect, an extended way of bringing his professional relationship with them to an end. The first meeting ended inconclusively with the partners requesting Mr Worsfold to arrange a further meeting in the new year. It would seem that, in reality, the partners were inviting Mr Worsfold to come forward with proposals for his leaving the partnership.

97. However, it is clear that Mr Worsfold did not for some time appreciate that his time in the partnership was limited. He clearly was spending more and more time out of the office, immersed in the Tidworth project and his partners, possibly as a reaction to his unwillingness to face up to what they regarded as the inevitable, clearly distanced themselves from that project. For these reasons, the remaining design work became more and more delayed. The problems were recognised at a conventional partners' meeting held on 8 January 2001. At that meeting, the question of programming of work within the partnership was discussed and the minutes record Mr Campodonic as stating that: *"Neil noted that there is an awful lot of work to do. Noses to the grindstone, don't ever go home, grow an extra arm, gird the loins etc."*

I am satisfied that this is a reference to the Tidworth contract and not to CFW's work generally and that the relevant minute is recording what amounts to a warning to Mr Worsfold to bring the Tidworth contract under control and to start acting as if he was a CFW partner, albeit the minute is worded in what might be described as CFW in-house code.

98. The partners then met for a second minuted meeting to discuss Mr Worsfold on 18 January 2001 and they all rounded on Mr Worsfold. The purpose of the meeting was stated in the minute taken of it to be to address and discuss the continuing concerns that the partners had as to Mr Worsfold and his contribution to and position in the practice. Although the matters about which the partners were complaining related to several other matters and to Mr Worsfold's personal behaviour over a number of years, it is clear that feelings were running even higher about the Tidworth contract and Mr Worsfold's role in it. Again, the meeting broke up inconclusively.

99. I am satisfied that Mr Worsfold's effective role in the Tidworth project ended at or soon after this meeting. He soon afterwards was given an ultimatum by Mr Campodonic and reached agreement with his partners soon afterwards and retired from the partnership with effect from 19 March 2001. With great reluctance and much ill-feeling, the remaining partners accepted that they would have to run the Tidworth project themselves. Mr Murray assumed responsibility for the project. An indication of the remaining partners' acceptance that the project was in dire straits and the design work in continuing disarray is to be seen from two documents dated 5 April 2001 and 11 April 2001. In the first document, Mr Murray wrote to Cowlin in response to its strenuous complaint about continuing delay in completing the design work: *"With regard to the resources of the practice, I can assure you that whilst we were somewhat taken aback by the amount of retrospective works required following Tim Worsfold's departure (and I understand this is our concern not yours) we feel we have now made significant gains in this area. Part of our problem of course was not knowing exactly how much work was required, which is why we failed to meet deadlines offered on tracking sheets etc …".*

The second document was a report from CFW to the design team which included this passage: *"Further to the departure of Tim Worsfold from CFW, Jeff Murray has assumed responsibility for the Project; the transition has highlighted several areas of concern to the practice, it has become evident that items such as tracking sheets, site queries and clarification over elements such as external finishes etc. have slipped behind programme. CFW are aware of their responsibilities to supply such information and endeavour to rectify the backlog. …*
East Wylie
Site design ongoing …".

100. It is against this background that the dispute about fees developed. The period following the start of work at South and North Avon was one during which the delays in finalising the remaining design work lengthened, largely because CFW was not providing sufficient resources to the work and because Mr Worsfold's previous inadequate performance as the project architect effectively ceased altogether due to his dispute with his partners The starting point of that dispute had been Cowlin's intimation on 8 December 2000 to Mr Worsfold that no further payments would be forthcoming whilst the design work remained incomplete. Mr Worsfold's reaction was to write to Cowlin on 31 January 2001, Mr Worsfold sent Cowlin an invoice, without a covering letter, claiming fee instalment no 5, which was a sum of £30,000 plus VAT. This instalment was the one described in the milestone as being for the balance of the design work after all other design work had been completed. CFW had been paid, by then, sums equal to the first four of the five design stages, totalling £210,000 and this sum was the last payment for design services that would become payable. At that time, extensive design work remained incomplete or unapproved and nothing further was said by CFW about this invoice for some months. CFW provided no explanation then or since as to why that invoice for the fifth design instalment payment was sent at that time.

101. The invoice stated, on its face, that the sum invoiced was due before 8 March 2001. Nothing further was said by either party about payment of this invoice until August 2001. Nothing, indeed, was said about any other payment until 30 April 2001 when Mr Murray wrote to Cowlin. He had recently taken over the project and he wrote seeking to revise the invoice payment schedule for site works. The letter proposed a rescheduling of the site payments but made no mention of the outstanding invoice. The next step was an invoice dated 2 July 2001 sent by Mr Murray seeking payment of £2,583.33 plus VAT being the first of the proposed rescheduled site payments. There is no record of an answer being sent by Cowlin to either the April letter or the June invoice.

102. Mr Murray stated in evidence that he constantly referred to outstanding payments to Mr Clark who kept fobbing him off with assurances that Mr Spiller was looking into the payment situation. No such conversations were remembered by Mr Clark nor are they referred to in any contemporaneous correspondence. I am satisfied that there was not any reference to outstanding payments and that the next mention of payment was when Mr Murray telephoned Mr Spiller in late August 2001 and asked whether he could call in to see him to discuss CFW's fees. The reason that no earlier mention had been made by CFW of the two unpaid invoices was made clear in Mr Murray's fax to Mr Spiller dated 28 August 2001. This showed what Mr Murray's state of mind was at that time. It stated: *"Outstanding £30,000 fees against East Wylie production information is not a negotiable item, we were promised payment upon providing drawings for construction purposes, this was subsequently amended to submission of peer review and then amended to receipt of peer review report. All of these items have been satisfied and we still await payment."*

103. That statement is tantamount to an admission by Mr Murray that CFW had accepted, in the period following the submission of this invoice, Cowlin's position that the invoiced sum of £30,000 would not become payable, at the earliest, until the peer review report was received from Pick Everard. That state of mind explains why CFW had neither chased up nor sought payment of the sum invoiced by that invoice and had not pressed Cowlin to agree to Mr Murray's proposed revised schedule of payments put forward in April 2001. Thus, in Mr Murray's mind in the summer of 2001, no further payments were due from Cowlin until the peer review report was received.

104. Mr Murray, therefore, put off all discussion of outstanding or unpaid fees until the Pick Everard peer review report was received. This report was dated 17 July 2001 and must have been received soon afterwards by Cowlin and CFW. Mr Murray clearly thought that once it had been received, the two outstanding but frozen invoices should at last be reactivated and that their payment should now be sought. He therefore broached the subject of their payment with Mr Spiller by telephoning him a day or two before 28 August 2001 and Mr Spiller invited him round to his office for an early morning meeting on 28 August 2001.

105. Mr Spiller prepared a brief note for that meeting which contained the rudiments of a proposal that he put forward for negotiating purposes at the outset of the meeting. This amounted to a three-part proposal to the effect that a contra charge of £8,080 would be made by Cowlin, that the fifth milestone payment was not yet due but that the net outstanding sum should be split into 12 parts and paid in monthly stages. This was clearly put forward as an opening gambit of a commercial negotiation over the outstanding payments.

106. Mr Spiller's note showed that £215,166 of the total contract sum had been paid, leaving an unpaid balance of £61,834. Mr Spiller then referred to contra charges that Cowlin was proposing to make against CFW which totalled £8,080.00. Each charge was for a small amount of additional work in different locations that had been necessitated by detailing errors on CFW's drawings. At that stage, CFW was not provided with a list of these charges, Mr Murray was merely informed that they totalled £8,080. This was the first time that these contra charges had been raised by Cowlin. The third component of Mr Spiller's proposal was that the net outstanding balance of the contract sum, being £53,754, should be split into stages with £10,000 being payable immediately, followed by 10 monthly instalments of £2,500 and a final payment of £18,754 on completion.

107. Mr Spiller stated that the meeting did not last long and was not particularly contentious and that apart from asserting CFW's entitlement to the fifth design instalment of £30,000, Mr Murray stated that he wanted to go and discuss the matter with his partners. Mr Spiller did remember disputing that CFW was contractually entitled to any further design payment, indeed it had already been overpaid for design work, and was not entitled to any further payment until the large amount of outstanding design work remaining to be completed had been finished. Mr Murray, on the other hand, believed that there was a degree of animosity at the meeting. However, his account did not differ significantly from Mr Spiller's and he agreed that he left the meeting with Mr Spiller's proposal. He stated: *"When I came out of the meeting what I would say is that we agreed to differ on it and consider it and come back … my parting words would have been along the lines of, "I don't think we're going to get anywhere today, I'm going back to the office, I'll take the opportunity to discuss this [i.e. Mr Spiller's proposal] with my partners and we will then respond to you in due course" – as soon as possible obviously. But I was not in a position to turn round and just agree everything right there and then with Mr Spiller."*[7]

108. Mr Murray telephoned Mr Spiller on his return to his office to seek clarification of some of the details of Cowlin's proposal and then faxed the document from which I have already quoted a passage in paragraph 102 above. This was, in effect a first response and was sent after Mr Murray had discussed the matter with some of his partners. It responded to the three parts of Mr Spiller's proposal by rejecting the contra charges which had to be dealt with as a separate issue, insisted that the £30,000 was non-negotiable since CFW had already agreed to defer its payment until the now received peer review report and put forward a differently structured phased instalment payment schedule for the balance of the unpaid fee. The fax was clearly intended to be a counter-proposal to that outlined by Mr Spiller and had been put forward, as the note ended: *"The above reflects the topics discussed, if there are any other items discussed which I have not mentioned, please let me know. In the meantime, I await your response."*

109. A fuller meeting of the partners then took place and it is clear that the meeting decided that CFW was no longer prepared to continue with the contract. Mr Murray took the advice of the legal helpline at the RIBA the following morning, and CFW did not waive privilege on the contents of that advice, and the partners then met again. A letter dated 29 August 2001 was then sent by CFW announcing that it was terminating its performance immediately. Mr Spiller would only have become aware of this dramatic and previously unannounced changed tack on receiving this letter.

110. The letter purported to accept Cowlin's repudiation of the agreement which was put on four separate but cumulative grounds. These were that the January and July invoices remained outstanding, a breach of clause 5.10 of the SFA/99 agreement; that the proposed withholding was a breach of contract since it precluded set-off or withholding; that the attempted rescheduling of payments was a breach of contract; and that the professional relationship had broken down.

111. CFW's partners elaborated in evidence on what was being referred to in the suggestion that the professional relationship had broken down. This was a general feeling that the partners had. This was based on what they perceived to be Cowlin's general hostile attitude to CFW, on Cowlin's non-payment of outstanding sums and on Mr Spiller's hostility and threats to sue CFW uttered at the meeting on 28 August 2001.

112. **Parties' contentions.** CFW contended that it had accepted Cowlin's repudiation by its fax of 29 August 2001 and that that repudiation arose as a result by each and all of the four matters I have referred to. Cowlin contended that it had not repudiated the contract on any of these grounds and that, in consequence, when

[7] D6/35/29 - /36/18.

CFW declined to resume work under the contract having erroneously treated Cowlin's conduct as repudiatory, it repudiated the contract.

113. **Summary of the Law.** Mr Sean Brannigan, counsel for Cowlin, helpfully summarised the relevant law in a series of submissions supported by authority. Mr Ian Pennicott, counsel for CFW, did not challenge any part of this summary and it is one which I readily adopt as an accurate statement of the law. The summary was as follows:

(1) A party commits a repudiatory breach of contract where he threatens to, or does, breach the contract in such a way "as to show that he does not mean to accept the obligations of the contract any further"[8];

(2) Such a breach occurs:

(i) where the contracting parties have agreed, whether by express words or implication of law that any breach of the contractual term in question shall entitle the other party to elect to put an end to all remaining primary obligations of both parties, i.e. were there is a breach of condition; or

(ii) where the event resulting from the breach of contract has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, i.e. where there has been a fundamental breach of contract[9];

(3) Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations[10];

(4) An absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, without any lawful excuse, is a repudiation[11];

(5) In relation to the failure by an employer to pay an instalment of the contract price:

(i) there cannot be a repudiation if there is no contractual duty to pay the instalment[12];

(ii) failure to pay one instalment out of many due under the terms of the contract is not ordinarily sufficient to amount to a repudiation[13];

(iii) a failure to pay is less likely to be a repudiation if it occurs towards the end of a contract[14];

(6) Where a party affirms a contract after becoming aware of repudiatory breach by the other party, he cannot thereafter rely on that breach in order to discharge his obligation to perform the contract[15]; and

(7) Where one party has failed to perform a condition of the contract, the other party cannot rely on that non-performance if it was caused by its own wrongful acts[16].

114. **Who repudiated the contract?** There can be no doubt that Cowlin did not, but CFW did, repudiate the contract and that CFW's repudiation was accepted by Cowlin.

115. **Non-payment of the invoice for £30,000.** When CFW invoiced Cowlin for £30,000, being a demand for payment of the fifth design fee instalment, no part of that sum was due. The design was nowhere near complete, or substantially complete by 31 January 2001 in relation to any of the four sites and the external works. Therefore, under the terms of the contract, that sum was not due. A sum which was not due under the contract could not be turned into a sum that was due merely by invoicing the employer and stipulating a date by which the invoiced sum should be paid.

116. Moreover, as I have already determined, CFW had accepted that this sum would not be considered as being claimable, or as capable of being demanded, until the peer review report was issued. The first demand for payment of this sum following that publication was made at the meeting on 28 August 2001 and repeated in the fax sent on the following day.

117. **Non-payment of the invoice for £2,583.33.** This sum represented the first instalment of the fee due for site services. This first instalment was for £1,500. The larger sum invoiced was the suggested first instalment payment in the suggested rescheduled payments put forward by CFW in April 2001, a suggested

8 Heyman v Darwins [1942] AC 356 at 378 & 398, HL.
9 Photo Production v Securicor [1989] AC 827 at 849, HL.
10 Woodar v Wimpey [1980] 1 WLR 277 at 283, HL.
11 Mersey Steel & Iron Co Ltd v Naylor (1884) 9 APP. Cas 434, HL.
12 Rees v Lines (1837) 8 C & P 126.
13 Mersey Steel & Iron Co Ltd v Naylor ibid.
14 Cornwall v Henson [1900] 2 Ch 298,CA.
15 Peyman v Lanjani [1985] Ch. 457.
16 Roberts v Bury Commissioners (1870) LR 4 CP 755.

rescheduling exercise which was never accepted by Cowlin. The first instalment was not due since the preceding instalment was also not due. The fact that this instalment was not due appears to have been accepted by CFW since, otherwise, there would have been no need to reschedule the site services payments and, rather than £2,583.33 being due in August 2002, the entirety of the balance of the contract sum, in excess of £30,000. would have been due but such has never been suggested by CFW. This sum was subject, in both parties' minds, to the moratorium that had only just been lifted and it had not been redemanded until the meeting on 28 August 2001.

118. **Parties in negotiation.** It is abundantly clear that Cowlin had never refused to pay either sum. Until the meeting on 28 August 2001, the situation was that Cowlin had large but unsubstantiated claims for delay and a firm belief that nothing further was due until, at the earliest, the completion of all design work and CFW had claims for unpaid fees that it was not pressing until it had completed the design work, whatever its views as to its contractual entitlement. At the meeting on 28 August 2001, Cowlin initiated a negotiation about both its claims and CFW's cross-claims by making a three-part proposal and CFW then made a counter-proposal in its fax sent the following morning. No part of either invoiced sum could be said to have become due, therefore, by the time CFW purported to accept a repudiation based on non-payment of sums due under the contract.

119. **Cowlin advanced a cross-claim or set off which it had no contractual entitlement to do.** In fact, Cowlin never advanced a cross-claim or set off prior to 28 August 2001, the sum put forward at that meeting was being raised for the first time but not as a cross-claim but as one component in a proposal put forward for negotiating purposes in an attempt to settle the disputes then raging.

120. **Cowlin attempted to rewrite the contract payment schedule.** Cowlin's suggested revised payment schedule had been put forward as part of the same negotiation and had never been implemented or forced on CFW unilaterally. Cowlin, in making a rescheduling proposal was doing exactly the same as CFW itself had done in April 2001, a further reason why Cowlin's conduct in suggesting a rescheduled payment schedule was not acting in breach of contract nor evincing an intention not to perform the contract.

121. **Relations had broken down.** There is no evidence that the contractual relationship had broken down save CFW's partners' assertion that it had in evidence. Furthermore, I find that no threat or unjustified pressure was intimated to Mr Murray by Mr Spiller at the meeting on 28 August 2001. In any event, the break down of professional dealings would not have amounted to a repudiation of the contract by Cowlin, even if such dealings had irretrievably broken down. At worst, a complete and irremediable breakdown of the professional relationship would have amounted to a discharge of the contract. Threats by Mr Spiller might, in an extreme case, have amounted to a breach by Cowlin of its implied duty not to impede CFW's performance of the contract or of some implied duty of co-operation but since no such threats, rudeness or unacceptable conduct occurred, this possibility does not arise.

122. **CFW affirmed the contract.** CFW continued to work, without protest, for the whole period from 31 January 2001 until 29 August 2001 and, following the meeting held on 28 August 2001, evinced a clear intention of proceeding with the contract in making proposals for the rescheduling of outstanding payments without any suggestion that it would cease work if agreement could not be reached. It follows that any repudiation by Cowlin was affirmed by CFW who cannot thereafter rely on the alleged acts of repudiation to enable it to be discharged from further contractual performance.

123. **Conclusion.** The parties were in the throes of a negotiation and CFW had tabled a counter-proposal with an invitation to respond whilst intimating an intention to carry on with the contract. Overnight, it changed its mind and decided that, in colloquial language, it wanted out. It then sought to justify its decision by relying on a number of alleged breaches of the contract by Cowlin which it alleged were a repudiation which it purported to accept. CFW then declined to continue with the contract. However, there had been no breaches of contract by Cowlin and the alleged breaches would not, in any case, have been fundamental or repudiatory breaches. Finally, and in any case, CFW cannot rely upon any of Cowlin's alleged repudiatory conduct that it can establish to excuse it from further contractual performance since it affirmed the contract after becoming aware of that conduct.

124. It follows that Cowlin had not repudiated the contract and CFW was neither entitled to accept that repudiation nor to contend that it was excused from further performance of the contract. Furthermore, in declining to continue with the contract when it had no grounds for doing so, CFW repudiated the contract and Cowlin has accepted that repudiation. CFW is entitled to damages quantified by its loss caused by CFW's repudiation.

5. Issue 4: Did CFW's Repudiation Cause Cowlin to Suffer Loss?

Factual Background.

125. CFW's repudiation of its contract placed Cowlin in very serious difficulties. It was already desperately behind in its construction programme and was still awaiting a significant amount of the construction drawings for the East Wylie site and had yet to receive any substantial part of the West Wylie designs. The work was difficult and detailed and CFW, until it was bought out, exercised a lien on all unfinished drawings and other details in its possession. The necessary architectural expertise needed to finish off the design work was not readily available at short notice and, without those completed designs, the work would come to a halt. Indeed, Cowlin's position as the contractor was placed in serious jeopardy unless and until it could show that it had the means of completing the design work in rapid order.

126. Cowlin had one, and as it reasonably saw the situation, only one immediate and reasonable solution to the problem that CFW's repudiation had thrown up. This solution involved it in turning to the architectural practice of Stride Treglown ("ST"). This was a small architectural practice but Cowlin had called it in to assist earlier in the contract to conduct a peer review of CFW's work, so dissatisfied was Cowlin about CFW's performance. ST had, therefore, a good working knowledge of the contract and of CFW's designs. ST had a full work load at the time this situation blew up, in September 2001, but it was willing and able to provide at very short notice a small team under the direction of Mr Bayliss who is an architectural technologist and who gave evidence. He explained that the commission came unexpectedly and he and three other technicians, with some assistance from a senior architect, provided the design and drawing staff for the commission. Had there been more personnel available, a larger team would have been provided but the team that was assembled was all that was available.

127. ST first had to check CFW's drawings, both those that had been used and those already provided to Cowlin but not used as well as the remaining drawings once the lien had been discharged by an overall compromise of the fees dispute and a further payment being made to CFW. For some time, however, ST had to work without access to CFW's outstanding drawings. ST was then instructed to complete the West Wylie designs before turning to the East Wylie designs. It had been anticipated by Mr Clark and Mr Spiller that all design work would be completed by ST by the end of 2001, a hope based largely on a significant under-estimate of the amount of work remaining which arose as a result of the unduly optimistic forecast of how much work remained that Cowlin had been provided with by CFW before it ceased to work on the contract.

128. Mr Clark explained that the amount of time that was needed to complete the East Wylie designs was greatly extended by the amount of correcting and supplementary detail that was required. The external works drawings had not been started, there were significant problems with the designs of the elevations of the houses, the levels and roofs of the garages and the oriel windows. This window work had to be done again from scratch since CFW's discs were not available to ST. Whilst it was being sorted out, a significant number of houses had to be left standing open to the elements. Thus, it proved imperative for ST first to devote all its resources to East Wylie.

129. The West Wylie drawings were started early in 2002 and were completed well before June 2002. The construction work started as soon as it was possible to start the work. Originally, it had been intended to construct both Wylie sites in tandem but it turned out that they were, in effect, constructed in series due to the additional resources needed to complete the West Wylie site resulting from the difficulties caused by CFW's drawing errors. The programme for West Wylie had to be completely redrawn and the construction work on site was carried out and completed in phases. The work was completed on 30 April 2003.

130. Cowlin then embarked on a lengthy and, from its point of view, very successful negotiation with DHE through Pick Everard which culminated in an agreed final contract sum, an extension of time until 11 February 2003 and payment of loss and expense arising in the extended period of the contract. It is clear from the detailed programming work done by both parties' experts that Cowlin's extension of time was at least 20

weeks longer than it was entitled to. The agreement reached between Cowlin and DHE included an agreed sum for liquidated damages for the period between 11 February 2003 and 30 April 2003, a period of about 12 weeks. This sum, totalling in excess of £419,670, was also arrived at by a process of negotiation.

131. The overall period of construction on the West Wylie site was not significantly different from the originally intended programme. However, the start of work was very significantly delayed and CFW's repudiation and the subsequent redesign accounted for most of that period. The nature of the work and of DHE's requirements, was that the roads and other external works that had to be constructed outside the area of each house and garden, could only be undertaken once construction work had been completed. In other words, the last about 14 weeks between the extended and actual dates for completion were taken up entirely with external works. Mr Clark explained convincingly that Cowlin had no alternative but to adopt this method of construction, it could have, but was not allowed to construct the external works in parallel with the other work and avoid this extended period at the end of construction when only external work was being carried out.

Cowlin's contentions.

132. This factual background led Cowlin to claim the costs associated with its working on site between 11 February 2003 and 30 April 2003. The summary of its case was as follows:
    (1) Cowlin had to find an alternative architect who could complete the outstanding design work and correct any outstanding detailing errors in CFW's drawings.
    (2) ST was the obvious and reasonable choice, particularly given its previous involvement and familiarity with CFW's designs and it was willing and able to accept the commission and to provide, as the maximum resources it could offer, a team of up to 5 design technicians to work on the Tidworth project.
    (3) ST was reasonably instructed first to complete the West Wylie designs and then to turn to, carry out and complete the East Wylie designs. This led to the East Wylie designs being available to allow a start of construction work at that site in June 2002. Work could not have started any earlier for two reasons, the need to complete the design drawings and the construction work at West Wylie.
    (4) It was not reasonably possible, given the amount of unfinished design work requiring ST's attention at West Wylie and the limited resources it could make available, for the East Wylie designs to be completed any earlier than they were or for construction work to start any earlier than it did on the East Wylie site.
    (5) The work proceeded at East Wylie at as fast a pace as could reasonably be achieved and, without any delay being caused by the dry lining work, was completed by 30 April 2003. This was a shorter period than had been programmed for originally.
    (6) It was necessary, as a result of DHE's instructions, for the external works to be carried out in their entirety after the construction work had been completed. In consequence, the external works were carried out over a 12-week period immediately preceding 30 April 2003.
    (7) CFW's repudiation delayed the commencement of the East Wylie works by a period of at least 35 weeks. This, in consequence, delayed the completion of those works by an equivalent period.
    (8) Cowlin secured a fortuitous settlement with DHE to the effect that it received an extension of time for the period of delayed completion for all but 12 weeks of the delay that CFW had caused at East Wylie.
    (9) In consequence, the only loss Cowlin suffered was the loss attributable to the last 12 weeks of the contract.
    (10) Although the external works were the only works being undertaken in that last 12-week period, the delay was not caused by those works or by any late design of those works. The 12-week period of delay had been caused, as a knock-on by the delay in starting and completing the design work and the consequent delay in starting construction work and that initial delay had been directly caused by CFW's repudiation.

Findings in relation to Cowlin's case.

133. **Introduction.** Cowlin's case, as presented at the trial, may be summarised in this way: *"On the case presented by Cowlin, CFW repudiated its contract and the contract came to an end in August 2001. The remaining progress was the best that could be achieved by way of a reasonable response to that repudiation without particular recourse to any specific programme. As a matter of fact, given the resources available, the drawings were produced as quickly as they could have been and the work was then carried out within a reasonable timescale. CFW repudiated the contract and therefore any delay that occurred thereafter was a consequence of the repudiation and is not a matter for which you are responsible. Cowlin was the "victim" of that repudiation and it had a duty to mitigate the loss that that repudiation*

caused. However, unless CFW can show that Cowlin acted wholly unreasonably in the steps it took to mitigate its loss, it cannot be said to have failed in its duty to mitigate its loss." [17]

134. CFW submitted that the question of whether or not the loss that Cowlin claimed was recoverable was not to be tested by the rules relating to mitigation but by those relating to causation. Cowlin had to establish on a balance of probabilities that the repudiation caused, or was a predominant cause of the loss that it claims and that that loss was not too remote.

135. However, in this particular situation, I don't think it makes any significant difference how the issue of the recoverability of Cowlin's loss is analysed. Cowlin is claiming the liquidated damages and onsite costs it incurred in a 14-week period that occurred at the end of the period that it was working on the East Wylie site as a result of it being forced to start that work late. Thus, Cowlin is asserting that the repudiation delayed the start of drawing work, that the start on site could not take place until the design work was substantially complete, that the design work took longer than could reasonably be anticipated but that that delay occurred because of Cowlin's difficulty in finding alternative architectural services and of responding to the poor design work left unfinished by CFW, that it was not unreasonable for the delay in completing the drawings to have taken so long; that there was no further delay in carrying out and completing the work and that the external work activity could only take place once all other work had been completed.

136. The overall delay caused to Cowlin was up to 35 weeks but only the last 14 of those weeks caused it on-going loss because of the favourable extension of time it recovered. As a matter of fact, therefore, the external works were the only works taking place in the period of on-going loss but it was not merely these works that were delayed by the repudiation, it was all works. The claim is better regarded as being for a delay to all works at East Wylie which, by virtue of other recovery from DHE, is confined to the loss incurred in the last 14 weeks of that delay period where, as it happens, the external works were being carried out.

137. Thus, Cowlin's claim involves a consideration of both the rules relating to causation and mitigation. Cowlin must establish, as a fact, that the loss was caused by the repudiation but, having established that, it can be deprived of the loss that it was caused in that way if CFW can show that it occurred because of an unreasonable attempt to mitigate the loss. I must therefore consider both questions.

138. **ST engaged as Cowlin's architect.** Cowlin was undoubtedly placed in real difficulty by CFW's repudiation. It occurred at the end of August at a time when the design was urgently needed, where much of the design work that had been done required substantial amendment because of the poor quality of the work carried out by CFW, where CFW was asserting a lien on the drawings it had worked on which it had been working on and where a considerable amount of time would be needed for any new architect to familiarise itself to the contract specification and the drawings carried out to date, the tracking documentation and the work carried out on site. There can be no criticism made of Cowlin's choice of ST, given its previous involvement in undertaking peer review work for Cowlin of CFW's earlier work on this project.

139. Mr Clark explained the decision to engage ST as follows: *"We took every step. We had a meeting with Strides, we set out what we required, they afforded us the amount of resources they could put to what our requirements were. There was not any way that they could afford any more resources and I could not go anywhere else in terms of architecture to procure another company to actually carry out any works. We had taken Strides on the understanding that we would soak up all their extra resources and anybody additional to that that they could put on to this project, bearing in mind the remainder of the project was virtually dealt with by one architect, where on Strides we had five people I believe working on the drawings."* [18]

140. The decision to engage ST, and the time taken to engage them, being the period of about 4 weeks starting with the repudiation, was clearly a reasonable decision and timescale.

141. **Time taken to complete East Wylie drawings.** The time taken to substantially complete the East Wylie drawings was between early October 2001 until various dates between 28 March 2002 and 30 April 2002,

[17] A slightly amended version of an exchange, taken from the transcript, between the judge and Mr Brannigan after the conclusion of the evidence which was clarifying the issues that were to be addressed in closing submissions and after both parties' cases had been closed. The contents of this quotation were submitted by Mr Brannigan accurately to summarise Cowlin's case as it then stood.

[18] D3/49/21 - /50/28.

construction work on site started as soon as the design was substantially completed for each phase and practical completion was achieved on 30 April 2002. The actual period during which construction work was carried out was about 40 weeks which was appreciably shorter than had been programmed for in the contract programme.

142. These periods of time were explained by Mr Clark of Cowlin and Mr Bayliss of ST, both of whom were reliable and impressive witnesses whose evidence was virtually unchallenged and which I accept without hesitation. In summary, their evidence was to this effect:
(1) Cowlin instructed ST to start with the West Wylie drawings and to complete those before embarking on the East Wylie drawings. This was a reasonable decision to have taken, it enabled the drawings to be completed in the order in which the work was by then programmed to be done, it prevented any interruption of the work on site and it prevented even longer delays to West Wylie which would have occurred had attention been turned to East Wylie or had ST's resources been shared between both sites and it enabled the semi-complete works, which were still open to the elements, to be finished off without further damage occurring to the work that had been achieved.
(2) ST had limited resources available and they devoted the entirety of the resources that were available who worked as hard as possible under great pressure. ST could not have coped with any greater volume of work or have worked and produced drawings faster than was in fact achieved. This was because of the inherent difficulties of the design process, the need to start halfway into the project with another architect's half completed designs, CFW's many errors requiring correction and an absence of the information obtained by CFW when it was the lead design consultant.
(3) The work at East Wylie was not delayed nor could it have started before the West Wylie work had been completed. This is because there were insufficient resources for Cowlin to work on both sites simultaneously. This problem arose because of the lateness in starting work on the West Wylie site, itself a produce of CFW's delays in finalising accurate and substantially completed designs. There was no evidence adduced by either party as to causes of delay whilst work proceeded save for unsubstantiated assertions by CFW that the dry lining work caused delay and progress was appreciably faster than had originally been programmed.

143. **CFW's alleged causes of delay.** CFW relied on two alleged causes of the delay in completing the works for 12 weeks beyond the date to which Cowlin obtained an extension of time. These were the delay caused by the dry lining work and by the postponement of the external works at any particular location until after construction work at that location had been completed. Neither allegation was made out.

144. The dry lining work was carried out by a subcontractor, E & H Drylining & Plastering Speicialists Ltd. whose principle was Mr Anthony Searle. His written witness statement was not challenged and he was not called for cross-examination. The effect of his evidence and that of Mr Clark's evidence on the question of possible delays caused by the dry lining was that the dry lining work caused no delay. This work had to be, and was, finished before the second fixing, and no completion or hand over was delayed by dry lining work. Furthermore, as soon as a plot became available for dry lining work, that work would invariably start very soon afterwards. At no time was there an insufficient number of operatives on site to prevent such dry lining work as was available being started and completed within the planned period of time.

145. As for the external works, the evidence of Mr Clark was unequivocal and it remained undented and clearly established despite continuous assertions to the contrary, none of which were supported by factual evidence. Mr Clark explained that there was a need to provide safe access to each unit prior to its being handed over. Thus, the external access work had to be completed before handover. However, the internal construction and work to the gardens and retaining walls had to be completed before the relevant external works could start. These could only be carried out once all other work had been completed. These external works were extended by the need to undertake some additional road works in the centre of the site and this necessitated blocking off the rest of the site. Thus, the external works could not start until a late stage in the contract once all other works had been completed, the site could not be handed over until these works had been completed and it reasonably took about 12 weeks to carry out this work. This period was in fact shorter than the programmed period for these works.

146. CFW attempted to challenge this evidence by seeking to show that external works were in fact carried out in parallel with the internal works. They also relied on the programming evidence of Dr Keane to the effect that these external works did not hold up completion. However, the evidence relied on amounted to no more than some fragmentary reference in contemporaneous site records to the effect that some internal works and external works were being carried out together. These external works were those being carried out within the curtillage of each dwelling and were, in most cases, snagging work being carried out after the main works had been completed. Dr Keane's view was irretrievably flawed since it emerged that he had not considered when the external works outside the curtillage of each dwelling had been carried out, he merely ignored these works. Thus, his view was based on when the external works within the curtillages of the units were carried out, that being work that was not part of the work that had to be carried out last and after all other work.

147. It follows that the dry lining work and the external work other than that outside the curtillages of the units did not delay the work and that the external works proper could not have been undertaken any earlier or taken any shorter period of time.

148. CFW attempted to show that the external works drawings could and should have been produced earlier. However, these drawings were produced well in advance of their being needed since the work would be carried out last. Thus, the dates for the delivery of these designs have no bearing on the length or timing of the delay to the completion of the work necessitated by the need to undertake the external works.

149. **Cause of delay.** It follows that the cause of the delayed start to the East Wylie works was a combination of the poor drawings produced by CFW before it ceased work which needed to be rectified, the delay in being able to start the design work because of the delays on West Wylie, CFW's repudiation and Cowlin's inability to find any architect at short notice to provide sufficient resources to enable the drawing programme to be accelerated or undertaken at any faster pace than ST was able to work to.

150. The overall period of delay caused by CFW was, therefore, about 35 weeks between late August 2001 and March 2002. The construction work could not have started any earlier at East Wylie because of the need to complete West Wylie first and the delays induced by CFW's poor designs precluded the stretched resources being deployed to enable both sites to be worked on simultaneously. There was no delay in carrying out the work at East Wylie and the external works could not have been started earlier, or before the other construction work had been completed and they could not have been undertaken any faster than they were.

151. **Cowlin's settlement with DHE.** Both programming experts agreed that Cowlin was particularly fortunate to obtain a settlement with DHE that gave it an extension of time for all but the last 12 weeks of the contract. Cowlin should, in reality, have received much less of an extension and paid much more by way of liquidated damages. The reasons why Cowlin was so successful were not explored and do not matter save that Cowlin's claim against CFW is greatly reduced from the figure it could have been since it has recovered its loss for over 20 weeks from DHE despite that period of delay not having been caused by DHE.

152. **Conclusion – causation.** It follows that CFW caused Cowlin to complete the works late by many weeks but that Cowlin may only recover such losses as it can show that late completion caused it to incur in the period after it recovered its losses from DHE and during which it incurred liquidated damages. These claimed losses, therefore, include liquidated damages that were incurred in an 11-week period between 11 February 2003 and practical completion that occurred on 30 April 2003, a period of 11 weeks, and on site costs and overheads incurred in the period after Cowlin recovered these extra costs, being a 14-week period between 22 January 2003 and 30 April 2003.

6. Issue 5: What is the Recoverable Quantum of Loss Flowing from CFW's Breaches of Contract and its Repudiation of the Contract?

Breach losses

153. **Mobilisation costs.** In the period between the beginning of August 2000 and the end of October 2000, Cowlin had mobilised a number of staff and management who were unable to undertake any other productive work in the period that Cowlin was waiting for the designs to be substantially completed by CFW and the consequent permission to take possession of the site and start work. The figure put forward by Cowlin is

agreed in the sum of £30,968.66 and it relates to the mobilisation of the project and site managers, a further site manager for North Avon, a project engineer and project quantity surveyor and a site administrator.

154. The only challenge to these claims relates to the claim for the site agent, Mr Chapman who was employed through an agency. Mr Chapman was engaged in that role for the project. CFW contended that Cowlin should have terminated his engagement as soon as it was known that the start of work on site was to be delayed and he could have been re-engaged once work was able to start. This is an unrealistic contention. Firstly, it was never clear how long the period of delay was going to be, CFW were continuously assuring Cowlin that the drawings would be ready very soon and Cowlin was entitled to accept that advice and not lay off staff since the start on site always appeared to be imminent. Secondly, it would not have been possible to engage and disengage a site agent the way suggested since Mr Chapman had been engaged for the project. As a result, the two relevant contracts, being the contract for his services signed by Cowlin with Orion and the contract for services Cowlin entered into with Mr Chapman, it would not have been contractually possible to lay off Mr Chapman and re-engage him or someone else when work on site was about to start.

155. Cowlin is entitled to recover £30,968.66.

156. **Winter working.** The effect of working through the winter months was that the work was undertaken during extended periods of wet weather rather than in the significantly drier summer months. This was particularly so in the winter 2000 – 2001 which records showed was the wettest winter since 1766. The effect of this was to require Cowlin to work in chalk ground conditions which had turned into slurry and in excavations where the sides had a tendency to collapse.

157. There were, in consequence, four additional heads of loss. These were as follows.

158. **Lean mix.** In order to assist the construction of the houses and to secure the excavations in the wet conditions, much more lean mix concrete was required. The lean mix was mainly used to support the underside of strip foundations and the sides of excavations. Mr Clark's evidence was that the very soft ground conditions were such that the excavations kept collapsing. An indication of the need for lean mix for support purposes as a result of the very wet ground is provided by comparing the amount of lean mix used in the period up to 18 March 2001 with its usage between 19 March 2001 and 9 September 2001. The spring and summer usage was about 1/30 of the usage in the winter months. This evidence shows that a very considerable volume of lean mix was required as a result of the wet winter working.

159. Mr Spiller estimated that 75% of the amount of lean mix that was used was only required because of the extended working in wet winter conditions on a chalk-based, steeply sloping site. This is a very conservative estimate, as the comparison between the volume of usage of lean mix in dry and wet working shows. Mr Spiller's estimate was based on his considerable experience and on that of Mr Clark who is also a very experienced site-based contracts manager. Their view was that more than 75% of the total quantity of lean mix used on site resulted from the wet winter conditions. I accept this evidence.

160. Cowlin paid its subcontractor for 88 cubic metres of lean mix although the applications for payment inspected only show 76 cubic metres being claimed for. However, it is unlikely that the subcontractor was paid for 12 cubic metres that were not provided and, in any event, the 75% estimate is sufficiently conservative an estimate that Cowlin has established that it used at least 66 cubic metres of lean mix concrete as a result of the unexpected excavation work in wet winter weather rather than in drier summer and early autumn weather that would have been encountered had the start not been delayed by CFW.

161. CFW contended that this head of loss was not foreseeable. However, this type of loss was clearly foreseeable by an experienced architect engaged to provide designs for houses to be constructed on a steeply sloping chalk-based site that there would be the need for significantly greater volumes of certain materials, such as fill and lean-based concrete, to allow for construction in very wet weather compared with dry weather and that, in general, such additional materials would be needed in the winter months compared to the summer months. This head of loss is, in principle, therefore recoverable.

162. CFW also contended that there was no evidence that Cowlin encountered appreciably wetter conditions in the months when construction took place between November 2000 and April 2001 than would have been encountered in the months that construction was planned between August 2000 and January 2001. However, Mr Spiller produced weather records which showed that the autumn and winter months were extremely wet.

Although the earlier months were also wetter than normal, there was clearly a significantly wetter period of working than would have been encountered had there been no delay.

163. Cowlin is entitled to recover £4,301.88.

164. **Type 1 filling under slabs.** This is a similar claim to the lean mix claim and relates to the additional filling used under the slabs to accommodate the very wet ground conditions. 471 cubic metres of type 1 filling was used at South Avon under the slabs and other foundations. This was necessary to prevent the foundations from sinking into the ground. Evidence that this usage was required by the very wet variable winter working conditions is that there was not a consistent depth of type 1 fill installed across the site and the usage was very much greater than on other sites.

165. Mr Clark thought that the percentage of the usage attributed to the wet working conditions, being again 75%, was in his experience a very conservative one. He would have attributed the percentage for this usage as being 85 – 90%. The claim is therefore based on 75% of 471 cubic metres. This claim, therefore, also succeeds in the same way as that based on lean mix concrete usage.

166. Cowlin is entitled to recover £11,225.40.

167. **6F2 materials.** Additional capping layer materials were required because the resistance of the underlying sub grade material was reduced by the very wet conditions. This reduction in the resistance was confirmed by 3 of the 4 California Bearing Ratio ("CBR") tests that were carried out which showed values of less than, or close to 2%. These values require a capping layer whereas higher values, in excess of 3%, such as the 14% obtained from the fourth CBR test, do not require any, or any significant, capping layer. Cowlin measured the average thickness of the capping layer in the period up to April 2001 as being 1.38 times greater than the average figure thereafter. This data confirms Mr Clark's evidence that significant quantities of 6F2 materials were required to enable the site to be worked on in the very wet winter working conditions.

168. Mr Spiller estimated that the requirement for capping layer materials doubled as a result of the very much greater need for a capping layer due to the wet winter conditions. This estimate was again based on his and Mr Clark's experience and I accept it. The claim is therefore based on supplying and laying 551.34 cubic metres of 6F2 material. This claim succeeds.

169. Cowlin is entitled to recover £14,642.97.

170. **Crushed concrete at 225-50mm stone usage.** These crushed concrete and stone materials were required under the South Avon roads and hardstandings and on the first section at West Wylie. There was a greater need for temporary roads and hardstandings to enable the wagons and other vehicles to travel to and onto the site in the very wet conditions. Moreover, the material that was intended to be used, being Special Excavated Material ("SEM"), taken from the site was unsuitable to provide the necessary support for temporary roads to be trafficked by heavy laden vehicles. Mr Clark gave evidence of the innumerable lorry loads of red stone arriving and seemingly being swallowed up by the wet ground.

171. Cowlin initially switched from SEM to stone but later had to switch again from stone to crushed concrete which is bulkier and more suitable in very poor conditions, albeit much more expensive than stone. The stone and crushed concrete was used in both the permanent and the temporary works.

172. Cowlin estimated that about 400 tonnes of this material would have been required had the roads been laid during the summer months as anticipated. In all, 2,397.02 tonnes of crushed concrete and stone materials were delivered to site between late September 2000 and 28 March 2001.

173. Cowlin did not have any way of assessing how much additional crushed concrete and stone materials were used. Some of the material was used where no fill would have been used and, in other locations, the crushed concrete was used instead of Special Excavated Material ("SEM"), which would otherwise have been used and which would have been taken from the site. Some limited usage of stone was provided for in the tender. It appeared that about 3 times more crushed concrete and stone was required than had been tendered for, given that the necessary road building and stone usage would have been undertaken in the comparatively dry summer months had the contract proceeded as intended.

174. Cowlin undertook a calculation which suggested that the additional usage was approximately 1,055 tonnes of stone and a further 1,360 tonnes of crushed concrete than was provided for in the tender. Mr Taylor checked

the assessment and did not query its accuracy. I accept that all but a negligible amount of these additional quantities, being quantities in excess of those on which the tender had been based, were required as a result of the wet winter working conditions since the tender estimate was based on a reasonable estimate of required stone usage and no other explanation has been offered for the greater use except the wet winter working conditions. These estimated figures were not accepted by Mr Edwards but he did not provide alternative figures.

175. I am satisfied that Cowlin's assessed figure is sufficiently reliable to enable Cowlin to succeed in the claim using the assessed figures as the basis of its proved loss.

176. Cowlin is entitled to recover £24,046.80.

Repudiation losses

177. **Liquidated damages.** Cowlin reached a settlement with DHE in July 2003 which resulted in liquidated damages being imposed for the period between 10 February 2003 and 30 April. A total of £436,000 was levied for this period. The settlement was based on Cowlin being granted an extension of time of 31 weeks for variations and delayed instructions, 3 weeks for other variations to the contract and 3 weeks for winter working through the 2002 – 2003 winter. DHE was at pains to insist that no extension had been granted for any delayed start or late possession of any site. The DHE made it clear in agreeing to the overall settlement that it included a sum to be paid for liquidated damages. The relevant passage in the DHE's letter to Cowlin dated 31 July 2003 states: *"Please find a schedule containing details of the LADs and actual handover dates as applied in accordance with the terms of the contract. The total damages under the contract are £436,000 and have been deducted from the amounts due to you … The details incorporated in the schedule are all fully in accordance with the terms of the contract and therefore are not subject to negotiation or amendment. … I can confirm that the agreement contained in Amendment 2 and 4 to the contract [which included agreement as to the extent of the extension of time and consequent additional payment] was concluded on a '**without prejudice**' basis."*

178. Of the overall period of 37 weeks for which an extension was granted, the two planning experts agreed that Cowlin was fortunate to receive any, or any substantial extension of time. The effect of their evidence is that Cowlin's maximum entitlement was no more than a handful of weeks. Cowlin's expert attributes the entire period for which no extension should have been granted as being the result of CFW's breaches of contract whereas CFW's expert attributes this period to the delays caused by Cowlin's dry lining subcontractor. I accept Cowlin's expert's views since the factual evidence clearly shows that no delay was caused by the dry lining subcontractor.

179. Cowlin is in fact claiming a slightly lesser figure as damages from CFW. The claim totals £419,670. This reduced claim, compared to the sum levied by DHE, is explained on the grounds that the two experts undertook a detailed programming exercise rather than accepting DHE's extension of time and considering whether the period of overrun beyond that extension was wholly attributable to CFW's breaches or to factors within Cowlin's control. However, since the sum that is claimed is £419,670 and is slightly smaller than the actual sum that is claimable, I will proceed on the basis that the smaller sum should be awarded since that is what is claimed and it is demonstrably a sum that has been lost.

180. **CFW's penalty argument.** CFW only contest Cowlin's entitlement to recover this sum on one ground. CFW contends that the liquidated damages that were paid by Cowlin should not have been paid since the underlying liquidated damages provisions in the design and build contract amounted to an unenforceable penalty. Therefore, CFW contended that Cowlin should have refused to pay this sum to DHE. This argument would have been upheld by a court or arbitrator had Cowlin sued DHE for the recovery of this sum had it been withheld by DHE or had DHE claimed it and Cowlin defended the claim on these grounds.

181. **Contract liquidated damages provisions.** The design and build contract incorporated the GC/Works/1 (edition 3) 1990 revision standard form of contract and a specially drafted liquidated damages set of provisions. These provisions worked as follows:

1. The construction works were divided into phases, the critical phases being phase 3 comprising a minimum of 22 type C and 2 type D houses; phase 4 comprising a minimum of 42 type C and 4 type D houses and phase 5 comprising the balance of the works. The dates for these completion handover events were provided in the contract programme.

2. The contract provided for extensions of time to be granted for listed causes of delay in the control of, or at the risk of, the employer. These extended dates were to be fixed by the Project Manager. A final extension of time would be considered and, if necessary granted, within 42 days after completion of the works.
3. The contract was for the provision of housing. The liquidated damages therefore were calculated on a house by house basis. Each house incomplete at the relevant date for the completion of a phase that should have been completed then would have liquidated damages calculated separately in accordance with a formula which comprised 4 elements.
4. The four elements were as follows:

"Type C Calculation of liquidated and ascertained damages	Week 1	Weeks 2 - 26
Alternative Accommodation	3,800	Nil
Residence to place of duty charge	190	Nil
Disturbance allowance	400	Nil
Removal charge	470	Nil
Total	4,860	190

- Alternative Accommodation: Standard weekly charge by "Hambro" plus 5% commission plus 4% inflation
- Residence to place of duty charge: 20 miles @ £0.198 x 7 days = £27.72
  Taxis, two round trips to take children to school 2 Nr x £15,00 x 5 days = £150.00 plus inflation
- Disturbance allowance: Standard MOD Charge
- Removal charge: £450.00 plus inflation; taken from actual costs on another MOD project"

5. The extension of time clause was intended to operate so that each house was treated separately and to both the phased provisions and to the date for completion. Thus, those houses due to be completed prior to the completion date would be considered for an extension of time from the phased date for completion, the balance from the date for completion.

182. The clear intention of these provisions was that the liquidated damages would represent a reasonable pre-estimate of DHE's loss arising from a delayed completion to each house. Since the new houses were to be used for relocating service families that had been living elsewhere, the loss that would be incurred would be the rent of temporary alternative accommodation for the service families involved during the period of delay and compensation for additional travelling, removal expenses and disturbance. Since alternative accommodation would have to be obtained for minimum periods of 6 months, the damages were calculated on the basis of the cost of alternative accommodation for a 6-month period arising in the first week of delay and in the first week of any subsequent 6-month period of delay and three smaller elements for travelling, disturbance and removal expenses in that first week and, in weeks 2 – 26, only a travelling element.

183. **CFW's contentions.** CFW's contention was that these provisions operated so harshly on Cowlin that they were clearly unenforceable and a penalty. The contention was that they were not a genuine pre-estimate of loss. This was because they were only workable if the entire delay was caused by Cowlin and no extension of time had occurred. This was because the DHE would need to rent alternative accommodation from the original date for completion of any house and would therefore enter into a 6-month lease, at its expense as soon as delay occurred. If, as here, an extension of time was followed by a period of delay for which liquidated damages were payable, the DHE would have entered into rental commitments during the first period when Cowlin had been granted an extension of time, since it would still need this accommodation, and when the liquidated damages period kicked in, would no longer need to rent alternative accommodation yet could charge Cowlin for that alternative accommodation cost.

184. It followed, so CFW contended, that no loss would have been suffered by DHE in the period that Cowlin was charged liquidated damages since, by 10 February 2003, it would have already entered into its alternative accommodation rental commitment as a result of the extended period already granted to Cowlin. No further loss would be incurred yet Cowlin was being charged as if DHE had first incurred the rental commitment on 10 February 2003.

185. **Cowlin's contentions.** Cowlin contends that the liquidated damages provision was not a penalty for two reasons. Firstly, it passed the threshold test for upholding liquidated damages provisions recently re-affirmed

in the decision of Jackson J in **Alfred McAlpine Capital Projects Limited v Tilebox Limited**[19]**.** Secondly, and in any event, the sum paid to DHE resulted from a reasonable settlement of Cowlin's liability for delay and is therefore recoverable by virtue of the principle that a court will uphold a settlement figure without going into the minutiae of its make up or basis if the settlement was a reasonable one reached to conclude a dispute as to the sum that should be paid.

186. **Conclusion – penalty or not.** In determing this issue, I first take account of the fact that there was no evidence adduced to show whether or not the DHE would have incurred, and would reasonably have been expected at the date of the contract to have to incur, the alternative accommodation costs whenever delay first occurred or whether it would only first incur those costs when delay for which Cowlin was responsible first occurred. In other words, it was possible that the DHE would only first obtain alternative accommodation on the first day on which liquidated damages became payable.

187. I also take account of the fact that the provisions, although cumbrous, are perfectly workable. It is true that Cowlin introduced a phased completion arrangement for the Wylie sites but these did not become part of the contract. Thus, the DHE could have, and indeed did, decline to take over houses in accordance with these phasing arrangements and, instead, insist on taking over the entire site only when it was fully complete..

188. In those circumstances, the liquidated damages clause, although potentially harsh on Cowlin, was nonetheless enforceable. The relevant test, enunciated by Jackson J which I accept correctly states the applicable test binding on judges at first instance, is as follows: *"In my view, a pre-estimate of damages does not have to be right in order to be reasonable. There must be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages which is likely to be suffered before it can be said that the agreed pre-estimate is unreasonable."*[20]

189. In this case, it was not certain that the alternative accommodation costs would inevitably kick in once the relevant initial date for completion passed. It was possible, and certainly not clearly impossible, that this charge would only first arise at the point when liquidated damages first became payable.

190. However, and more significantly, DHE and Cowlin were in dispute as to whether liquidated damages should be paid and for what period. Cowlin believed that it was liable to pay such damages for most of the period of delay, for at least 30 – 35 weeks. It discovered during the negotiations that the DHE was minded to award an exceedingly generous extension of time but, in return, would insist on levying liquidated damages to the full for the short period of overrun not covered by the extension of time. It followed that Cowlin was prepared to drop any contention that the liquidated damages provisions were a penalty and forego the risk of having to pay huge liquidated damages and to lose the prospect of recovering as part of its claim any payment for delay-based costs in return for accepting liability for liquidated damages for a period of 11 weeks.

191. On that basis, the sum claimed is reasonably recoverable and is not too remote. It represents a sum reasonably incurred as a direct result of the delays caused by CFW's repudiation since it was a sum resulting from a reasonable settlement of a dispute as to Cowlin's liability to DHE for the delay caused by CFW. As such, it is clearly recoverable even if there were arguments available to Cowlin during the negotiations that the sum was irrecoverable or not payable since it was a penalty. Such arguments would, in any case as I have already held, not have succeeded but, even if they had succeeded if put forward, do not result in the settlement figure being irrecoverable.

192. **Conclusion.** Cowlin is entitled to recover the slightly smaller sum than it incurred of £419,670.

193. **Prolongation costs.** In the period of delay, Cowlin incurred irrecoverable costs in keeping its site-based staff on site during that period. The costs that are claimed are £7,268.08 for a period of 14 weeks. This weekly sum is agreed by CFW, subject to liability. The basis of a claim for the additional 2 weeks in addition to the 12 weeks of delay is that it had programmed to complete its work on site two weeks prior to the conclusion of the contractual date for completion. That additional period was one that Cowlin has not been remunerated for by the DHE and the loss represents the expenditure incurred in employing its site-based staff in that additional two week period.

19 [2005] BLR 271.

20 Ibid., paragraph 48 of the judgment.

194. This expenditure in the additional two-week period would have been avoided had Cowlin not been subject to the delaying influences of the additional works and CFW's breaches of contract. Since it is clear that CFW was the predominant cause of most of the delay, including the last two weeks of the original contract period, it follows that this additional 2-week period, at the outset of the 37-week period for which Cowlin obtained an extension of time, was a period where the site-based costs were only incurred because of CFW-induced delays.

195. **Conclusion.** Cowlin is entitled to recover the sum of 14 x £7,268.08, a total sum of £87,216.96.

196. **Head office overheads.** The claim is based on the conventional application of Emden's formula for a 10-week period. The sum is agreed, subject to proof that the loss was incurred. The loss is the loss of recovery of profit and head office overheads arising from the inability to earn these recoveries from other work in the relevant period because Cowlin's resources were still employed on non-profitable, non financial recovering work for DHE.

197. Mr Spiller gave evidence to the effect that the effects of the repudiation were that he and Mr Brown were much more heavily involved in the project than they should have been. This precluded them chasing other work, being involved in negotiations and tendering and otherwise generating financially rewarding new work.

198. I readily accept that the heavy additional involvement that these two senior members of Cowlin's management team reasonably became involved in at Tidworth precluded significant additional earnings elsewhere. It follows that the conventional basis for assessing this loss, recourse to the Emden formula for a 10-week period, is appropriate.

199. Cowlin is entitled to recover the sum of £143,088.90.

200. **ST additional costs.** Having made allowance for the balance of CFW's fees which would have been paid had CFW not repudiated its contract but were not paid, Cowlin incurred an additional sum of £36,410.65. This sum is recoverable. CFW merely seeks to challenge that part of the sum claimed which represents fees for additional architectural services required by DHE after the repudiation had occurred. That is a correct principle but it is clear from Mr Spiller's evidence that the only additional work for which CFW cannot be reasonably held liable for was for the preparation of one kitchen layout. Thus, the possible irrecoverable element of the claim is minimal. I will make an allowance of £1,410.90 for that and any other additional element.

201. Cowlin is entitled to recover the sum of £35,000.00.

202. **Additional professional fees.** Cowlin incurred additional costs in engaging a landscape architect, namely £4,218.23, and White Young, the engineering consultants, in preparing the Health and Safety files, namely £7,803.62.

203. CFW challenge its liability to pay the landscape architect's fees but the work carried out was required to complete the designs, would have been carried out by CFW but could not be carried out by ST because that practice had no available landscape architect. CFW had an obligation to prepare the Health and Safety files, a liability it confirmed in its letter dated 29 August 2001. The sum paid to WYG was a reasonable fee for carrying out this work.

204. Cowlin is entitled to recover the sums of £7,803.62 and £4,218.23.

205. **Price increases.** Both quantity surveyors accept and agree that Cowlin may recover the sum of £26,170.00 for price increases incurred in the period of delay.

206. Cowlin is entitled to recover £26,170.00

207. **Legal costs and licence fee to use CFW's drawings.** Cowlin sought to recover the licence fee it paid CFW to enable it to have CFW's lien removed and to use its incomplete drawings. It also claimed the legal costs associated in making and negotiating a claim for the recovery of these drawings. However, the claim was compromised by an agreement providing for the drawings to be made available in return for the payment of a fee. The agreement contained no reservation of rights. This claim has therefore been compromised and is irrecoverable.

7. Issue 6: Additional Claims

Drawings discrepancies

208. Cowlin claim 4 separate additional costs incurred in requiring additional work, being £9,165.50 for additional bricklaying costs; £13,934 for additional carpentry costs; £506.50 for dry lining costs; and £2,293.01 for facing bricklaying costs. These sums total £23,606.00.

209. These costs arose because Cowlin had to correct errors and discrepancies arising from CFW's drawings. Schedules of these additional costs were prepared and served with Cowlin's pleadings. These had been prepared from daywork sheets submitted by the tradesmen involved. Each daywork sheet had been authorised when first submitted by Cowlin's on-site quantity surveyor having obtained approval from the relevant site manager involved with that work who confirmed any extra work resulting from the need to correct discrepancies. These daywork claims were included in payment certificates which describe the work involved.

210. It follows that, despite CFW's assertion that these claims have not been substantiated, Cowlin has indeed substantiated these claims and no defence has been advanced. The relevant discrepancies were not ones that an architect, exercising reasonable skill and care, would have left on the drawings and the sum is recoverable as damages resulting from CFW's failure to exercise reasonable skill and care.

211. **Brick costs.** CFW failed to obtain the local planning authorities approval to the proposed facing bricks to be used, being stock bricks of a yellow colour. These had to be returned because they were rejected by the planning authority exercising its planning powers but the supplier would only reimburse Cowlin half the relevant cost. Cowlin is therefore entitled to this irrecoverable element of the cost, being £2,293.01.

212. Cowlin is entitled to recover the sums of £23,606.00 and £2,293.01.

8. Issue 7. Cowlin's Overall Recovery

213. **Overall recovery.** Cowlin is entitled to recover the following sums:

1. Mobilisation (paragraph 155)	30,968.66
2. Lean mix (paragraph 163)	4,301.88
3. Type 1 (paragraph 166)	11,225.40
4. 6F2 (paragraph 169)	14,642.97
5. Crushed concrete (paragraph 176)	24,046.80
6. Liquidated damages (paragraph 192)	419,670.00
7. Prolongation costs (paragraph 195)	87,216.96
8. Head office overheads (paragraph 199)	143,088.90
9. ST costs (paragraph 201)	35,000.00
10. Additional fees (paragraph 204)	7,803.62
	4,218.23
11. Price Increases (paragraph 205)	26,170.00
12. Additional claims (paragraph 212)	23,606.00
	2,293.01
Total	834,252.42

214. Cowlin is entitled to judgment for £834,252.42, subject to any deduction for previous payments following any of the adjudication decisions.

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Mr Sean Brannigan (instructed by Hammonds, Rutland House, 148 Edmund Street, Birmingham, B3 2JR, for the Defendant