JUDGMENT : **MR JUSTICE JACKSON**:TCC : 6th December 2004

1. This judgment is in six parts, namely, part 1: introduction, part 2: the facts, part 3: the present proceedings, part 4: was there a contract for a defined scope of work? Part 5: was that contract an agreement in writing within the meaning of section 107 of the Construction Act? Part 6: is the decision of Mr Wakefield a valid and enforceable adjudicator's award?

Part 1: Introduction

2. This litigation arises from a dispute between the Trustees of the Stratfield Saye Estate and a building company. The trustees of the Stratfield Saye Estate appear as claimant in the present litigation but have been the respondents in three previous adjudications. I shall refer to this party as "the Estate". The building company was originally called Abbot Hill Lyons Limited but has changed its name to AHL Construction Limited. This company has been the claimant in all three adjudications but is defendant in the present litigation. I shall refer to this party at "AHL".

3. The various disputes between the parties all arise out of a project to restore a large derelict property belonging to the Estate called Heckfield Wood House. AHL started work on this project on 8 September 2003 but were ordered to stop work on 16 September. The financial claims arising from that episode have generated three adjudications and now the present action in the Technology and Construction Court. In this judgment I shall refer to the Housing Grants Construction and Regeneration Act 1996 as "the Construction Act".

4. It may be helpful if at this stage I introduce the key individuals who feature in the story. Mr Graham Tongue was employed as agent by the Estate from 7 August 1990 until 30 September 2003. Mr Paul Sedgwick became employed as agent by the Estate on 4 August 2003 and remains in that position today. Thus it can be seen that the events giving rise to the present dispute occurred during the handover period when the Estate had two agents and when Mr Sedgwick was taking over the reigns from Mr Tongue.

5. Mr Glover is a chartered building surveyor whose practice involves building surveying services in relation to a wide variety of construction work including new developments, refurbishments and modifications to existing structures. He deals with most aspects of the construction process, such as the preparation of plans and specifications, building regulation approvals, planning permissions, the selection of contractors, negotiating contracts and administering construction contracts. Mr Glover has provided building surveying services to the Estate in relation to various projects over a period of about seven years. One of the projects which Mr Glover handled on behalf of the Estate concerned Heckfield Wood House.

6. Let me now turn to AHL. AHL is a building company with two directors. They are Mr Trevor Hill and Mr Graham Lyons. Mr Lyons was the director who handled all negotiations leading up to AHL commencing work on 8 September 2003. Mr Hill was the director responsible for overseeing construction operations after that date.

7. During the course of this trial I have heard evidence from Mr Glover, Mr Tongue, Mr Sedgwick and Mr Lyons. I found all four witnesses to be entirely honest. They are responsible, professional people who were doing their best to assist this court in a fair and nonpartisan manner. Of course, on some matters their recollections differed. This is unsurprising since the events in question occurred over a year ago. Moreover, all of them are busy people who have other matters to attend to in addition to this particular building project.

8. Counsel for the Estate is Mr Robert Clay, counsel for AHL is Mr Stuart Kennedy. I am grateful to both counsel for their clear skeleton arguments and for their concise and effective advocacy. Having dealt with these matters by way of introduction, I can now turn to the facts of the case.

Part 2: The facts

9. For some years the Estate was owner of a derelict property called Heckfield Wood House. In 1997 Mr Tongue as agent for the Estate engaged Mr Glover to prepare plans and specifications for renovating the property. Work did not proceed at that time.

10. During 2003 the Estate decided to carry out works to Heckfield Wood House which would make the property wind and weathertight. This would enable various temporary protective coverings around the property to be removed. In June 2003 Mr Tongue told Mr Glover that the Estate wanted to proceed with works to make the building wind and watertight. Mr Tongue stated that the Estate could spend on these works no more than £150,000 excluding VAT and professional fees. In discussions between Mr Tongue and Mr Glover the works which were planned for 2003 were referred to as "phase 1".

11. Mr Glover discussed the project with a local builder, Mr East. On 9 July Mr Glover sent to Mr Tongue his budget costs for the phase 1 works. These amounted to £214,500 exclusive of VAT and professional fees. On 30 July Mr Tongue telephoned Mr Glover. According to Mr Glover's oral evidence, which I accept, in that telephone conversation Mr Tongue told Mr Glover to go ahead and get the works started. Mr Tongue's evidence was somewhat different, however. Both Mr Glover and Mr Tongue are witnesses called by the claimant. Mr Tongue was much less certain about these matters where his recollection differed from that of Mr Glover.

12. Following the telephone conversation of 30 July Mr Glover made arrangements for Mr East to start work. Unfortunately, however, Mr East had to withdraw owing to family difficulties. In late August 2003 Mr Glover approached AHL. On 28 August Mr Glover and Mr Lyons met on site. Both men have a similar recollection of this meeting. At the meeting negatives of the four drawings, which are now pages 154 to 157 of bundle 1, were examined. Mr Glover explained that his clients required the phase 1 works to be carried out. The phase 1 works consisted essentially of those works which were required to make the building wind and weathertight. The drawings showed certain further works which were not essential for making the building wind and weathertight. Both men appreciated that these further works might be excluded from phase 1 despite being shown on the drawings.

13. Mr Glover proposed that AHL should carry out the works on a "cost plus" basis. Mr Lyons said that AHL would be happy to proceed on this basis subject to agreeing rates. At the end of the meeting both men expected the work to be awarded to AHL, but no firm agreement was reached. During the course of the meeting Mr Glover did not tell Mr Lyons about the cost limit of £150,000 which had been imposed by the Estate.

14. There then followed some negotiations about rates. Mr Lyons wrote three letters to Mr Glover quoting progressively lower figures. Mr Lyons' third letter was dated 2 September 2003. In this letter Mr Lyons proposed rates for site foreman, tradesmen, carpenters and bricklayers, M and E tradesmen, plumbers and electricians, labourers, pick-up truck driver and specialist tradesmen. Mr Lyons also proposed that plant and materials should be charged at cost plus 10 per cent to cover overheads and profits. Mr Lyons said that his company would require some site accommodation, storage and a site toilet and these would be charged at cost plus 10 per cent. He added that VAT would be added to these figures. He said that their foreman would be Mr Mark Busby, a very experienced bricklayer. Mr Lyons went on to say that his company's surveyor would submit weekly details of labour, plant and materials used on the contract and would appreciate two weekly invoicing on the contract.

15. Mr Glover was minded to write to Mr Lyons accepting these rates and instructing AHL to proceed on this basis. Before doing so, however, he telephoned Mr Tongue and Mr Tongue told him to go ahead. In the course of this conversation Mr Glover told Mr Tongue that work would start on 8 September and that there would be a site meeting on that day. Mr Glover wrote to Mr Lyons on 2 September 2003 as follows:

"Heckfield Wood House repairs and improvements, phase 1.

Further to our meeting on site and discussion concerning the above project and your subsequent letter confirming your rates, I am pleased to be able to confirm your appointment to carry out the first phase of the above works. The contract will be a cost plus contract and you will be paid as follows: foreman £31 per hour, mason/carpenter £25 per hour, M and E tradesmen £25 per hour, labourer £20 per hour. Plant will be as follows: pick-up truck driver £30 per hour. Materials, plant, skips and other direct costs, including site accommodation, will be paid at cost plus 10 per cent. You will be expected to keep full timesheets for the labour for each man each day, stipulating the element of work they have been engaged in and materials invoices to support the valuation at the end of each month.

"Water, electricity and telephone are on site but temporary connections will need to be made by yourselves. You are to start on ... and I will meet you there on that day to agree a programme for the first month's work. I enclose a key for the padlock to the gate and fencing. I expect you to have a minimum of three men on site at all times. Please arrange for the following to be put in hand immediately prior to the above date: CIS certificate to be ready for presenting to the Estate, insurance for £2 million public liability and employer's liability, health and safety plan. Please make contact with the scaffolder to arrange for adjustments to the scaffold for access and to replace the decayed ladder on the front elevation. I enclose their details. I look forward to seeing you on Monday 8 September at 9am."

16. The only difference between the rates quoted in this letter and the rates quoted by Mr Lyons in his letter on the same day concerned M and E tradesmen. The rate which Mr Lyons had quoted was £30 per hour for M and E tradesmen. This difference was insignificant in the context of phase 1 because phase 1 would only involve minimal M and E works. This minor difference was resolved over the next couple of days. In a letter dated 3 September 2003 (which emerged for the first time during the course of the trial) Mr Lyons wrote as follows: *"Thank you for your letter dated 2 September and we note the contents. Our quotation for M and E tradesmen was £30 per hour, not £25 per hour as your letter states. Unfortunately, we cannot reduce this figure so I hope it is acceptable. I would assume that most of the M and E items are in the next phase and they can be competitively quoted for. We look forward to meeting you on Monday."*

17. After this letter there was a telephone conversation between the two men in which it was agreed that the rate for any M and E work on the phase 1 contract would indeed be £30 per hour. Also on 2 September Mr Glover sent an e-mail to Mr Tongue. That e-mail includes the following passage: *"I am pleased to be able to tell you that I have now successfully negotiated good terms with another builder. These are Abbot Hill Lyons of Guildford. They have recently competed another project for us near Guildford where they have achieved a very satisfactory standard of work. They are able to start on Monday and I have today confirmed acceptance of their rates and asked them to programme their resources for this date ..."*

18. Mr Tongue said in evidence, and I accept, that he received and read this e-mail. He showed it to Mr Sedgwick. He did not, however, take any specific action on the e-mail. He did not, for example, contact Mr Glover or tell him not to proceed with the contract.

19. On 8 September AHL duly set up on site and started work. There was a site meeting that day at which the scope of the phase 1 works was discussed in some detail. Mr Glover prepared a formal minute of the site meeting, the accuracy of which has not been challenged. Mr Lyons made a manuscript note of the site meeting. During cross-examination Mr Glover accepted that Mr Lyons' note was broadly accurate.

20. During the course of the meeting Mr Sedgwick, the new agent for the Estate, appeared. Mr Sedgwick came upon the meeting by accident. He noticed that the gate of Heckfield Wood House was open, he went down the drive to see if there were trespassers and when he reached the buildings he found the site meeting in progress and he took part in it. Mr Sedgwick said in evidence, and I accept, that his main role during the site meeting was listening and finding out the details of the works to be done. Mr Sedgwick recalls, however, that he made two contributions to the discussion. Firstly, he commented that the cellar depth was insufficient. Secondly, he said that the Estate's insurers had been told that Heckfield Wood House was a vacant property. During the course of the meeting Mr Sedgwick did not suggest that works should not proceed.

21. Following that meeting AHL duly proceeded with their building works. One week later, however, on 15 and 16 September, the Estate decided to cancel the project. Mr Sedgwick duly gave instructions that phase 1 works should cease. Certain lesser works were still required in order to leave the site in a suitable state. These were duly carried out by AHL and paid for by the Estate. The Estate also paid to AHL certain other sums which were certified by Mr Glover.

22. AHL was much aggrieved by the cancellation of the building project. AHL made various financial claims against the Estate which were disputed and which were referred to adjudication. In the first adjudication AHL claimed payment for work done and also compensation for loss of profit. The

adjudicator made an award in AHL's favour which was a nullity. That was because the adjudication had begun before any dispute crystallised.

23. In the second adjudication AHL claimed £30,787.66 in respect of works which it had done at Heckfield Wood House. The Estate contended that a lesser sum was due, namely, £12,386.85. The adjudicator awarded £15,901.14 plus VAT. The Estate duly paid that sum subject to an agreed adjustment in respect of payments made direct to scaffolders.

24. On 28 July 2004 AHL commenced the third adjudication. On this occasion AHL was claiming compensation for the cancellation of the contract. The total sum claimed was approximately £132,000 plus interest. The Estate disputed this claim on a number of grounds, one of which was that the adjudicator lacked jurisdiction. By a decision dated 15 September 2004 Mr Wakefield, the adjudicator in the third adjudication, found in favour of AHL. He concluded that the losses which AHL had suffered in consequence of the Estate's repudiation of the contract amounted to £73,400. Interest on this sum was assessed at £2,013.97. Accordingly, the adjudicator ordered the Estate to pay a total of £75,413.97 to AHL.

25. The Estate was aggrieved by the commencement of the third adjudication. It maintained that there was no legal foundation for AHL's claims in that adjudication. The Estate also maintained that the adjudicator had no jurisdiction to deal with AHL's current claims. Accordingly, the Estate commenced the present proceedings.

Part 3: The present proceedings

26. By a claim issued on 5 August 2004 under Part 8 of the Civil Procedure Rules the Estate claimed against AHL two declarations, namely:
"(i) That there is no construction contract in writing governing any claim for loss of profit on work not carried out, (ii) that there is no jurisdiction under the HGCRA to decide the disputes raised by the defendant's purported adjudication notice of 28 July 2004."

27. It was subsequently ordered that because this action raised issues of fact requiring oral evidence the action should proceed under Part 7 of the Civil Procedure Rules. On an unknown date in late August or early September the Estate served an amended particulars of claim which claimed the following declarations:
"(1) There was no concluded contract made between the claimants and the defendant containing terms as to (i) a specified or defined scope of works, (ii) a programme or sequence of work, (iii) a programme or period for a specified scope of work, (iv) a completion date. (2) That there was no concluded contract made between the claimants and the defendant under which the defendant was entitled to (i) carry out and complete a specified scope of work, (ii) a continuous provision of work and/or instructions from the claimants providing continuous work. (3) That there is no construction contract in writing governing any claim for loss of profit on work not carried out. (4) That there is no jurisdiction under the HGCRA to decide the disputes raised by the defendant's purported adjudication notice of 28 July 2004."

28. On 24 September 2004 AHL served its defence and Part 20 claim. The relief claimed by AHL was a declaration in the following terms:
"(a) There was a contract between the parties, (b) the contract was in or evidenced in writing, (c) the contract was a construction contract under the Act, (d) the contract incorporated an agreed scope of works, (e) the defendant was under an obligation to complete the works in a reasonable time, namely, by the end of January 2004, (f) the defendant was obliged to provide a minimum of three operatives on site at all times, (g) the claimants were under an obligation to co-operate with the defendant and not to hinder or prevent the defendant from continuing with and completing the phase 1 works, (h) the adjudicator in the third adjudication did have jurisdiction in this matter and his decision is valid and enforceable."

29. AHL also claimed damages for the Estate's failure to comply with Mr Wakefield's decision. Thereafter the pleadings continued. There was a reply, then a rejoinder and then an amended rejoinder. Although the sums at stake are modest, both parties have thrown themselves into three successive adjudications and then into this litigation with considerable vigour.

30. A mass of issues arise from the pleadings and from the intricate arguments of counsel. However, the three central issues which have emerged are as follows: (i) was there a contract for a defined scope of work? (ii) Was that contract an agreement in writing within the meaning of section 107 of the Construction Act? (iii) Is the decision of Mr Wakefield, dated 15 September 2004, a valid and enforceable adjudicator's award?

31. The trial of this action took place on Wednesday 1 and Thursday 2 December. The witnesses called on behalf of the Estate were Mr Glover, Mr Tongue and Mr Sedgwick. On behalf of AHL one witness was called, namely, Mr Lyons. Unfortunately, this court could not sit on Friday 3 December. Accordingly, I said that I would give my decision on the morning of Monday 6 December. This I now do.

Part 4: Was there a contract for a defined scope of work?

32. There was undoubtedly a contract between the parties. AHL carried out works under that contract for a period of eight days, namely, between 8 and 16 September. The first question to address is how and when that contract came into being. In my judgment, the contract came into being on 8 September 2003. On that date AHL started work. By this conduct AHL accepted the Estate's offer to employ AHL as contractor for the phase 1 works. No contract price was agreed. Instead the agreement was that the Estate would pay AHL for works actually done at the rates previously set out in correspondence.

33. I now come to the crucial question: what, if anything, was scope of the works which AHL and the Estate agreed should be carried out? In my judgment, the scope of the works was (a) what was shown on the three construction drawings numbered 03/09/01, 03/09/02 and 03/09/03, and (b) what was set out in section 2 of the minutes of the site meeting on 8 September 2003. The three construction drawings were discussed between Mr Glover and Mr Lyons on two occasions, namely, 28 August and 8 September 2003. The minutes of the site meeting on 8 September were drawn up by Mr Glover in order to record matters agreed on that occasion. Section 2 of those minutes reads as follows: *"Scope of works. 2.1: Dismantling and removal of elements still standing which will not form part of the new building. 2.2: Ground floor slabs including DPM and insulation but not batons and timber floor finish. 2.3: First floor joists and herringbone strutting and beams to carry these and possibly some floor covering to be defined later. 2.4: New external walls and structural internal walls (not stud work), repairs to existing walls including replacing decayed lintels and new window/door openings and repairs to stacks. 2.5: Rendering external walls to extent agreed. 2.6: Roof structural timbers and felt batons and slating and lead work. 2.7: Rainwater goods. 2.8: External joinery including doors and windows. 2.9: External decoration. 2.10: Soil drainage but not new treatment plant, surface water drainage including soakaways."*

34. It must be remembered that Heckfield Wood House was a derelict property. The work required could only be described in general terms. The details of what needed to be done would most easily be determined as the project proceeded. For example, there were sections of wall which might be capable of repair or which might require rebuilding. It was clearly inevitable that throughout the course of the works Mr Glover would be giving regular instructions in order to detail items of work which would be required or not required. Whether these instructions should be characterised as "amplification instructions" or as "variation orders" is a semantic question into which I need not go. It should be remembered that this was not a contract with a bill of quantities or a specific contract price. It was a "cost plus" contract.

35. The important question which I must now confront is this: given the flexibility of the whole arrangement, was Mr Glover entitled on 16 September to instruct AHL to omit the entirety of the remaining work? In answering this question I gain assistance from the decision of His Honour Judge Lloyd QC in **Abbey Developments Limited v PP Brickwork Limited** [2003] EWHC 1987 (Technology); [2003] CILL 2033. In that case Abbey engaged PPB as a labour only subcontractor for brickwork and blockwork. Clause 2 of the subcontract conditions empowered Abbey to increase or reduce the quantity of work. Judge Lloyd held that this clause did not enable Abbey to determine the entire subcontract. At paragraphs 45 to 47 Judge Lloyd said this:

"45. The justification for these decisions [certain overseas authorities which the judge had been discussing] is, in my judgment, to be found in fundamental principles. A contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the

work which it contracted to carry out. To take away or to vary the work is an intrusion into and an infringement of that right and is a breach of contract. (The work has to be defined sufficiently for there to be a right to execute it.) Hence, contracts contain provisions to enable the employer to vary the work in order to achieve lawfully what could be achieved without breaking the contract or by a separate further agreement with the contractor. By entering into a contract with a variations clause such further agreement is obviated as the contractor's consent to changes in the work is in the primary contract. So such clauses enable an owner to remove work from the contractor just as they oblige the contractor to carry out additional work or to make alterations in the work, none of which could be achieved without the consent of the contractor.

"46. Provisions entitling an owner to vary the work have therefore to be construed carefully so as not to deprive the contractor of its contractual right to the opportunity to complete the works and realise such profit as may then be made. They are not in the same category as exemption clauses. They have been common for centuries and do not need to be construed narrowly. In developed forms they now offer contractors opportunities to participate actively in the success of the project and to enhance their returns (for example, by way of value engineering or the application of concepts such as partnering).

"47. However, the cases do show that reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else, whether because the prospect of having it completed by the contractor will be more expensive for the employer than having it done by somebody else, although there can well be other reasons such as timing and confidence in the original contractor. The basic bargain struck between the employer and the contractor has to be honoured and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost once the contractor is out of the way (or at the same time if the contract permits others to work alongside the contractor)."

36. How do these principles apply in the present case? The "basic bargain struck between the employer and the contractor" was this: AHL would carry out works to make Heckfield Wood House wind and weathertight. The employer, acting through Mr Glover, was fully entitled to give instructions which would vary the details set out on the drawings or the works described in the site minutes. However, the employer's power to omit works was subject to a clear limit. AHL had been employed to carry out the phase 1 works. "Phase 1" was understood by everyone to mean works which would convert Heckfield Wood House from a derelict property into a building which was wind and weathertight. The employer, acting through Mr Glover, had no power to issue omission instructions which would detract from or change this fundamental characteristic of the works.

37. The conclusion to which I have come is reinforced by a consideration of the express terms of the contract. AHL was required to maintain a minimum of three men on site at all times, see Mr Glover's letter dated 2 September. Rates for the work were agreed significantly lower than those originally quoted by AHL. It is clear that these terms were all agreed on the basis that AHL would have continuity of work over a period of months. It would not make business sense for AHL to tie up resources in the way that it did if the whole project could be cancelled at the employer's whim.

38. The next question that arises is whether Mr Glover was acting without authority or beyond his authority in entering into this contractual arrangement on behalf of the Estate. In my judgment, he was not for two reasons: (i) Mr Tongue, the agent, expressly authorised Mr Glover to enter into this contract during the telephone conversation on 2 September 2003. (ii) Mr Glover gave sufficient details of the proposed contract in his e-mail dated 2 September 2003. Both Mr Tongue and Mr Sedgwick saw this e-mail. Neither of them responded with a request for more information, neither of them telephoned Mr Glover and told him not to proceed with the contract.

39. If I am wrong in this conclusion, it seems to me that the Estate has ratified the contract which Mr Glover made. Such ratification occurred on 8 September. Mr Sedgwick attended the second half of the crucial site meeting on that date without making any adverse comment. Furthermore, after leaving the meeting Mr Sedgwick had time to reflect on matters and take instructions if he wished. Despite this Mr Sedgwick did not send any communication later on 8 September to suggest that works should not proceed.

40. In the further alternative, in my view, Mr Glover was acting within his apparent or ostensible authority when he concluded the contract with AHL. Mr Glover was undoubtedly the Estate's surveyor in connection with works to Heckfield Wood House. At no stage did anyone tell AHL that Mr Glover could only contract for works up to the value of £150,000. Furthermore, Mr Sedgwick's conduct on 8 September amounted to holding out Mr Glover as the duly authorised agent of the Estate for the purpose of the works under discussion. It is significant that when the Estate cancelled the project it did so because of a change of mind about what works to do in that financial year. Mr Sedgwick said in evidence that the decision to stop work had nothing to do with the question of Mr Glover's authority or whether he had exceeded that authority.

41. Before leaving this aspect of the case there are one or two other matters on which I should comment. It is quite true that there was no agreed programme and no agreed completion date for the works. Neither of these was necessary in order for the contract to come into existence. It must have been implied in the contract that the works would be completed within a reasonable time. Such term would not have given rise to any difficulty. It is clear from the evidence that both Mr Lyons and Mr Glover regarded a period of three to four months as reasonable for the execution of these works. It is also correct, as Mr Clay points out, that no cash flow was produced by AHL until 16 September. The cash flow was not handed over on that date because by then the contract was terminated. In my view, the cash flow was not a contract document. Its existence was not required for contract purposes.

42. Let me now draw the threads together. For the reasons set out above there was a contract between the parties for a defined scope of work. When the project was terminated on 16 September 2003 only a very small part of that work had been executed.

Part 5: Was that contract an agreement in writing within the meaning of s107 of the Construction Act?

43. Section 107 of the Construction Act provides as follows:

"(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."

44. There has been no shortage of judicial decisions on the meaning of section 107 in the six years since that provision came into force. The most important decision for present purposes is **RJT Consulting Engineers v DM Engineering (Northern Ireland) Limited** [2002] BLR 217. In that case DM, who were mechanical and electrical subcontractors, employed RJT, a firm of engineers, to do design work. DM subsequently made allegations of professional negligence which were referred to adjudication. The Court of Appeal held that the adjudicator had no jurisdiction because the original agreement between DM and RJT was insufficiently recorded in writing. Ward LJ, who gave the leading judgment, said this about the interpretation of section 107 at pages 221 to 222:

"(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 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 ejusdem 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) Subsection (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) Subsection (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 subsection 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) Subsection (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 or 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 ***Grove Deck Limited v Capital Demolition Limited*** *[2000] BLR 181. Dealing with section 107.5 His Honour Judge Bowsher QC said:*
"'Disputes as to the terms expressed 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 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 agreement which is giving rise to the dispute ...

"(19) On the 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. The only exception to the generality of that construction is the instance falling within subsection (5) 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 subsection (5) 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 ..."

45. Robert Walker LJ agreed with that analysis. Auld LJ agreed in the result but not in the reasoning process. At page 223 Auld LJ said this:

"(21) I also agreed 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 section 107 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) Section 107(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 ..."*

46. In the present case there have been some interesting submissions by counsel on the question which of the two analyses offered in RJT is correct. Mr Clay inclined in his submissions to the proposition that the reasoning of Auld LJ should be accepted. In my view, it is not possible to regard the reasoning of Auld LJ as some kind of gloss upon or amplification of the reasoning of the majority. The reasoning of Auld LJ, attractive though it is, does not form part of the ratio of **RJT.**

47. The principle of law which I derive from the majority judgments in **RJT** is this: an agreement is only evidenced in writing for the purposes of section 107, subsections (2), (3) and (4), if all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing.

48. It is now necessary to apply this principle to the present case. In my judgment, all the express terms of the agreement between AHL and the Estate were recorded in writing. Firstly, the works to be done were shown on the construction drawings and set out in the site minutes. Secondly, Mr Glover's letter dated, 2 September 2003, bore the heading: "*Heckfield Wood House, repairs and improvements -- phase 1."* The phrase "*phase 1"* meant and was understood by all persons involved to mean works which would make the building wind and weathertight. This obviously meant the whole of such works. It would not make sense to start the works and then stop before the objective was achieved. For example, it would not make sense to construct only half of the roof or to leave out one wall.

49. It was an express term of the agreement that payment would be on a "cost plus basis". This was duly recorded in Mr Lyons' letter dated 2 September and in Mr Glover's reply of the same date. The rates at which the Estate would pay for labour, plant and materials were all set out in Mr Glover's letter dated 2 September and Mr Lyons' letter dated 3 September 2003. When Mr Glover was being cross-examined on this aspect of the case he accepted that every term of the agreement which he negotiated was recorded in writing.

50. For all of these reasons I come to the conclusion that the agreement between AHL and the Estate was evidenced in writing within the meaning of section 107(2) (c) of the Construction Act. If, however, I am wrong in this conclusion it becomes necessary to consider the effect of section 107(5) of the Construction Act. In this case there have been three successive adjudications. The existence of an agreement between the parties falling within the scope of the Construction Act was admitted by the Estate in each of the first two adjudications, even though other points were taken as to jurisdiction. See paragraph 2 of the referral and paragraph 2 of the response in the first adjudication and paragraph 2 of the referral and paragraph 5 of the response in the second adjudication.

51. I therefore come to the conclusion that, as a fallback position, AHL is entitled to rely upon the exchanges of written submissions in the first two adjudications. These exchanges constitute a sufficient record of the agreement between the parties for the purposes of the Construction Act. For all of these reasons, my answer to the question posed in part 5 of this judgment is: yes.

Part 6: Is the decision of Mr Wakefield a valid and enforceable adjudicator's award?

52. My answer to this question follows from the conclusions reached in parts 4 and 5 of this judgment. For the reasons there set out I reject each of the grounds upon which Mr Clay attacks the adjudicator's decision as being invalid or unenforceable.

53. Towards the end of the hearing on Thursday there was some discussion between counsel and the court as to what form of order the court should make (a) if the Estate succeeded on the substantive issues and (b) if AHL succeeded on the substantive issues. Counsel told me that if AHL succeeded neither party would wish the court to make a series of declarations as set out in the pleadings. Instead it was agreed that the appropriate relief would be an order enforcing Mr Wakefield's decision. Counsel indicated that they would attempt to agree matters such as interest in readiness for the hearing this morning.

54. In the result, therefore, AHL succeeds on the substantive issues. The claim made by the Estate for declarations must be dismissed. On the Part 20 claim made by AHL I will make an order enforcing the adjudicator's decision. I invite both counsel to assist me in the precise formulation of that order.

MR ROBERT CLAY appeared on behalf of the CLAIMANT
MR STUART KENNEDY appeared on behalf of the DEFENDANT