JUDGMENT : HIS HONOUR JUDGE RAYNOR QC. TCC. 30th July 2004.

1. This is an action brought by the claimant, Murray Building Services Limited, against Spree Developments to enforce an adjudicator's award that was given under the provisions of the Housing Grants, Construction & Regeneration Act 1996. That Act brought in a summary procedure for the speedy enforcement of adjudication awards given in respect of construction contracts as defined in the Act subject to the proviso that in order to be the subject of a valid adjudication award the construction contract had to be in writing as defined in the Act.

2. In this case there was an adjudication award and the claimant made an application for summary, judgment on that award, which I determined against it earlier because I found that, at least as regards the absence of a clear statement of contract price, there was an arguable defence with a real potential of success as to whether there was an agreement in writing within the meaning of the Act. At the conclusion of that application for summary judgment it was agreed that there should be tried as a preliminary issue the question of whether there was a construction contract in writing within the meaning. of the Act, and that is the preliminary issue that I have to determine today.

3. For present purposes I can state the chronology quite simply. The employer under the building contract was a company called Parsonage Chambers Limited. The main contractor was the defendant, Spree Developments Limited. The contract (as is not unusual in cases such as this) was, in fact, only concluded long after the time with which I am concerned; it was dated in September 2002; whereas the agreement between the parties was made earlier that year. The architect under the contract was a firm called Hodder Associates. There were quantity surveyors called *"The Simon Fenton Partnership"* and engaged by the employer were consulting engineers named *J R Book*.

4. J R Book provided a specification both for mechanical engineering services and for electrical engineering services. Those specifications were revised prior to the time with which I am concerned. It was put to the defendant that the claimant be engaged by it as a domestic, not a nominated, subcontractor for the purpose of undertaking; the mechanical engineering services and the electrical engineering services works in accordance with the Book specification. Originally the claimant submitted quotations for those works to Book, not to the defendant, dated respectively 13th December 2001 and 15th February 2002, J R Book then requested the architects to instruct the defendant to place orders with the claimant for the works in question at the prices quoted (in one case exactly the same price as quoted; in the other case there was a slight discrepancy); but it is common ground that the defendant did not comply with the architects' instruction issued thereafter.

5. The defendant made request for copies of the quotations to see what it was that was intended to be completed and on 16th and 17th April 2002 the claimant submitted revised quotations for electrical and mechanical works, again to Book. Those quotations were not supplied to the defendant. The defendant was unwilling to issue an order when it had not been given a copy of either the specification or the quotations but was put in a dilemma because a threat was made in, I believe, the latter part of April 2002 on behalf of the employer that if an order was not issued then the defendant would find itself in breach of contract; and, for that reason, the defendant came to issue the documents which I am concerned with in this action.

6. The first was a fax dated 1st May 2002 (at page 321 of the bundle) on the headed notepaper of Spree Developments (the defendant) addressed to Mr Murray of Murray Building, Services. It is a document that needs to be read in full and I will quote it in full:
"Re: 3 The Parsonage, Manchester. Dear Andrew -- Please find attached our order number 14362 relating to your quotation and specification issued by J R Book. Following my meeting with David Airey from 1 R Book and your subcontractor, Walsh Electrical Contractors, I have agreed with David Pender that they should commence on site on Monday, 13th May [David Pender is of Walsh Electrical Contractors]. This, I feel, will give you sufficient time to consider your programme of works for both the electrical and mechanical elements of the contract. Finally, l would be obliged if you would forward your costs once finalised and agreed with J R Book. Our order is given to enable you to order materials and attend site as referred to above."

There were then references to tax, health and safety policy, and method statements; and the letter in its pre-penultimate paragraph made a request by way of copy to David Airey: *"Please forward revised copies of contractors' drawings to assist in monitoring the schedule of work'"*.

7. The order (dated 1st May also) again described the work and said that "to complete electrical and mechanical installation as per J R Book Consulting Engineers' scheme" the site was defined, the contract sum was stated as *"electrical - less 2½% main contractor's discount; mechanical - less 2½% main contractor's discount'"*. It follows that the order did not state in writing what the contract price was. But Mr Jess, counsel for the claimant, submits that by a process of construction I can construe the fax as amounting; to a stipulation that the contract price would be the prices agreed with J R Book minus 2½% main contractor's discount. On that basis he contends that there is a construction contract in writing within the meaning of the Act.

8.. With that background, I now turn to the provisions of the Act. By section 1(17 of the Act, it is provided that the provisions only apply where the construction contract is in writing. Subsection (2) says: *"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) the agreement is evidenced in writing"*. Subsection (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'*.

9. At the commencement of the court hearing today, Mr Jess confirmed that the provision of section 107 that he said this case came within was subsection (c); namely, the agreement is said to have been evidenced in writing: and the documents relied on are the two documents that I have read in full, namely, the fax of 1st May 2002 and the order of 1st May 2002.

10. The effect of section 107 of the Act has been the subject of authoritative judicial interpretation in the Court of Appeal in the case of **RJT Consulting Engineers Limited v D.M.Engineering (Northern Ireland) Limited.** That was an appeal from a decision of the Technology and Construction Judge sitting in Liverpool, Judge MacKay, who had held in effect that it was not necessary for all of the material terms to be set out in writing if the agreement was in writing. The Court of Appeal emphatically disagreed. Lord Justice Ward, who gave the leading judgment, in paragraph 12 said this:
"I turn to the construction of section 107. Section 107, subsection (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 on 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 arc.

Section 107(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 [with which I am concerned] will be to the same effect namely that the evidence in writing is evidence of the whole agreement.

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."

Lord Justice Ward, although he did not need to deal with the actual decision in Grovedeck v Capital Demolition, went on to approve a dictum in that case of Judge Bowsher QC, who had stated:
"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."

In his final paragraph, Lord Justice Ward said: *"What has to be evidenced in writing is literally the agreement, which means all of it, not part of it."* Lord Justice Robert Walker agreed with that judgment. Lord Justice Auld's judgment was to slightly different effect. although he did say in paragraph 22 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".*

11. It is thus necessary (and, indeed, is conceded by Mr Jess) that in order to enforce this agreement by adjudication, the price, which is a vital term, must be recorded in writing within the meaning of the Act. That does not mean that the actual price must be stated. It would be sufficient if (as he contends) by a process of construction I were satisfied that the provision in the letter which says *"forward your costs once finalised and agreed*" means that the contract price will be that which is agreed with Book subject to the 2½% main contractor's discount. If that argument is right, theft there will be a construction contract in writing within the meaning of the Act. What I have thus to determine is whether that argument is correct. I pause before considering that to note that it is agreed by both parties (in my view rightly) that if the matter is not one of construction, but falls to be determined by way of implication of a term, then that would not suffice to render the agreement an agreement in writing within the meaning of the Act.

12. In order to determine the proper construction of the contract. I have regard to the principles of law that were set out in the speech of Lord Hoffman in the case of **ICS Limited v West Bromwich Building Society** [1998] 1 W.L.R 896. The relevant part of the judgment is at page 912 and, again, it will be helpful. I think, if I quote this verbatim,

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. (2) The background was famously referred to by Lord Wilberforce as 'the matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. (?) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. (4) The meaning which a document or any other utterance would convey to a reasonable: man is not the same thing as the meaning of its words. (S) The rule that the words should be given their natural and ordinary meaning reflects the commonsense of the preposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents."

I do not think I need to go on and read any more. I have thus to determine what the proper construction of these two documents is, and, in particular, whether they bear tire construction contended for by the claimant.

13. Evidence was adduced from both Mr Andrew Murray, the managing director of the claimant. and Mr Stephen Fitton a director of the defendant who had the conduct of the matter at the relevant time. Those statements set out what the subjective understanding of both those witnesses was. Both counsel agree, quite rightly, that such subjective understanding is not admissible before me. But what I do have regard it) is the factual matrix, which is that Spree was the main contractor under the contract with Parsonage; that both parties knew that there was a scheme for both types of relevant work undertaken and revised by Book, and indeed there was express reference to that in the order of I" May; that quotations had been tendered to Book by the claimant, which quotations had not been seen by the defendant; that neither quotation had, at the time of the issuing of these documents, been accepted by Book, because that is, indeed, what is implicit in the fax of 1st May; that the defendant was to engage: the claimant not as a nominated subcontractor but as a domestic subcontractor.

14. It is against that background that 1 now come back to the proper construction of these documents. The documents, to my mind, define sufficiently the scope of the work that was to be carried out; and, indeed, it is not contended to the contrary before me. The order form specifically omits the price. The

covering letter says, finally, (and I have quoted this before): *"I would be obliged if you would forward your costs once finalised and agreed with J R Book".*

15. It is said that, applying the factual matrix, those words, on their true construction mean that the claimant is to be entitled, by way of contract price, to the price agreed with Book. I am unable to accept that contention. It does not seem to me that that is a natural meaning of these words. It does not seem to me that they would be so understood by the hypothetical objective reasonable bystander, the fact is that the defendant chose to leave blank the contract sums. If the defendant had intended to say that the contract sums should be what was agreed with Book minus 2½% it would have been simplicity itself to say that. If the defendant had intended to *say "we will agree to pay whatever you agree"*, it would have been simple to state that in the fax, if it was not in the order form. What Mr Fitton in his letter stated was "1 would he obliged if you would forward your costs once finalised and agreed with J R Book". It does not seem to me that that carries with it any implication that those will be the sums that will constitute the contract price. For a start, the words used are "costs once finalised". It does not state "please let me know what is the agreed price for the work with Book". The word used, as I say, is "costs". What. Mr Fitton had in mind, no doubt, was that he would be given a breakdown of the costs. The claimant was not the nominated subcontractor. Mr Fitton would have been entitled, had he wished, to have challenged any computation of the costs - or at least that is how I read this fax. What the order achieved was that the claimant had an order under which it went on site. If there had been no final agreement of price satisfactory to the defendant then the claimant would not have been without remedy. Because if matters had been aborted the claimant would clearly have been entitled to recover payment on a quantum meruit basis for the works carried out. In the words of Mr Boyd, counsel for the defendant. "To construe the Words in the way contended for by the claimant involves an extraordinarily vigorous process of construction". I go further. The construction contended for is incorrect

16. I had considered whether or not it would be appropriate to express a view as to whether, by a process of implication, a term of the contact would be implied to the effect that the price would be the costs agreed with Book minus the discount. In the event, that is not something that falls to be decided today, and, in any event would not assist because it has been conceded Pas 1 have said) that the implication of a term would not avail the claimant because the contract would still not be a construction contract in writing within the meaning of the Act. In those circumstances, I express a view as to whether such a term falls to be implied.

17. I stress a number of things. First, although this means that the claimant will fail in an attempt to enforce the award, it does not mean that the claimant is without remedy. It will be open to the claimant to claim, on the basis of what it says is the contract, the sums due under thereunder. What it cannot do is to enforce the adjudication award because the construction contract was not in writing within the meaning of the Act since the contract price (I find) was not stated in the documents relied on. It follows that the declaration sought will not be queried, but no action will continue because the claim has been pleaded in the alternative.

Counsel for the Claimant : Mr Jess :
Counsel for the Defendant: Mr Boyd

MR. JESS: *The preliminary issue is resolved against the claimant.*

THE JUDGE: *The preliminary issue is resolved against the claimant but the action then proceeds on the basis of the contractual claim in paragraph 9 if the claimant wants to proceed on that basis.*

MR. JESS: *Certainly, I think, in the light of that the claimant would wish to be amending its claim slightly to include the extras.*

THE JUDGE: *To include the extras.*

MR. JESS: *And also quantum meruit claim generally because that may well be sensible. So I would ask that your Lordship did not*

THE JUDGE: *Can I deal first then with what I have done today?*

MR. JESS: *Yes.*

THE JUDGE: *Is the order I made far the determination of preliminary issue in this bundle?*

MR. JESS: *It is not in the bundle.*

THE JUDGE: *No. I did not think it was (addresses clerk). Has somebody got a copy of the order? I can say, can I not: "**On trial of preliminary issue it is declared that the construction contract between the parties is not an agreement in writing**"?*

MR. JESS: *Evidenced in writing?*

THE JUDGE: *"**Is not a construction contract in writing within the meaning of section 107, subsection (1) of the Act.**" That is the first thing. Presumably there then is the question of the costs of the trial of the preliminary issue. Did I reserve the costs of the summary judgment application?*

MR. JESS: *Yes.*

MR. BOYD: *My Lord, you did.*

THE JUDGE: *I thought I did On the basis of what I have determined I would have thought, Mr Jess, that you could not resist an order for costs both of the summary judgment and the trial of the preliminary issue.*

MR. JESS: *No. I do not think there are any arguments I can raise against that.*

THE JUDGE: *So: "**The claimant do pay the defendant's costs of the application for summary judgment and the trial of the preliminary issue to be the subject of detailed assessment on the standard basis in default of agreement**". Now we go on with the action.*

MR. JESS: *Yes. As I said, 1 would ask your Lordship to allow some time to reflect on the pleadings before moving forward to the stage of further directions.*

THE JUDGE: *What I would be minded to do... You definitely will want to amend, will you not?*

MR. JESS: *Yes.*

THE JUDGE: *There is no doubt about that.*

MR. JESS: *There is no doubt at all.*

THE JUDGE: *Is there any reason why I should not put you on time for an amendment, put the defendant on time for a consequential amendment, and then fix another case management conference?*

MR. JESS: *Yes.*

THE JUDGE: *Is my diary up here? I think it is. I obviously cannot give permission to amend because I have not seen a draft. But I cannot believe it will be contentious because there is no possible limitation issue. When will you want to apply to make an application with an amended pleading? -14 days? - bearing in mind we are in August?*

MR. JESS: *I would have thought that would be okay.*

THE JUDGE: *Today is the 30th, is it not? So that is 13th August, is it not`?*

MR. JESS: *It is. At the moment I have a personal difficulty.*

THE JUDGE: *I am not fixing an application. All l am saying is that "**by 4.00 pm on 13th August the claimant do make application to amend particulars of claim so as to add any revised or additional claims it wishes to bring**". I think that that will then have to produce a hearing and I think what 1 would like to do is leave it to the good sense of those instructing both of you. If I could record this, I imagine that barring something I have nor foreseen, the application will go by way of agreement. If you can then agree an order between you (when you have got the application that makes provision for the filing of a consequential pleading, anything else you want to agree, such as discovery and the fixing of a CMC that can be done administratively with Isobel Rich) then I do not think I need to do anything more today.*

MR. JESS: *Yes. I am sure, yes.*

THE JUDGE: *Is that sensible?*

MR. JESS: *Yes. Yes.*

THE JUDGE: *So at the moment what I have said is that on the trial of the preliminary issue it is declared, etc; the costs provision; and then all I have then done is say* ***"by 4.00 pm (in 13th August the claimant do make application for amendment for the particulars of claim".*** *etc.*

MR. JESS. *Yes.*

THE JUDGE: *Is there anything else that anybody wants today?*

MR. JESS: *I do not believe so.*

MR. BOYD: *My Lord, bearing in mind the overriding objective and bearing in mind the expeditious progress through today's hearing, the costs issue -- to go off for a detailed assessment when it would appear that we have the schedules before the court and they were served appropriately- I wonder if your Lordship would be minded to summarily assess the costs'?*

THE JUDGE:: *What are we dealing with?*

MR. BOYD: *The total costs*

THE JUDGE: *Where are your schedules? I have got before me. .. (Addresses clerk)*

MR. BOYD: *My Lord, each party had two schedules.*

THE JUDGE: *There must be two schedules, must there not'? (Addresses clerk) I will continue while the file is being brought up. Are these schedules accumulative?*

MR. BOYD: *One is discretely with regard to the summary judgment application.*

THE JUDGE: *That is 30th June?*

MR. BOYD: *That is the 30th June - one in the sum of --*

THE JUDGE: *So you are £2,186?*

MR. BOYD: *Yes.*

THE JUDGE; *It is very modest.*

MR. BOYD: *Yes.*

THE JUDGE. *That is the summary judgment one. It appears to be exclusive of VAT.*

MR. BOYD. *Exclusive.*

MR. JESS: *It appears to be. I just wanted confirmation of that.*

THE JUDGE: *Your schedule of costs for the hearing on 30th July, unless it has been updated, is not complete anyway. You have not included counsel's fee, for a start.*

MR. BOYD: *No. My Lord, I would seek to persuade your Lordship that that omission can be rectified,*

THE JUDGE: *But you will not have given notice.*

MR. BOYD: *I think there is Court of Appeal authority that that is not fatal to the---*

THE JUDGE: *How much are you adding?*

MR. BOYD: *it is £750.*

THE JUDGE: *For today?*

MR. BOYD: *Yes.*

THE JUDGE: *That, again, does not seem an excessive sum by any means. Mr Jess, £750, I mean, to put it on the schedule...*

MR. JESS: *We would prefer a detailed assessment but...*

THE JUDGE: *These are modest sums.*

MR. JESS: *Yes.*

THE JUDGE: *Let us deal with it in terms. The schedule for the summary judgment application...*

MR. JESS: *There is no issue I would take.*

THE JUDGE: *So I can summarily assess that?*

MR. JESS: *Yes.*

THE JUDGE: *That does seem sensible. Then I am going to add £750. That is the only thing that needs to be added, is it not?*

MR, JESS: *Yes.*

THE JUDGE: *£750. When I said detailed assessment, I had not, Mr Boyd, addressed my mind to the quantum of this,*

MR, BOYD: *Yes.*

THE JUDGE: *These are modest by the standards that I see here.*

MR. BOYD: *Yes.*

THE JUDGE: *Which is not to say I will allow them in full because I have not looked at them vet.*

MR. BOYD: *Of course.*

THE JUDGE: *What is the total?*

MR. BOYD: *Of the two?*

THE JUDGE: *No - of the 30th July one. I have not got a calculator here.*

MR. BOYD: *The total of 30th July is*

MR. JESS. *£5,378.*

THE JUDGE: *Right - £5,378. The only thing you have not been given notice of is counsel's fee but I cannot imagine that you are going to be saying much about that.*

MR. JESS: *No.*

THE JUDGE: *Is there anything you want to say about---?*

MR. JESS: *Yes - three issues.*

THE JUDGE: *Right.*

MR. JESS: *Firstly, drafting witness statement of Mr. F Fitton (on the second page, fourth item up) 56 units.*

THE JUDGE: : *Just one moment - £728?*

MR. JESS: *Yes -- 5.6 hours, it equates to if working, on the basis--*

THE JUDGE: *Just one moment. Just let me... I know one should not do this necessarily but I just want to see what is the charge for drafting.*

A SPEAKER: *(inaudible)*

THE JUDGE: *Fifty-six units equates to how much time?*

MR. BOYD: *I understand a unit is one-tenth of an hour; so it is 5.6 hours.*

THE JUDGE: *Five point six hours. Yes, I can see your point on that, Mr Jess. What is your second point'?*

Mr. JESS: *The second point is the bottom one there: "**research and drafting instructions to counsel**" down as 3.3 hours effectively -- £429, which seems excessive.*

THE JUDGE: *Yes.*

MR. JESS: *The third one just results from the fact that the court attendance has been a lot shorter than that envisaged (assuming it means 30th July on this page and not 20th June). He has put five tours attendance; and, of course, the actual attendance here is going to be less than two and a half hours; it is going to be two and a quarter hours.*

THE JUDGE: *So that needs to be reduced.*

MR. JESS: *Yes.*

THE JUDGE: *What do you say is a reasonable sum?*

MR. JESS: *Let me just do the arithmetic.*

THE JUDGE: *I suspect there will not be a great deal between you.*

MR. JESS: *It is not entirely clear which individual has done what even though two different rates unfortunately are claimed.*

MR. BOYD: *My Lord, if I can assist, it is the lower of the two fee earners, Mr Motson(?)*

MR. JESS: *That is the attendance. What about the statement of Mr Fitton?*

MR. BOYD: *Both. All.*

MR. JESS: *Everything?*

MR. BOYD: *Yes.*

MR. JESS: *t suppose you would say that.*

MR. BOYD: *That is what I was instructed to say (inaudible).*

THE. JUDGE: *If I were a pompous person I would then say, "**That's an outrageous thing to say, Mr Jess**".*

MR. JESS: *Yes.*

THE JUDGE: *But I am not.*

MR. JESS. *If one reduced the witness statement to £450, the research, drafting instructions to £250, and the attendance today to 2¼ hours at £ 130, which is £260 plus quarter of... So if one said £300 that would, in round terms, seem to cover it.*

THE JUDGE: *Have I got a calculator? Sorry.*

MR. JESS: *The deductions I am proposing ate something less than £300 on the first one and--*

THE JUDGE: *Just one second. You said allow £450 on the first.*

MR. JESS: *Yes.*

THIE JUDGE: *So that is £728 minus £450. You arc knocking off £278 there. You arc knocking off £429 minus £250.*

MR. JESS: *£179, l think.*

THE JUDGE: *£179 - and you are knocking off £330 on the other one?*

MR. JESS: *Yes.*

THE JUDGE: *So that totals £278 plus £179 plus £350 is £807. So £5,378 minus £807 equals £4,571.*

MR. BOYD: *My Lord, all l would say is the work was deemed necessary. It was done. I appreciate it may be a little on the high side. I will leave it in your Lordship's hands.*

THE JUDGE: *I am going to allow the sum that Mr Jess has said, which means it is £2,186.50 plus £4,571 and is, on my calculation, £6,757.50. Would somebody just check that?*

MR. BOYD: *Yes.*

THE JUDGE: *That is correct, is it? So my order will be the declaration on the preliminary issue; the claimant do pay the defendant's costs of the application for summary judgment, the trial of the preliminary issue, summarily assessed in the sum of £6.757.50. When would you pay that by?*

MR. JESS. *The normal 14 days.*

JUDGE: *Fourteen days. Right. So by 4.00 pm on 13th August, as well; and by the same time claimant do make application to amend particulars of claim. Thank you very much for the concise way that was dealt with.*