JUDGMENT : Her Honour Judge Frances Kirkham : 15th November 2002. TCC. Birmingham.

1. This is an application for summary judgment. The matter was heard on 23 October 2002. I invited Counsel to make further brief written submissions, which both did.

2. The claimant ("Cowlin") is a contractor. The defendant ("CFW") is a firm of architects. The parties were involved in a project for the rebuilding of servicemen's housing for the MoD. Cowlin were employed as design and build contractor. They stepped in when the original contractor, DMD Ltd, were unable to continue with the project. CFW acted as architects for the project. They had been involved with DMD before Cowlin took over.

3. Cowlin applies for summary judgment to enforce the decision dated July 2002 of an adjudicator, Dr Mair Coombes Davies, awarding £323,373.52 (including VAT) to Cowlin. It is common ground that, if Dr Coombes Davies had jurisdiction, the claimant is entitled to enforce that decision by summary judgment.

4. CFW defend the application on the ground that the adjudicator did not have jurisdiction on the grounds, first, that there was no construction contract between the parties and, secondly, that there was no dispute capable of being referred to adjudication. CFW also contend that the adjudicator had no jurisdiction to add VAT to the sum she decided CFW must pay to Cowlin.

5. To determine the issues it is necessary to consider the background and the detailed references which the parties made to relevant documents. This includes consideration of a dispute between the parties arising out of this project and which was referred to an earlier adjudication by Mr Philip Harris. Mr Harris' decision is dated 25 October 2001. In undertaking this exercise, I bear in mind the guidance given in Swain -v- Hillman (though neither party has suggested that there might be any difficulty in this regard) and that CPR Part 24 permits the court to enter summary judgment if it considers that CFW has no real prospect of successfully defending the claim.

6. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) provides that a party to a construction contract has the right to refer a dispute to adjudication. The nature of the work which CFW were to undertake was within the scope of the definition in section 104 of the Act. There is no issue as to that. The issues are, first, whether CFW waived their right to object to Mr Harris' jurisdiction, secondly whether there was a contract between the parties and, thirdly, whether a dispute had arisen which was capable of being referred to Dr Coombes Davies.

Background

7. The first exchange between Cowlin and CFW to which I have been referred is dated April 2000. Miss Jefford for CFW takes me to an earlier letter from CFW to DMD dated 28 November 1999 in which CFW state that their appointment *would "eventually be based upon the SFA/99 Design and Build Contractor version document, the precise conditions and inclusions of which can be agreed when the contract is awarded…".* (I refer to this form of contract as SFA/99.)

8. On 10 April 2000 CFW sent a fax to Cowlin in which they refer to the fee proposal they submitted to DMD on 28 November 2000 and say that it will be "important to agree our fee and payment schedule as quickly as possible after [12 April] prior to commencing any services." On 11 April 2000 CFW sent to the Project Manager a copy of their letter dated 28 November 1999 to DMD, and pointed out that the total fee currently included in Cowlin's tender was substantially less than that which CFW had previously agreed.

9. By letter CFW to Cowlin dated 20 April 2000 CFW referred to fees and stated "If and when you reach an agreement with the MoD we should meet to discuss the detailed appointment conditions and payment schedule. I would recommend the use of SFA/99 which I can provide at the appropriate time." CFW wrote again to Cowlin on 26 April 2000, asking Cowlin to provide details of fee stage payments.

10. On 8 June 2000 Mr Payne of CFW faxed Mr Natt of Cowlin:
"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 agreed:
Lump sum fee of £277,000.

CFW to propose the payment instalment.
Form of appointment to be SFA/99.
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 Tuesday. 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."

11. On 8 or 9 June 2000 Cowlin faxed back to CFW the CFW fax of 8 June, with an additional manuscript note made by Mr Natt of Cowlin: *"Agreed. Hope we'll have received the official order prior to your return…."*

12. At 11:30 hrs on 20 June 2000 Mr Payne of CFW faxed to Mr Spiller of Cowlin
"Further to my fax to Ian Natt of 8 June, I have now liaised with the team in our office who will be producing the drawing information to suit your building programme, and have prepared a draft Architect's 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 …"

    The document then lists 24 months, beginning June 2000, with staged payment amounts against each month.

13. In a statement in these proceedings, Mr Payne explains that, after he had sent that fax, he met Mr Spiller just after midday. Following that meeting, at 16:15 hrs on the same day, Mr Payne sent another fax to Mr Spiller. That fax again listed 24 monthly stage payments. The dates differ slightly from those in the earlier fax that day, but the amounts remain the same. The fax says
"I 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: …."

14. Mr Payne's statement explains that he, Mr Campodonic of CFW and Mr Spiller met on 21 June. They discussed, and agreed in principle, the revised schedule of instalment payments set out in the second fax of 20 June. Mr Spiller said that he wanted to discuss these with MoD to make sure that they tied in with the construction contract payment dates. Mr Payne says that Mr Spiller telephoned later that day to confirm that the proposed payment dates would so tie in.

15. By letter dated 6 July 2000 Mr Natt of CFW wrote to Mr Payne and noted "the agreement of the milestone stage payments of our lump sum fee with Mr Spiller." He went on to say that he had been able to complete the appointment document and he enclosed two copies with that letter. He asked Cowlin to
"complete as follows and return one copy for our use, and retain one for your records:
Insert the date of the building contract on page A
Execute as a deed on page G
Initial the foot of each page adjacent to my initial."

16. It is common ground that no standard form appointment document was signed by Cowlin.

17. On 10 July 2000, CFW sent their first invoice to Cowlin, seeking payment of fees of £75,000 plus VAT. The invoice reads "To architectural services rendered in accordance with SFA/99 standard form of agreement dated 3 July 2000. Fee instalment No.1." The date of the invoice and the amount shown in that invoice accord with the first stage payment shown on the later fax dated 20 June 2000. The next invoice was dated 4 August 2000 and this was followed by a number of further invoices from CFW to Cowlin for fees. Each invoice contains the same description of services as shown on the first invoice dated 10 July 2000. In each case, the amount invoiced accords with the amount set out in the later fax dated 20 June 2000, though the dates of the invoices vary from the dates of the schedule.

18. By letter dated 7 August 2000, Cowlin returned to CFW
"copies of our proposed contract for amendment, particularly with regard to the pages in which a 'yellow' sticker is attached. We would also suggest that the document be amended to incorporate a clause to the effect that "where this document contradicts the requirements of the main contract the conditions of the main contract are to apply."

19. The parties have not produced the document to which the yellow stickers were attached. Mr Payne's statement indicates that Cowlin required amendment to the stage payments, the addition of the words *"all to comply with Building Regulations" to the section detailing design services and addition of the words "where*

this document contradicts the requirements of the Main Contract, the conditions of the Main Contract are to apply."

20. On 24 October 2000 CFW wrote to Cowlin
"Re CFW SFA/99 appointment document. We are trying to complete the above document which was returned by Mr Natt on 7 August 2000. Mr Natt indicated some changes required to the schedule of stage payments but now that our payment No.3 has slipped by at least three weeks, further changes will be required to complete this section of the document. Have you prepared a revised milestone payment schedule, and if so how does this affect our schedule? Your response will enable us to revise our cash flow forecast for the forthcoming months…."

21. They wrote to Cowlin again on 21 November 2000
"Further to your letter dated 7 August 2000, I am enclosing two copies of our revised SFA/99. We have revised the payment schedule and programme broadly in line with the actual progress that has been made to date and to accord with our reported completion dates sent by fax today … The schedule also now includes reference to the requirement to fully comply with building regulations and the schedule has been initialled. I look forward to receiving one completed copy of the signed Form of Agreement in due course."

22. It appears that for nearly a year after this time there was no further correspondence or discussion as to the terms of the contract. Work was undertaken. Invoices were submitted and some were paid. It appears that CFW ceased work in about August 2001. On 29 August 2001 CFW wrote to Cowlin
"We consider the [unpaid] invoices to be outstanding to the point that you are at default under Clause 5.10 under SFA/99.
We also draw to your attention that we have received no written notice under Clause 5.12 of the Agreement of your reasons for withholding payment…
In accordance with Clause 8.7 copies of … will be supplied to Cowlin in due course…"

23. By letter dated 3 September 2000, Messrs Hugh James Ford Simey ("Hugh James") CFW's solicitors wrote to Messrs Lee Crowder, Cowlin's solicitors.
"There is currently a dispute between our clients regarding two matters, namely (i) payment of [identified] invoices and (ii) the present contractual position between our clients. The RIBA currently prescribes as the standard form of agreement for the appointment of an Architect in a Design and Build situation the use of SFA/99 coupled with the amendment applicable to a Design and Build contract namely amendment DB2/99. [I refer to the latter as DB2/99.] This is precisely the form of agreement which has been tendered to your clients and accepted in writing by Ian Natt in a fax of 9 June 2000. The form of contract submitted for execution by your clients has not been withdrawn by our clients. The document was handed back to them some six weeks ago when our clients indicated that it was scarcely possible to require the redrafting of a contract both agreed in writing by your clients and acted upon by both sides for a period of upwards of 12 months. It is not in dispute that your clients have not signed the contractual documents handed to them. Nonetheless they are bound by SFA/99 / DB2/99 which they have accepted in writing albeit not by signing the actual contractual document. Our client's authorship of the fax of 20 June 2000 is not in dispute nor is the applicability of the milestones there enlisted [sic]. Our clients are puzzled that you now raise matters alleged to be outstanding in relation to the payments due at milestones 3, 4 and 5….
Our clients consider that your clients have repudiated the contract… Your clients have put forward a claim for set-off which is firstly excluded by the terms of the contract…"

Hugh James go on to say that CFW, subject to some provisos, are prepared to submit the existing dispute or differences to the decision of an agreed adjudicator.

24. On 7 September 2001 Cowlin gave notice of adjudication. In the introduction to that notice, Cowlin contend that they entered into a contract with CFW on or around 8 June 2000, relying on the fax from CFW to Cowlin dated 8 June 2000, the hand-written note on that facsimile made by Mr Natt of Cowlin, and the further fax to Cowlin dated 20 June 2000 detailing milestone payments to be made by Cowlin to CFW under the contract. Cowlin explain that they contend that the wording in the fax of 8 June was intended to refer to the RIBA form and that CFW contend that the fax was intended to refer to SFA/99 and DB2/99. In section 4 of the notice, Cowlin set out the decisions that they seek from the adjudicator namely:
"4.1 That the contract entered into between Cowlin and CFW was the RIBA form

4.2 That Cowlin had not by their actions or omissions or in any way repudiated the contract between Cowlin and CFW

4.3 That by accepting the alleged repudiation by Cowlin, CFW had wrongfully repudiated the contract between Cowlin and CFW

4.4 That CFW be liable for the fees and expenses of the adjudicator

4.5 That CFW meet the costs of Cowlin in this adjudication."

On 11 September 2001, Hugh James sent Lee Crowder a document which all have described as a Counter Notice to Cowlin's notice to refer the dispute to adjudication. In the Counter Notice, CFW admit the matters contained in Cowlin's introduction to the notice to refer and they confirm that CFW's contentions as to the nature of the contract are as stated in sub-paragraph 2.2 of the notice to refer. CFW state that in the adjudication they *"seek a decision from the adjudicator as follows:*

4.1 That the contract entered into between Cowlin and CFW was SFA/99 together with DB2/99.

4.2 That Cowlin have repudiated the contract between Cowlin and CFW by failing to make payment of the sum of £30,000 due from Cowlin…

4.3 That CFW have fairly and reasonably repudiated the contract between Cowlin and them on the following grounds.

4.4 That Cowlin forthwith pay the sum of £30,000 plus VAT…

4.5 (not used)

4.6 That Cowlin be liable for the fees and expenses of the adjudicator.

4.7 That Cowlin pay the costs of CFW of the adjudication."

25. Lee Crowder replied:
"We note that you are seeking to introduce an additional point to be decided by the adjudicator under clause 4.4 of your Counter Notice. This additional point is clearly not included in our client's notice of adjudication and is therefore outside the ambit of the current adjudication. Accordingly any adjudicator which is appointed in accordance with the RIBA appointment procedure will be directed to ignore clause 4.4 of your Counter Notice for the purpose of this adjudication. Should your clients wish to raise this additional point, they will need to initiate their own separate adjudication proceedings."

26. By letter dated 18 September 2001, Lee Crowder wrote to Hugh James to say that Cowlin accepted CFW's wrongful repudiation of the contract.

27. On 18 September 2001 the RIBA nominated Mr Philip Harris to act as adjudicator.

28. By letter dated 19 September 2001, Lee Crowder wrote to Mr Harris, including in the third paragraph of the letter: "We confirm that one of the matters requiring a decision in these adjudication proceedings is the nature of the contract entered into between the parties. The referring party contends that the contract is the RIBA form whereas the respondents contend that SFA/99 and DB2/99 form the contract between the parties."

29. 21 September 2001: Hugh James to Lee Crowder.
"We entirely agree with you that the adjudicator has misunderstood the nature of the contract under which he has been appointed and we entirely concur with the remarks in the third paragraph of your letter of 19 September. However there is a difficulty that arises upon which you have not touched in your correspondence. Cowlin seek a decision in the nature of a declaration that the binding contract between Cowlin and CFW was the RIBA form … whereas our clients contend for SFA/99 with DB2/99. We do not believe that it is within the powers of an adjudicator to make a declaration as to which is the form of contract under which his appointment has purportedly been made. An adjudicator is a creature of the contract under which he is appointed. If it is not clear whether he has been appointed under contract A or contract B then it is doubtful whether he has been appointed validly at all and we cannot accept that he has the power to decide that issue… Consequently we cannot accept that the adjudicator has the power to decide which of the forms of contract contended for is that applicable to the relationship between Cowlin and CFW. Since a decision as to that seems to be a necessary pre-condition to deciding the other matters contended for we are dubious as to whether this adjudication can proceed at all as at presently constituted. Subject to that issue…"

Hugh James go on to deal with procedural matters.

30. Hugh James wrote to Mr Harris by letter dated 21 September 2001 to say that they were "in complete agreement" with the third paragraph of Lee Crowder's fax to Mr Harris of 19 September. They go on to make the same point to Mr Harris as they had made in their letter of the same date to Lee Crowder namely
"We are not satisfied that you have jurisdiction to decide the issue raised by Cowlin in 4.1 of their notice to refer which would require you to decide that the contract entered into between the parties was the RIBA form rather than SFA/99 together with DB2/99."

31. Mr Harris wrote to both firms of solicitors on 24 September 2001, referring to the Counter Notice:
"Irrespective of its status, it seeks a decision from the adjudicator over the nature and form of the contract between the parties. At its simplest level, therefore, it can be stated that both parties are interested in having resolved the issue of the nature and form of the contract…. I invite the parties to agree that I have jurisdiction to decide the nature and form of the contract, such decision to have the usual force and effect accorded to an adjudicator's decision. If the parties cannot agree upon this, then my initial view is that the adjudicator must form a view on whether there is, or is not, a contract in the form contended for by the referring party…. I direct that the parties advise me, unequivocally, whether they agree to the Counter Notice … proceeding as a conjoined matter for my decision…If agreement is reached then that agreement, together with an agreed timetable for dealing with the Counter Notice, is to be sent to me… If the parties do not agree, they should advise me in writing of their respective positions…"

32. By letter dated 24 September 2001 Hugh James wrote to Lee Crowder to say that CFW denied that they had wrongfully repudiated the contract between Cowlin and themselves but rather asserted that they had accepted Cowlin's repudiation of the contract. They say: "One thing that is clear is that both parties to the contract do accept that the contract has been wrongfully repudiated by someone."

33. Lee Crowder wrote to Hugh James on 25 September 2001 repeating their assertion that there was clearly a contract in existence between the parties and relying on the fax of 8 June 2000.

34. On 27 September 2001, Mr Harris wrote to Lee Crowder and Hugh James, seeking further clarification as to whether he was to ignore the Counter Notice, or to take into account the Counter Notice but not Clause 4.4, or to have regard to the Counter Notice in some other way, which the parties should specify and clarify to him. Lee Crowder replied on 27 September 2001:
"We confirm that there is no consensus to the joinder of paragraph 4.4 of the Counter Notice with the current adjudication. Accordingly, we confirm that you are to take into account the Counter Notice but not Clause 4.4 thereof."

35. Hugh James also replied on 27 September 2001:
"From the attitude of [Cowlin's] solicitors it would appear that [Cowlin] is not prepared to allow [CFW's] fee dispute (although it is inextricably linked into the claim) to be dealt with in a single consolidated adjudication procedure. This means that we have now been instructed by CFW to seek an institutional appointment of an adjudicator from the RIBA…"

36. Mr Harris wrote again on 28 September 2001, pointing out that he had directed the parties to advise him unequivocally whether they agreed to the Counter Notice proceeding as a conjoined matter:
"It is my view that I cannot adjudicate over any aspect of the Counter Notice without the agreement of the parties or unless I am properly appointed by the RIBA. For the avoidance of doubt, Lee Crowder's fax of 27 September does not, in my view, unequivocally record agreement to the Counter Notice being conjoined. Unless the RIBA appoints me to deal with the Counter Notice, I will not deal with it."

37. Both Lee Crowder and Hugh James replied that day. Lee Crowder said that their understanding was that the Counter Notice, without the addition of Clause 4.4, was in effect a mirror image of the notice of adjudication and would not require separate consideration or a further separate timetable. By clause 4.4, CFW were seeking to introduce a further matter for the adjudicator to adjudicate upon. Cowlin unequivocally rejected that. Cowlin agreed to accept the entirety of the Counter Notice, other than Clause 4.4. If CFW wanted to rely on the entirety of their Counter Notice without severing clause 4.4, then separate adjudication proceedings would be needed. Hugh James' letter included the following:
"As far as the rest of the Counter Notice is concerned, we agree with Lee Crowder's comments to you in their letter of 28 September that these matters are a mirror image of those contained within the original Notice of

Adjudication." Hugh James then said: *"The more that we research this matter the more it becomes apparent that is extremely questionable that there was ever a contract written or otherwise in existence between the parties. We are certainly forming the view that any entitlement to payment, which [CFW] has, may well be based in quasi contract. A draft contract document was prepared by [CFW] which lay for many months unsigned in [Cowlin's] offices. Indeed, we understand that that document was subsequently rejected…"*

38. Cowlin then served their referral notice. In their response to that, dated 2 October 2001, CFW contended that no contract had been concluded, with the result that the adjudicator did not have jurisdiction.

39. On 5 October 2001, Hugh James wrote to Mr Harris to say that, with the exception of paragraph 4.4 of the Counter Notice, which Lee Crowder had rejected in their letter of 28 September 2001, the other matters raised in the Counter Notice merely reflected the original notice of adjudication, "albeit put from CFW's stand point". As Cowlin were not prepared to accept conjoined adjudications, CFW was not at that stage pursuing its claim for fees. They did not, however, repeat the concern as to Mr Harris' jurisdiction which they had raised in their earlier letter.

40. By letter dated 9 October 2001, Mr Harris set out his understanding of the scope of the adjudication: Cowlin unequivocally agreed to the Counter Notice, except clause 4.4 being dealt with in the adjudication and that appeared to accord with Lee Crowder's view. He went on:
"For the avoidance of doubt, therefore, I confirm my view that the parties have agreed that I may decide in this adjudication either in favour of the decisions sought at clause 4 of the notice of adjudication or in accordance with the decisions sought in the Counter Notice at clause 4 (but not resolving the issue at 4.4). It is understood that in deciding either way or the other in accordance with the notice of adjudication or the Counter Notice, I will resolve the decisions sought in each notice."

41. Hugh James replied to Mr Harris on 12 October 2001. They acknowledged that, in the absence of Cowlin's consent, the matters raised in clause 4.4 of the Counter Notice would need to be dealt with as a separate adjudication. They asserted that the issues raised in CFW's response were not only the defence to Cowlin's case but also the positive assertion of those matters set out in the Counter Notice, with the exception of clause 4.4. They reminded Mr Harris that CFW's position on the contract issues had been set out in CFW's response. They acknowledged that CFW's position had changed somewhat since the Counter Notice and repeated CFW's assertion that there was no contract and that the adjudicator did not have jurisdiction.

42. In his decision dated 25 October 2001, Mr Harris stated:
"I take the view that the issues referred to me are those set out in the notice of adjudication and Counter Notice (save for 4.4 of the Counter Notice) and indeed that the parties have agreed that this is the case."

43. Mr Harris decided that the contract entered into between Cowlin and CFW was not the RIBA form but was SFA/99 updated with DB2/99. Mr Harris then went on to deal with other issues.

44. A period of time elapsed, then Cowlin made a claim for additional costs said to have been incurred as a result of delays by CFW on the project. Cowlin wrote to CFW by letter dated 27 February 2002 summarising its claim. They alleged that CFW had failed to produce and co-ordinate the drawings in accordance with the original milestone payments and this had delayed commencement of work by 14 weeks. The claim was said to be made up as follows:
Cost of completing drawings and dealing with health and safety issues:£107,453.70
An additional 14 weeks of preliminary costs as a result of delay: £97,720.06
Additional costs of winter working resulting from delay: £174,797.20
Additional concrete and hard core used as a result of the delayed start and winter working conditions: £106,227.68
Abortive costs due to incorrect scheduling and detailing: £34,862.88
Inflationary features: £130,460.15
Finance charges: £20,873.62
This totalled £672,395.29 excluding liquidated damages which were to be advised separately.

45. CFW replied by letter dated 5 March stating simply that CFW did not consider it appropriate to meet to discuss such items at present. They asked Cowlin to provide a full and detailed breakdown of their monetary claims "and the reasons you deem them appropriate against this practice's appointment. At

present the details are too vague for any possible response other than to dismiss the allegations out of hand as being unfounded."

46. Cowlin wrote to CFW on 11 March, enclosing what they described as "full supporting documentation of the monetary claim." They added, in the letter, a couple of sentences to explain the basis for the claim, namely that CFW were said to have delayed commencement of work by 14 weeks and caused significant problems throughout. Cowlin suggested a meeting to attempt to resolve differences, and set out possible dates. The "full supporting documentation of the monetary claim" annexed to that letter is a document containing 190 sheets, comprising copy invoices and pages of calculations.

47. CFW replied to Cowlin by letter dated 11 March 2002. They pointed out that they had asked for full and detailed breakdowns of both the monetary claims and the reasons that Cowlin deemed them appropriate. While Cowlin might have attempted to provide a breakdown of the monetary claims, there was nothing to explain how Cowlin said that CFW were liable. "Until such time as we receive full documentation supporting your belief that this practice is responsible for your assertions, we will not consider this matter further."

48. Cowlin replied by letter dated 15 March contending that they had already supplied sufficient detail to identify both the case against CFW and the consequences of their alleged failures. They said "For the avoidance of doubt, a dispute has crystallised between us." Cowlin invited CFW to attend a meeting.

49. On 4 April 2002 CFW wrote to Cowlin. The letter explained that CFW were not in a position to negotiate any items and that they had passed all correspondence to insurers who would, no doubt, contact Cowlin. CFW asked that all correspondence thereafter be addressed to insurers.

50. On 12 April 2002, Cowlin wrote to CFW's insurance brokers. (Plainly, brokers were not the right people to deal with this.) On 24 April 2002, Cowlin wrote directly to the underwriters for CFW's insurance. The letter was sent recorded delivery. It complained that neither CFW nor brokers would attempt to resolve matters amicably and warned that Cowlin would have to progress their claims through other avenues available.

51. On 24 April 2002 Cowlin wrote to CFW to notify a further head of claim, bringing the total claim to £717,510.80.

52. CFW's underwriters engaged Messrs Crawford and Company, Loss Adjusters, to assist. Mr Saunders of Crawford spoke to Mr Spiller of Cowlin by telephone and arranged to meet. Cowlin then wrote to Mr Saunders by fax dated 25 April 2002, confirming arrangements for the meeting which was to take place on 1 May "on the basis that this is a serious invitation to reach a settlement of our claim and not the continuation of the procrastination offered up until now by CFW".

53. A meeting was held on 1 May 2002 between representatives of Cowlin and Crawford. There are some issues as to what was said. CFW's case is that Cowlin were unwilling to provide the necessary information. Cowlin's case is that Mr Saunders knew little about the claim and was not in a position to negotiate. It is not possible or appropriate for me to attempt to deal with those issues in an application for summary judgment but there is no need for me to do so, as it is common ground that there was little discussion and that the meeting did not last long. Cowlin wrote to Mr Saunders on 3 May 2002. They made the point that their letter detailing the claim against CFW had been sent under cover of Cowlin's letter dated 27 February 2002, that is some two months previously. The letter recorded that Mr Saunders had said at the meeting that his intention was to obtain information from CFW by the end of the following week and then to consider such information before requesting a further meeting with Cowlin:
"You have not suggested a date for such a meeting but have indicated that you could need a week or ten days, or possibly several weeks, to consider the issues. Such a vague proposition is quite unacceptable to us. Some comments made by you concerning CFW's attitude suggest that CFW are dismissive of our claim and are not likely to make a serious offer to settle. Notwithstanding this, Cowlin are prepared to give you until 10.00 am on Friday, May 17 2002 to make a satisfactory offer in settlement of our claim before taking immediate and substantive action. Cowlin have already been fully reasonable in giving CFW (or if they so decided their insurers) every opportunity to meet with us over the last two months and give you this final opportunity."

54. Mr Saunders did not reply until 14 May 2002. He wrote:

"I refer to our recent meeting in connection with this matter and confirm, that in view of the various complexities of your allegations, it has been necessary for us to obtain and review all the files held by CFW, following our meeting with them, which unfortunately is taking longer than anticipated. Please be assured it is our intention to return to you as soon as possible and I would ask you to bear with us for the time being."

55. On 18 May 2002, Cowlin wrote to CFW to say that there was dispute between them in that CFW had been responsible for a 14 week delay in the commencement of construction work together with further delays to the progress of work and consequential additional costs. They warned that they would be applying for the appointment of an adjudicator. They said "The dispute has arisen because you have declined to settle our claim which has been submitted to you in the sum of £717,510.80."

56. Cowlin applied to the RIBA for the appointment of an adjudicator. Dr Coombes Davies was appointed.

57. By letter dated 29 May 2002 Hugh James, on behalf of CFW, challenged the jurisdiction of Dr Coombes Davis on the grounds that there was no contract and/or no construction contract in writing for the purposes of Section 107 of HGCRA and/or that the dispute set out in the referral notice was substantially different from that set out in the notice of adjudication. That position was maintained in CFW's response to Cowlin's referral notice in the second adjudication.

58. In her decision dated 5 July 2002, amended 8 July 2002, Dr Coombes Davis assumed that the contract was SFA/99 with DB2/99 and that the services which CFW were to provide were those listed in the services supplement to the latter document. She decided that CFW had not properly performed their duties and should forthwith pay to Cowlin £275,211.51 and VAT, a total of £323,373.52.

Mr Harris' jurisdiction

59. Mr Brannigan for Cowlin invites me to decide, first, that CFW had agreed that Mr Harris have jurisdiction and had submitted to his jurisdiction, and to conclude that they are bound by that. If that is correct, the question whether or not there was a contract between the parties is moot. Cowlin's case is that there was a binding decision by Mr Harris that there was a contract. That was a decision he had jurisdiction to make because CFW expressly agreed and provided Mr Harris with jurisdiction to decide whether there was a contract and if so on what terms. CFW's service of a Counter Notice amounted to a submission to jurisdiction. It expressly referred to "the dispute", ie the dispute which Cowlin had referred to adjudication and to the decisions which Cowlin had asked the adjudicator to make. CFW asserted on a number of occasions that the matters set out in its Counter Notice and on which it sought decisions were the mirror images of those decisions which Cowlin were seeking. CFW thus expressly agreed that Mr Harris had jurisdiction in the first adjudication and that there was a construction contract between the parties, although CFW contended that the terms were different from those for which Cowlin contended. They agreed that Mr Harris had jurisdiction to decide which contention was correct as to the terms of the contract. They are bound by that and therefore waived any entitlement to argue that Mr Harris did not have jurisdiction.

60. CFW's case is that it did not by its Counter Notice or otherwise agree to Mr Harris' jurisdiction. CFW maintained their objection throughout. Alternatively, they contend that they agreed that Mr Harris have jurisdiction subject to CFW's primary argument, namely that there was no contract. CFW accept that if they agreed that Mr Harris did have jurisdiction to decide whether or not there was a contract or if they are estopped from denying that jurisdiction, then (i) the issue as to whether or not there was a contract does not arise and (ii) there can be no challenge to Dr Coombes Davies' jurisdiction on that basis.

61. I conclude as follows. By their Counter Notice, CFW accepted that the adjudicator had jurisdiction to determine the terms of the contract. They expressly accepted that the adjudicator had jurisdiction to decide the issues in Cowlin's notice to adjudicate and in their Counter Notice, except for clause 4.4. CFW maintained that position until 28 September 2001. That is clear from the Counter Notice which CFW served and the correspondence, written of course by competent solicitors who must be taken to have understood matters relevant to adjudications. It was not until 28 September that Hugh James first indicated that there might be an issue as to whether there was a contract at all. CFW's response to Cowlin's notice of referral then made CFW's position clear. In that document they stated unequivocally that no contract had been concluded so that Mr Harris did not have jurisdiction. Thereafter, CFW maintained that position.

62. In short, CFW initially accepted that the adjudicator had jurisdiction. They then changed their mind. Mr Harris ignored that jurisdictional objection. Given the previous correspondence, and in particular Hugh James' replies to Mr Harris' requests for clarification, it is understandable that Mr Harris was led into confusion.

63. I have also been referred to **Project Consultancy Group v Trustees of the Gray Trust** July 1999 (unreported). In that case, Dyson J (as he then was) referred to a passage in the judgment of Devlin J in **Westminster Chemicals & Produce Ltd v Eichholz and Loeser** [1954] 1 Lloyds Rep 99 which concerned the acceptance of jurisdiction. Dyson J said that, although that case concerned an arbitration, he agreed that what Devlin J had said was equally applicable to adjudication. I find that of assistance in deciding, as I do, that CFW had submitted to jurisdiction in adjudication.

64. Did CFW waive their right to challenge jurisdiction?

65. Mr Brannigan referred me to chapters 7 and 35 of Mustill & Boyd, Second Edition, but these do not assist me with the question of withdrawal of acceptance of jurisdiction. I am not assisted by comparison with the Arbitration Act 1996. There are too many dissimilarities between the processes. Unlike adjudicators, arbitrators are given the power to determine their jurisdiction. The Arbitration Act 1996 contains an express provision requiring a party to raise any jurisdiction issue at the earliest opportunity. Section 31 of the Act envisages that a party may in some circumstances validly object to an arbitrator's jurisdiction, even though he has agreed to the appointment. There are no such provisions in HGCRA.

66. In **Sea Calm Shipping Co S.A. v Chantiers Navals de L'Esterel S.A.** [1986] 2 Lloyds Rep. 294, the court considered a case where a party sought to take a jurisdiction point in an arbitration very late in the day. Hirst J quoted from the judgment of Devlin J (as he then was) in Westminster Chemicals where a party had submitted to the jurisdiction of an arbitrator, then he was bound by the award. In Sea Calm, Hirst J concluded that there had been positive affirmation of a contract and thus of an arbitration clause, and that the defendant was bound by that election. In this case, one of the elements of waiver summarised in Sea Calm was present, namely the unequivocal statement by CFW at an early stage that they accepted the adjudicator's jurisdiction. Miss Jefford submits that I should distinguish the present case from the position in Sea Calm, because, in that case, the parties had progressed much more deeply into the arbitration than was the case here.

67. CFW made their election. At the time they did so, they were represented by solicitors. Hugh James had been acting for CFW for some time before Cowlin served their notice to adjudicate, as the correspondence demonstrates. Whilst the adjudication process is rapid, the questions whether there is a relevant contract between the parties and whether an adjudicator has jurisdiction would normally be at the front of the minds of those acting for parties. Hugh James must be taken to have understood the rapid nature of the adjudication process and that any challenge to jurisdiction must be taken at the earliest possible opportunity. CFW thus had sufficient knowledge to make an election to accept jurisdiction. Hugh James served the Counter Notice on behalf of CFW. Hugh James continued to correspond with Lee Crowder and the adjudicator on the assumption that the adjudicator had jurisdiction. Hugh James indicated in the 28 September letter that the adjudicator may not have jurisdiction. They then made their objection to jurisdiction at the first formal opportunity, namely service of their response to Cowlin's notice of referral. Miss Jefford submits that, in circumstances where the adjudication process is rapid and often does not permit much time for a responding party to reflect on its position, it would be a harsh result if CFW were estopped from denying the adjudicator's jurisdiction or were found to have waived altogether their right to object, when they had raised their objection at a comparatively early stage. I accept that such a result might be harsh. However, it seems to me that must be the result: a court will generally conclude that, once a party has made an election, he is bound by it and has waived his right to object. I therefore conclude that having elected to affirm the adjudicator's jurisdiction and expressly sought decisions by the adjudicator, CFW waived its right to object to the jurisdiction of the adjudicator. CFW could not go back on that election. Accordingly, Mr Harris had jurisdiction to decide the matters which he dealt with.

68. CFW's alternative case is that, even if it is found that they did agree to Mr Harris' jurisdiction over the issues in the Counter Notice, they did so after and subject to their principal objection to jurisdiction on

the ground that there was no contract. I reject that submission. The content and tenor of the correspondence does not support that submission.

69. In case I am wrong on the question of jurisdiction, I deal with the question whether there was a contract between the parties.

Was there a construction contract between the parties?

70. Cowlin's case is that they contracted with CFW in the summer of 2000. All the essential details of the contract were agreed by the fax of 8 June 2000 and faxed reply of 8/9 June. Thereafter, further details such as dates for milestone payments were resolved. Those dates then changed because the circumstances of the contract changed. Although the parties did not complete the formal contract document which CFW had prepared, that document was treated by both parties as the contract document and acted upon by both parties for at least a further twelve months.

71. CFW's case is that prior to 8 June 2000, there was discussion and correspondence regarding instalment payments. It is clear from the fax of 8 June that it was intended that there be a formal appointment and that the schedule of instalment payments was yet to be agreed. The instalment payments were agreed at a meeting on 21 June 2000 but the formal appointment document was never signed. Indeed, the parties did not even agree which standard form was to be used. Instead, on 7 August, Cowlin asked for amendments to the payment schedule and to include a provision that the main contract terms take precedence. CFW never agreed to the proposals concerning the main contract terms. Although CFW provided an amended payment schedule in November 2000, Cowlin never signed or agreed that. There was no agreement as to whether the contract was to be signed as a deed. There was no agreement as to the scope of the services which CFW were to provide, because the services supplement of DB2/99, which sets out the scope of services, was never agreed. Accordingly, there was no concluded contract, no agreement as to all essential terms and no acceptance by Cowlin of the draft terms put forward by CFW. Although CFW proceeded as if there were a contract and indeed positively contended that there was a contract, it is not uncommon for parties to proceed on that basis and in any event the test as to whether or not there is a contract is an objective test. Cowlin's own case as to what the contract was has changed a number of times during both the adjudication and court proceedings. They have never been able consistently to identify what the contract was or how it was formed.

72. The test whether a contract came into existence must be considered objectively. I must disregard subjective issues such as the parties' intentions. I therefore give no weight to the evidence in Mr Payne's statement as to what he believed the effect of the 8 June fax to be.

73. It is clear to me on analysis of the documents to which I have referred and the unchallenged evidence from Mr Payne as to the matters discussed at the meetings on 20 and 21 June 2000 and Mr Spiller's telephone call to Mr Payne later on 21 June, that a contract was concluded between the parties on 21 June 2000. At that point, the payment instalment schedule was agreed. All essential terms were agreed. There was a subsequent dispute as to which of the standard forms applied but that is not unusual and was a matter which was capable of resolution. Confusion as to which standard form applied did not prevent agreement being reached. The attempt by Cowlin to make changes, by introducing reference to the main contract, came after the contract had been concluded. CFW were under no obligation to agree to that proposal. CFW contend that the scope of services was not agreed. In her decision, Dr Coombes Davies decided that the services to be provided by CFW were set out in schedule E5 Final Proposals, part of DB2/99, but that schedule had not been agreed between the parties. Miss Jefford develops this to submit that this indicates that the scope of services to be performed by CFW had not been agreed. So far as I am aware, this is the first time that this point has been raised. I am not aware of any exchange between the parties which suggests that there may have been any lack of understanding between them as to the scope of work. That appears to be an artificial position for CFW now to take.

74. It appears that the contract was made partially in writing and partly orally on 21 June 2000. It is clearly evidenced in writing. Pursuant to section 107(2) of HGCRA, this was a construction contract.

75. It would not normally be relevant to consider documents which were created after the contract is said to have been formed, but Mr Brannigan submits that I should have regard to the correspondence after

June 2000 and to the documents in the first adjudication which, he submits, throw light on whether the parties considered there was a contract. These all reinforce my conclusion as to the formation of the contract. The invoices all indicate an acceptance by CFW that there was a contract in place, as does the letter from CFW dated 29 August 2000 which makes a number of specific references to the contract. The letter from Hugh James dated 3 September 2001 could not be clearer: it is a long and considered letter from competent solicitors who must have given thought to the question whether or not a contract existed between the parties. Their clear understanding was that a contract existed; in dispute was which standard form applied. CFW subsequently, through solicitors, gave notice of acceptance of alleged repudiation of the contract.

As at 18 May 2002, was there a dispute between the parties?

76. Cowlin contend that there was a dispute. This came into existence when CFW/insurers failed or refused to agree that Cowlin was entitled to the sum it claimed.

77. CFW's case is that, as at 18 May 2002, when Cowlin gave notice to adjudicate, CFW and their insurers had not had sufficient opportunity to consider the issues which were referred to Dr Coombes Davies. Miss Jefford submits that whether or not there was a dispute is a question of fact. Adjudication is a rapid process. There must be a clear dispute between the parties to safeguard the parties to that process. Miss Jefford makes no complaint about the lack of particularisation of the claim but only that CFW and their insurers had not had sufficient time to consider it.

78. I have been referred to a number of authorities. In **Monmouthshire County Council v Costelloe and Kemple Limited** (1965) 5 BLR 83, Lord Denning MR, in a case concerning the ICE conditions, said:

"Was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractor. Until that claim is rejected, you cannot say that there is a dispute or difference. There must be both a claim and a rejection of it in order to constitute a dispute or difference."

79. In **Halki Shipping Corporation -v- Sopex Oils Ltd** [1998] 1WLR727, Swinton Thomas LJ said, at page 761, "… there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable". He cited a passage from the judgment of Templeman LJ in **Ellerine Bros Pty Ltd v Klinger** [1982] 1 WLR:"*It is not necessary, for a dispute to arise, that the defendant should write back and say "I don't agree." If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."*

80. In **Fastrack Contractors Limited v Morrison Construction Limited** [2000] BLR 168, HHJ Thornton QC undertook a review of relevant decisions including those **Halki** and **Monmouthshire**. He said
"A dispute can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."

81. In **Tomlinson**, HHJ Humphrey Lloyd QC said
"A dispute is not lightly to be inferred. Nevertheless, there must come a time when a dispute will arise, usually, where a claim or assertion is rejected in clear language without the possibility of further discussion, and such a rejection might conceivably be by way of an obvious and outright refusal to consider a particular claim at all."

82. In **Sindall -v- Solland** (unreported, June 2001) HHJ Humphrey Lloyd QC said
"for there to be a dispute for the purposes of exercising the statutory right of adjudication, it must be clear that a point has emerged from the process of discussion or negotiation has ended and that there is something which needs to be decided."

83. In **Edmund Nuttall -v- R G Carter Ltd** [2002] BLR312, HHJ Seymour QC said
"In my judgment a dispute is something different from a claim… While a dispute can be about a claim, there is more to a dispute than simply a claim which has not been accepted…. For there to be a dispute, there must have been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind… The construction of the word "dispute" for the purposes of the 1996 Act … is not simply a matter of semantics, but a question of practical policy… The whole concept underlying adjudication is that

the parties to an adjudication should first themselves have attempted to resolve their differences by open exchange of views and, if they are unable to, they should submit to an independent third party for decision the facts and arguments they have previously rehearsed among themselves. If adjudication does not work in that way, there is a risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been possible."

84. In short, recent first instance decisions tend to support **Monmouthshire**. If I follow the guidance given by Lord Denning MR in **Monmouthshire**, I must decide whether CFW had been given sufficient opportunity to consider the claim. The circumstances were that the parties had ceased to work together by August 2001. At a meeting on 28 August 2001, Cowlin had notified to CFW a claim of about £8,000 in respect of "direct cost contras". I have not been referred to any other relevant contact between the parties as regards the claim the subject of the second adjudication until Cowlin's letter to CFW of 27 February 2002. There is no suggestion that Cowlin had previously intimated that such a claim would be made. CFW wished to involve their insurers. It was therefore understandable that they initially responded to Cowlin in the terms of their letter of 8 March 2002. Cowlin responded very promptly on 11 March with what they described as full supporting documentation in support of their monetary claim. They sent CFW a substantial number of documents. They did not, however, explain in detail how CFW were said to have been responsible for the 14-week delay on which the money claim was based. In their letter, they simply said that CFW had been fully aware of the timetable for the production of drawings and of the programme required for Cowlin's work; they were fully aware of the delays which CFW had caused. CFW replied immediately, by letter of the same date (11 March 2002). They pointed out that Cowlin had not explained the basis of their claim. Cowlin's response to that was simply to contend that they had supplied sufficient detail to enable CFW to identify both the case against them and the consequences of their failures, then to repeat their request that CFW meet to discuss the claim. CFW explained on 4 April 2002 that they would not be able to meet Cowlin, because of insurers' involvement.

85. By 24 April, when Cowlin contacted underwriters directly, CFW had been in possession of Cowlin's claim for eight weeks and of the detail of the money claim for six weeks. Underwriters appear to have reacted immediately to the letter of 24 April, because Mr Saunders of Crawford telephoned Cowlin on 25 April and agreed to meet. Mr Saunders needed to understand the basis of the claim in order to be able to advise underwriters whether to accept or reject the claim. Unless he knew from Cowlin or CFW the factual basis and alleged breaches of contract or duty, he could not report to insurers. It may be said that, in circumstances where Cowlin had not given particulars of their claim, it was not good enough for Cowlin simply to say, as they did, that CFW knew what their claim was all about so there was no need for Cowlin to explain it. At the meeting on 1 May Mr Saunders learned that Cowlin would not be providing any explanation. He would have to obtain information from CFW. However, by 3 May, when Cowlin made their peremptory demand for a substantive response by 17 May, CFW had been in possession of the 27 February claim and the 11 March details for nearly eight weeks. By that stage, I conclude that CFW should have known broadly whether they admitted some or all of Cowlin's claim or rejected it totally. Insurers' involvement may have prolonged that process, but I am not told when insurers first became involved. On 3 May CFW and insurers were given a further 14 days beyond the time they had already had. Cowlin's demand for a substantive response by 17 May cannot be said to have been high handed or unjustified. Following the **Monmouthshire** test, therefore, I conclude that by 18 May CFW and their insurers had been given sufficient opportunity to indicate broadly their response to Cowlin's claim.

86. Most disputes stem from claims. But the existence of a detailed claim is not necessary to give rise to a dispute. Many court and arbitral proceedings are begun before the nature of the dispute or difference between the parties has been explicitly set out. In any event, Miss Jefford does not rely on the lack of particularisation. Absence of a reply gives rise to the inference that there is a dispute. That is what happened here. That conclusion is reinforced by the fact that Cowlin had delivered an ultimatum. I conclude that by 18 May 2002 a dispute had arisen. Cowlin had made a claim. The nature of the claim had been outlined so that, although CFW did not know the detail, they were aware of the bare bones of it. Although CFW had not expressly rejected the claim, Cowlin had made it clear that, unless CFW made

their position clear by 17 May, Cowlin would have to assume that CFW did not accept the claim. In the absence of an acceptance of Cowlin's claim, CFW must be taken to have rejected it, so that a dispute had arisen. By the time the deadline passed, there was undoubtedly a dispute.

87. If I follow the test indicated by Swinton Thomas LJ in **Halki,** I arrive at the same conclusion but by a different route. Cowlin submitted a claim on 27 February 2002. CFW did not admit that the sum claimed by Cowlin was due and payable. Applying the test in **Halki,** as CFW had not by 18 May accepted the claim, even though they had not expressly rejected the claim, nevertheless by that date there was a dispute between the parties.

88. In my judgment, the approach in Halki is to be preferred. I am guided by the straightforward analysis in that case. In **Halki** (in the context of the Arbitration Act 1996) the Court of Appeal reminded us that the courts have generally construed widely the word "dispute" and they declined, in that case, to construe the word more narrowly in the context of an arbitration. While I accept that the adjudication process involves short timescales, and that there is a risk that a responding party may be ambushed, those are not in my judgment reasons to construe the word dispute more narrowly in the context of adjudications than in other contexts. I bear in mind the practical difficulties faced by an adjudicator whose jurisdiction is challenged on the ground that there is no dispute. The court should not add unnecessarily to those difficulties by giving a narrow meaning to the word dispute which would in turn permit a responding party to introduce uncertainties which might be difficult for an adjudicator to deal with. Otherwise, there is a risk that the purpose of HGCRA may be defeated.

89. There was a construction contract and a dispute. It follows that Dr Coombes Davies had jurisdiction.

VAT

90. Dr Coombes Davies decided that CFW should pay Cowlin £275,211.51 plus VAT of £48,162.01, being in total £323,373.52. CFW submit that the adjudicator did not have jurisdiction to decide whether VAT was payable on any sum awarded to Cowlin.

91. In its notice to adjudicate of 18 May 2002, Cowlin stated *"…we seek a decision that CFW have not properly performed their duties as noted above, that we be paid the sum of £717,510.80 or such other sum as the Adjudicator shall decide, the Adjudicator's costs VAT together with the entitlement to seek summary enforcement…"*. That was repeated in its notice of referral, in which Cowlin made it clear that they were seeking VAT in addition to the principal sum claimed and costs. CFW have at no stage challenged the adjudicator's jurisdiction to decide whether VAT is payable.

92. CFW submit that Cowlin did not claim VAT before the adjudication, relying on Cowlin's letter dated 24 April 2002 to CFW and notice to adjudicate dated 18 May 2002. I cannot agree. Although Cowlin do not refer to VAT in their letter of 24 April, they do specifically refer to it in the notice to adjudicate. Cowlin put the question of VAT in issue in the notice to adjudicate. Accordingly, the adjudicator had jurisdiction to deal with VAT. It is irrelevant whether or not Dr Coombes Davies was right to decide that VAT was payable.

Conclusion

93. CFW have no real prospect of successfully defending the claim and judgment should be entered for Cowlin.

Mr Sean Brannigan of Counsel (instructed by Lee Crowder) for the Claimant
Ms Nerys Jefford of Counsel (instructed by Hugh James Jones Simey) for the Defendant