CA on appeal from QBD Leeds District Registry (HHJ Grenfell) before Buxton LJ; Rix LJ; Moses LJ. 30th January 2007.

JUDGEMENT : Lord Justice Moses:

1. This is an appeal by CMS Medical Limited ("CMS") against a summary judgment pursuant to part 24 of the Civil Procedure Rules. The judgment of HHJ Grenfell of 17 March 2006 was given in favour of Lead Technical Services Limited, trading as Peter Wade Consultancy ("LTS").

2. LTS had brought proceedings to enforce an adjudication in the sum of £83,541.90 under Part II of the Housing Grants Construction and Regeneration Act 1996 ("the 1996 Act"). The adjudication and the proceedings to enforce it arose out of a dispute over fees. LTS is a consulting engineer. It agreed to work for CMS Medical Supply Packagers on construction of a warehouse shed, integrated offices and what are described as a separate block of starter units. LTS carried out work for CMS between 2003 and 2004. The dispute about fees was referred to the adjudicator on 29 December 2005. The response of CMS came on 9 January 2006 and the adjudicator's decision, with admirable expedition, on 27 January 2006. Summary judgment in favour of enforcing that adjudication was on 17 March 2006. That judgment, as I have said, upheld the award and dismissed the counterclaim summarily. It is therefore somewhat dispiriting to record that the appeal against the summary judgment should now be taking place in January 2007, over two years since LTS last worked for CMS.

3. I say it is somewhat dispiriting since the adjudication was undertaken, as I have said, pursuant to Part II of the 1996 Act. The statutory scheme was designed to afford an expeditious system for providing an interim solution to disputes and thus meeting what this court, in ***Carillion Construction Limited v Devon-port Royal Dockyard*** [2005] EWCA Civ 1358, described as legitimate cashflow requirements. The progress of this dispute has hardly fulfilled that purpose, but so to observe merely begs the very question we have to decide, for it assumes the application of that part of the Act. There is no dispute but that the agreement between CMS and LTS was a construction contract for the purposes of Part II; see Section 106(2). But part 2 only applies where the contract in writing, is as defined in section 107:

> *"107(1) The provisions of this Part apply only where the construction contract is in writing, and any other 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.*
> *(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties in agreement in writing to the effect alleged.*
> *(6) References in this Part to anything being written or in writing include its being recorded by any means."*

4. CMS denies the jurisdiction of the adjudication on two distinct bases. Firstly it is contended that an earlier agreement between the parties in November or December 2002 was supplanted, to use CMS's words in its Defence and Counterclaim, by a signed Deed of Appointment dated 23 September 2003. It was an express term of that deed that the Technical and Construction Solicitors' Association Rules should apply; see Clause 18. Under those rules the ICE has no power to nominate the adjudicator. The adjudicator in the instant appeal was nominated by ICE and not, as the Deed provided, by the Technical and Construction Solicitors' Association. Secondly it is contended by CMS, as it has been contended throughout, that there was no agreement in writing within section 107. On the contrary there was an oral agreement that LTS's fees would be capped at £20,000. If that is correct the agreement would fall outwith section 107; there was no oral agreement by reference to terms which were in writing; see Section 107(3).

5. I turn then to the facts. There is no dispute but that LTS's quotation dated 20 November 2002 for preparing drawings for planning approval, making a submission for planning approval and carrying out necessary liaisons with the planning officer to the approval stage, was accepted by CMS's conduct and was subject to LTS's standard terms and conditions. Invoices were submitted by LTS in 2003 for that work. There was a dispute about a further quotation, dated 6 June 2003. CMS contended that that was a separate quotation, accepted separately and forming a distinct contract; see paragraph 62 of its response to the reference to the adjudicator. But that is only relevant in that it referred to the fact that CMS did not agree that LTS should act as a planning supervisor, a point regarded as important by the judge.

6. I turn then to the Deed of Appointment. There is a dispute between the parties as to whether the Deed of Appointment was, as it is put by LTS, completed. It was, be it noted, clearly signed by representatives of both parties on 23 September 2003. But the adjudicator held that that document was, as he put it, fatally flawed and never came into force. He said: *"The Deed of Appointment fails to reduce the referring parties' fees. It is uncompleted having not included Alan Mcdonald as Planning Supervisor [words omitted], has no scope of works included under Schedule 2 of the services. Moreover the lists at pages 18 to 29 of the response are not referenced*

within the document; are denied by the referring party, including a section on Planning Supervisor which was explicitly declined by the responding party in his letter of 20 June 2003, with the F10 officially appointing another person. The Respondent failed to provide any convincing argument or evidence as to how these new sheets were incorporated despite their assurances at the meeting. I consider this document to be fatally flawed and never to have come into force."

7. The basis of that conclusion is that in the Deed at Schedule 2 there is a blank, and the words contained under that heading read: *"Insert appropriate list of services."*

8. There follows, then, a list of distinct duties starting with the duties of an architect and following with the duties of a structural engineer and thereafter of a planning supervisor and another under the rubric of "design". They are not, as the adjudicator puts it, referenced. They include duties as a planning supervisor, which it is plain CMS did not impose upon LTS.

9. The judge agreed with the adjudicator on similar grounds. In addition he referred to the fact that Schedule 1 of the Deed refers to a percentage of fees at different stages of the project. The Deed itself referred to remuneration and the instalments with which it should be paid, see clause 5, but there was nothing in the Deed which showed the precise amounts to be paid (see paragraphs 10, 12 and 14 of the judge's judgment).

10. There is no reference as to how the Deed came into existence, either in the adjudicator's decision or in the judge's judgment. On the contrary, in the judgment of HHJ Grenfell at paragraph 15, he says: *"It is unclear as to why that [that is the incomplete deed] had to be entered into in September 2003 when the contract was well under way, and, as I am satisfied was the position, the terms had already been accepted."*

11. I find this puzzling. There was material which appeared to explain how the Deed came into existence, how it came to be signed and how a list of unidentified duties came to be enclosed with that document. The explanation is clearly set out within the Defence and Counterclaim. Paragraph 14 of the defence says that:
"On or about 8 September 2003 Mr Heron acting for the Bank of Scotland emailed the Claimant requesting that the Claimant enter into a Deed of Appointment including a form of collateral warranty. In the email Mr Heron required clarification of the list of services that the Claimant was performing so that the same could be incorporated into the Deed. In reply the Claimant [that is LTS] requested a list of services from Mr Heron. In reply to the Claimant's request Mr Heron asked the question which roles were the Claimant carrying out. In response the Claimant [LTS] provided;
a) Planning Supervisor
b) Architectural and Engineering Design c) Site Supervision.
d) Certification."

12. The emails which were before the judge, and which are before us, amply support those contentions. They start with an email from Mr Heron for the Bank of Scotland seeking a Deed of Appointment of LTS and a form of collateral warrant. He says he can provide a draft list of services. Heather Evans, on behalf of LTS, replies by email dated 10 September asking for a draft list of services to be provided roles. The Bank of Scotland said they would provide them and asked which roles LTS were carrying out. There is then a reply from Heather Evans, dated 10 September, as set out in the defence. There is then an email from the solicitors for the Bank to Peter Wade dated 19 September attaching the Schedules of Services and a response from Heather Evans of the same date by email saying that the points are acceptable.

13. To my mind this explains exactly why the Deed came into the picture at that stage. The judge makes no reference to it at all. Nor does he make any reference as to why Peter Wade, on behalf of LTS, signed the Deed if it was not intended to constitute an agreement between the parties, and in particular if it was not intended to satisfy the very thing the Bank of Scotland wished to be satisfied in order to assist in the finance of the project. Nor is there any reference in the judgment whatever to the Collateral Agreement. The Collateral Agreement which was before the judge refers specifically to the Deed of Appointment dated 23 September 2003. The Collateral Warranty signed by LTS, CMS and on behalf of the Bank of Scotland specifically refers at Appendix 1 to the Deed of Appointment dated 23 September and also in the preamble to the warranty.

14. In those circumstances there is a real prospect of establishing that the failure, better to identify the services undertake which LTS agreed to undertake were mere inadequacies of LTS in its response to the bank before it signed the Deed.

15. Nor does the fact, as the judge seems to have thought, that the Deed itself does not quantify the fees deprive at least, it is strongly arguable, the Deed of legal force (see in particular ***Pao On & Others v Lau Yiu Long*** [1980] Appeal Cases page 614, in the opinion on behalf of the Board given by Lord Starman at page 631, F to G).
Had the judge referred to the emails to which I have referred he would himself have found an explanation for the insert which he describes as curious in paragraph 10 of his judgment. The judge's failure to do so fortifies me in my conclusion that there was an explanation for the existence of the signed deed and the inadequacies of the identification of LTS's role. That explanation assists in establishing a real prospect of proving that the agreement between the parties was that which was contained in the Deed. If that is so the adjudicator had no jurisdiction. He was appointed by the wrong body. The judge was wrong to enforce the adjudication by way of summary judgment.

16. I turn then to the second contention; the contention that the fees were capped by agreement at £20,000. The difficulties in the adjudicator's exercise of jurisdiction do not stop at the Deed. As I have said, CMS contends that at the time the Deed was discussed the parties orally agreed that LTS's fees would be capped at £20,000. That

controversy was not merely a dispute as to the terms of a written agreement; it was a question which went to the jurisdiction of the adjudicator. If the contentions of CMS are correct then there was no contract in writing as defined by Section 107 and as contended in paragraphs 35 to 36 of the Defence and Counterclaim.

17. There were three important items in support of CMS's contention. Firstly there is a letter from LTS dated 20 December 2005 which tends to support the existence of an oral agreement to cap the fees. It is a letter written to solicitors for CMS by Peter Wade. It concerns the request for his fees to be paid. He says as follows: *"Our letters of offer clearly indicate that third party fees, in particular planning and building control fees, are not considered part of our fee. We believe it incongruous that your client should consider any agreement to cap fees at £20,000 would include third party costs which are such clear exclusions. On the presumption that the fees were indeed to be capped at £20,000 it follows by your own arithmetic that you accept by implication that your client still owes £10,800 exclusive of VAT."*

    The letter continues: *"The reference to the £20,000 was at the meeting when your client announced that both this company and the contractor were required to sign a collateral warranty. In our case this was extended to include a Deed of Employment substantially at variants with our terms of offer to that date [words omitted]. Your client's subsequent actions have blatantly required this company to spend excessive amounts of time on administration and consultation with regard to the project which indeed are still ongoing and consequently under no circumstances could be reasonably expect [sic] the £20,000 capped conditions to have been respected on his part."*

18. Quite apart from that letter which seems to suggest, or at least is evidence suggesting acceptance that there had been an agreement to cap the fees at £20,000, there is a statement from the contractor for the building works, Neil Farrar of Farrar Developments Limited, which whilst not conclusive, suggests that there had been a meeting at which Peter Wade on behalf of LTS agreed to cap his fees at £20,000 (see paragraph 5 of the witness statement dated 9 January 2006).

19. Thirdly there is the circumstance that invoices sent regularly by LTS up to 2004 added up to a figure of approximately £21,000. Subsequently CMS alleged negligence against LTS. It was in response to those allegations a year later that LTS sought to charge, in accordance with their standard terms and conditions, by the hour, reaching a figure of about £90,000. That course of conduct and the surprising uplift in the amount of fees claimed is set out clearly in paragraphs 5 to 7 of CMS's defence. At paragraph 37 of his adjudication the adjudicator said since there was no writing to evidence such an agreement, he did not accept that it existed. The judge in his judgment at paragraph 24 says this: *"To my mind I cannot envisage a situation where an agreement as such was entered which was not then followed up immediately by something in writing which confirmed such an agreement. I can, however, envisage a situation where something may well have been said that could have been interpreted by one party as being some kind of promise to keep fees to a particular amount, but that is far from establishing an agreement to cap fees, and there can be no doubt that a party who seeks to allege such an agreement has a heavy burden to discharge, and one of the factors that I have to consider is whether the Defendant in this claim has any real prospect of establishing that there was such a cap. In my judgment the Defendant does not have any such real prospect."*

20. The judge does not descend to any detail at all. He speaks in generalities. He does not grapple with the material in Mr Farrar's statement, in LTS's own letter of 20 December 2005, or the fact that the increased fees in the sum of nearly £90,000 were not claimed until long after the work was completed and in response to allegations of negligence.

21. All that material was before the judge. If he was going to dismiss it summarily, as he had to do if he was going to enforce the adjudication summarily, he should at least have explained his reasoning by which he dismissed all that evidence which tended to support CMS's contentions. I regard the judge's conclusion as an inadequate response to the assertions of CMS and miles away from justifying a summary judgment dismissing those assertions.

22. The question then arises as to what this court should do. At the outset I sought to stress the importance of the adjudicator's role in achieving a speedy interim solution to disputes over fees or payments. That purpose is obstructed unless the courts protect adjudications from disputes of fact and law on appeals which can better be resolved subsequently. The Court of Appeal expressly approved Jackson J's four principles in ***Carrillion Construction***. It would merely diminish the force of this court's strictures as to the rigorous approach which should be adopted to appeals of this nature if I repeat them. They are clearly set out by Chadwick LJ at paragraphs 84 to 87. But an adjudicator cannot act where there is a real prospect based on cogent grounds of establishing that the adjudicator had acted without jurisdiction. The evidence as to how and why the Deed came into existence and the evidence of an oral agreement to cap LTS's fees at £20,000 convince me that this is one of those rare cases where the judge erred in enforcing the adjudicator's decision.

Lord Rix:

23. I agree.

Lord Justice Buxton:

24. : I also agree.

Order: Appeal allowed.

MR A EDWARD (instructed by Messrs Beaumont Legal) appeared on behalf of the Appellant.
MR J HOLROYD (instructed by Messrs Atkinson Firth) appeared on behalf of the Respondent.