JUDGMENT : Her Honour Judge Frances Kirkham. 11th October 2002. TCC. Birmingham.

1. This is an application by the claimant for summary judgment against the defendant in connection with work which was undertaken as part of installation of air conditioning services for Eli Lilley Pharmaceuticals in Basingstoke. The parties reached an oral agreement whereby the claimant agreed to undertake work of installation of ductwork for £27,000 plus VAT. The work was to be undertaken in two stages, a first fix and a second fix during March and April 2001. In the action the claimant seeks to recover that agreed sum of £27,000 plus VAT, plus a sum of £3,204 plus VAT in respect of some extra work said to have been carried out. The claimant has invoiced for those sums.

2. I remind myself that by CPR24.2 the court may give summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim and I also remind myself that it is not appropriate for the court to be conducting a mini trial. That is the guidance that has been given in **Swain v Hillman**.

3. The claimant bases its claim under two broad headings. The first is pursuant to the Housing Grants Construction and Regeneration Act 1996 and the second is simply on the pleaded and factual basis. I deal firstly with the 1996 Act aspects of the matter.

4. The claimant relies on section 107(2)(c) and 107(4) of the 1997 Act. These provide that the relevant Part of the Act applies only where the construction contract is in writing: *"section 107(2)(c) provides that there is an agreement in writing, if the agreement is evidenced in writing*." I accept Miss Hitchin's submission that *"subsection (4) of the Act goes to explain the parameters of sub-section (2). Sub-section (4) provides that "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. I have been referred to the decision of the Court of Appeal in **RJT Consulting Engineers Ltd v DM Engineering Northern Ireland Ltd**, 2002 EWCA, CIV 270, a decision dated March 2002. In that case the Court of Appeal considered the provisions of section (1) and (7) of the Act, principally in connection with sub-section (5), with which of course we are not concerned here, but nevertheless in that case the court gave extremely helpful guidance as to the approach which should be taken when considering questions under section 107.

6. In his judgment Lord Justice Ward said at paragraph 13: *"Section 107(2) gives three categories where the agreement is to be treated in writing. The first is where the agreement whether or not signed by the parties is made in writing. This must mean where the agreement is contained in a written document which stands as a record of the agreement and all that was contained in the agreement. The second category, an exchange of communications in writing, likewise is capable of containing all that needs to be known about the agreement. One is therefore led to believe by what used to be known as the eivsdem generis rule that the third category will be to the same effect, namely that the evidence in writing is evidence of the whole agreement."* The third category to which Lord Justice Ward refers in that paragraph falls within subsection (2)(c), the provision with which we are concerned here.

7. In paragraph 15 of this judgment Lord Justice Ward refers to section 107(4). He says "*that allows an agreement to be evidenced in writing. What is there contemplated is thus a record of everything which has been said. Again it is a record of the whole agreement."* At paragraph 19 he says *"on a point of construction of section 107 what has to be evidenced in writing is literally the agreement, which means all of it, not part of it. A record of the agreement also suggests a complete agreement, not a partial one."* He goes on to refer to the only exception to the generality of that, being the instance falling within sub-section (5) with which we are not concerned here.

8. Whilst dealing with this judgment I would note also that I have found the contents of paragraph 16 of Lord Justice Ward's judgment extremely helpful in giving guidance as to the approach that the courts should take when considering this section of the Act.

9. The claimant's case is that this is an agreement which is evidenced in writing. Mr Mason for the claimant has explained that the claimant relies on a fax which was sent by Mr Webb, a director of the claimant company, to the defendant dated 25th March 2001. That fax was in fact sent after the claimant began work, but before the claimant stopped work, but no point is taken on the timing of

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that fax. The claimant submits that in this fax all relevant terms of the agreement, as Mr Mason puts it, are recorded and it is therefore sufficient to constitute written evidence of the agreement.

10. I reject that submission on two counts. The first is that the fax does not in fact set out or record all of those matters on which the claimant itself seeks to rely in pursuing its claim. That fax does not explain even in summary terms the scope of the work to be undertaken. As I mentioned at the beginning, this was a labour only contract, yet the only description of the scope of the work in the fax is *"reference Eli Lilley, DP area, plus HEPA filter."* That does not on the face of it explain the scope of the work which the claimant was to undertake. It is not clear, for example, whether materials were to be supplied and so on. The contract was for work to be carried out by way of first fix, then second fix. That is not clear on the face of the fax itself. There is reference in the fax to *"second fix work."* However, it is not clear whether first fix work was relevant between these parties or not.

11. In connection with this application Mr Edwards, a director of the defendant company, has made a statement. His evidence is that there were further terms of the contract between the parties and on which the defendant relies. In very broad terms, those matters include references to the specification or standard to which work was to be carried out, matters as to quality and issues as to the timing during which work was to be undertaken. The period during which work was to be undertaken was a matter which the defendants claim was important for them.

12. Mr Mason's submission is that this fax contains all terms relevant to the claimant's claim. Even if that were so - and, as I have said, I do not accept that the fax does contain all those terms - but even if it did, it seems to me to be quite wrong that a claimant should be entitled to rely on a document which it said contained all of the relevant terms and to ignore and invite the court completely to disregard the additional terms which the defendant says were agreed orally.

13. It is clear from the judgments in the **RJT** case that the writing must evidence the whole of the agreement. Section 107 does not permit the claimant to identify those parts of the agreement on which he relies and ignore the matters which the defendant says were agreed between the parties. The judgments of their Lordships in **RJT** indicate that that is very far from the approach which the court considers appropriate. In this context I refer to the helpful contents of paragraph 16 of the judgment, to which I referred earlier.

14. Mr Mason asks rhetorically what a claimant is to do in these circumstances if it wishes to obtain the benefit of the protection of the Act. It seems to me that the answers are quite straight forward. A contractor can require a contract to be reduced to writing. A contractor can at some later stage clarify the terms which he believes have been orally agreed and invite the other contracting party to agree that those are indeed the agreed terms of the agreement. The door is by no means shut to a contractor in these circumstances.

15. In view of my conclusion that the claimant cannot show that the provisions of the relevant part of part 2 of the 1996 Act apply because this is not an agreement which has been evidenced in writing, there is no need for me to deal with the question whether the defendant served a valid section 101(1) withholding notice, which would otherwise have been a matter which I would have had to decide. I do, however, observe that I should have been slow to conclude that the defendant's letters dated 8th May and 14th May 2001 were not sufficient notice.

16. Mr Mason submits that the claimant here is in a position analogous to a claimant who sues on a cheque. He submits that the claimant is entitled to judgment for the sum demanded leaving the defendant to pursue any counterclaim it may have. I reject that submission. Quite apart from the factors which are dependent upon the section 107 point, Mr Mason's submission ignores the principle that the claimant is entitled to be paid only for work done properly and that the defendant in normal circumstances may have not only a counterclaim, but also a right to an abatement if work has not been done at all or has not been done properly.

17. The claimant pursues its application irrespective of the applicability of the 1996 Act. The claimant puts its claim simply. It claims payment of the £27,000 plus VAT and the £3,204 plus VAT for extras and asserts that it is entitled to payment of those sums. The defendant defends the claim and pursues a

counterclaim on a number of bases, broadly that the claimant did not complete the work it had agreed to undertake. The defendant puts in issue the number of hours which the claimant has claimed for, suggesting that not all of these were worked and claims that some of the work was defective. The defendant alleges that it required the claimant to return to site over I believe an Easter weekend to complete work which it had not completed and alleges that the claimant refused to do so, as a consequence of which it was obliged to arrange for the work to be completed by others. The defendant has raised these matters in pleadings and in the statement which Mr Edwards prepared in connection with this application. In its evidence the claimant has not answered any of those matters.

18. Mr Mason has taken me in careful submissions to matters concerning one of the defendant's heads of counterclaim. Originally the defendant claimed amongst other matters the sum of £11,688 in respect of the cost of engaging a contractor, CVS Limited to undertake some work The CVS cost was said to be £10,438 and a supervision cost by Norsted, the defendant's contractor, was put at £1,250. The defendant now reduces its claim. It is no longer pursuing a claim for £11,688, but has reduced it to sums of £1,250 and £1800, that is some £3,050. Therefore the defendant concedes that its claim is worth only the smaller sum.

19. It would not be appropriate for me to reach any conclusion on the material currently available to me to infer that the defendant was deliberately exaggerating its claim or for any particular purpose. Those are matters which, if the parties wish to put them in issue, should be explored at trial with the benefit of evidence from both sides.

20. For the purpose of this application the claimant now concedes that the defendant may be able to show an entitlement to two of its other heads of counterclaim worth £19,477.94 and £2,523.52 and the claimant now seeks summary judgment not on the whole of its claim as was originally the case, but on the net sum of £13,486.48. The defendant resists the claimant's application for summary judgment for a partial sum on the grounds that the claimant has not applied for judgment for the lesser sum.

21. In its application the claim is put simply. The claimant seeks an order that judgment be entered for the claimant in the sums claimed because the defendant has no real prospect of successfully defending the claim or the issues that it raises. Mr Mason suggests that on the face of it the application form may amount to an explanation that the claimant is seeking judgment for a lesser sum in the alternative. I think that that is a rather laboured reading of the application That construction is not clear to me on the face of it, nor do I think that commonsense suggests that the application is put on an alternative basis.

22. At the beginning of this hearing the claimant sought relief in relation to defects in its application for summary judgment. It had not made clear that points of law were to be relied on and certainly it was not clear to me until Mr Mason began his helpful submissions that the claimant was putting its case very heavily on the basis that this was a contract evidenced in writing within the meaning of section 107, nor did the application or the statement by Mr Webb in support of the application make it clear that it was the claimant's belief that the defendant had no real prospect of successfully defending the claim. I gave relief in relation to those deficiencies, but no relief was requested in respect of the changed basis of the application.

23. It seems to me that the changed basis in truth reflects a recognition that the application was unsustainable if the section 107 point did not succeed so that concessions would have to be made to enable the claimant to get anywhere close to the mark. The provisions of CPR make it clear that parties must set out the case on which they seek to rely and it seems to me that it would be wrong here to allow the claimant to succeed on an application for payment of part only of the sum. But in any event, if one takes the figures for which the claimant now seeks judgment and if one deducted from those the figure of £3,050 which is the CVS claim reduced from the £11,688 figure, that leaves by my calculation a figure of about £10,436 which might be described as being possibly unaccounted for. On the defendant's case that sum may be mopped up, as it were, by their claim for losses which they say that they have suffered because their main contractor Norsted no longer send them work.

24. Mr Mason criticises that head of claim on a number of grounds. He suggests that there is an absence of causation, Norsted's complaints being in truth directed to the claimant and not to the defendant, and

he further criticises that head of claim on the ground that the loss claimed is irrecoverable on the ground that it is too remote or was not reasonably foreseeable. It seems to me that in this industry it is not unknown for there to be cases whereby a party suffers loss as a result of difficulties which have arisen on a project in the sense that that party is no longer sent work. These are matters which should be the subject of evidence and that evidence can of course be tested in cross-examination at trial. There may well be interesting legal points which the parties will want to argue depending upon the factual basis for this claim. What cannot be said at this stage with any confidence is that the defendant has no real prospect of successfully prosecuting its claim for damages under this head and it follows that it cannot be said that the defendant has no real prospect of successfully defending the claim which the claimant makes.

25. In the circumstances therefore the claimant would not be entitled to succeed on its application for summary judgment even if it were appropriate to permit the claimant to pursue its application for payment of part of the sum claimed and not all.

MISS HITCHIN: *My Lady, I indicated before the short adjournment that there were likely to be two issues arising, the first being the issue of costs, the second being directions.*

JUDGE KIRKHAM: *Yes.*

MR MASON appeared on behalf of the Claimant
MISS HITCHIN appeared on behalf of the Defendant