

THE WRITTEN CONTRACT AND DISPUTES IN ADJUDICATION

1. Section 107 of The Housing Grants, Construction and Regeneration Act 1996 deals with the need for the construction contract to be in writing:

“(1) The provisions of this Part [of the Act] 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” should 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 that 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 for 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 it being recorded by any means.”**

2. Whilst the existence of a signed written contract will, usually, not give rise to any difficulties, problems arise where or when the agreement is made orally, wholly or partly, and/or where the agreement is evidenced in writing.

3. This issue was first considered fully in the case of **RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd** [2002] BLR 217. DM were mechanical and electrical sub-contractors who retained RJT to carry out certain design work for £12,000. The agreement between them was not itself in writing. However, there was a substantial amount of documentation, such as fee notes and drawing schedules which evidentially confirmed that the two parties were in a contractual relationship. DM claimed damages for alleged professional negligence from RJT and referred the disputes to adjudication; the Adjudicator proceeded to make a decision. In the first instance, the Judge decided that the agreement between the parties was sufficiently evidenced in writing to be an agreement in writing for the purposes of the 1996 Act.

4. The Court of Appeal decided that the contract between the two parties was not in writing within the definition of Section 107. Ward LJ decided that it was not sufficient to give an Adjudicator jurisdiction that there was evidence in writing which was simply capable of supporting the existence of the agreement or its substance. They considered that the whole of the agreement had to be evidenced in writing. Ward LJ, with whom Robert Walker LJ agreed, stated at paragraph 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...”

5. Auld LJ, however, did not go so far. At paragraph 21, he stated as follows:

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

6. This creates or certainly can create a major problem. There are many written agreements between the parties to a construction contract which do not record, necessarily or “literally”, every term which has been agreed. Even some important matters are left to oral agreement, for instance the day on which the works are to commence. There may be many minor immaterial matters which have been agreed which are not recorded in writing. This may include a change to the originally specified paint colour in one of many rooms. If the majority in the **RJT** case are themselves to be taken “literally”, the construction contract would not be in writing or, at least, as fully in writing as their judgments suggest is required.

7. The law was taken further in the case of **Carillion Construction Ltd v. Davenport Royal Dockyard** [2003] 79. In that case there was no doubt that there was, originally, a construction contract between the parties which was fully in writing. However, the time came when the parties were alleged to have met

and agreed a variation to the payment regime originally legislated for. The documents, such as letters, did evidence the fact that there was a discussion relating to whether the contract payments provisions should be changed but they did not evidence the existence of an unconditional contract varying the original contract or of any agreement which defined how the new payment regime was to operate. Although this was only a first instance decision, it has not been appealed. The decision itself is comprehensible because the alleged agreement to vary the payment provisions was a highly material and important term.

8. The **Carillion** case, however, raises more starkly the potential problem where parties orally vary an existing contract. Applying the logic of **RJT**, minor alterations to agreed terms, if made orally, could well have the effect of ensuring that what was a construction contract in writing within the meaning of Section 107 becomes disengaged from the 1996 Act because one of the terms, albeit varied, has been varied orally and is not evidenced in writing. This type of oral change is not at all uncommon.
9. Section 107 also begs the question of when and how the construction contract needs to be “evidenced in writing” to come within the Act. Section 107(4) is not exclusive. There is nothing in the Act which suggests that the “evidencing” needs to be done or made at the time that the alleged agreement is reached. Thus, it may be possible to evidence an agreement in writing by a letter from one party to the other several years later which sets out all the terms of the agreement said to have

been reached. That will be evidence in writing of all the terms of the agreement even if it is not in itself immensely reliable evidence. Similarly, there is no requirement in the Act that the written evidence of the agreement needs to be communicated by one party to the other. Thus, it could be said that a handwritten note of what was agreed which was not submitted at the time to the other party could amount to sufficient evidence in writing. Of course, that written evidence will need to be produced for any adjudicator.

10. These types of consideration will give rise to procedural complications. If one assumes that an agreement is allegedly evidenced in writing, and an issue as to jurisdiction on this count is raised with the adjudicator, the adjudicator will effectively have to determine whether there is a construction contract in writing within the meaning of Section 107. Even if the adjudicator decides that there is such a construction contract, it is then open to the objecting party to challenge the adjudicator's jurisdiction in Court. That will then stymie an application for summary enforcement of the adjudicator's decision because there will be a triable issue for which a trial attended by witnesses may well be required. This will delay, unavoidably, enforcement of the decision. That becomes further complicated if it is accepted by both parties that there is an arbitration agreement in writing; in those circumstances one party may apply for a stay of proceedings on the basis that there is a bona fide dispute as to whether all the terms of the construction contract are evidenced in writing.

11. Other problems can arise. For instance, in **Pegram Shopfitters Ltd v. Tally Wiejl (UK) Ltd** [2003] BLR 296, the Judge found that, where both parties contended that there was a written contract in existence, it was open to the adjudicator to consider and decide upon whether the specific terms were incorporated. In that case, there was a dispute as to what adjudication rules applied.

12. Problems may also arise in “Letter of Intent” cases. This is an issue which is coming up in a number of cases. The first step on the analysis in such cases must be to determine whether or not there is a contract at all. This will involve the consideration of whether or not the parties intended that they should be bound contractually by the terms of the Letter of Intent itself, even if the parties were intending to negotiate a formal contract thereafter. Having decided that there was a contract between the parties in the terms of the Letter of Intent, one must then go on to consider the principles of the **RJT** and **Carillion** cases, namely as to whether or not all the terms of the contract, such as it is, were recorded or evidenced in writing within the meaning of Section 107 of the Act. If the answer to that question is in the affirmative, there is or should be a construction contract in writing which entitles either party to proceed to adjudication. If one concludes that the parties did not intend any contract to come into being, the contractor or the sub-contractor as the case may be, has to pursue its entitlement to quantum meruit in the Courts.

Disputes

13. Over the last 2-3 years, there has been a growing number of jurisdictional challenges to adjudicators' decisions on the grounds that there was not a dispute in being at the time that it was referred to the requisite adjudicator. In the **Carillion** case, His Honour Judge Bowsher QC considered that the party which received the claim was to be given a reasonable opportunity to respond. He did, however, say that was not the point. He did, however, find that there was not a dispute because at the time of the Adjudication Notice, the party had not in fact been told and was unaware in what respect it was alleged to have broken its obligations.

14. However, the more conventional view is that the test for what is a dispute is that outlined in the arbitration case of **Halki Shipping Corporation v. Sopex Oil Ltd** [1998] 1 WLR 7272 where the leading judgment stated:

“... there is a dispute once money is claimed unless and until the defendant admits that the sum is due and payable”

15. In the more recent cases of **Beck Peppiatt v. Norwest Holst** and **Orange EBS v. ABB** [2003] BLR this test has been confirmed and reinstated. It should, thus, be sufficient for a dispute to arise that a claim has been presented by one party to the other and that other has not accepted it. There does not have to be a period of any specific length during which the responding party must be given a reasonable opportunity to respond. There must be a matter of fact and degree as to when the dispute arises. For instance a dispute will not arise the minute that the claim is

delivered. If, however, within a few days the claim has not been accepted there will be considered to be a dispute. A non-acceptance of a claim or even silence, will be sufficient to give rise to a dispute. In the Orange case, a period of 4 weeks was considered sufficient for a dispute to arise, even though 2 weeks of that represented the Christmas construction break in which little, if anything, was being done.

16. Another related approach is for a party which receives a claim to write to the other side saying that it does not necessarily reject the claim, but it needs substantially greater particularisation to form a view one way or another. Following, for instance, the Orange decision, this would not prevent or defer the creation of a sufficient dispute under Halki principle.

ROBERT AKENHEAD Q.C.

17th September 2003