JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR : TCC : 28th October 2003.

Introduction

1. In this action the Claimant, Dean and Dyball Construction Ltd. (*"D and D"*), seeks payment from the Defendant, Kenneth Grubb Associates Ltd. (*"Grubb"*), of an amount of £315,390.14, together with interest, which it is claimed is due from Grubb pursuant to a decision (*"the Decision"*) of Mr. Albert Lester, acting as an adjudicator, dated 8 September 2003. It was contended on behalf of D and D that there was no defence to the claim and thus summary judgment was sought for the sum which Mr. Lester had determined was due. The application for summary judgment was resisted on behalf of Grubb initially on five grounds, each of which was said to vitiate the Decision. Those five grounds were set out at paragraph 5 of the first witness statement of Mr. Guyan Stuart Lane made on behalf of Grubb as follows:-

"*(a) The claim which was referred for adjudication was not the same claim as the claim which had been rejected by KGA* [that is, Grubb] *and in respect of which the parties had been corresponding before D & D served the Notice of Adjudication dated 22 July 2003.*

(b) The contract between the parties was not capable of being adjudicated because it was not "in writing" as defined by section 107 of the Housing Grants Construction and Regeneration Act, 1996.

(c) The dispute was not validly referred for adjudication under the contractual provisions.

(d) The Adjudicator made an error of law by answering the wrong question.

(e) The procedure lacked fairness."

Miss Kim Franklin, who appeared on behalf of Grubb at the hearing of the application for summary judgment, at first placed relatively little emphasis on the second and third of these points. However, as her argument unfolded she became more interested in them and ultimately submitted that it was arguable on the facts for which she contended that the agreement between the parties was made partly orally and partly in writing, that it did not expressly incorporate any provision for adjudication, and thus did not actually contain any provision at all for adjudication. She drew together, and sought to refine, the first and fourth points, submitting that at the time notice of adjudication was given on behalf of D and D there was no existing dispute between the parties, alternatively the dispute referred was a different dispute from that which had actually arisen between the parties because the quantum of the amount claimed and the elements alleged to make up that amount were different from those previously identified, alternatively Mr. Lester addressed the wrong question in reaching his conclusion. Miss Franklin did rely heavily upon the fifth of Mr. Lane's points. She also trailed her coat in relation to an entirely new point in respect of which she wished to reserve her position, but which she did not argue before me. That point was whether, as a matter of law, an adjudicator has jurisdiction to make an error of law. Miss Franklin's position was that he does not, and that any decisions to the contrary in the context of adjudication, in particular the decision of the Court of Appeal in ***C & B Scene Concept Design Ltd. v. Isobars Ltd***. [2002] BLR 93, were *per incuriam* because relevant earlier authority, specifically the decisions in ***Anisminic Ltd. v. Foreign Compensation Commission*** [1969] 2 AC 147, ***O'Reilly v. Mackman*** [1983] 2 AC 237 and ***Lee v. Showmen's Guild*** [1952] 2 QB 329, had not been cited. However, as I have said, Miss Franklin did not seek to argue this latter point before me. I am uncertain how, in those circumstances, she can reserve her position in relation to the point.

2. In order to evaluate the merits of the points which Miss Franklin did seek to pursue before me it is necessary to consider the circumstances which led up to the making of the Decision.

The contractual relationship between the parties

3. D and D is a subsidiary of a company called Dean and Dyball Developments Ltd. (*"Developments"*). D and D itself carries on business as a building contractor. In early 1998 Developments entered into an arrangement with West Somerset District Council (*"the Council"*), which owns the harbour at Watchet in Somerset, to construct a marina (*"the Marina"*) in the harbour. In order to perform its obligations to the Council in respect of the construction of the Marina Developments engaged D and D to undertake the necessary works.

4. In order to retain water within the Marina at low states of the tide it was envisaged that it would be necessary to provide an impounding gate (*"a Gate"*) across the entrance.

5. Grubb carries on business as a consulting engineer. Grubb was approached by Mr. Peter Cross of D and D to see whether it would be interested in designing a Gate and providing other services ancillary thereto. Following that approach Grubb sent to D and D a letter dated 24 May 2000 (*"the Proposal Letter"*) which began as follows:- *"Following the meeting with your Peter Cross, we are pleased to outline our fee proposal to undertake a* [sic] *various consultancy services in relation to Watchet Marina. We have tried to structure our offer in a way that allows the project to evolve in alternative designs.*"

6. The Proposal Letter set out at some length the services which Grubb was prepared to provide in respect of the Marina. Two alternative designs of a Gate were postulated, either a float operated tilting gate or a hydraulically powered tilting gate, depending upon the outcome of an initial study of the site. The fee sought varied depending upon which of these options was selected, albeit only by £775. The Proposal Letter included:-

"***3.0 SCOPE OF PROPOSAL***
We envisage the following being within the general scope of the work to be undertaken by us:
1. The initial study of the site, so that a preferred gate type and specification can be agreed, together with general project management costs.
2a EITHER: The design of a float operated tilting gate with associated systems.
2b OR: The design of a hydraulically powered gate with associated systems. ….
4.0 PROGRAMME FOR M & E WORKS
…
We suggest the following outline programme for the assignment: …
Gate available for commissioning 40 weeks
…
10.0 VALIDITY
This offer is open for acceptance for a period of thirty days from the above date.
11.0 TERMS AND CONDITIONS OF CONTRACT
We are unsure of your intentions with regards to terms and conditions of contract. We suggest adopting the Association of Consulting Engineers Conditions of Engagement B(2)."

7. It appears that D and D did not respond to the Proposal Letter within the period of 30 days from the date of the letter other than to acknowledge receipt of it in a letter dated 1 June 2000, in which it also requested Grubb to proceed with the initial study. However, in a facsimile transmission dated 23 August 2000 Mr. Bill Prince of D and D wrote to Mr. Kenneth Grubb of Grubb so far as is presently material as follows:-
"*We confirm acceptance of your fee proposal for the above works, in the form of your letter addressed to our Mr. P.J. Cross and dated 24 May 2000. We will be appointing you to carry out the full scope of services described under section 3 of your proposal.*
Our official appointment letter will follow in due course, however in the mean time we would be grateful if you could continue to work to the programme of 36 weeks to commissioning of impounding gate – this period to have commenced 31 July 2000.
In addition to this we will be commissioning you to undertake a CFD analysis of the Harbour and Marina entrance as detailed in your facsimile dated 10 August 2000."

8. No *"official appointment letter"* was in the event forthcoming.

9. The case advanced before me on behalf of D and D by Mr. Simon Henderson was that either a contract was concluded between D and D and Grubb by the acceptance by D and D in its facsimile transmission dated 23 August 2000 of the offer contained in the Proposal Letter or the facsimile transmission dated 23 August 2000 was a counter-offer which incorporated by reference the terms of the Proposal Letter and the documents referred to in it, specifically the Association of Consulting Engineers Conditions of Engagement B(2) (*"the ACE Conditions"*), and which counter-offer was accepted by Grubb by conduct in undertaking the provision of the services described in the Proposal Letter.

10. In his first witness statement Mr. Lane set out the position of Grubb in relation to the contract alleged as follows:-

"*11. D&D alleges a contract based upon an offer from KGA by letter dated 24 May 2000 and an acceptance by D&D by letter dated 23 August 2000. Leaving aside the issue as to whether the contract between D&D and KGA was formed on that basis, I am informed by Mr. Digby* [of Grubb] *that some terms of KGA's appointment were agreed orally but there was no exchange of communications in writing in respect thereof, nor was the agreement of the oral terms evidenced in writing.*

12. For example, KGA's letter of 24 May 2000 proposed either a displacer operated tilting gate or a hydraulically operated tilting gate. KGA were requested to provide an analysis of each system and did so. KGA's preference was for a system using a "cheat" chamber which would store water in the cheat chamber which could then be used to displace water to operate the tilting gate. The benefit of this system was certainty of operation of the gate. KGA completed the designs for this system and it was sent to tenderers by D&D. However, D&D was concerned about the costs of the proposed system and instructed KGA to find a cheaper alternative.

13. KGA then considered introducing a brake system to keep the gate in place during tidal change until displacement became inevitable, then the gate would operate as required. However, it proved impossible to source a brake or clutch of the size required.

14. D&D then instructed KGA to design schemes for a powered system to raise and lower the gate. By letter dated 5 November 2001 … , KGA sent D&D two design proposals for a powered gate system, outlining the budget costs, which did not include KGA's own design costs. KGA sought D&D's agreement to proceed with this option, which constituted a variation to the general scope of work originally to be undertaken by KGA. On or about 5 November 2001, in a telephone discussion with Mr. Digby, Peter Cross of D&D orally accepted KGA's motorised proposal for raising and lowering the gate. There was no exchange of communications in writing in respect thereof, nor was the agreement of the oral term evidenced in writing."

11. The effect of the passage from the first witness statement of Mr. Lane which I have set out in the preceding paragraph of this judgment does not seem to be to challenge the proposition that a contract was originally concluded between D and D and Grubb in one of the ways contended for on behalf of D and D, but rather to introduce evidence that such contract may have been varied orally subsequent to being made.

12. On the material put before me I take the view that a contract was concluded between D and D and Grubb in relation to the work which it was desired by D and D Grubb should undertake in relation to the Marina by the acceptance by Grubb of the counter-offer contained in Mr. Prince's facsimile transmission to Mr. Grubb dated 23 August 2000 by conduct in getting on with the work. By the date of that facsimile transmission the period of validity of the offer contained in the Proposal Letter had expired, so that offer was no longer available for acceptance. Also the period until commissioning contemplated by the facsimile transmission was shorter, 36 weeks, than that contemplated in the Proposal Letter, 40 weeks. Although the facsimile transmission of 23 August 2000 envisaged that an *"official appointment letter"* would follow, it does not seem to me on proper construction of the facsimile transmission that it was not intended at that point to enter into a binding contract. The transmission in terms did *"confirm acceptance"* of the Proposal Letter. In my judgment it thereby incorporated by reference not only the Proposal Letter and all its terms, save as specifically altered by the facsimile transmission, but also documents, specifically the ACE Conditions, referred to in the Proposal Letter.

13. The significance of the debate as to how the contract between D and D and Grubb was formed and as to whether particular provisions were written down seemed initially to be that Mr. Lane, at any rate, wished to take the point that Mr. Lester had not had jurisdiction to make the Decision because the agreement between D and D and Grubb was not one to which the provisions of *Part II* of *Housing Grants, Construction and Regeneration Act 1996* (*"the 1996 Act"*) applied because the circumstances did not fall within *s.107* of the 1996 Act. The material provisions of that section are:-

"(1) The provisions of this Part apply only where the construction contract is in writing, and any agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing –

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."

The Court of Appeal held in ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd***. [2002] BLR 217 that for the purposes of *s. 107* of the 1996 Act what was required was a document which recorded the whole of the relevant agreement between the parties: it was not enough that there was a document which recorded in writing that there was an agreement. The policy reason for so construing *s. 107* which commended itself at least to both Ward LJ, at page 222 of the report, and Robert Walker LJ, at page 223, was that it was inappropriate for an adjudicator to be expected to deal with disputes as to the terms of oral contracts. Auld LJ in his judgment adopted a rather different emphasis, contemplating that all that was required was that the terms of the contract material to the issue in the adjudication should be recorded in writing, and that it was not necessary that other terms should be.

14. Her interest in the point having been aroused, Miss Franklin submitted that, on the material set out in the first witness statement of Mr. Lane in the passage which I have quoted, it was arguable that the agreement between the parties was partly in writing and partly oral. She submitted that D and D had not clearly elected to adopt the suggestion of Grubb that the ACE Conditions should be incorporated into the agreement, and, that being so, they were not. In those circumstances, Miss Franklin contended, it was arguable in the light of the decision in ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd***. that *s. 107* of the 1996 Act did not apply either, with the consequence that there was no provision for adjudication in the contract between D and D and Grubb. If those submissions were well-founded, it would follow that it would not be appropriate for me to enter summary judgment in favour of D and D because if it were found at trial that the contract between the parties contained no provision for adjudication it would inevitably follow that Grubb was not bound by the Decision. However, for the reasons which I have given it seems to me that Miss Franklin's belated enthusiasm for the point as to how the contract between D and D and Grubb had been made was misplaced. It seems to me to be quite clear how the contract was made and that it incorporated the ACE Conditions. I therefore reject Miss Franklin's submissions that it was arguable that the relevant contract contained no provision for adjudication.

15. As an alternative to her main submission in respect of the contract point, Miss Franklin submitted that, if the contract between the parties did contain provision for adjudication, that was as a result of the operation of *s. 107* of the 1996 Act and consequently was the provision made by the *Scheme for Construction Contracts* (*"the Scheme"*), set out in the *Schedule* to *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 1998 No. 469. This submission, which was not fully developed, seemed to depend upon the premise that the agreement between D and D and Grubb was contained in an exchange of communications in writing, or wholly evidenced in writing, but did not incorporate the ACE Conditions. For the reasons which I have given I reject that submission also.

16. In *RJT* ***Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd***. the Court of Appeal was not concerned with, and expressed no view about, a situation in which a contract originally made, or adequately evidenced, in writing was subsequently varied orally and there was no written evidence of the oral variations. The policy reason which commended itself to Ward LJ and to Robert Walker LJ for requiring all terms of a *"construction contract"* to be evidenced in writing logically suggests that any variation to a *"construction contract"* ought also either to be in writing or evidenced in writing if there is subsequently to be an adjudication as a result of the operation of Part II of the 1996 Act. However, it does seem a strange result if a *"construction contract"* to which *s. 107* of the 1996 Act applies at the time it is made is taken outside the ambit of the section because some variation, however minor, is subsequently made orally and not evidenced in writing. Happily it is not necessary to grapple with this issue in the present case because in this case the question of the availability of adjudication as a mechanism for interim resolution of disputes does not depend upon the operation of *s. 107* of the 1996 Act, but upon the express terms of clause B9.2 of the ACE Conditions.

17. By clause B9.2 of the ACE Conditions it is provided that:- *"Where this Agreement is a construction contract within the meaning of the Housing Grants, Construction and Regeneration Act 1996 either party may refer any dispute arising under this Agreement to adjudication in accordance with the Construction Industry Council Model Adjudication Procedure.*"

18. In the result it seems to me that D and D and Grubb by their contract, and not as a consequence of the operation of *s. 107* of the 1996 Act, agreed that, in the event of any dispute arising between them in relation to the subject-matter of that contract, either of them could refer that dispute to adjudication in accordance with the Construction Industry Council Model Adjudication Procedure (*"the Procedure"*). That is to say, not merely did they each agree to submit disputes to adjudication, but they specifically agreed to such adjudication, if it took place, being governed by the Procedure. It is thus material to notice relevant provisions of the Procedure.

19. The Procedure includes the following:-

"*1. The object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the Contract and this procedure shall be interpreted accordingly.*

2. The Adjudicator shall act impartially….

4. The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

5. The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration….

8. Either Party may give notice at any time of its intention to refer a dispute arising under the Contract to adjudication by giving a written Notice to the other Party. The Notice shall include a brief statement of the issue or issues which it is desired to refer and the redress sought. The referring Party shall send a copy of the Notice to any adjudicator named in the Contract….

14. The referring Party shall send to the Adjudicator within 7 days of the giving of the Notice (or as soon thereafter as the Adjudicator is appointed) and at the same time copy to the other Party, a statement of its case including a copy of the Notice, the Contract, details of the circumstances giving rise to the dispute, the reasons why it is entitled to the redress sought, and the evidence upon which it relies. The statement of case shall be confined to the issues raised in the Notice…

17. The Adjudicator shall have complete discretion as to how to conduct the adjudication, and shall establish the procedure and timetable, subject to any limitation there may be in the Contract or the Act. He shall not be required to observe any rule of evidence, procedure or otherwise, of any court or tribunal. Without prejudice to the generality of these powers, he may:

(i) request a written defence, further argument or counter argument
(ii) request the production of documents or the attendance of people whom he considers could assist
(iii) visit the site
(iv) meet and question the Parties and their representatives
(v) meet the Parties separately
(vi) limit the length or time for submission of any statement, defence or argument
(vii) proceed with the adjudication and reach a decision even if a Party fails to comply with a request or direction of the Adjudicator
(viii) issue such further directions as he considers to be appropriate….

20. The Adjudicator shall decide the matters set out in the Notice, together with any other matters which the Parties and the Adjudicator agree shall be within the scope of the adjudication.

21. The Adjudicator shall determine the rights and obligations of the Parties in accordance with the law of Contract….

30. The Parties shall be entitled to the redress set out in the decision and to seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration. …"

20. By clause B2.3 of the ACE Conditions it is provided that:-
"*The Consulting Engineer shall exercise reasonable skill, care and diligence in the performance of the Services* [meaning that which he had agreed to do under the terms of the ACE Conditions]."

The dispute

21. Grubb designed a Gate which was in due course manufactured and installed in the entrance to the Marina. In this judgment I shall refer to the gate which Grubb designed as *"the Gate"*. D and D considered that the Gate did not function satisfactorily. In a letter dated 30 August 2002 to Grubb D and D wrote, so far as is presently material, as follows:-

"We refer to the works you have carried out at Watchet Marina to design a Tidal Lock Gate, and to supervise the installation and commissioning of this gate.
We would advise that the Gate, which was due to impound the Marina in July 2001, has never been properly commissioned and fully handed over to our Employer, and has never operated to the reasonable satisfaction of the Marina operator.
It is now twelve months since completion of the works and we are still in the process of making further modifications to ensure the Gate will operate without constant manual assistance.
This situation is wholly unacceptable, and has arisen from your failure to comply with your professional obligation to design a Tidal Lock Gate for Watchet Marina Harbour suitable for the purpose.
As a result of the failure of the Gate to operate satisfactorily, we are making a claim against you for the additional costs we have incurred in ensuring the safety of the Marina….
The enclosed Document has been prepared to substantiate our claim that you are in breach of your professional obligations, and also sets out the recovery we are seeking from you to redress that breach…."

The sum claimed at that time was quantified at £369,938.90. From the terms of the letter dated 30 August 2002 it appeared that the justification put forward for the claim was simply that the Gate did not function as required, which matter was said to amount to a *"failure to comply with your professional obligation to design a Tidal Lock Gate for Watchet Marina Harbour suitable for the purpose"*. In other words, the contention on behalf of D and D seemed to be that Grubb owed it a contractual obligation to design a Gate which was fit for the purpose for which it was required. There was no overt assertion that Grubb had failed to use reasonable skill, care and diligence in designing the Gate.

22. No doubt there was other intermediate correspondence between the parties or their representatives which was not put in evidence before me, but by a letter dated 17 June 2003 Messrs. Clarke Willmott (*"Clarke Willmott"*), solicitors acting on behalf of D and D, wrote to Grubb in these terms:- *"Further to our previous correspondence on this matter we now enclose with this letter an updated summary of the costs that our clients have incurred as a result of your negligence and breach of contract."*

The costs were then put at a total of £470,073.60. The reference to the alleged *"negligence"* of Grubb indicates that it was at least by that time being asserted on behalf of D and D that the failure of the Gate designed by Grubb to function as desired was as a result of a want of care and skill on the part of Grubb.

23. Clarke Willmott gave a Notice of Adjudication (*"the Notice"*) dated 22 July 2003 to Grubb. The Notice included:-

"2 ***The Dispute***

2.1 Following its detailed design by KGA, the gate was fabricated and installed by Taylor and Sons Ltd in the period leading up to June 2001. Under the terms of the Offer Letter [that is, the Proposal Letter], *KGA had a responsibility to oversee the commissioning of the gate and this process commenced during July 2001.*

2.2 During the initial commissioning of the gate it quickly became apparent that it did not function in the manner and with the consistent reliability which was a fundamental requirement of a gate installed to impound tidal waters in a marina.

2.3 The process of adjustment of the various configurations of buoyancy and ballast in the gate to try and ensure that it functioned in such a manner continued throughout July, August, September and October 2001 and, in total, more than forty fully documented tests were carried out to try and achieve the specified operation.

2.4 Dean and Dyball Construction began to lose confidence in the design of the gate as constructed and, after discussions, KGA designed an additional mechanical solution to assist the opening and closing of the gate. This solution was known as the Gate Motorised Advance System ("GMAS") and KGA prepared design and fabrication drawings for this motorised drive, which was intended to ensure the rise and fall of the gate in the manner that had originally been envisaged.

2.5 After further protracted delays, installation of the GMAS was eventually carried out in April 2002. However, despite this, the gate still failed to operate in accordance with specifications. In particular, with the GMAS in operation it proved impossible to guarantee "fail safe" operation. This had always been a fundamental element of the design because, if the gate were to fail and allow water to drain out of the marina, there would be potentially very high cost caused by any damage to yachts in the marina at the time.

2.6 There were also a number of other problems around the workings of the gate including the width of the net clearance provided by the gate, the "slamming" of the gate during operation, problems with the stop logs and frame modifications. These, and other problems encountered, will be dealt with fully in the Referral Notice.

2.7 In view of the failure of the GMAS to ensure a "fail-safe" mode of operation, further discussions took place with KGA and it was suggested that compressed air could be used to assist the initial movement of the gate in the event that the GMAS failed. KGA therefore developed a pneumatic system ("the PAS") which was installed. Again, despite this further attempt to remedy the position, the gate would still not operate reliantly in a fail-safe manner.

2.8 As a result of the ongoing costs of these problems to Dean and Dyball Construction (which will be detailed in the Referral Notice) a decision was made to adopt an entirely different solution (the Hydraulic Ram Solution), which will, when implemented during the next six months, make the GMAS and PAS redundant.

3 ***The Claim***

3.1 KGA were formally notified of a claim against them on the 30th August 2002 and that letter (and the claim document enclosed with it) will be included with the Referral Notice.

3.2 A further letter from Dean and Dyball Construction which stated that ongoing problems were still being incurred was posted to KGA on the 3rd February 2003.

3.3 In an attempt to discover what were the causes of the problems with the gate, Ove Arup and Partners were instructed to produce a report on the gate design. A copy of this report was posted to KGA on 21 May 2003, and one will be appended to the Referral Notice.

3.4 As a result of the design failures of the gate, Dean and Dyball Construction consider that KGA are in breach of their contract with Dean and Dyball Construction. "

24. In the Notice the sum claimed by D and D was quantified as £531,260.00 and it was said that that sum was continuing to increase. At paragraph 4.2.1 of the Notice it was promised that, *"The detailed breakdown of this amount (and any updated total) will be provided with the Referral Notice."*

The Adjudication

25. Mr. Lester was nominated as adjudicator by the Construction Industry Council on 23 July 2003.

26. The case advanced on behalf of D and D in the adjudication was set out in a Referral Notice (*"the Referral Notice"*) dated 29 July 2003. Section 4 of the Referral Notice was entitled *"The Dispute"*. It contained this formulation:-

"*4.1 The dispute concerns Dean & Dyball Construction's entitlement to damages and interest as a result of a breach of contract by KGA.*

4.2 It will be established later in this Referral Notice that KGA were appointed by Dean & Dyball Construction under the Association of Consulting Engineers Conditions of Engagement 1995 Agreement B2 ("ACE Agreement") to provide certain consultancy services ("the Consultancy Services") to Dean & Dyball Construction.

4.3 The ACE Agreement includes the provision (at Clause B2 2.3) that:

"The Consulting Engineer shall exercise reasonable skill, care and diligence in the performance of the Services".

Dean & Dyball Construction contend that this defines the standard of the contractual duty owed by KGA to Dean & Dyball Construction. Dean & Dyball Construction further contend that this standard was clearly not adhered to by KGA in the performances of the Consultancy Services and, therefore, KGA are in breach of contract and liable to repay Dean & Dyball Construction in respect of all the damages arising out of that breach.

4.4 Further, it is Dean & Dyball Construction's contention that the settled legal position in respect of damages arising out of a breach of contract is that they are to "put the party whose rights have been violated in the same position so far as money can do, as if his rights had been observed"."

27. Grubb was not legally represented for the purposes of the adjudication. It did receive some, limited, assistance from Mr. Roger Kemp, a loss adjuster, in relation to the quantum of the sums claimed. Grubb's immediate reaction to Mr. Lester's appointment as adjudicator was to write him a letter dated 11 August 2003, of which the material part read:-

"*Thank you for your letters in respect of the above matter. We are in a difficult position since in the absence of a formal ACE agreement with Dean & Dyball we are advised that the question of an adjudication clause is in doubt.*
To date we have received a copy of a report by their technical advisors Arup, to which we responded fully and suggested a meeting. In our view there is no proven reason for the problems at Watchet and considerable reason to believe that the problem is caused by factors for which Dean & Dyball hold responsibility rather than us. Dean & Dyball's lawyers Clarke Willmott had neither taken up our offer of a meeting or responded to our letter, but instead proceeded with an application for adjudication, which appears to be premature and doubtful in law.
We understand that a meeting has now been agreed and look forward to its positive outcome.
We have attempted to speak to Clarke Willmott to agree more time for our response. Unfortunately they do not accept the holiday season as a valid reason to set back the question of adjudication.
At this stage we do not feel able to sign and return the adjudication form as requested by you, for the reasons stated above.
We are pleased to provide you herein with the immediate correspondence between ourselves and Dean & Dyball together with other documentation that clarifies our position."

28. The documentation provided by Grubb to Mr. Lester included a paper which was untitled but was in the nature of a commentary on the technical issues arising in relation to the Gate as perceived from Grubb's angle, including observations on the report prepared for D and D by Messrs. Ove Arup and Partners (*"Arup"*). The paper went into quite a lot of detail, but its thrust was that the problems experienced with the Gate were not a consequence of any fault on the part of Grubb.

29. During the course of the adjudication Mr. Lester decided to meet separately the parties and their respective technical experts. He adopted the practice after each such meeting, of which there were several, of producing a note summarising the effect of the discussion, seeking the agreement of the person with whom the meeting had taken place as to the accuracy of the note and circulating the note to the parties.

30. As I have mentioned, Mr. Kemp assisted Grubb during the adjudication in respect of quantum issues. In a letter to Mr. Lester dated 27 August 2003 Mr. Kemp made the point that:-
"*With regard to the alleged sum expended by D & D of £531,260.00, we have not had the opportunity to date of reviewing this or the component elements. It will be necessary for us to review all invoices, plant records and labour costs. Additionally we will need to inspect the calculation of running costs and the calculation of replacement @ half life. From this we would need to introduce KGA's additional costs following the commissioning period and the issue of betterment, for as evidenced from the documentation submitted, the motorised option was not necessary.*"

31. Mr. Kemp did then consider the sum claimed and its make-up. He sent to Mr. Lester comments on those matters by a facsimile transmission dated 4 September 2003.

The Decision

32. At paragraph 2.3 of the Decision Mr. Lester set out his understanding of the dispute which had been referred to him for determination:-
"*The dispute is basically concerned with the entitlement to damages by Dean & Dyball occasioned by the non-performance of the tilting gate under all operating conditions.*
The full text of the Dispute as set out in the Dean & Dyball Referral Notice is as attached as Appendix A."

33. In Section 4 of the Decision Mr. Lester considered *"Technical Issues"*. After setting out a history of the development of various aspects of the design of the Gate at paragraph 4.7 Mr. Lester set out *"Comments"*. Those *"Comments"* included:-
"*After studying all the evidence and listening to the arguments put forward at meetings with both parties, it is clear that the design of the displacers was seriously flawed from the start.*

Of particular relevance is the report by Arup who rightly pointed out that the duty of a consultant is to ascertain and take into account all the possible forces which could act upon or affect the operation of a system. It is then their duty to a [sic] *design the system to withstand these forces and allow sufficient margin to withstand expected but indefinable external or internal forces in all foreseeable situations…..*

When Arup examined the spread sheet calculations they discovered that one factor which was not taken into account on the sheets submitted was the frictional resistance of the system between the displacers and the gate.

KGA in subsequent discussions claimed that these forces were assessed and taken into account in a separate calculation. However the fact remains that the many adjustments to the spread sheet on site do not reflect the incorporation of these forces which resist motion in both directions…..

It is always easy to be wise in hindsight, but had even one of two analyses described in the Arup report and subsequent meetings been carried out during the original design stage and certainly after the first commissioning problems came to light, the real cause of the unpredictable gate behaviour could have been found.

These two fundamental analyses were:

1) *What is the theoretical torque generated by the displacer and resisted by the gate at various stages of gate opening, i.e. angle of opening*
2) *What is the force available at the gate cable over and above the balancing forces which keep the system in equilibrium.*

The first analysis carried out by Arup shows that the resisting torque of the gate on a falling tide decreases as the gate rises, while the torque generated by the displacer increases as the water level falls and the buoyancy decreases and hence the mass increases. This means that if the gate is in the horizontal position, the gate torque is at its maximum and the displacer at its minimum. Even if the displacer has been calculated to have sufficient mass to fail safe on a balanced system, it will not lift the gate unless there is sufficient margin to overcome all the friction and possible wave action forces. The calculations by Arup show that this margin is so small that the slightest additional resistance will not allow the gate to rise. When, with the aid of an outside force, the angle of the gate is increased by a few degrees, a point is reached where the now increased displacer torque takes over and the gate lifts. The set of curves from the Arup report clearly show this phenomenon and various site observations bear this out.

The second analysis merely determines the additional *force available at the gate cable when the system is in balance. It* [sic] *this additional or "reserve" force which must be able to overcome all the internal and external resisting forces such as friction in shaft bearings and pulleys, rope bending, gate bearings and unknown but possible hydrodynamic forces which might occur over the life of the project.*

There is no evidence that this simple calculation was carried out, but if it was, the additional forces calculated from the existing configuration are far too small to give an adequate margin for all foreseeable conditions….

[Having set out a calculation of friction forces, Mr. Lester went on]
There is little doubt that this is the cause of the problem. The stark conclusion which must therefore be drawn is, that had the displacer been larger (displaced more water for the same vertical movement) the system as envisaged would have operated successfully without the need for additional mechanical or pneumatic assistance.

The next stage in this adjudication is to determine why the displacer was not designed larger. KGA maintains that they were given a fixed chamber size at the start of the project and this determined the maximum size of the displacer making due allowance for future space requirements should the D&D decide to reintroduce the equipment in the cheat chambers.

This statement implies that the mechanical design was governed by the civil design, a situation which is unusual to say the least. In most installations the civil works are designed to support, protect or otherwise facilitate the safe operation of the process (mechanical) equipment.

In fact when the various minutes of meetings between KGA and Babtie were examined, it became apparent that the normal design procedures were followed in that KGA were asked by Babtie to give them the size of the displacers to enable them to size the chambers….

There is no doubt therefore that the responsibility for the size of the displacers lies with KGA and any costs incurred relating to this issue must also be KGA's responsibility."

34. In the light of his conclusion in paragraph 4.7 of the Decision which I have quoted in the preceding paragraph of this judgment Mr. Lester turned to consider quantum. He determined that the sum for which D and D now seeks judgment was due in respect of damages and half of his fee payable by KGA.

35. In his first witness statement Mr. Lane sought to analyse the Decision and the reasoning underlying it in paragraph 23. Having quoted some of the passages from paragraph 4.7 which I have set out, Mr. Lane went on:-

"*(d) Having considered causation, the Adjudicator then went on to consider quantum. He did not address the question of whether KGA had failed to exercise reasonable care and skill in designing the displacers as they had been designed. The gist of his reasoning was: the displacers were the cause of the problems. They were designed by KGA, therefore KGA were in breach, without considering whether KGA was in breach of the ordinary negligence standard.*

(e) At the meeting with the Adjudicator at the offices of the ICE on 2 September 2003 attended only by representatives of KGA, Mr. Digby informs me that the Adjudicator stated that his view was that KGA's appointment was to design the gate howsoever they wished. The gate mechanism did not work. Therefore KGA must be liable.

(f) There is abundant authority as to the nature of the legal test to be applied to a question of alleged professional negligence or the equivalent allegation in contract (albeit the precise expressions vary, depending on the circumstances of the allegation in view, which may be a failure of care, a lack of skill, an error of judgment, or some other departure from the proper standard). For example: [for the purposes of this judgment I need not set out the examples given by Mr. Lane – they were well-known quotations from the directions to the jury of McNair J in ***Bolam v. Friern Hospital Management Committee*** [1957] 1 WLR 582 at page 587, from the speech of Lord Diplock in ***Saif Ali v. Sidney Mitchell & Co***. [1980] AC 198 at page 220, and from the speech of Lord Hobhouse in ***Arthur J.S. Hall & Co. v. Simons*** [2002] AC 615 at page 737]

(g) The adjudicator had authority only to decide in accordance with English law. He did not do so. Accordingly his decision is a nullity. (It has been stated in a number of cases since the introduction of the Housing Grants Construction and Regeneration Act 1996 that the making of an error of law by an adjudicator does not take him outside his jurisdiction or nullify his decision. In my respectful submission, those cases are inconsistent with higher binding authority: As Lord Diplock said **in O'Reilly v. Mackman** *[1983] 2 AC 237: "if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity [underlining added]".)*

(h) Accordingly, in my submission the decision is a nullity."

The objections to enforcement of the Decision

36. It is, I think, unnecessary to say any more than I have already concerning the objection that the contract between the parties was not one which fell within the provisions of *s. 107* of the 1996 Act. The objection that the dispute between D and D and Grubb was not validly referred to adjudication under the appropriate contractual provisions is also disposed of by my findings as to how the relevant contract between the parties was made and what were its terms, for the objection as articulated by Mr. Lane at paragraph 21 of his first witness statement comes to no more than that on his analysis of how the contract was made the ACE Conditions were not incorporated, so that the Procedure was not incorporated, yet Mr. Lester conducted the adjudication under the Procedure. On Mr. Lane's analysis any adjudication would have had to have been conducted under the Scheme.

37. I therefore turn to the objections for which Miss Franklin had more initial enthusiasm.

38. The first of these objections was that there was not, at the date of the Notice, a dispute extant between D and D and Grubb. This objection may conveniently be considered together with the submission of Miss Franklin that, if a dispute was referred to Mr. Lester, it was a new dispute which only came into existence at the moment at which the Notice was given. In her written skeleton argument Miss Franklin articulated these objections in this rather confusing way:-

"*9. In their Notice of Adjudication D & D fall between two stools:*

a. Under the heading "The Dispute" D & D set out a background chronology of the problems experienced with the gate. They make no case as to why those problems are said to be attributable to KGA and give no details of a dispute.

b. Under the heading "The Claim" D & D set out the claim documents they rely upon, but do not state when, where and how it is said that KGA rejected these claims "in clear language without the possibility of further discussion". Any such suggestion would sit uneasily with KGA's letter of 11.8.03 … which refers to the fact that D & D and their lawyers had not taken up KGA's offer of a meeting nor responded to KGA's letter.

c. Nowhere in the Notice do they set out the "issues" or questions being referred to the adjudicator for decision as required by the MAP [that is, the Procedure]. *They do not allege negligence or give any particulars.*

10. In their Referral, D & D seek to describe their dispute in different terms.

"4.1 This dispute concerns D & D's entitlement to damages and interest as a result of a breach of contract by KGA".

They still do not set out how or when this dispute was said to have crystallised.

11. The Notice of Adjudication and the Referral are two such different documents that it cannot easily be said that the Referral is "confined to the issues raised in the Notice" as required by paragraph 14 of the MAP. In any event neither define a dispute as explained and required by the relevant authorities…..

15. In any event what D & D referred to the adjudicator was very different in terms of heads of claim and quantum from the claim previously intimated….

b. Letter of Claim 30.8.02 12 heads (last two estimated future losses) totalling £369,938.90 claimed as a debt.

c. Letter 17.6.2003 14 heads totalling £470,073 not referred to in Adjudication Notice and not relied upon by D & D in their definition of "the dispute".

d. Notice of Adjudication – claim of £531,260 intimated (£161,322 more than letter of claim). This is accepted by D & D … no breakdown supplied with Notice.

e. Breakdown supplied with Referral:

i. Claims 17 items against previous 13.

ii. Jettisons two heads of claim (12 and 13) totalling £70,000 odd in favour of an alternative remedial solution (items 14 and 15) totalling £155,000 odd.

iii. Claims under two wholly new heads (items 16 and 17) totalling £64,000 odd.

16. D & D thereby do exactly what Judge Thornton has said they should not and tagged onto existing heads of claim a further list of matters which have not been considered, rejected or disputed by KGA. "

39. Paragraph 9 of the written submissions of Miss Franklin which I have set out in the preceding paragraph seems to focus not so much on whether there was actually a dispute between D and D and Grubb at the date of the Notice, but on whether the Notice was formally defective in failing to identify a cause of action in law which could support the contention that Grubb was liable to D and D, failing to formulate concisely an *"issue"* or *"issues"* to be considered by an adjudicator, and in failing to state how precisely it was contended that the dispute sought to be referred had arisen, that is to say, when and how it was said that Grubb had rejected a claim made by D and D. In her oral submissions Miss Franklin did indeed seek to pursue all of these matters, and I shall need to deal with them. However, she also contended that actually there was no extant dispute between the parties at the date of the Notice and/or that the dispute sought to be referred by the Notice was different from that which in fact was extant at the date of the Notice. Consequently I need to deal with those points also. It is convenient to deal with the questions of substance before the questions of alleged formal deficiencies in the Notice.

40. In support of her submission as to the need for there to be a crystallised and clearly articulated *"dispute"* before anything can be referred to adjudication Miss Franklin reminded me of some observations of my own in ***Edmund Nuttall Ltd. v. R.G. Carter Ltd***. [2002] BLR 312 in paragraph 36 of my judgment at pages 321 and 322 of the report. There I said:- *"In my judgment, both the definitions in Shorter Oxford Dictionary and the decisions to which I have been referred in which the question of what constitutes a* "dispute" *has been considered have the common feature that 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. It may be that it can be said that there is a* "dispute" *in a case in which a party which has been afforded an opportunity to evaluate rationally the position of an opposite party has either chosen not to avail himself of that opportunity or has refused to communicate the results of his evaluation. However, where a party has had an*

opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a "dispute" *between the parties is not only a* "claim" *which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side. No doubt, for the purposes of a reference to adjudication under the 1996 Act or equivalent contractual provision, a party can refine its arguments and abandon points not thought to be meritorious without altering fundamentally the nature of the* "dispute" *between them. However, what a party cannot do, in my judgment, is abandon wholesale facts previously relied upon or arguments previously advanced and contend that because the* "claim" *remains the same as that made previously, the* "dispute" *is the same. The construction of the word* "dispute" *for the purposes of the 1996 Act and equivalent contractual provisions, in my judgment, is not simply a matter of semantics, but a question of practical policy. It seems to me that considerations of practical policy favour giving to the word* "dispute" *the meaning which I have identified. 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 which they have previously rehearsed among themselves. If adjudication does not work in that way there is the 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. There is also the risk that a party to an adjudication might be ambushed by new arguments and assessments which have not featured in the* "dispute" *up to that point but which might have persuaded the party facing them, if only he had had an opportunity to consider them. Although no doubt cheaper than litigation, as Mr. Richards's fees in the present case indicate, adjudication is not necessarily cheap."*

41. It seemed to be implicit in the submissions of Miss Franklin that for there to be a *"dispute"* between parties it was essential that each and every fact to be relied upon by a party making a claim, the significance sought to be attached to each and every such fact, and each and every element of the claim, needed to have been identified and put forward to the opposite party for it to consider and have an opportunity to formulate a response in detail. Any such suggestion would be to confuse an entirely necessary and proper enquiry as to whether, at the moment of giving a notice of adjudication, a dispute existed between the relevant parties in relation to the matter sought to be referred with a formalistic investigation as to whether the precise claim sought to be advanced in respect of a matter in dispute had itself been advanced in detail prior to the giving of the notice. While I do not resile from what I said in ***Edmund Nuttall Ltd. v. R.G. Carter Ltd.*** in the passage quoted in the preceding paragraph, the proper scope of the enquiry as to whether, at the time a notice of adjudication was given there was a dispute between the parties in relation to the matter sought to be referred must depend upon the facts and circumstances of the particular case, not least what the dispute is said to be about. In ***Edmund Nuttall Ltd. v. R.G. Carter Ltd.*** the essential point was whether it could be said that because the amount of a claim was the same as the amount of a claim previously advanced and rejected there was a *"dispute"* about that claim, when the facts and arguments alleged to support the claim were different from those previously considered. That point does not arise in the present case. It is therefore necessary to turn to the points which do arise in the present case.

42. It is correct that the quantum of the damages claimed by D and D had altered between the initial letter of claim of 30 August 2002 and the subsequent letter from Clarke Willmott dated 17 June 2003, and that that quantum, and its alleged composition, altered again between 17 June 2003 and the date of the Notice. The question is whether, as Miss Franklin submitted, that circumstance is sufficient to mean that at the date of the Notice there was no crystallised dispute as to the claim which D and D then sought to advance. In my judgment whether, at the point of the giving of a notice of adjudication, there is a crystallised dispute in respect of the matter sought to be referred when the quantum of the sum claimed and the alleged composition of that sum has altered from the sum previously claimed is a question of fact and degree the answer to which depends upon what, on the facts, the dispute between the parties was actually about. If liability in respect of a claim is not, at the point of giving notice of adjudication, in dispute, so that the only dispute is about quantum, it is likely to be difficult to say that there is a dispute about a formulation of quantum which is new at that stage and which the responding party has not had an opportunity to consider. However, as it seems to me, the situation is different if liability itself is in dispute and the party alleged to be liable has not accepted that it is bound to pay to the other party any

sum whatever. In such a case there is a crystallised dispute as to liability – it is denied – and a crystallised dispute as to the obligation of the party alleged to be liable to make a payment to the other party – the responding party's position is that it will pay nothing. Those crystallised disputes do not cease to be crystallised simply because the quantum of the claim is altered.

43. My approach as explained in the preceding paragraph is very similar to that indicated by H.H. Judge Anthony Thornton Q.C. in his judgment in ***Fastrack Contractors Ltd. v. Morrison Construction Ltd***. [2000] BLR 168 on page 177 of the report, of which Mr. Henderson reminded me. There the learned judge said:-

"*25. These considerations do not lead to the conclusion that Morrison's submissions are correct, namely that only the precise sums previously claimed may be referred to adjudication; that no additional or lesser sum may be claimed; and that if a different sum is claimed, the consequence is that the whole reference, in its entirety, is without any jurisdiction. A claim can often be made without any quantification having been finalised or even attempted. The subsequent dispute can then be in the form "what sum is due?" as opposed to "is £x due?"*

26. Thus, whether or not the reference is wholly or partly lacking in jurisdiction will depend on the nature and extent of the dispute that has purportedly been referred to adjudication by the referring party. A particular dispute may correctly be characterised as being in this form: "what sum is due for a particular interim payment?" or "what sum is due for a particular item of work:" or "what sum is due at the Final Account stage?" without any particular or finalised sum being included as part of that claim. Alternatively, the dispute may be correctly characterised as being one concerning the question of whether or not a particular specified sum is due. In the first type of dispute, it would not necessarily follow, if a larger sum had been included in the notice of adjudication than the sum previously claimed in the relevant application, that no dispute had yet arisen."

44. In the present case D and D made a claim against Grubb in its letter dated 30 August 2002 in relation to the alleged failure of the Gate to operate as required. Grubb never accepted that it had any liability to D and D in respect of the matters complained of. That was the position up to the giving of the Notice. Thus as at the date of the Notice there was a crystallised dispute as to whether Grubb was liable to D and D. That dispute was continuing as at 17 June 2003 when Clarke Willmott indicated an increased quantum of the damages claimed and a revised basis of calculation. Grubb did not accept liability to pay the revised sum or enter into negotiation concerning it. D and D had, prior to the giving of the Notice, sent to Grubb a copy of a report by Arup in relation to the Gate which Grubb had considered and to which it had responded. The response given before the Notice was not put in evidence before me, but the commentary on the Arup report included in the document sent by Grubb to Mr. Lester indicated that Grubb rejected any suggestion that it was at fault in relation to the problems experienced with the Gate. Against that background it seems likely that the intended purpose of the meeting referred to in Grubb's letter to Mr. Lester dated 11 August 2003 was to provide Grubb with an opportunity either to persuade Arup to revise the conclusions contained in its report or to persuade D and D that the Arup report was inaccurate or unreliable in some way. Certainly no evidence was put before me which indicated that Grubb wanted a meeting so that it could be persuaded that it was at fault. Thus, in my judgment, and contrary to the submission of Miss Franklin, the reference to a wish for a meeting does not indicate that as at the date of the Notice there was not a crystallised dispute. I therefore find that as at the date of the Notice there were crystallised disputes between D and D and Grubb as to whether Grubb was in law responsible to D and D in respect of the deficiencies alleged in the operation of the Gate and, if so, as to the damages to which D and D was entitled. The dispute referred by the Notice was not a new dispute.

45. At paragraph 9 of her skeleton argument Miss Franklin contended that in the present case D and D fell between two stools in the Notice because (1) in the Notice no case was made as to why the problems described in the section entitled *"The Dispute"* were said to be attributable to Grubb and no details of any dispute were set out; (2) in the section of the Notice entitled *"the Claim"* there was no assertion as to when, where and how KGA rejected the claims *"in clear language without the possibility of any discussion"*; and (3) nowhere in the Notice was there any statement of the issue or issues which it was sought to refer to adjudication – in particular there was no allegation of negligence and no particulars of any alleged negligence were set out. As I have already pointed out, the thrust of these points seems to involve the

assertions that it is necessary to set out in a notice of adjudication, if the notice is to be effective, particulars of a dispute which (a) disclose what amounts in law to a cause of action and (b) show not only what the dispute is about, but also in detail how it has arisen. Those assertions are, in my judgment, misconceived. What precisely must be set out in a notice of adjudication for it to be effective as such depends upon what is required by the relevant rules agreed by the parties as a matter of contract, or by the Scheme, as the case may be. In the present case rule 8 of the Procedure required only that the Notice *"include a brief statement of the issue or issues which it is desired to refer and the redress sought"*. In other words it had to state what the dispute was about and what remedy was desired. It was not required to state how the dispute had arisen and it was not required to disclose on its face what in law would amount to a cause of action. Equally it was not required to specify the nature of the dispute referred in a form similar to that in which preliminary issues are often drafted in this court. While the formulation of the Notice, and in particular that section of it entitled *"The Dispute"*, seems to me to have been lacking in focus and unduly discursive, in my judgment it was tolerably clear on a fair reading of the Notice as a whole, including the section entitled *"The Claim"*, that the dispute sought to be referred by it was as to whether, as D and D contended, KGA was in law responsible to it for the deficiencies alleged in the operation of the Gate and, if so, to what sum by way of damages was D and D entitled. It is true that the dispute as set out in the Notice did not indicate upon what legal foundation the liability of Grubb might be said to rest. That lack of precision raised the possibility that the allegation relied on in the adjudication might be simply that Grubb was liable because it owed a duty to ensure that the Gate as designed by it was fit for its intended purpose. If that had turned out to be the allegation which was pursued, it would have lacked any foundation in law and ought to have failed. As matters proceeded it was made clear in the Referral Notice that the contention advanced on behalf of D and D was that Grubb had failed to perform its contractual obligations in relation to the Gate with reasonable skill, care and diligence. That way of putting the case was, it seems to me, encompassed by the general formulation of the dispute referred as a dispute as to whether Grubb was in law liable to D and D for the deficiencies alleged in the operation of the Gate. The general included the more specific. I reject the submission of Miss Franklin that the dispute described in the Referral Notice was a different dispute from that referred by the Notice.

46. Miss Franklin's next point was that Mr. Lester did not decide the dispute which was referred to him but a different dispute. This point depends upon the supposed contrast between how the dispute in relation to liability was described in the Notice and how it was described in the Referral Notice. In essence Miss Franklin submitted that the dispute as described in the Notice was as to whether Grubb was liable simply because the Gate failed to operate as required, regardless of whether Grubb had undertaken the design of the Gate with reasonable skill, care and diligence, whereas the dispute as described in the Referral Notice was as to whether Grubb had designed the Gate with reasonable skill, care and diligence. She further submitted, as I understood it, at any rate in the context of this part of her submissions, that it was the latter formulation of the dispute which Mr. Lester decided, which was not the dispute referred by the Notice. At paragraph 13 of her skeleton argument Miss Franklin developed the argument in a rather different way, which seemed to involve the submission that Mr. Lester had decided the dispute as formulated in the Notice, but in doing so had fallen into error of law as to the basis upon which a professional man could be held liable :-

"*KGA submit:*

a. The adjudicator wrongly refers to the Referral rather than the Notice of Adjudication for the definition of the dispute.

b. Even so, he misquotes para 4.1 of the Referral

c. He clearly and fundamentally misstates the central issue:

i. The question is not whether D & D are entitled to damages by reason of the non-performance of the gate.

ii. The question is whether, in all the circumstances, KGA's design of the gate was below the standard to be expected of reasonably competent engineers and whether the losses claimed were caused by any negligence on their part.

d. In the event he does not appear to be too sure."

47. The confusion in Miss Franklin's submissions as to whether Grubb's case was that Mr. Lester had decided that Grubb had failed to perform its contractual obligations with reasonable skill, care and

diligence, which would have involved application of the correct legal test, but was not the dispute referred, or had applied the wrong test in law, as a result of deciding what, according to Miss Franklin, was the dispute as formulated in the Notice, that is to say, on Grubb's case, it seems, the dispute in fact referred, appears to me to illustrate that the approach adopted on behalf of Grubb to the application for summary judgment on behalf of D and D was simply to seek to raise any and every point, good, bad or indifferent, by way of objection to the Decision without regard to whether any particular point was consistent with, or arguably properly alternative to, any other point. In reality either Mr. Lester decided the dispute referred to him or he did not. If he decided the dispute referred to him, either he decided it according to the applicable law or he did not, regardless of what consequence may follow if he failed to apply the correct law, the point as to which Miss Franklin sought to reserve her position. It seems to me that Mr. Lester did decide the dispute referred to him, namely whether Grubb was liable in law to D and D in respect of the failure of the Gate to operate as required and, if so, to what sum by way of damages was D and D entitled, and did decide that dispute by addressing the correct issue in law, namely did Grubb perform its contractual obligations with reasonable skill, care and diligence. That he addressed the correct issue appears from his reference in paragraph 2.3 of the Decision to the dispute as elaborated in section 4 of the Referral Notice, which in terms referred to the relevant contractual obligation, and from his comments in paragraph 4.7 of the Decision, in the passages quoted earlier in this judgment, as to frictional resistance being omitted from Grubb's design calculations, the *"fundamental"* analyses which Grubb did not undertake once the problems with the Gate first came to light, how *"simple"* one of the relevant analyses was, and Grubb being incorrect in asserting that the size of the displacers was imposed upon it, rather than selected by it. I therefore reject the submission that Mr. Lester did not decide the dispute referred to him. I find that the point in relation to which Miss Franklin sought to reserve her position does not arise in this case.

48. The final objection taken to the Decision was that it was arrived at by Mr. Lester following a procedure which was unfair, notwithstanding that it was a procedure expressly permitted by the Procedure. The procedure said to be unfair was conducting separate interviews with the parties and their respective experts. In her skeleton argument Miss Franklin developed the point in this way:-

"*17. The rules of natural justice require that both parties have an opportunity to deal with the other party's case. This is not possible if evidence has been taken in private….*

18. It is submitted that every fair-minded fibre of an impartial tribunal's frame strains against taking evidence in the absence of the other party. Yet the CIC MAP [that is, the Procedure] *permits an adjudicator to meet the parties separately. ..*

19. Whilst it is accepted therefore that an adjudicator may meet the parties separately, just as an adjudicator may have telephone conversations with them, KGA submit that it would make life a great deal easier if he declined to do so. In any event it does not permit the adjudicator to conduct proceedings unfairly. …

20. KGA contend that the procedure adopted by the adjudicator was procedurally unfair.

a. Lane paras 24 et seq.

b. Clarke Willmott's letter 22.8.03…

c. The Adjudicator met or interviewed individuals separately as follows:

i. Prof Jack Lewin 22.8.03

ii. Mr. Shields (D & D) 27.8.03 …

iii. KGA 2.9.03

iv. D & D and Arups 2.9.03

d. Adjudicator's notes ….

i. Do not reflect duration of telephone call/meeting

ii. Clearly are not a verbatim or even detailed note of what transpired. No more than a note of the substance of what transpired …

iii. There is no confirmation in respect of each set of notes that the party present agrees with them. Eg notes of meeting with Arup and D & D on 2nd September sent to KGA on 4th September without such confirmation.

iv. Notes key meetings between both parties and experts separately on 2nd September circulated on 4th September 4 days before the date of his decision given on 8th September …

v. Such oversights inevitable in the available time limits.

e. So far as it is said that there is no evidence that anything was said that might have influenced the Adjudicator, KGA contend that that is precisely to the point. They have no notion of what actually was said (or not said) or what impression was conveyed at these private meetings. They know from their own view point that the Adjudicator's note did not accurately reflect the content of their meeting with him. They have no way of knowing whether it accurately and fully reflects what transpired between him and D & D.

f. Despite the Adjudicator's best efforts and intentions he could not hope to be transparent in his dealings with the parties."

49. Mr. Lane's thoughts on the subject of alleged lack of procedural fairness were set out at paragraphs 24 and 25 of his first witness statement:-

"*24. During the course of the adjudication the Adjudicator held a number of meetings and/or discussions with various representatives of the parties and their experts, each time in the absence of any representatives of the other parties. For example, I am informed by Mr. Digby that on 2 September 2003 the Adjudicator met with KGA and its expert Professor Jack Lewin. On the same day he met with D & D and their experts Ove Arup. He met with D & D's Contracts Manager on site on 27 August 2003. By letter dated 22 August 2003 … D & D's solicitors wrote to the Adjudicator reaffirming their objection to any meeting taking place with Professor Lewin without Ove Arup being present.*

25. The Adjudicator circulated questions requiring responses prior to the meetings and he subsequently circulated brief notes of the meetings. … Nevertheless, KGA does not know (and cannot know) the full extent of the discussions which took place between the Adjudicator when he met with D & D's representatives and their experts. There may have been matters discussed which, without any intention on the part of the Adjudicator to mislead, were not recorded faithfully, or in sufficient detail, or from which the nuance or emphasis was not clear to KGA which might have impressed itself upon the Adjudicator, so that KGA was denied an opportunity to properly consider those matters, and to respond. It is clear that D & D's solicitors themselves objected to the course taken by the Adjudicator as they obviously had the same concerns which KGA has. I respectfully submit that the procedure was unfair to both parties in this respect and accordingly the decision is invalid."

50. In support of her submissions Miss Franklin reminded me that in his judgment in ***Discain Project Services Ltd. v. Opecprime Development Ltd***. (2001) 80 Con LR 95 at page 101 H.H. Judge Peter Bowsher Q.C. considered the position of an adjudicator who became involved in telephone conversations with one or other of the parties to an adjudication. The learned judge commented:- "*If the adjudicator receives "relevant information" by telephone (as by any other means) he is required by para 17 of the Scheme and by ordinary courtesy, or natural justice, to pass that information to the other party for comment. Doing that may be very time-consuming. Communicating by telephone may be much more time-consuming and more dangerous than communicating by fax. It requires taking a careful note of the telephone conversation and then sending a letter or fax to both parties summarising the conversation. It may then be that the party to the telephone conversation disputes the summary of the conversation, and it may also be that the party who did not take part in the telephone conversation is suspicious of what has been said.*"

While indicating his view that there was no reason in law why an adjudicator should not have telephone conversations with one party to an adjudication on its own, H.H. Judge Bowsher Q.C. counselled great caution in doing so.

51. Miss Franklin also reminded me of some observations of H.H. Judge Humphrey Lloyd Q.C. in the rather unusual case of ***Glencot Development and Design Co. Ltd. v. Ben Barrett & Son (Contractors) Ltd.*** [2001] BLR 207. In that case a person appointed as adjudicator in relation to disputes between the parties became involved in mediating some of the issues in dispute. That mediation did not resolve all of the issues, and so the question arose of whether it was appropriate for him to resume his role as adjudicator. One of the parties objected, but the adjudicator insisted on proceeding. After the adjudicator had made a decision the issue arose whether the decision was vitiated by a failure on the part of the adjudicator to

observe the rules of natural justice. At paragraphs 24 and 25 of his judgment, on pages 219 and 220 of the report, H.H. Judge Lloyd Q.C. said:-

"*24. In this case Mr. Kennedy submitted that there was no evidence that anything emerged in the discussions that might have affected Mr. Talbot's decision or approach. That very submission effectively makes the defendant's case. Whilst in an adjudication it is permissible to make inquiries and receive evidence and submissions from one party alone there is a clear obligation on the adjudicator to give any absent party a complete and accurate account of what has taken place. Mr. Talbot went to and fro between the parties. We do not know what he heard or learned. He was under no obligation to report it, nor given that the content was "without prejudice" and confidential ought there to be any inquiry as to what happened. Those private discussions could have conveyed material or impressions which subsequently influenced his decision. On the evidence he was or may have been instrumental in resolving the issue about the 3 per cent discount which was one of the matters that he later had to decide (in the event against the defendant). Of much more consequence in my view is the fact that the discussions on 29 September were heated so that it would have been only understandable if some view had been formed about some people or a party. In the adjudication Mr. Talbot was asked to decide certain points about which there was no documentary evidence, in other words to form a view about the credibility of the applicant's case. These are areas where unconscious or insidious bias may well be present. Mr. Talbot's action in writing the letter of 2 October tellingly suggests that he was concerned about* [what] *an outsider might reasonably think about what had taken place.*

25. Accordingly and taking account of Mr. Talbot's commendable openness and explanations which I accept as accurate I have nevertheless reached the conclusion any fair-minded and informed observer would conclude [from] *Mr. Talbot's participation in the lengthy discussions on 29 September that there was a real possibility of him being biased.*"

52. The common thread in the passages which I have just quoted relevant to the circumstances of the present case is that natural justice requires that, if an adjudicator receives a communication about a matter of significance to the substance of the adjudication from one party alone in the absence of the other, he should inform the absent party of the substance of the communication so as to give that party an opportunity to deal with it if it wishes. There was, perhaps, a slight difference of expression between H.H. Judge Bowsher Q.C. and H.H. Judge Lloyd Q.C. as to exactly what the adjudicator was required to do in terms of the thoroughness of the record of the substance of the communication to be sent to the absent party. H.H. Judge Bowsher Q.C. spoke of the provision of a *"summary"* of the communication, while H.H. Judge Lloyd Q.C. contemplated that a *"complete and accurate account"* would have to be given. However, in my judgment there was no difference of significance between them in respect of the fundamental requirements of natural justice in a case in which a communication is received from one party in the absence of the other. The absent party must be told the substance of what has been said and afforded an opportunity to comment upon it. The reason is fairly obvious, namely that it would be grossly unfair for the person charged with making a decision to rely upon material provided by one party to the dispute of which the other party was unaware and with which it had not been given a chance to deal. H.H. Judge Bowsher Q.C. also considered that it was appropriate for the tribunal to provide the party providing the information with a note of what had been said. That is undoubtedly prudent. However, it does not seem to me that that step is one which should be taken in the interests of the party which did not provide the information. So far as that party is concerned what is important is that it should be aware of the perception of the tribunal of what it has been told and of the potential significance of that information from the tribunal's point of view. It is in justice to the provider of the material that it is desirable to confirm with it that the tribunal has understood correctly what it has been told. Obviously if the tribunal has misunderstood what it has been told, and that is pointed out by the party providing the information, the corrected information should then be put to the other party.

53. Rule 1 of the Procedure in terms provides that *"The object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute…"*. By Rule 2 an adjudicator is bound to act impartially. In my judgment in ***RSL (South West) Ltd. v. Stansell Ltd.*** [2003] EWHC 1390 (TCC) at paragraph 31 I expressed the view that:- *"The duty to act impartially is, in its essence, a duty to observe the rules of natural justice. It is not simply a duty not to show bias.*"

In the same case I emphasised the importance of a party to an adjudication knowing the case which it had to meet and having a proper opportunity to meet that case. However, that is not necessarily the same thing as having a hearing. Once one gets beyond the fundamentals of knowing the case one has to meet and having a proper opportunity to meet it, and having a proper opportunity to deploy any positive case one may wish to make, what natural justice and fairness require is likely to depend upon the facts of the particular case. Critically, in the case of adjudication, it is likely to depend upon whether a procedure for conduct of the adjudication has been agreed as a matter of contract. If so, it is likely to be difficult to demonstrate that an adjudicator acted unfairly by following the agreed procedure. Conversely, it may be relatively easy to demonstrate that he acted unfairly if he did not follow the agreed procedure. Each party to an adjudication in relation to which a procedure has been agreed would seem to be entitled to say that it had a legitimate expectation that the agreed procedure would be followed. Rule 17 of the Procedure gave Mr. Lester a discretion as to how to conduct the adjudication in this case. That discretion, although described as *"complete"*, was obviously not totally unfettered – he had still to observe the fundamental requirements of natural justice. It does not seem to me that natural justice necessarily requires that a party have an opportunity to cross-examine witnesses for the opposite party, although it may do, especially if the credibility of a witness is in issue. Again, it does not seem to me that natural justice necessarily requires that evidence from witnesses for one party be taken in the presence of the opposite party or its representatives. It may be sufficient for a tribunal taking evidence from the witnesses for one party simply to indicate to the opposite party, to give it an opportunity to deal with it, what those witnesses have said to which the tribunal is minded to attribute importance. That is essentially the course which Mr. Lester took in the present case. As to whether, absent an express provision in the relevant adjudication procedure permitting such a course to be taken, it would be appropriate to hear witnesses from one party in the absence of the other, I have some doubts. Certainly I have grave difficulty in seeing that adopting such a course could ever be appropriate without the tribunal indicating to the absent party what has been said to which the tribunal is minded to have regard and providing an opportunity for a response. The practice of submissions on behalf of a party to legal proceedings or arbitration proceedings being made in writing, and in that sense in the absence of the opposite party, is now well-established. It is accepted that in a case in which submissions are made in writing all that natural justice and fairness require is that a party should have an opportunity to deal with the primary submissions of the opposite party (rather than necessarily the answer to its own primary submissions). In other words, knowing what is said for the case of the opposite party or against its own case, a party should have an opportunity to answer. There is no obvious reason, at least in a case in which the credibility of witnesses is not in issue, why a similar procedure should not suffice to satisfy the requirements of natural justice and fairness in relation to evidence if parties have agreed that a tribunal may, if it wishes, hear evidence from witnesses for the opposite party in its absence.

54. There was no suggestion in the present case on behalf of Grubb that Mr. Lester did in fact have regard to evidence given on behalf of D and D of which it was unaware or which it did not have an opportunity to answer. The objection was simply one of form. It involved the somewhat unpromising proposition that the Procedure, if operated in accordance with its express terms, could be operated unfairly. Perhaps that could happen, but I am satisfied that it did not happen in the present case and that no dispassionate observer, aware of the circumstances, would consider that there was a risk of actual unfairness on the part of Mr. Lester.

Conclusion

55. For the reasons which I have given I find that there is no substance in the objections taken to the Decision and, consequently, that the Decision should be enforced in accordance with its terms. There will be judgment for D and D in the sum claimed, together with interest, as to which I will hear Counsel.

Simon Henderson (instructed by Clarke Willmott for the Claimant)
Kim Franklin (instructed by Berrymans Lace Mawer for the Defendant)