JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM. B'ham District Registry. 22nd July 2005

1. The claimant is a residential building and design company. Mr Philip Lloyd is a director of the claimant. Mr Malnick is a solicitor, specialising in commercial property. During 2003, Mr Malnick decided to convert his former offices in Upper Street, Islington, London, into three residential flats. He engaged the claimant to undertake the work. A dispute arose *[and]* which the claimant referred to adjudication.

2. This is a Part 8 application by the claimant to enforce the decision of the adjudicator, dated 1 December 2004. The adjudicator decided that Mr Malnick should pay the claimant £116,460.13, inclusive of interest, plus VAT, and be liable for the adjudicator's fees and expenses of £5,162.89 inclusive of VAT. Mr MaInick resists payment on the ground that the contract between the parties was not a contract in writing within the meaning of section 107 of the Housing Grants, Construction and Regeneration Act 1996. It is common ground that, throughout, Mr Malnick has made clear his jurisdictional challenge to the adjudication on that basis.

3. I am grateful to Miss Dumaresq, Counsel for the claimant, and Mr Acton, Counsel for Mr Malnick, for their assistance with this case

4. The principal issues here are whether the contract between the parties was a contract in writing within the meaning of section 107(2) (b) or (c) of the Act and as to the effect of subsection (4). Section 107 provides:

"(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.

(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. **RJT Consulting Engineers v DM Engineering (Northern Ireland) Ltd** CA [2002] 131.8 217 is the principal authority on this point. I have also been referred to **Hollins v Russell** CA [2003] 1 WLR 2487, paragraphs100-110; **Trustees of the Stratfield Saye Estates v AHL Construction Ltd**, an unreported decision of Jackson J dated 6 December 2004; **Debeck Ductwork Installation Ltd v T & E Engineering Ltd**, unreported, 14 October 20112; **Connex South Eastern Ltd v MJ Building Services Group plc** [2004] EWHC 1518 (TCC); **Branlow Ltd v DenMaster Demolition Ltd**, unreported 26 February 2004, **Sheriff of Lothian & Borders at Linlithgow**; and **Carter v Nuttall**, an unreported decision of His Honour Judge Thornton QC dated 21 June 2000. Mr Acton reminds me of the judgment of May LJ in **Pegram Shopfitters Ltd v Tally Weijl** CA [2004] BLR 65, that there may be cases, in relation to adjudication matters, where *"legal principle has to prevail over broad brush policy"*.

Procedure

6 The claimant makes this application for enforcement pursuant to CPR Part 8. Mr Acton takes the point that an application to enforce the decision of an adjudicator should normally be made pursuant to CPR Part 7, with an application for summary judgment. In fact, Miss Dumaresq prefaced her submissions by suggesting that this was an application for summary judgment. She did not suggest that, by following the Part 8 route, the claimant was in any better position than if a Part 7 route had been followed. Miss Dumaresq did not take issue with Mr Acton's submission that, given that this matter is preceding pursuant to Part 8, the court must deal with the witness statements on the basis that the facts alleged by Mr Malnick must be accepted unless they are obviously and demonstrably fanciful or ill founded, and that Mr Malnick is entitled to succeed unless the court concludes that, on a trial with an oral hearing, he would have no genuine prospect of succeeding. Mr Malnick's case is that, here, there are genuinely triable disputes of fact which prevent the claimant succeeding.

7. In broad and general terms, it seems to me that Part 7/summary judgment would be the normal route when a party wishes to obtain judgment requiring payment of a sum of money. Here, however, Mr Malnick does not suggest that the claimant is not entitled to succeed at all, simply by virtue of having chosen the Part 8 rather than the Part 7 route. Mr Malnick does not appear to be prejudiced by proceeding in this way. It is open to this court to entertain the claim which the claimant makes.

Background

8 It is common ground that Mr Malnick and Mr Lloyd reached an oral agreement on 3 September 2003 whereby the claimant would undertake the conversion work. Mr Malnick made a manuscript note of his telephone conversation with Mr Lloyd that day. This records an agreed price of £412,000, inclusive of VAT, "*no extras*" and a list of possible bathroom/ kitchen fittings.

9. The claimant began work on or about 12 September 2003.

10. It is common ground that the parties subsequently agreed a variation to the contract, namely that the claimant would carry out additional work at a cost of £10,000, inclusive of VAT, bringing the contract Sum to £422,000 including VAT. The scope of the work included in that £10,000 is in issue.

11 By letter dated 11 February 2004, Mr Lloyd wrote to Mr Malnick setting out the claimant's understanding of the contract That letter stated, insofar as relevant here, as follows:
"My apologies for the delay in confirming our verbal agreement of early September last year in the sum of £412,000 as the total project conversion cost.

The construction work for your project has been priced based on [the architect's drawings. This agreed sum is inclusive of labour, materials and plant and includes VAT at a rate of 5% where applicable to your project.

The sum agreed excludes the following items

Archilects' fees
Engineers' fees
Planning fees
Building control fees
The Party Wall Act 1996
Dishwashers/ washing machines
Carpets to three flats
Burglar alarms
Works to bressummers or chimneys (other than specified)
Structural works to external walls (other than specified)
Pointing (other than to new brickwork)
Ground floor, basement and underground drainage

An allowance has been made for repairs to the roof box gutters. On further inspection replacement is recommended

Normally Lloyd Projects' terms of payment are. 40% payment of total project costs prior to project start date; 40% at an agreed midway point during the works, and the 20% balance on completion. However, as you are aware, we are well into the contract and so have asked [the architect] to prepare a valuation.....

Please confirm that the above is acceptable; by signing below and returning one copy of this fetter to the Lloyd Projects office. If you have any questions, please do not hesitate to contact me."

12. By a second letter, also dated 11 February 2004, the claimant sent Mr Malnick an interim valuation in the sum of £190.377 60 inclusive of VAT. Mr Malnick paid the claimant £200,000

13. Mr Malnick did not countersign Mr Lloyd's letter. Instead, Mr Malnick wrote to Mr Lloyd, on 17 February 2004, as follows:
"Thank you for your two letters dated 11 February. I trust you have received my cheque for £200,000, sent yesterday,

I have the following comments:
1 The wall between the top flat and common stair does not have the same "Ecomax Soundslab" as in the other walls.
2 The same applies to the small ceiling area above top flat entrance door.
3 Please confirm that the waste pipe in the first-floor flat (in the false ceiling of the hall) has been soundproofed
4 The specification provides for two layers of plasterboard on both sides of walls between dwellings and common stair but there is only one on the stair side.
5 Presumably there should also be two layers on the underside of the stairs of the top flat.

6 I have already paid all professional and Council fees. 7 There is no Party Wall Act work.

8 Please provide quotation for fitting burglar alarms.

9 Your price of £412,000 was agreed on the basis of your providing a first rate job with no extras. However, I agreed to the chimney work being extra because we had discussed brat beforehand and I also agreed (albeit reluctantly) to the extra pointing and drainage work. I thought £10,000 was a lot and though you did not provide details of time for labour and cost of materials, as I requested, I still agreed.

10 I am not agreeable to any other extras whatsoever.

11 I relied on your word and my knowledge of the standard of your work that your product would be top quality and that there would be no extras when I agreed your original quotation,

12 Would you please provide PC sums for kitchen and bathroom fittings

13 Could you please let me know the anticipated completion date

Apart from the few hiccups mentioned above I am very pleased with the work so far and thank you and your men for all your hard work,"

14. Mr Malnick and Mr Lloyd spoke by telephone on 17 February 2004- Mr Malnick made a note of that telephone conversation, which reads as follows; *"Filling material has been changed.* [Mr Malnick] *quite right waste pipe has been soundproofed. 2 layers of plasterboard on and walls confirmed. Yes to everything else."*

15. Work continued. In March 2004, the claimant made another request for payment. Mr Malnick paid part of that.

16. Mr Malnick wrote to Mr Lloyd by letter dated 20 June 2004. This letter states, so far as relevant: *"Further to my letter of yesterday and your previous telephone call - at which I am still smarting - I have looked for your letter to which you say I have not replied. I presume you mean that I did not countersign and return your letter of 11 February. Well, that is right but I did reply to it - by letter of 17 February. What have you done to reply to point to 12 and 13 in my letter?"*

17. In a letter dated 13 July 2004, Mr Malnick stated *"You told me in March that you might possibly finish the job at the end of April '**or thereabouts**'. In the middle of April you told me **'middle of May'**. It is now the middle of July and you have still not completed the work and cleared the site. You initially said it would take 6-7 months and we are now in the eleventh month."*

18 By letter dated 13 August 2004, Mr Lloyd submitted an application for payment. That letter indicated that practical completion of the three apartments and common areas had been achieved in July 2004 and keys handed to tenants. By that application for payment, the claimant claimed payment for what were described as extra works, namely

1 Rebuilding of chimneys	*£10,000.00*
2 Repointing of brickwork	*£1,840.00*
3 Repairs and modification of basement drainage	*£1,272.53*
4 Intrusion alarm installation	*£2,330.00*
5 Replacement of lead gutters	*£2,143.20*
6 Carpet to staircase/vinyl to bathrooms and kitchens	*(£1.026.48)*
7 Decorative wall boarding to showers	*£870.96*
8 PC for kitchen fittings	*(£3,835.14)*
9 PC for sanitary fittings	*£46.11*
10 PC for light fittings	*£1,089.99*

The claimant's application for payment was supported by extracts from relevant documents. For example, in support of the claim for £10,000 for rebuilding of chimneys, the claimant relied on paragraph numbered 9 in Mr Malnick's letter dated 17 February 2004. Similarly, the claimant relied on that letter in support of its claim for the cost, as extras, of repointing of brickwork and of work to basement drainage.

19. Mr Malnick did not agree that he was liable to make any payment.

20 In his letter dated 21 September 2004, Mr Malnick stated: *"You will recall that in our conversation on 3 September 2003 you said that the project would take 6-7 months and I relied on that representation. In February you told me that at least one flat would be definitely ready by the end of April (i.e 8 months from commencement)"*

21. The claimant issued a notice of adjudication on 8 October 2004, claiming £121,397.84, exclusive of VAT. On 12 October 2004 the RIGS nominated Mr Riches as adjudicator. In the adjudication, the claimant was represented by Harris Consulting, construction contracts and commercial consultants. Mr Malnick represented himself, advised by counsel. The adjudicator made his decision on 1 December 2004. Mr Malnick has refused to pay the money which the adjudicator decided he should pay.

22. The claimant commenced these proceedings on 14 April 2005, claiming £127,283.98 inclusive of VAT, interest and reimbursement of the adjudicator's fees. Mr Eyre, the claimant's solicitor, and Mr Malnick made statements in connection with these proceedings. I have read not only those statements but also some of the evidence lodged in the adjudication proceedings.

The issues

23.. The claimant's case is that either the contract was made in writing by the exchange of letters dated 11 and 17 February 2004 or that these letters are evidence in writing of the agreed terms, within either section 107(2)(b) or (c). The claimant contends that the letters identify with sufficient certainty for the purposes of section 107 the whole of the material contract terms as previously agreed orally. The contract is evidenced in writing. Acceptance of those further matters raised by Mr Malnick in his letter of 17th February 2004 was by conduct and/or the subsequent telephone conversation later on 17 February 2004. The contract was performed on the basis of those terms. Insofar as evidence of acceptance of the defendant's terms is required for the purposes of section 107, it is, Miss Dumaresq submits, evidenced by the defendant's own manuscript note of that conversation. Miss Dumaresq relies on **Connex** in support of that submission. She submits that one must not confuse documentary evidence which may support the existence of a contract with the written documentary evidence necessary to satisfy the section 107 requirement for a written record of the material terms of that contract.

24, Mr Malnick's case is that the agreement was not made by the exchange of letters, within the meaning of section 107(b) because (1) the agreement had been made orally, over five months before the exchange of correspondence, and not by the exchange (2) the exchange of correspondence does not contain a concluded agreement (because there is not a consensus between the two letters) and (3) the exchange of correspondence does not contain all of the agreed terms.

25. So far as section 107(2)(c) is concerned, Mr Malnick's case is that not all material terms are recorded in the relevant documents. Further, that the letters are not evidence of any agreement because they are not in accord in all respects. He contends that the case must also fall within section 107(4) and it does not. Mr Malnick contends that, on 3 September 2003, he and the claimant concluded an oral contract. The terms of that contract were as follows:

The claimant would carry out the conversion of the offices into three flats in accordance with the contract drawings

All work would be carried out to the highest levels of workmanship and materials and would be suitable for use in a tenanted flat

The fixed price for this work, inclusive of VAT, would be £4l2,000. That would be an all-inclusive price which would include

all work shown on the plaits, and any work incidental thereto
kitchen fittings and flooring
bathroom fittings and flooring
internal decoration and light fittings to flats and common parts
carpets to common parts
installation of an entry phone system and communal letterbox

The claimant would do everything needed to convert the offices into flats and restore the building so that no further work (other than redecoration) would have to be done to the fabric of the building for many years or to the roof for the next 50-60 years.

There would be no extra charge for all that work even in the event of unforeseen circumstances. The only exception to this was work to the chimneys.

Work would commence on R September 2003 and would be completed within 6-7 months, by 8 April 2004 at the latest.

No agreement was made as to when and how the: price would be paid.

The contract sum was subsequently increased by £10,000 to a total of £422,000. Mr Malnick's case is that that was a total fixed price.

26. Mr Malnick identifies four principal areas in which, he contends, the agreed terms were not evidenced in writing.

    standard of work
    scope of the work, including identity and standard of fittings
    project management duties
    the contract period/time for completion.

27. Mr Malnick's case is that a number of these matters cannot be ascertained from the drawings or other documents, but were the subject of oral agreement between me parties; only by examining the oral evidence can a tribunal determine the terms of the contract between the parties.

28. In both the adjudication and in these proceedings, the claimant's case has been that Mr Lloyd understood the confirmation of the oral agreement (reached between the parties sometime between 3 September 2003 and February 2004) to be to the effect that the additional £10,000 was for the chimneys alone. Mr Lloyd prepared a statement in the adjudication proceedings, in which he made the following points. He contended that he gave no indication that some elements of the work would be done to a standard that would last the next 50-60 years; to the contrary, he said that the work would outlive his lifespan. He rejected Mr Malnick's contention that the price was fixed and any unforeseen extras were at the claimant's risk; he said that it was *"categorically not the case that I undertook to do work entirely at my risk"*. Mr Lloyd denied that he agreed to carry out, for £412,000, the work as shown on the plans *"and any work incidental thereto";* the claimant had contracted to do what was shown on the drawings, though in practice they had not taken a narrow approach to that. Mr Lloyd contended that work to the chimneys, work of repointing the brickwork at the rear elevation and work to the basement underground drainage were excluded from the contract sum; these were extras. Contrary to Mr Malnick's position, Mr Lloyd contended that the replacement of lead gutters was an extra. Mr Lloyd contended that the PC sums for kitchen fittings and sanitary fittings and light fittings were to be treated as conventional PC sums; that is, if Mr Malnick were to receive any saving on PC sums, then it must follow that the claimant was entitled to be paid any extra over those PC sums.

29. The claimant's case in these proceedings is that the risk of alt unforeseen work was not included within the contract price. The claimant draws a distinction between that which was a necessary incident of carrying out the work set out on the drawings whether expressly referred to or not, and that which has been referred to as unforeseen extras, unforeseen work or unforeseen circumstances. Mr Lloyd's evidence in the adjudication was that he did not agree to work arising out of unforeseen circumstances as being included within the contract sum. In that context. he accepts that the claimant was obliged to undertake work incidental to that set out on the drawings and to complete conversion of the offices to flats to the standard required by Mr Malnick.

30. The claimant relies on the fact that the adjudicator was able to deal with its claims for extras. He decided that some of the items claimed by the claimant were not extras but were within the scope of work which the claimant had agreed to undertake. For example, die adjudicator did not accept that the claimant was entitled to claim as extras the cost of repointing, of drainage or of work to gutters. I treat with caution the fact that the adjudicator tackled these issues. The question is whether the adjudicator had jurisdiction to deal with the issues, not how in fact he dealt with them. The court must

decide, objectively, whether or not all material terms were recorded in writing. The fact that the adjudicator felt able to deal with the claimant's claims within the adjudication is, in my judgment. irrelevant here.

Section 107(2)(b)

31. It is common ground that an oral agreement was concluded between the parties and made by telephone on 3 September 2003.

32. The claimant's case is that the reference to the contract that is "made" by the exchange of correspondence within section 107(2)(b) is to the written agreement as contrasted with an oral agreement. It does not preclude a prior oral agreement being reduced to writing by the exchange. It is not concerned with identifying the first moment in time that an agreement is reached but rather with the means whereby the whole of that agreement, the material terms of the agreement, can be identified with sufficient certainty. The emphasis of section 107, as construed by the Court of Appeal in RJT, is on the requirement for a sufficient written record of the whole of the agreement. It is not concerned with the timing of that record.

33 Mr Malnick's case is that the agreement was not made by the exchange of letters in February 2004. It had already been made orally over five months before the exchange of letters, and not by that exchange. Further, the exchange of correspondence does not contain a concluded agreement,

34. I accept Mr Acton's submission that, normally, a contract is made when agreement is reached. It cannot be made on more than one occasion. One would not normally describe a contract reached already, and then substantially performed, and later recorded in writing, as a contract converted into a contract in writing.

35 As I set out in more detail in relation to the section 107(2)(c) issues, it is not clear from the letters that the parties were of one mind in February 2004.

36. In my judgment, this is not a case which falls within section 107(2)(6). By the time of the exchange of letters in February 2004, the oral agreement was already in existence. The parties had been working pursuant to that oral agreement for some five months and were bound by it. It would be straining the language of section 102(2)(6) to describe the February 2004 letters as an agreement made by the exchange of communications in writing, as that sub-section requires. The exchange of correspondence in February 2004 is capable of coming within section 107(2)(c) but does not fall within section 107(2)(b).

37. The next question, therefore, is whether the provisions of section 107(2)(c) are satisfied

Section 107(2)(c)

38. In **RJT**, Ward LJ pointed out that writing is important "*because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are."* He held that *"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. ..... No doubt adjudicators will be robust in excluding the trivial from the ambit of the agreement and the matter must be entrusted to their common sense."*

39. As Jackson J said in the **Stratfield Saye** case, *"The reasoning of Auld LJ* [in **RJT**], *attractive though it is, does not form part of the ratio of **RJT***", and. at paragraph 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 an adjudication have been recorded in writing."*

40 Miss Dumaresq submits that the test of whether there is sufficient record in writing to satisfy section 107 is not whether each and every detail, however minute, has been fully recorded in writing, but whether the material terms of the agreement are so recorded. She submits that, save in respect of an agreement as to the precise contract period and as to some other "*more fanciful details*" as she describes them, the express terms identified by Mr Malnick substantially echo the material terms as identified in the two February letters - as to scope, quality and price. She submits that Mr Malnick's challenge by

raising objections on the grounds of allegedly unrecorded agreed terms is perhaps best described colloquially as a classic attempt to avoid the adjudication process and its consequences - the type of challenge that Ward LJ hoped adjudicators would dismiss robustly. It would be wholly unrealistic to expect a far higher standard of recording of details for the purposes of an HGCRA construction contract than is ever achieved in practice in the industry. It cannot have been the intention of parliament when legislating for a dispute resolution procedure for almost the entire construction industry that such unusual and unrealistic practices would be a prerequisite. The test of writing for section 107 neither requires the minutiae to be set out nor does it preclude an argument as to whether or not the particular term was incorporated. The test is concerned with whether the jurisdictional threshold for a 1996 Act adjudication is met. In particular, the judgment of Ward LJ in **RJT** refers to the "*material terms of the contract*". Miss Dumaresq submits that Ward LJ is not suggesting that every single item, detail or matter that may fall to be performed under the contract, however trivial, must be evidenced in writing. Furthermore, he specifically approves the notion that where there is a construction contract within section 108 (by implication it must therefore meet the section 107 threshold for writing) a dispute as to whether a particular term is or is not incorporated into the contract is one within the adjudicator's jurisdiction.

41. Miss Dumaresq relies on the decision in **Hollins** in support of the proposition that I should adopt a broad interpretation of section 107. It seems to me that the judgment of Ward LJ in **RJT** is clear. It was accepted by Jackson J in **Saye Stratfield** to be clear. It is not necessary or appropriate to be seeking a wider interpretation. I see no reason to depart from the approach indicated by the majority in **RJT**. It seems to me that the test the court should apply in the light of the guidance given in RJT is clear.

42. I have witness statements, but none of the evidence has been tested in cross examination nor have the letters been considered alongside the witness evidence. Is the position clear simply from a common sense reading of the documents?

43. So far as the standard of work is concerned, the claimant's letter of 11 February is silent on the point. Mr Malnick's letter of 17 February refers to "*a first rate job*" and that the product would be of "*top quality*". He says that he agreed with Mr Lloyd that no further work would be required for many years and no work to the roof would be required for 50-60 years. In his evidence in the adjudication, Mr Lloyd took issue with those matters.

44. The claimant contends that the scope o£ the work is properly and sufficiently identified in the two letters, namely conversion of the offices into three flats based on the architect's drawings. I was taken to these drawings to consider a number of issues. The claimant's case is that the specification, expressly referred to in Mr Malnick's letter of 17 February, is contained in the drawings. The documents which identified the scope of the works are incorporated by express written reference.

45.. Mr Malnick lists, at paragraph 21 of the witness statement he prepared in relation to these proceedings, 14 items which, he says, the claimant should have undertaken within the agreed fixed price but which, he contends, could not be ascertained from any document. Mr Malnick refers to these items in the context of his contention that all extras, whether unforeseen or otherwise, were within the contract sum. In his statement, Mr Malnick states *"most of these I discussed at some point with Mr Lloyd"*. Miss Dumaresq dealt with each of those 14 items in detail. Broadly, the items can be considered in the following categories and the claimant's position is as follows: some items were specifically shown on that the architect's drawings and are thus within the scope of work; it was clear that some items of work would be required to the exterior of the building to ensure that this was in keeping with the conditions of planning consent, including eg the provision of coloured brickwork if necessary; some: work was necessary because it had to be carried out if the claimant were to comply with Building Regulations; in relation to some items, it was necessary to undertake work to ensure that this was consistent with the requirement that work be of top quality and bearing in mind that this was a late Victorian building; and in relation to some items, the claimant has not made any claim for money for work carried out.

46. In my judgment, the fact[s] that the claimant does not now make any claim in relation to some items of work or that the claimant adopted a wide interpretation of the scope of work it had to carry out are

irrelevant to the objective question whether the two letters fall within section 107, but do tend to illustrate that not all matters were recorded in the letters.

47. I deal with the more significant items. There is a dispute between the parties as to the treatment of so-called PC sums for kitchen and bathroom fittings. Mr Malnick's evidence is that he and Mr Lloyd discussed the allowance, within the fixed price, which the claimant was making for kitchen and bathroom fittings, and which the parties have described as PC sums. Mr Malnick says that he asked whether the PC sum for the kitchen would be sufficient to provide imitation granite worktops rather than the beech worktops suggested by Mr Lloyd. Mr Malnick offered to investigate the possibility of obtaining fittings more cheaply from his own sources. He contends that they agreed that no upward adjustment to the agreed fixed price would be made, whatever the actual cost of the fittings; the PC sums had no contractual status and at no time was it agreed that use of PC sums in calculating the fixed price would relieve the claimant of its obligation to provide works of the contractually agreed standard for the contractually agreed fixed price. This is disputed by the claimant, which contends that these were genuine PC sums with the consequence that it is entitled to the actual cost of fittings even though the cost causes the fixed price to increase. The claimant's case is that there was an agreed machinery whereby certain matters may be resolved at a later date. The agreement is not rendered incomplete because the final price is unknown at the time the contract is made.

48. In my judgment, the manner in which PC sums were to be treated was a material term. The agreement between the parties is not capable of being ascertained from the letters.

49. There is a difference between the parties as to the work to be included within the £10,000 variation. Mr Malnick's case has been that this sum included work to repointing and drainage as well as to the chimneys. In both the adjudication and these proceedings, the claimant's case has been that Mr Lloyd understood the confirmation of the earlier agreement in Mr Malnick's letter of 17 February 2004 to be in accordance with his understanding of the earlier oral agreement, namely that the £10,000 was for the additional chimney work alone, The claimant's letter dated l1 February 2004 shows, as an exclusion to the agreed sum of £412,000, both pointing (other than to new brickwork) and the ground floor, basement and underground drainage. It makes reference to the box gutters. In the adjudication, the claimant relied on paragraph numbered 9 in Mr Malnick's letter dated 17 February 2004 in which Mr Malnick states *"I also agreed (albeit reluctantly) to the extra pointing and drainage work."* In its accounts summary, the claimant claimed as extras the cost of re-pointing of brickwork, repairs and modification to the basement drainage and replacement of lead gutters, over and above the £10,000 claimed for rebuilding of chimneys. The claimant now says that it adopts the adjudicator's decision, which was that repointing, drainage and guttering were not extras. But that in my judgment is not the point. The witness statements, claimant's account summary and the referral document in the adjudication all indicate that the discussion between Mr Lloyd and Malnick prior to February 2004 are matters which will need to be explored before it can be understood what the parties actually agreed in relation to these items.

50. Mr Malnick's evidence is that he agreed a high price because he required a top quality job and because the claimant was to assume all risks, even for unforeseen matters. In the statement which he prepared in relation to the adjudication proceedings, Mr Lloyd denied that the parties had agreed that any unforeseen extras were at the claimant's risk. I take careful note of the distinction which the claimant draws between unforeseen work necessary to complete the work shown in the drawings and unforeseen circumstances. However, on the basis of the documents available to me, there appears to a gap between the claimant's understanding and Mr Malnick's understanding on this point. By way of example, in submissions, Mr Acton said that the claimant would be obliged, within the agreed sum, to undertake any work necessary to eradicate dry rot if this had been found during the course of carrying out the work. The claimant's position was that it would have had no such obligation. The true position cannot be ascertained from the documents. Whilst Mr Malnick's approach seems to be of rather startling breadth, the court would need to consider this in the light of all the circumstances including the oral evidence. In my judgment, the question which party is to bear the risk of the unforeseen is of fundamental importance. The letters make no reference to this.

51 Mr Malnick contends that it was a term of the contract that the claimant provide a high-quality level of service in managing the project smoothly, so as to ensure his total peace of mind. In the adjudication, and in these proceedings the claimant disputes the existence of any agreement to provide project management services. Its case is that, in any event, the disputed existence of any such term does not go to the issue of the jurisdictional threshold but rather one that falls within Ward LJ's comments in paragraph l 1 of RJT

52 So far as time for completion is concerned, Mr Malnick contended in his statement in the adjudication that Mr Lloyd had said that it would take 6 to 7 months to complete the work. Miss Dumaresq points out that nowhere does Mr Malnick say in terms that he agreed orally with Mr Lloyd that work would be completed within that period. The claimant denies that there was any agreement as to time for completion. The position as to time for completion is not clear from the letters. There is some force in the claimant's argument that the letters suggest that there was no such agreement between the parties as to time for completion, Miss Dumaresq submits that Mr Malnick's letter dated 13 July 2004 is consistent with there being a series of hoped for completion dates but not with contractual agreement as to a period; the evidence from the correspondence is of complaint by Mr Malnick as to slowness and not that a contractually binding completion date had been breached. It seems to me, on the face of the evidence available at this stage, that Mr Malnick may well not prove an agreement as to completion within 6-7 months.

53 Miss Dumaresq accepted that it would be difficult to ascertain from the letters what had been agreed as to the claimant's obligations so far as internal and external decoration are concerned. She submits that it can be inferred from the claimant's obligation to complete work to the high standard required by Mr Malnick that the claimant should undertake such decoration within the contract sum. But that depends upon a conclusion that it is clear from the letters that the claimant was obliged to undertake work to that standard and that in itself is not clear given the claimant's stance in the adjudication.

54. I ignore the fact that the adjudicator felt able to deal with issues. The question is whether, objectively, the exchange of letters contained all material terms.

55. I am not persuaded that one can ascertain from the documents what were the material terms of the agreement. Of the matters which Mr Malnick contends were agreed orally and not recorded in writing, the following are in my judgment material issues: who was to bear the risk of the unforeseen, the standard of work required and the scope of the work to be undertaken for £422,000. In my judgment these are more than trivial items. They are not within the category of items which an adjudicator should deal with robustly as Ward LJ suggests. They are items which go to the threshold jurisdiction issue: unless these material terms have been evidenced in writing, it cannot be said that the contract is evidenced in writing within the meaning of section 107 as defined in **RJT**. I accept Mr Malnick's case that oral evidence is needed to enable a tribunal to identify what were the terms which the parties had agreed. In my judgment the two letters do not evidence the agreement within the meaning of section 107(2)(c).

Authority

56. Given my conclusions as to s 107(2)(b) and (c), it is unnecessary for me to decide any issue concerning section 107(4) and I decline to do so.

The adjudication process

57 Mr Acton's skeleton contained submissions as to the perceived prejudice caused to a defendant by reason of the nature of the adjudication process and of enforcement proceedings. These matters were not argued and are not relevant here.

Conclusion

58. In all the circumstances, the claimant's claim fails.

Miss Delia Dumaresq of Counsel (instructed by Glovers) for the Claimant
Mr Stephen Acton of Counsel (instructed by Guillaumes) for the Defendant.