Before Auld LJ; Ward LJ; Robert Walker LJ. Court of Appeal. 8th March 2002

JUDGMENT : Lord Justice Ward :

1. The HGCRA 1996 introduced changes of some importance to the construction industry. It gave an entitlement to stage payments, made provision for the date when payments under a construction contract became due, dealt with the need to give effective notice of intention to withhold payments, provided a right to suspend performance for non-payment, prohibited conditional payment provisions and imposed a statutory set of contractual provisions which in default took effect as implied terms of the contract concerned. It also gave the important and practical right to refer disputes to adjudication so as to provide a quick enforceable interim decision under the rubric of "pay now, argue later". All of these provisions, however, only applied to construction contracts as they were defined in the Act and, importantly for the purposes of this appeal, to contracts in writing. The sharp issue in this appeal is what is meant by time-hallowed words - an agreement which is "evidenced in writing"?

2. That issue arises in this way. The appellant, RJT Consulting Engineers Ltd., is a practice of consulting engineers. It was retained by the Holiday Inn, Liverpool, to provide the outline design for mechanical and electrical work which was to be undertaken as part of the refurbishment of the hotel. The main contract was given to David Patton (Ballymena) Ltd. and they engaged the respondent, DM Engineering (N.I.) Ltd. as the mechanical and electrical sub-contractor. The consultant engineers became involved with the sub-contractors in the negotiation to establish a price for that work eventually agreed at about £1.8m. The sub-contractor submitted a tender to David Patton to do the work for that sum and that tender was accepted. It is not in dispute that in about April 2000 Mr James Bennett acting for the respondent sub-contractor asked Mr Raymond Tooth acting for the appellant consulting engineers if the consultants would complete the design of some of the works the sub-contractor had agreed to perform. Mr Tooth agreed that the appellant would complete that detailed design for £12,000.

3. A dispute then arose between the parties which the respondents sought to refer to an adjudicator to resolve. It is necessary to pause a moment to see how the dispute was defined in the Referral Document. The case was put this way:-

"10. ... DM entered into a consultancy contract with RJT, retaining RJT to complete the detailed design of the M and E Works with the exception of small particularly technical elements ...

11. The consultancy agreement included, inter alia, terms to the effect:

i) That RJT would incorporate the Outline Design and Performance Specification for the Holiday Inn. That is that RJT would design the M & E Works in order to ensure that it met with the Client Specification and the price agreed between Patton's and DM.

ii) That RJT would protect DM's position in the contract since RJT was fully cognisant of the pricing arrangement, the parameters of the Contractual Matrix and the risks accepted by DM;

iii) That RJT would provide full and proper information in sufficient time to allow DM to carry out its M and E Works efficiently and without suffering loss and expense ...

12. This is a construction contract within the meaning of section 104 of the Housing Grants, Construction and Regeneration Act 1996 ...

16. RJT have failed to discharge its responsibilities and obligations under the Consultancy Contract and/or at common law. These failures are:

i) Professional negligence; and/or

ii) Breach of contract.

17. The particulars of this professional negligence and/or breach of contract are:-

2.1 Failure to design the works properly, adequately, in good time, or at all, in accordance with the terms of the Consultancy Contract ...

2.2 Failure to produce drawings, specifications and information properly, adequately, in good time or at all ...

2.3 Failure to achieve a professional standard of work ...

2.4 Failure to design the M and E Works to ensure compliance with budget ...

2.5 Failure to represent or control DM's interests either properly, adequately or at all ...

2.6 Failure to comply or act in accordance with the Consultancy Contract ..."

As a result of those alleged breaches DM claimed some £858,000 for direct loses and expenses due to disruption for sums not certified and for other sums due to the mechanical ventilation works. Loss due to disruption to the main contractor was to be ascertained.

4. The appellants challenged the right to seek adjudication denying that the agreement was in writing and within Part II of the Act. The adjudicator, Mr Allan Wood, decided that the agreement was sufficiently evidenced by the drawing schedules and by a letter of 31st January 2001, to which I shall have to refer in detail shortly, and he proposed to proceed to make a decision. That proposal met with protest from the consulting engineers, and it led to the consulting engineers seeking a declaration in the Technology and Construction Court in Liverpool as follows:-
"That the construction contract made orally between the parties in or about April 2000 was not an agreement in writing for the purposes of section 107 of the Housing Grants, Construction and Regeneration Act 1996, and that accordingly the provisions of Part II of that Act do not apply to that construction contract."

On 9th May 2001, His Hon. Judge MacKay sitting as a deputy judge of the High Court dismissed that application but gave permission to appeal.

The Housing Grants, Construction and Regeneration Act 1996.

5. Part II of that Act deals with construction contracts. Section 104 defines "construction contract" and under sub-section (2) an agreement to do design work is included. There is no dispute, therefore, that this is a construction contract and that the work related to "construction operations" as they were defined in section 105. Section 108(1) gave the right to refer a dispute arising under the contract for adjudication under a procedure complying with the section. Section 108(3) provided that the decision of the adjudicator was binding until the dispute was finally determined by legal proceedings, by arbitration (if the contract provided for it) or by agreement. That dispute resolution process was generally welcomed within the industry as the adjudicator was required to make his decision within 28 days and so there was, as Lord Ackner said in the debate at the report stage, "a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts" That right and the others I have mentioned are, however, only conferred if the construction contract or any other agreement is in writing. That is the effect of section 107 which I need to recite in full:-

"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 an 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."

The judgment under appeal.

6. The judge, accepting some of the commentaries on the Act, accepted the submission of the sub-contractors that "the terms of section 107 are a widening process". He held:-

"It will be seen that section 107 is in itself not an exclusive piece of legislation but an inclusive piece of legislation. The purpose of the Act, and in particular section 107, was to bring in, notwithstanding that agreements were not in writing, those agreements which could be caught by the Act. And so the Act's purpose was to ensure that parties to construction agreements would be able to take advantage of the procedure set out in the Act."

He referred to the defendant's submissions that:-

"... the court can look at all the written evidence to determine whether or not that evidence is capable of supporting the existence of an agreement between the parties. Nowhere in the Act, they say, is it stipulated that the substance, material consideration, terms, quantities, etc. of the contract must be set out in writing ... The actual material between the parties by way of written substance is here comparatively great. There is, for example, a fee note from RJT to DM on a number of invoices setting out the nature of the work, the names of the clients and the identity of the place of work. There are minutes taken during meetings between the experts when the work was to be carried out which clearly identifies the parties and the nature of the work which needed, at those particular times when those minutes were made, to be done. There is also clear reference in the correspondence around the issue of the arbitration to the parties and the nature of the work."

7. He expressed his conclusion in this way:-
"What is my decision? I decide to look at the problem in what Mr Wood [counsel for the sub-contractor] described as a purposive way. I looked to see what the Act was meant to do and what the Act is trying to do. It seems to me that if I were to find that it is necessary to have a recitation of the terms of an agreement when the existence of the agreement, the parties to the agreement and the nature of the work and the price of the agreement are plainly to be found in documentary form, but nonetheless in a contract worth more than three-quarters of a million pounds because the initial agreement was oral, it is not caught by the Act, then it seems to me such an attempt would run contrary not only to the terms of the Act but contrary to my duty to carry out what I believe to be the law at any particular time. And therefore, adopting that methodology, I hold that it is not necessary to have the terms identified and the extensive documentary evidence in this case is well sufficient to bring it within the adjudication proceedings and therefore I refuse the declaration."

The submissions before us.

8. Mr Blackburn Q.C., who did not appear in the court below, submits to us that the judge confused documents consistent with there being a contract and documents which constituted a record of the entirety of the oral agreement. He submits that the whole agreement has to be evidenced in writing in order to provide the certainty which would enable the adjudicator to move swiftly to a decision within the short timetable provided by the Act.

9. Mr Wood, for the respondent, contends that all that is necessary is that there be evidence in writing of the existence of a contract alternatively that no more than the identities of the parties, the consideration and the nature of the work need be evidenced in writing. He submits that the purpose of the Act is to spread the benefits of the various rights conferred by Part II as widely as possible. He relies, as the judge did, on a commentary in A Practical Guide to the Adjudication in Construction Matters by R.A. Anderson that:-
"The Act provides that the contract, and any agreement between the parties as to any matter, is effective for the purposes of Part II of the Act only if it is in writing but the definition of "an agreement in writing" in the Act is extremely wide."

He also referred to A Commentary on Contracts: Part II HGCRA 1996 by R.A. Joyce to the effect that:-
"Evidence in writing of a contract dealt with by s107(2)(c), leaves the door open for such evidence to come into existence after the commencement, or even completion, of the contract's performance. Thus an invoice submitted by one party to the other may be sufficient evidence, as might a confirmation of verbal instructions set out in a letter."

10. He furthermore relies on a judgment of His Hon. Judge Thornton Q.C. in an unreported decision of 21st June 2000 in the TCC in **R.G. Carter Ltd. v Edmund Nuttall Ltd**. There the judge said:-
"This statutory scheme, which is unprecedented and novel in this country ... was intended, as is well known, to provide for the first time parties with a rapid, albeit interim, but binding, means of resolving disputes holding up payment within the construction industry at each tier of the often lengthy construction chain. In those circumstances it is to be expected that the width and ambit of this statutory structure would be extensive. I therefore approach the question of construction of section 108(1) from the standpoint that it is both part of the background to the Act and the apparent working of the Act itself that it is wide in its ambit and extensive in its effect."

My views.

11. Let me deal first with Judge Thornton's views which command respect. As I read his judgment it was common ground (see page 11 of his judgment) that the parties accepted that there was in existence a construction contract contained in a letter which accepted the tender set out in the schedule of documents which accompanied the tender. Consequently the issue was not directed to the construction of section 107 of the Act but to the construction of section 108(1) of the Act dealing with the right to refer a dispute arising under the contract for adjudication. Once jurisdiction to refer the matter to arbitration was established the judge held, and in my judgment rightly held, that it was proper within that adjudication to decide whether or not a particular term had been incorporated into the contract. The scheme would be emasculated if a party were able to deprive the adjudicator his power to decide simply by putting up an argument that some term was or was not incorporated into an agreement otherwise accepted to be in writing. Giving a wide construction to section 108 begs the question whether a wide construction should be given to the jurisdictional threshold established in section 107. Section 107 may in fact serve another purpose.

12. I turn to the construction of s107. S107(1) limits the application of the Act to construction contracts which are in writing or to other agreements which are effective for the purposes of that part of the Act only if in writing. This must be seen against the background which led to the introduction of this change. In its origin it was an attempt to force the industry to submit to a standard form of contract. That did not succeed but writing is still important and writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are.

13. S107(2) gives three categories where the agreement is to be treated in writing. The first is where the agreement, whether or not it is signed by the parties, is made in writing. That 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 eiusdem generis rule that the third category will be to the same effect namely that the evidence in writing is evidence of the whole agreement.

14. Sub-section (3) is consistent with that view. Where the parties agree by reference to terms which are in writing, the legislature is envisaging that all of the material terms are in writing and that the oral agreement refers to that written record.

15. Sub-section (4) allows an agreement to be evidenced in writing if it (the agreement) is recorded by one of the parties or by a third party with the authority of the parties to the agreement. What is there contemplated is, thus, a record (which by sub-section (6) can be in writing or a record by any means) of everything which has been said. Again it is a record of the whole agreement.

16. Sub-section (5) is a specific provision. Where there has been an exchange of written submissions in the adjudication proceedings in which the existence of an agreement otherwise than in writing is alleged by one party and not denied by the other, then that exchange constitutes "an agreement in writing to the effect alleged". The last few words are important. The exchange constitutes an agreement in writing which does more than evidence the existence of the agreement. It also evidences the effect of the agreement alleged, and that must mean such terms which it may be material to allege for the purpose of that particular adjudication. It is not necessary for me to form a view about **Grovedeck Ltd. v Capital Demolition Ltd**. 2000 Building Law Reports 181. Dealing with section 107(5) His Hon. Judge Bowsher Q.C. said:-

    "Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by adjudicators under the Act, ..." (Emphasis added by me).

    I agree. That is why a record in writing is so essential. The written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute.

Conclusions.

17. In my judgment the learned judge was wrong to conclude as a matter of law that it was sufficient to give the jurisdiction to entertain an adjudication that there was evidence in writing capable of supporting merely the existence of the agreement, or its substance, being the parties to it, the nature of the work and the price.

18. Even if that were all that was required, the documents relied on in this case are wholly insufficient. There were fee notes "for professional fees expended to date in connection with the Mechanical and Electrical Services on the ... project". Letters from the main contractor to the sub-contractor referred to the fact that the sub-contractor "engaged RJT Consulting to advise you on performance of your tender" but there is nothing to indicate what advice was to be given. On 31st January 2001 the sub-contractors wrote to the engineers saying, "As RJT Consulting Engineers have designed this project for DM Engineering (N.I.) Ltd., can you provide us with your professional indemnity insurance ..." There were drawing schedules prepared by RJT identifying the client as "D & M Eng (N.I.) Ltd." There were minutes of mechanical and engineering design meetings stating "RJT/DM Eng to review this along with the construction programme and confirm their proposals for drawing production, approval, fabrication and commencement on site in each area" There were other minutes referring to the parties connections with each other. All of this is evidence of the existence of the contract, some evidence of the consideration and some indication that the nature of the work was design and advisory. But it is not evidence of the terms of the oral agreement that was made between the two gentlemen back in April 2000. It is certainly not evidence of the terms of the contract on which the respondents rely in the adjudication. For that reason I would allow the appeal.

19. On the point of construction of s107, 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. The only exception to the generality of that construction is the instance falling within ss5 where the material or relevant parts alleged and not denied in the written submissions in the adjudication proceedings are sufficient. Unfortunately, I do not think ss5 can so dominate the interpretation of the section as a whole so as to limit what needs to be evidenced in writing simply to the material terms raised in the arbitration. It must be remembered that by virtue of s107(1) the need for an agreement in writing is the precondition for the application of the other provisions of Part II of the Act, not just the jurisdictional threshold for a reference to adjudication. I say "unfortunately" because, like Auld L.J. whose judgment I have now read in draft, I would regard it as a pity if too much "jurisdictional wrangling" were to limit the opportunities for expeditious adjudication having an interim effect only. No doubt adjudicators will be robust in excluding the trivial from the ambit of the agreement and the matter must be entrusted to their common sense. Here we have a comparatively simple oral agreement about the terms of which there may be very little, if any, dispute. For the consulting engineers to take a point objecting to adjudication in those circumstances may be open to the criticism that they were taking a technical point but as it was one open to them and it is good, they cannot be faulted. In my judgment they were entitled to the declaration which they sought and I would accordingly allow the appeal and grant them that relief.

Lord Justice Robert Walker:

20. I agree that this appeal should be allowed for the reasons set out in the judgment of Ward LJ. It is the terms, and not merely the existence, of a construction contract which must be evidenced in writing. The judge aimed at a purposive approach but he did not in my view correctly identify the purpose of section 107. No doubt the general purpose of Part II of the 1996 Act is to facilitate and encourage the process of adjudication. But it is intended to be a swift and summary process, as is apparent from the time limits in section 108(2). Parliament evidently decided (as Judge Bowsher noted in the passage cited by Ward LJ) that it was inappropriate for an adjudicator to have to deal with the disputes which often arise as to the terms of an oral contract.

Lord Justice Auld:

21. I also agree that the appeal should be allowed. I do so, not because the whole agreement was not in writing in any of the forms for which section 107 of the 1996 Act makes provision, but because the material terms of the agreement were insufficiently recorded in writing in any of those forms.

22. Although clarity of agreement is a necessary adjunct of a statutory scheme for speedy interim adjudication, comprehensiveness for its own sake may not be. What is important is that the terms of the agreement material to the issue or issues giving rise to the reference should be clearly recorded in writing, not that every term, however trivial or unrelated to those issues, should be expressly recorded or incorporated by reference. For example, it would be absurd if a prolongation issue arising out of a written contract were to be denied a reference to adjudication for want of sufficient written specification or scheduling of matters wholly unrelated to the stage or nature of the work giving rise to the reference.

23. There may be cases in which there could be dispute as to whether all the terms of the agreement material to the issues in the sought reference are in writing as required by s107 and it could defeat the purpose of the Act to clog the adjudicative process with jurisdictional wrangling on that account. However, there will be many cases where there can be no sensible challenge to the adequacy of the documentation of the contractual terms bearing on the issue for adjudication, or as to the ready implication of terms common in construction contracts.

24. S107(5) is an illustration of the draftsman's intention not to shut out a reference simply because the written record of an agreement is in some immaterial way incomplete. It provides that an exchange of written submissions in proceedings in which the existence of an agreement otherwise than in writing is alleged by one party and not denied by the other constitutes an agreement in writing "to the effect alleged". If the effect of the agreement so alleged contains all the terms material to the issue for adjudication, that procedure is available notwithstanding that the agreement contains other terms not in writing which are immaterial to the issue. As Ward L.J. has observed, the exchange constitutes an agreement in such terms as it may be material to allege for the purpose of the particular adjudication. In my view, it would make no sense to confine that sensible outcome to the written form of agreement provided by s107(5) whilst excluding it in the other forms for which the section provides.

Order: appeal allowed; declaration made that the construction contract made orally between the parties in or about April 2000 was not an agreement in writing for the purposes of s107 HGCRA 1996, and that accordingly the provisions of Part II of that Act do not apply to that construction contract; the respondent to pay the appellant's costs of the appeal and of the action, including the costs of the application, to be assessed if not agreed.

PRIVATE (Order does not form part of the approved judgment)

John Blackburn Q.C. (instructed by Hill Dickinson) for the Appellant
Graham Wood and Dean O'Leary (instructed by Brunton & Co.) for the Respondent