JUDGMENT : **HIS HONOUR JUDGE BOWSHER Q.C** : TCC : 24th February 2000

1. **Introduction** : This is an application for enforcement of an award made by an Adjudicator awarding £153,142.27 to the claimants.

2. **The parties :**The claimants are demolition sub-contractors. The defendants are demolition contractors.

3. **History :** In early 1998, the claimants undertook demolition work at a site in Cockspur Street, London SW1 as sub-contractors for the defendants. In early 1999, the claimants undertook demolition work as sub-contractors for the defendants at Heinz Research Building, Hayes Park.

4. In each instance, the claimants acted pursuant to an oral contract.

5. On both sites, the claimants were not paid sums that they claimed were due to them, and they suspended work on 27 July, 1999 at Cockspur Street and 28 July at Hayes Park.

6. On 8 December, 1999, the claimants gave notice of referral of disputes under both contracts to adjudication and applied to the Chartered Institute of Building for the appointment of an adjudicator. The Chartered Institute appointed Mr. R.L. Louch FRICS, ACIArb to be adjudicator in respect of the disputes at both sites.

7. The claimants served a Referral Notice on 15 December, 1999 and the defendants served a Response as ordered by the Adjudicator on 4 January, 2000.

8. The Adjudicator made his adjudication on 19 January, 2000. The Adjudicator was asked by the defendants to give reasons for his adjudication and he did so. By his adjudication, the adjudicator ordered that the defendants should pay £143,908.00 in respect of breaches of contract and moneys due on both contracts. The defendants were also ordered to pay the adjudicator's fees and the costs of the claimants. The adjudicator ordered that the defendants should comply peremptorily with the decision within 7 days of receipt of the decision by the parties' representatives.

9. **The defences** : Although reference has been made to other matters which might have been raised by way of defence, the defendants in the end rely on two defences only:
   a. Part II of the Housing Grants, Construction and Regeneration Act, 1996 (the Act) does not apply to these contracts as they were not in writing.
   b. The Referral Notice is bad because it refers to two contracts, not one.

10. **Construction contract not in writing** : I shall first deal with the applicability of the Act to these contracts.

11. The parties made agreements falling within the definition of "construction contract" contained in sections 104 and 105 of the Act and not excluded by section 106 of the Act (referring to residential occupiers). However, the contracts were made orally.

12. The defendants rely on section 107 of the Act which states that Part II of the Act only applies where the construction contract is in writing. There was no contract in writing between the parties, say the defendants, and therefore the Act does not apply and the Adjudicator acted without jurisdiction. The claimants respond that in the circumstances of this case, by virtue of the provisions of section 107(5) of the Act, there are agreements in writing making Part II of the Act applicable.

13. Section 107 of the Act is in the following terms:
   "(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."

14. The Adjudicator sent a notice of his adjudication to the defendants by letter dated 16 December, 1999. The defendants' solicitors wrote by Fax to the Adjudicator on 20 December, 1999 protesting at the short period of time allowed by the Adjudicator for serving the Response, ordered to be served by 4 January, 2000. By a second Fax of 20 December, 1999, the defendants' solicitors wrote to the Adjudicator requesting him to dismiss the referral to him forthwith for want of jurisdiction and further requesting him to deal with that request as a preliminary point to avoid the expense of preparing a detailed Response. The ground for that request was that there was no agreement in writing as required by s107 of the Act. The defendants by their solicitors wrote that the claimants alleged oral agreements and although the claimants alleged that the agreements were confirmed by correspondence in Appendix 1 to the Referral Notice, that correspondence passed between the parties after the arrangement between them ceased and there was nothing in that correspondence evidencing any agreement so as to satisfy s107(2)(c) of the Act. Further Faxes passed between the defendants' solicitors and the Adjudicator on the same day. The Adjudicator wrote "I cannot investigate my own jurisdiction but on the basis of the documents before me and on the balance of probabilities I consider that in respect of the dealings between Grovedeck and Capital there are valid construction contracts in existence which have been referred to me in this adjudication. Accordingly, I will be proceeding as previously advised."

15. Despite a protest in a further Fax, the Adjudicator stood by that decision.

16. In submissions before me, Mr. Darryl Royce, counsel for the claimants, made it plain that the claimants do not now contend as they did in correspondence that the documents in Appendix I evidenced the agreements in writing pursuant to s107(2)(c) of the Act. Those letters were written after the disputes arose. It is argued that the exchange of written submissions completed after the Adjudicator's expression of a view on jurisdiction in correspondence "constitutes " an agreement in writing to the effect alleged" pursuant to s107(5) of the Act.

17. The defendants then instructed Messrs. Drake & Reynolds, Chartered Quantity Surveyors, to act on their behalf in the adjudication. On 24 December 1999, Drake & Reynolds served a Response to the Referral Notice. That Response dealt in detail with the whole of the claimants' referral, but began with a denial of the Adjudicator's jurisdiction. "It is denied that the Contracts to which the Referral Notice refers are in writing or evidenced in writing pursuant to s107 of the Housing Grants, Construction and Regeneration Act 1996 and consequently the jurisdiction of the Adjudication and the validity and/or enforceability of any decision which it makes or purports to make are expressly denied and/or objected to by The Other Party. The fact that the contract does not comply with s107 of the Act is clearly supported by the Referring Party's letter dated 26 July 1999.

    If, in the alternative, it is found that the construction contracts do comply with the requirements of s107 of the Act then the Other Party makes the contentions in the paragraphs below."

18. In his decision, dated 19 January, 2000, the Adjudicator dealt with the point of jurisdiction as follows: *"I have considered the submissions with regard to whether or not the contracts are in writing and thus comply with the requirements of s107 of the Act and as a result my jurisdiction and although I cannot rule upon my own jurisdiction I find that Grovedeck in these adjudication proceedings have alleged an oral agreement with Capital and Capital have not denied this and consequently there is an agreement in writing in accordance with s107(5) of the Act and I have decided to proceed with the adjudication."*

19. By their Response to the Referral Notice, the defendants did not deny that there were oral agreements relating to the two projects. The Response did however deny the terms of the agreements alleged by the claimants. It was the defendants' case that under the terms of the contract for which they

contended, no money was owed to the claimants and in suspending work, the claimants acted in breach of contract. At the heart of the adjudication was a dispute about the terms of the oral contracts.

20. By the Response, the defendants alleged:
    a. Each contract was for a fixed sum;
    b. Each fixed sum was inclusive of VAT;
    c. There was no provision for variations and the lump sum was intended to cover everything necessary for the complete and proper execution of the demolition works;
    d. There was no provision for 'loss and expenditure' and since the contracts were fixed price lump sum contracts, the claimants were responsible for losses or increased costs incurred as a result of the acts of third parties for whom the defendants were not responsible.

    Those matters were in issue in the Adjudication.

21. In his decision, the Adjudicator identified four issues for decision, the first of which was "The basis for the claims of Grovedeck". In a section headed "The Decision", he wrote three paragraphs:
    "15. [In this paragraph, the Adjudicator considered whether certain invoices had been sent and a certain payment made. Having considered the material put before him and having made an enquiry of his own volition, the Adjudicator decided those matters against the defendants.]
    "16. Following consideration of the events set out in paragraph 15 above I find that I attach no weight whatsoever to any of the submissions made by or on behalf of Capital and as a result dismiss their case in its entirety. For this reason I find that the Grovedeck's case fully succeeds.
    "17. I have been referred to the case ***John Cothliff Ltd -v. Allen Build (North West) Ltd*** *and find I am in this instance bound by the decision therein. I have been provided with costs information following my letter dated 13 January 2000 and find that Grovedeck should be reimbursed the full costs of the application fee to the CIOB and 80% of its other incurred costs in prosecuting this adjudication."*

22. I infer that in dismissing the defendant's case in its entirety, the adjudicator found that the contracts were in the terms alleged by the claimants. The first question is whether the Adjudicator had jurisdiction to enter on his enquiry and make his findings.

23. Both in the exchange of letters before entering on the enquiry and in his Decision, the Adjudicator said that he had no authority to decide his own jurisdiction, but he did respond to the request of the defendants to investigate his jurisdiction. In the Fax of 20 December, 1999 from which I have quoted, he considered that there were *"valid construction contracts"* before him. As the defendants' solicitors pointed out, that was not the point: the question was whether there was within the meaning of s107 of the Act a construction contract in writing. When he came to make his Decision, the Adjudicator came to the point raised before me and referred to s107(5): in making that reference, I understand him to be referring to the Referral Notice and the Response to the Referral Notice as founding jurisdiction under s107(5).

24. The Claimants do not allege that the exchange of letters brought the contracts within the Acts. The Claimants allege that the contracts were brought within the Act by the Referral Notice and the Response to the Referral Notice once the Adjudicator had embarked on his enquiry.

25. When the contracts between the parties were made, they were oral contracts to which the Act did not apply. If they had been contracts in writing to which the Act did apply, they would have been required to include terms with the effects set out in s108(1) to (4) of the Act, and if they did not do so, the contract would have been subject to the requirements of the statutory scheme set out in The Scheme for Construction Contracts (England and Wales) Regulations 1998 SI 1998 No. 649. Since the Act did not apply to those contracts, the parties were still at liberty to conduct themselves in accordance with mid-nineteenth century concepts of liberty of contract, and they agreed on no terms that would have complied with s108 of the Act.

26. So when and how, if at all, did those oral contracts become subject to statutory terms?

27. The contracts were not subject to any terms about adjudication when the disputes arose. Nor were they subject to any such terms when the claimants gave notice of referral and applied to the Chartered Institute of Building for appointment of an Adjudicator. The contracts were not subject to any terms

about adjudication when the Adjudicator was appointed and so, at the date of his appointment, he had no jurisdiction. Did something happen later to change the nature of the contracts between the parties and give jurisdiction to the adjudicator so as to bestow validity on what was proceeding as an invalid adjudication? The claimants say, Yes. The claimants' submissions involve this unstated proposition that even though in every communication after his unlawful appointment the defendants challenged and denied the jurisdiction of the adjudicator, those same communications themselves changed the nature of the parties' contracts and gave him jurisdiction. Freedom of contract has fallen, but I cannot believe that it has fallen that far.

28. On one reading of s107(5), if one party to an adjudication alleges the existence of an oral agreement and the other does not deny the existence of an oral agreement, then there is an agreement in writing *"to the effect alleged"*, that is, in the terms alleged by the claimant, even though the other party hotly denies, as he did here, that the agreement was in the terms alleged. Parliament cannot have intended such an unjust result.

29. I think this is a case where it is permissible, following the decision of the House of Lords in **Pepper v. Hart** [1993] AC 593, to look at Hansard. It appears from the Hansard Report of the proceedings in the House of Lords for 23 July, 1996 that s107(5) originally contained no reference to adjudication proceedings. The House of Lords accepted a Commons amendment that after the word "submissions" there should be inserted the words *"in adjudication proceedings or"*. If one reads s107(5) without the words *"in adjudication proceedings or"* it is clear that the intention of Parliament was that a contract should be treated as a contract in writing if in arbitral or litigation proceedings before the adjudication proceedings in question an oral contract had been alleged and admitted. I also would read the words *"and not denied"* as meaning that the alleged terms of the contract were not denied. By adding the words *"in adjudication proceedings or"*, Parliament intended to add a reference to other preceding adjudication proceedings. There was no intention by Parliament to provide that submissions made by a party to an unauthorised adjudication should give to the supposed adjudicator a jurisdiction which he did not have when he was appointed.

30. Read in that way, the sub-section has an entirely sensible and practical intention and purpose and I so read it. 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, but if in any case such room for dispute has been removed by previous formal and binding legal submissions, then the adjudicator has jurisdiction.

31. An adjudicator does not have jurisdiction to decide his own jurisdiction: **Smith v.Martin** [1925] 1 KB 745: **Palmers Ltd v. ABB Construction Ltd** [1999] BLR 426. A party who protests the jurisdiction of an adjudicator may invite him to inquire into his jurisdiction, but not to decide it: **Christopher Brown v. Oesterreichischer Waldesbesitzer** [1954] 1 QB 8. The claimants expressly disavow any suggestion that the defendants have made an ad hoc submission to adjudication or waived any right to challenge the jurisdiction.

32. Accordingly, I find that the contracts between the parties, made orally in the first instance, are not deemed by statute to be contracts in writing and Part II of the Act does not apply to them. I find that the Adjudicator did not have jurisdiction to enter upon and make this adjudication and he was not subsequently given such jurisdiction and I decline to enforce his decision.

33. **One contract, not more than one to be referred.** It is not necessary for me to make any decision on the second line of defence. However, it is a matter of practical importance so I shall say something about it.

34. In Part II of the Act, wherever there is reference to contract it is in the singular, "a contract" or "the contract". Mr. Royce relies on s5 and s6 of the Interpretation Act, 1978, "Unless the contrary intention appears, ". words in the singular include words in the plural "". So does a contrary intention appear? I do not think that a contrary intention does appear from the Act. Reading the Act alone, I see nothing to prevent more than one contract being included in one referral. If there is to be any restriction on the

number of contracts, or the number of disputes under one contract, to be referred, one has to look to the terms of the contract or the statutory scheme. But the restriction, if any, is to be derived from the contract or the statutory scheme. The statute is not to be construed by reference to the statutory instrument made under it.

35. Para 8 of the statutory scheme indicates that it is only with the consent of the parties that an adjudicator can adjudicate at the same time on more than one dispute under the same contract or adjudicate at the same time on related disputes under different contracts. (What is one dispute may raise interesting philosophical questions. In **Fastrack Construction v. Morrison Construction** (4.1.2000) Judge Thornton at para 20 said that "the dispute which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference"). So where the statutory scheme applies, that is the position. But I see no reason why a construction contract in writing which sufficiently complied with s108 of the Act as to avoid the application of the Scheme should not provide for the referral of more than one dispute or more than one contract without the consent of the other party. Parties might be unwise to agree to such a term, but I do not see why they should not do so. S108(2)(a) of the Act requires that a construction contract shall "enable a party to give notice at any time of his intention to refer a dispute to adjudication" but I do not read that as showing any intention that the singular does not include the plural.

36. In the present case, if the Act had applied to the contracts, the Scheme would have applied and the claimants would have had no right to refer more than one dispute or more than one contract except with the consent of the defendants. That is another ground for refusing to enforce this adjudication.

37. **Conclusion** : I dismiss this application for summary judgment. If I were to give leave to defend, the same arguments would be presented over again before a court in no better position than I to deal with them. There being nothing else left in the action, I also dismiss the action. The claimants are to pay the defendants' costs of the action. I do not have a schedule of the totality of the defendants' costs. The defendants' costs are therefore to be the subject of a detailed assessment if not agreed.

Darryl Royce for the claimants (Solicitors: Fenwick Elliott)
Delia Dumaresq for the defendant (Solicitors: Edward Harte & Co.)