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THE IMPACT OF LEGISLATIVE CHANGE ON ADJUDICATION PROVISIONS & THE REQUIREMENT FOR WRITTEN CONTRACTS UNDER THE NEW CONSTRUCTION ACT

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The deletion of section 107 of Part II of the Housing, Grants and Construction Act 1996 will have a profound effect on the requirements for contracts in writing under the adjudication provisions of the new Construction Act 2009. This paper presents a reflection on the legal provisions and case law concerning the requirement for contracts in writing under the provision of the 1996 Act, against the backdrop of new rules encompassing oral and partly-oral agreements between parties. While the new provisions are unlikely to have an impact in cases where there are formal contracts which incorporate adjudication clauses, the changes are more likely to have an impact where there letters of intent are involved and where contracts in writing are based on standard terms and conditions supplemented by oral agreements. While the legislative changes may not have an impact on the role of the Adjudicator, it may affect their modus operandi, requiring more efforts to ascertain the precise intentions of the parties under dispute.

INTRODUCTION

The Amidst a flurry of cases during the early years of adjudication, the courts appear to have achieved their aim of resolving questions thrown up by the 1996 Housing Grants Construction and Regeneration Act (HGCRA) and creating a reliable process for the pursuit of adjudication-related claims¹. Increasingly, however, jurisdictional challenges have reduced the effectiveness of Adjudication and increased the cost of the process². In 2010, a study by the Glasgow Caledonian University found that upwards of 25%

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¹ Fenn, P and O'Shea, M (2008) Adjudication: Tiered and Temporary Binding Dispute Resolution in Construction and Engineering, J. Prof. Issues in Engrg. Educ. and Pract. 134, 203.

² The Scottish Executive (2004) Improving Adjudication in the Construction Industry: A report on Consultation & proposals, May, Scottish Executive.

of challenges to the Adjudicators jurisdiction were related to whether the contract was in writing.³

Against the backdrop of recent court decisions, it is clear that case law concerning the requirement for written agreements is still at an evolutionary stage. Given these developments it is timely to reflect upon case law concerning written agreements and in light of recent changes to adjudication legislation in the UK.

I. THE NATURE OF THE ADJUDICATORS' DECISION

The creation of the Scheme for Construction Contracts and the Housing Grants Construction and Regeneration Act led to the development of the alternative methods of dispute resolution first proposed by in the Latham Report.⁴ Adjudication was introduced on a statutory basis under the Housing Grants Construction and Regeneration Act 1996.

Adjudication in the construction industry is a process that provides for the referral of a dispute arising under contract at any time, to a person (an adjudicator) who has to act impartially on the basis of such information as the parties to the dispute are able to provide him, or he is able to ascertain for himself within a very limited timescale. He reaches conclusions as to the parties' rights and obligations under their contract on the basis of the information provided by the parties. The decision being set out is contractually binding on the parties until the original decision is finally determined in legal proceedings or by arbitration (if the contract so provides for between the parties) or by agreement between the parties. Adjudication is therefore not final and not binding. The dispute is not settled by adjudication, although it may be if the parties choose to accept the adjudicator's decision as final. Once the adjudicator has made his decision on the rights of the parties under contract, it is for the parties to decide whether they agree with those conclusions, or have the dispute heard again by a tribunal that will give them a decision that is final and binding. The parties are quite at liberty not to accept the adjudicator's decision, although they are bound by the decision, temporarily at least.

Adjudication by itself does not and cannot resolve the dispute. For the dispute to be resolved each party has to decide for itself that it will not take the matter further. An adjudicator states what his conclusions are as to the rights and obligations of the parties. This decision may be based upon very

³ Kennedy,P, Milligan, J, Cattanach, L and McCluskey, L (2010) The development of Statutory Adjudication in the UK and its relationship with construction workload, RICS COBRA 2010 conference, Dauphine-Paris University, 2nd-3rd September, ISBN 9781842196199.

⁴ Latham, M (1994) Constructing the team: final report - Joint Review of Procurement and Contractual Arrangements in the United Kingdom, Construction Industry. HMSO.

limited information. It certainly will have to be made in a limited time. Both these factors may well mean that the adjudicator's decision leaves a lot to be desired. The adjudicator may certainly not have sufficient time to make a full, forensic investigation. It may be that the adjudicator considers the dispute is of such a nature that it is totally impossible for him to reach any sort of conclusion. To refer a dispute to adjudication, a construction contract must exist.⁵

Examples abound where parties have argued that all or part of the contract is not 'in writing' to avoid any liability. The courts have considered this aspect on a number of occasions under the provisions of the 1996 Act and held that no contract exists where the agreement is too ambiguous to constitute a contract. What constitutes a contract in writing is an interesting question and fundamental to adjudication under HGCRA, but who decides if a contract is in writing? Does the adjudicator have the power to decide? If no contract exists, then it follows that the Adjudicator has no jurisdiction under the law. However, Adjudicators do not have power to decide on their own jurisdiction. Many adjudicators faced this challenge and either decided to resign or continue with proceedings. Typically, the decision was an objective one, taking into account factors such the price and scope of works, as well as start and completion dates.⁶

II. ORAL AND WRITTEN AGREEMENTS: THE PROVISIONS OF THE HGCRA

The HGCRA required construction contracts to be in writing. Whilst oral agreements were binding on the parties, the difficulty arose in determining the precise terms of that agreement in the absence of clear written evidence. It is for this reason that section 107 of the Act only applied to written contracts. Thus, unless the construction contract was an 'agreement in writing' there was no right to adjudicate under the 1996 Act. This meant that oral contracts were not subject to adjudication under HGCRA, unlike the new state of affairs created under the provisions of the Construction 2009 Act. There was a complicated definition of what is meant by the term agreement 'in writing'. Section 107(1)-(6) of the HGCRA 1996 stated:

(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.

⁵ Royce, D (2009) Adjudication: Recent Development, <http://construction.practicallaw.com/6-204-4037> (access on 28th July 2011).

⁶ Green, M (2006) Construction Adjudication and the Definition of Disputes: an Analysis of Recent Case Law, Proceedings of the 2006 COBRA conference, Bartlett School, UCL, London, 7-8th September.

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 mean.

In circumstances where a contract was not be covered by section 107, Atkinson (2002)⁷ suggested that that courts had taken ‘*a robust approach to the interpretation of section 107, straining its meaning ... so that parties without a contract can benefit from adjudication*’.

In *A&D Maintenance & Construction Ltd v Pagehurst Construction Service Ltd*,⁸ the court confirmed that, although there was no written contract, both parties proceeded as if there was one and neither party denied a contract was in place, thus an agreement in writing existed. If either party had denied their intention to create a written contract, then an adjudicator would have had no jurisdiction under the provisions of the 1996 Act. In *Grovedeck Ltd v Capital Demolition Ltd*,⁹ Grovedeck sought to enforce the adjudicator’s decision. In the enforcement proceedings, Grovedeck abandoned the post-dispute correspondence as evidence of the contract in writing and adopted the argument based on Section 107(5). HHJ Bowsher was unable to accept that:

The contracts were not subject to any terms about adjudication when the Adjudicator was appointed and so, at the date of his appointment, he had no jurisdiction. Did something happen later to change the nature of the contracts between the parties and give jurisdiction to the adjudicator so as to bestow validity on what was proceeding as an invalid adjudication? The claimants say, Yes. The claimants’ submissions involve this unstated proposition that even though in every

⁷ Atkinson, D (2002) *Stretching a point*, Building, Issue 05.

⁸ *A&D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* [1999] 64 Con LR.

⁹ *Grovedeck Ltd. v. Capital Demolition Ltd.* [2000] B.L.R. 181, 185.

communication after his unlawful appointment the defendants challenged and denied the jurisdiction of the adjudicator, those same communications themselves changed the nature of the parties' contracts and gave him jurisdiction. Freedom of contract has fallen, but I cannot believe that it has fallen that far

The 'in writing' requirement was applied wholesale to the entire substantive agreement, as endorsed by the Court of Appeal decision in *RJT Consulting Engineers v DM Engineering (Northern Ireland) Ltd* (2002).¹⁰ *RJT Consulting Engineers Ltd* was the third decision of the Court of Appeal in respect of adjudication.

In *RJT Consulting Engineers*, the Technology and Construction Court held that the documentary evidence and written material between the two parties was sufficient to bring their agreement within the adjudication proceedings. Accordingly the declaration sought by RJT that the agreement was not an agreement in writing for the Act was refused. The matter then came before the Court of Appeal, which overturned the decision of the TCC. RJT argued that there had been confusion regarding documents consistent with there being a contract and documents, which constituted a record of the entirety of the oral agreement. RJT maintained that the whole agreement had to be evidenced in writing in order to provide the certainty, which would enable the adjudicator to move swiftly to a decision within the short timetable provided by the 1996 Act.

DM countered that all that was necessary was that there should be evidence in writing of the existence of a contract in writing, whether that would be the identities of the parties, and the price and nature of the works to be undertaken. The Court of Appeal agreed with RJT. The invoices and other extensive evidence relied on by DM was simply evidence of the existence of contract. It was not evidence of the terms of the oral agreement between the parties. Section 107 of the Act details what has to be evidenced in writing is literally the agreement, which means all of it, not just part of it. The only exception to that generally is where relevant parts of an oral agreement are alleged and not denied in written submissions in adjudication. The appeal was allowed however it was noted that what is more important is that the terms of the agreement is material to the issues giving rise to the adjudication are clearly recorded in writing. Written evidence of all the material terms would therefore suffice. The material terms of the agreement must be recorded in any one of the forms prescribed by section 107 of the Act for the requirements of that section to be met and for the agreement to constitute a 'construction contract'.

¹⁰ *RJT Consulting case (RJT Consulting Engineers v DM Engineering (Northern Ireland) Ltd* [2002] All ER (D) 108 (Mar).

For a claimant to seek to say that a contract is evidenced in writing pursuant to section 107 (4) of the Act, they must show that the written documentation evidenced the whole of the agreement and not just part of the agreement, as was the case in *Debeck Ductwork Installation Ltd v T&E Engineering Ltd*.¹¹ However, in *Cowlin Construction Limited v CFW Architects (2002)*,¹² only a little over a month later, HHJ Kirkham held that:

It appears that the contract was made partially in writing and partly oral....It is clearly evidenced in writing. Pursuant to section 107(2) of HGCRA, this was a construction contract.

Whereas, in *Carillion Construction Limited v Devonport Royal Dockyard (2002)*,¹³ HHJ Bowsher held that if a variation to the terms of a contract is agreed orally, this must be recorded or evidenced in writing, failing which an adjudicator will not have jurisdiction to decide disputes arising under the oral agreement. While some suggest that the debate surrounding the requirement to satisfy section 107 has largely been resolved,¹⁴ some controversy remained. In *RJT*, the Court of Appeal decided that the whole of the terms of the agreement (not just the fact of an agreement) must be evidenced in writing, but scope to depart from the 'RJT' principle does exist in particular circumstances. In *Connex South Eastern Ltd v MJ Building Services Group Ltd (2004)*,¹⁵ for example, the court held that there was no oral aspect to the underlying contract (i.e. the meeting minutes confirmed that Connex accepted M J Building's tender in its entirety) and therefore the Act did apply, whereas in the *RJT* Court of Appeal case it was found that part of the underlying contract was oral, and, as that part of the oral contract had not been evidenced in writing, the Act did not apply.

In light of the foregoing, it seems that the process of deciding what was considered 'evidenced in writing' and what was not was fraught with difficulty. The apparently restrictive interpretation of section 107 of the Act by the Court of Appeal in *RJT* remained of real concern within the industry, particularly among smaller firms who fell outside the provisions of the 1996 Act. Concern within the industry was expressed as early as 2004 in a report by the Construction Umbrella Bodies.¹⁶ The report recommended that in

¹¹ *Debeck Ductwork Installation Ltd v T&E Engineering Ltd*, Unreported October 14 [2002] TCC.

¹² *Cowlin Construction Limited v CFW Architects* [2002] EWHC 2914 TCC.

¹³ *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358).

¹⁴ Tan, S.G (2007)"Challenges to the adjudicator's decision," Thesis (Master of Science (Construction Contract Management)), Faculty of Built Environment., Universiti Teknologi Malaysia, Johor Bharu.

¹⁵ *Group Connex South Eastern Ltd v MJ Building Services PLC* [2004] BLR 333.

¹⁶ The Construction Umbrella Bodies Adjudication Task Group (2002) *Guidance for Adjudication*, July, www.cic.org.uk/adjudication/adjudicationinfo.htm The Local Democracy, Economic Development and Construction Act 2009, HMSO, London.

respect of ‘evidenced in writing’, the law should be clarified particularly in light of the *RJT* case, to avoid undermining the adjudication process altogether if left unresolved. A number of authors have considered the decision in *RJT* unfortunate and suggested that it would create, or the potential to create, major problems.¹⁷ Critics suggested that it would open the door to a ‘flood of jurisdictional challenges’. There are many written agreements between the parties to a construction contract that do not incorporate, necessarily or ‘literally’, every term which has been agreed. Indeed, some important matters are left to oral agreement, for example, the day on which the works are to commence.¹⁸ There may also be many minor immaterial matters which have been agreed which are not recorded in writing. If the majority view in *RJT* was taken ‘literally’, the construction contract would not be in writing or, at least, as fully in writing as their judgments had suggested is required. However, the House of Lords refused a petition to appeal. Certainly, the *RJT* decision considerably limited the right to adjudicate where no written contract agreement exists, but the decision was reached not because the court wished to restrict the right to adjudicate, but as LJ Ward foresaw, the difficulty an adjudicator would have making a decision based on an alleged oral agreement within the tight timeframe provided by the process.¹⁹ Indeed, as LJ Ward stated:

Certainty is all the more important when adjudication is envisaged to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are

Nevertheless, there is still controversy about the effect of section 107 as construed by the decision in *RJT*. In the early 2000s, some within the construction industry called for the abolition of the requirement so that all construction contracts even those which are oral or partly in writing are covered by the Act²⁰ (akin to legislation in New South Wales); others preferred the status quo.²¹

¹⁷ Gould, N (2003) Dispute resolution in the construction industry: An overview, King’s College London and Society of Construction Law, Construction Law seminar, 9 September.

¹⁸ Tan, S.G (2007) "Challenges to the adjudicator's decision," Thesis (Master of Science (Construction Contract Management)), Faculty of Built Environment., Universiti Teknologi Malaysia, Johor Bharu.

¹⁹ Brawn, D (2010) The circumstances in which an adjudicator's decision is unenforceable or inappropriate in construction disputes, International journal of arbitration, mediation and dispute management, volume 76, Number 3, August.

²⁰ Bowes, D (2007) Practitioners’ perception of adjudication in UK construction. In: Boyd, D (Ed) Proceedings of the 23rd Annual ARCOM Conference, 3-5 September 2007, Belfast, UK, Association of Researchers in Construction Management, 117-125.

²¹ Kennedy, P, Milligan, J, Cattanach, L and McCluskey, L (2010) The development of Statutory Adjudication in the UK and its relationship with construction workload, RICS COBRA 2010 conference, Dauphine-Paris University, 2nd-3rd September, ISBN 9781842196199.

III. CONTRACTS IN WRITING: RECENT DEVELOPMENTS

A closer examination of the precise terminology of the 1996 Act is fundamental to our understanding of the law concerning contracts in writing and the nature of what constitutes a contract under HGCRA. The 1996 Act used wording such as ‘by reference to terms that are in writing’. There is no reference to a ‘previous agreement that is in writing’. Indeed, there is no provision for adjudication in relation to an alleged construction contract made orally or otherwise not evidenced in writing – (see case under footnote 13). This would seem to be contrary to the provisions of section 107 (1) of the 1996 Act. What constitutes a construction contract? What is the basis of the agreement? There must obviously be agreement on scope, price and time. On the contrary, what if there was no agreement over time? Certainly, there would be an implied term within the contract that the works will be completed within a ‘reasonable time’, but does this provide us with certainty that a contract exists where the scope and price are more precise? What if the contract alluded to reasonable costs incurred? What if the identity of the parties was uncertain? What if the scope of works was based on subsequent instruction or orders, which may or not be set down in writing? In such circumstances is there any guidance we can draw upon as to what constitutes a construction contract? Section 107 of the Act only applies where there is a contract in writing, meaning that all material terms must be in writing; see RJT as the leading authority in the area. Justice Jackson has also provided additional guidance on the constitution of a construction contract more recently in the case of Mast Electrical v Kendall (2007).²² Justice Jackson noted that a thorough analysis of correspondence, meeting minutes and so on was warranted to establish whether a contract was ever concluded between parties. He also noted that where there had been performance ‘*the court would lean in favour of finding a contract if it could probably do so*’. What if there was no agreement on all the material terms between the parties? Under RJT principles there would be no contract, but the contractor may be entitled to a quantum meruit under contract law provisions. In all circumstances, courts would be obliged to follow the principles established within RJT. In other words, as Brawn (2010, pg 37)²³ has noted, either:

The contract must be in writing;
Established by means of communication in writing;

²² Mast Electrical Services v Kendall Cross Holdings Limited [2007] EWHC 1296 (TCC).

²³ Brawn, D (2010) The circumstances in which an adjudicator's decision is unenforceable or inappropriate in construction disputes, International journal of arbitration, mediation and dispute management, volume 76, Number 3, August.

Evidenced in writing;
Agreed by reference to terms in writing; or
Exchange of submissions in proceedings in which the existence of contract is alleged by one party and not denied by the other party.

The decision of the court in *Hart Investments Limited v Fidler* (2006)²⁴ provides a further example of an authority in this area. In terms of the role of the Adjudicator, they would need to adopt a rigorous approach in determining whether minor issues said to have been agreed orally between parties prevent an otherwise written contract pursuant to section 107 of the Act being considered as a contract in writing.

The exercise itself must be objective and take into account the nature of the contract and the parties themselves. Nevertheless, what may be a minor issue in one contract may not be minor in another one. In for example, a 10 million pound project an oral agreement on different types of architectural ironmongery may be a minor issue but a major one on another development. The adjudicator would also need to consider the intention of the parties, and whether they intend to give affect to their oral agreement such that it becomes binding in written form at later stage. On the other hand, a later oral agreement may not be binding on parties because it lacks consideration or because it was not intended to be binding, as in the case of *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008].²⁵ There remains a great deal of legal uncertainty about the effect of subsequent oral amendments to written contracts or oral variations to the scope of works, to the extent that differences of opinion have emerged among legal practitioners. While some consider that the right to adjudicate was lost under the 1996 Act, others considered the right to adjudicate unaffected, particularly with respect to oral amendments to the works. The debate has provided a fertile ground for challenges to the Adjudicator's jurisdiction under the 1996 Act. Indeed, what if the written terms of the contract were incomplete or further terms agreed orally, or significant changes to the scope of works agreed on an oral basis? Is there any guidance we can draw upon in such circumstances? The answer to this question is yes. For instance, in *Hatmet v Herbert* (2005),²⁶ there was sufficient written evidence as to the scope of the work, price and timeframe, but little information on the basis of price revision. In these circumstances the provisions of section 15 of the Sale of Goods Act (1992) such that an implied term would apply that would require a reasonable price be paid for any price revision. In *Carillion*

²⁴ *Hart Investments Limited v. Fidler* [2006] EWHC 2857 (TCC).

²⁵ *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC).

²⁶ *Hatmet Ltd v Herbert* [2005] EWHC 3259 TCC.

Construction Ltd v Devonport Royal Dockyard Ltd (2005)²⁷ a written contract was varied mid-way into the works by an oral agreement. This changed the basis of the payment to a cost-reimbursable one. The court held that the adjudicator had no jurisdiction to decide whether an oral agreement varied the written one. The adjudication was deemed invalid by the court under the prescriptions of the 1996 Act. Letters of intent are a common feature of the contract-forming process in the construction industry, but do they have any currency under the provisions of section 107 of the Act? The answer to this question is no. Where the works are undertaken under a letter of intent it will be difficult, but not impossible, to demonstrate that an agreement in writing exists as prescribed under section 107. This is because by the time a dispute has arisen further agreements have usually been made that are either inferred from conduct, where they agreed orally, or not evidenced by the letter of intent.

It is also common for parties to rely on particular documents as evidence that a contract exists during adjudication, but are there any legal implications under the provisions of the 1996 Act? The answer to this question is yes. Where a party, relies upon a particular document as evidence of a contract when adjudicating, it will be bound by the terms within that document. Subsequently, if evidence emerged under the old rules that there are other terms not recorded in that document, even if they are recorded in other documents, then if the adjudicator takes those other documents into account in his decision, that decision is unlikely to be enforced by the courts. In for example, Redworth Construction v Brookdale Healthcare (2006)²⁸ the court concluded that while the 'contract' referred to adjudication, it did not meet the RJT test of an agreement in writing as prescribed under section 107. In terms of agreements as to the scope of works and subsequent oral variations, there are three noteworthy cases. In Debeck v T&E Engineering (2002),²⁹ the contract between the parties was not adequately evidenced in writing because the fax relied upon by the plaintiff did not sufficiently establish the scope of works. In Management Solutions Professional Consultants Limited v Bennett (Electrical) Services Limited (2006)³⁰ and ALE Heavylift v MSD (Darlington) Limited (2006),³¹ the parties waived the need for instructions to vary the scope of works to be confirmed in writing. The argument upheld by the courts was that the absence of confirmation in writing did not take the contract outside the

²⁷ Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358).

²⁸ Redworth Construction v Brookdale Healthcare [2006] 110 ConLR 77).

²⁹ Debeck Ductwork Installation Ltd v T&E Engineering Ltd, Unreported October 14 [2002] TCC.

³⁰ Management Solutions Professional Consultants Limited v Bennett (Electrical) Services Limited [2006] EWHC 1720 (TCC).

³¹ ALE Heavylift v MSD (Darlington) Limited [2006] EWHC 2080 (TCC).

scope of section 107 of the 1996 Act. The principle being that where a written contract provides that instructions allowing variations to the scope of works are permissible if confirmed in writing, a contract in writing still exists even if the instruction given under the authority of the contract is not confirmed in writing.

What about the inclusion of implied terms in a construction contract? Does this transform an otherwise written contract into one that is no longer written under the provisions of section 107 of the 1996 Act? The answer to this question is no. According to Royce (2009) '*it was manifestly not the intention of parliament to exclude from the jurisdiction of an adjudicator an agreement solely because it contains implied terms*', as endorsed by the court in *Connex South Eastern Ltd*³² and more latterly *Allen Wilson v Privetgrange Construction* (2008).³³ Rather, Parliament's intentions were to avoid a situation whereby one or other party would suggest that a contract, otherwise not complete under the provisions of section 107, could be completed after execution by virtue of implied terms representing the 'unexpressed intention' of either party, as noted in *Galliford Try Construction Ltd v Michael Heal Associates Ltd* (2003).³⁴ We know that implied terms operate by virtue of the law. Such terms are implied into contracts for different reasons. Whereas, some terms are implied into contracts to give effect [for example, business efficacy] to a contract, other terms are implied to provide context to an actual relationship between parties. Should we differentiate between different types of implied terms within the context of section 107?

The answer to this question is no, according to Royce (2009).³⁵ Thus, there is no reason why any type of implied terms transform an otherwise written contract into one not covered by the provisions of the 1996 Act; see for example, *Allen Wilson v Privetgrange Construction* (2008),³⁶ as an example of an authority in this area. The remaining provisions of Section 107 merit also closer scrutiny. This is because they provide other means by which agreements can be made in writing under the provisions of the 1996 Act.³⁷

Section 107 (4) states:

³² *Group Connex South Eastern Ltd v MJ Building Services PLC* [2004] BLR 333.

³³ *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC).

³⁴ *Galliford Try Construction Ltd v Michael Heal Associates Ltd* [2003] EWHC 2886 (TCC).

³⁵ Royce, D (2009) Adjudication: Recent Development, <http://construction.practicallaw.com/6-204-4037> (access on 28th July 2013).

³⁶ *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC).

³⁷ Housing Grants Construction and Regeneration Act 1996, HMSO, London.

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.

Section 107 (5) states:

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.

The wording of Section 107 (5) is controversial and worthy of closer examination. The wording seems to suggest that if one party to adjudication alleges the existence of an oral agreement under their terms, and the other party does not deny the agreement on this basis, then there will be an agreement in writing. Thus, in spite of the ruling in *RJT* it does seem possible to create a written agreement from an oral agreement which is oral or partly oral if the agreement is asserted in written submissions in an adjudication, arbitration or legal proceedings where the other party does not deny that agreement. It is difficult to believe that Parliament's intention was to create something so manifestly unjust. Is there any guidance we can draw upon? The answer to this question is yes. In, for example, *Grovedeck v Demolition* (2000),³⁸ the court held that section 107(5) had a narrow focus. In other words, it only applied where an oral agreement has been admitted in a previous adjudication, but most responding parties would raise an *RJT* jurisdictional challenge on the basis of section 107 in that first adjudication. Thus, a party who does not raise the challenge initially would lose the right to challenge on those grounds in subsequent adjudications. However, is it also worth examining the precise wording of section 107 (5) against the backdrop of parliamentary intentions and deliberations at this point. An examination of the proceedings of the House of Lords for 23rd July 1996 on the wording of section 107(5) reveals no mention of 'adjudication proceedings'.

It seems that the upper chamber of Parliament incorporated an amendment proposed by the House of Commons, in which the words 'in adjudication proceedings or' would immediately follow the word 'submission'. According to Royce (2009)³⁹ Parliament's intention was to make reference to to 'other, prior' adjudication proceedings, not to provide an adjudicator with jurisdiction over proceedings for which he did not have at appointment based upon submissions made by one party to otherwise

³⁸ *Grovedeck Ltd. v. Capital Demolition Ltd.* [2000] B.L.R. 181, 185.

³⁹ Royce, D (2009) Adjudication: Recent Development, <http://construction.practicallaw.com/6-204-4037> (access on 28th July 2011).

unauthorised adjudication. We know that amendments to the Act will repeal Section 107 of the 1996 Act in its entirety. This will mean that adjudication provisions will apply to all construction contracts whether written or oral, or even partly in writing and partly oral. However, the new Act will also amend section 108(2) whereby all the provisions setting out the required adjudication procedures will have to be in writing. If they are not in writing the Scheme for Construction Contracts will apply. There have been two recent cases that have caused some confusion among practitioners in relation to contracts in writing. In *T & T Fabrications v Hubbard* (2008),⁴⁰ the decision of an adjudicator was not enforced on the basis that certain terms of the contract relating to the provision of drawings and the timing of the works were not in writing.

The terms went to the scope, quality and essential of the works and there was a genuine dispute as to whether these terms had been agreed. Therefore, there was an arguable case that the terms of the contract were not in writing. However in the second case, *Allen Wilson Joinery v Privetgrange Construction Limited* (2008)⁴¹ it was held, firstly, that implied terms do not prevent a contract from being in writing and, secondly, that a budget price with a final price to be agreed does not prevent there being a contract in writing. In sum, the HGCR Act required contract to be in writing (or at least those evidenced in writing), if the adjudicator's decision was not to be challenged on jurisdictional grounds. There have a large numbers of challenges where the contract was not in writing or not evidenced in writing under the UK regime, but much fewer incidences and disputes elsewhere. In New Zealand, for example, Construction Contracts Bill (CCB) not only provides for written contract, but also to oral or partly written and partly oral contract.⁴² The BCISP Act in Singapore and NSW (Section 7(1)) too define a "contract in writing" in relatively wider terms, to the extent that it would extent to a loose collection of documents, exchanges and invoices.⁴³ This suggests that the proposed amendments to HGCR Act may not be as problematic as some commentators anticipate. The removal of section 107 of the 1996 Act, and so the requirement for a construction contract to be in written form, may render the RJT principles and subsequent legal judgements ineffectual, however, it is important to note that, until the amendments to the Act come into force, the case law remains effective.

⁴⁰ *T & T Fabrications v Hubbard* [2008] EWHC B7 (TCC).

⁴¹ *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC).

⁴² Tan, S.G (2007) "Challenges to the adjudicator's decision," Thesis (Master of Science (Construction Contract Management)), Faculty of Built Environment., Universiti Teknologi Malaysia, Johor Bharu.

⁴³ Chow, Kok Fong (2005). *Security of Payment and Construction Adjudication*. Singapore: LexisNexis, p. 465-492.

IV. THE CONSTRUCTION ACT 2009: IMPLICATIONS OF IMPEDING CHANGE TO THE REQUIREMENTS FOR CONTRACTS IN WRITING

The Local Democracy, Economic Development and Construction Act – *the Construction Act 2009* -received Royal Assent in July 2009 (Brawn, 2010), and came into force on 1st October 2011 (in England and Wales). The new legislation amends Part II of the Housing Grants, Construction and Regeneration Act 1996. The main benefits of the new Act, as conceived by the Government, was to improve cash flow in the construction supply chains and encourage parties to resolve disputes by adjudication rather than by arbitration or litigation (Gwilliam, 2010). The main changes effected by the new Act are:

- Adjudicators will no longer be limited to contracts in writing;
- Adjudicators will be able to correct their decision if a clerical or typographical error is made; and
- Parties will not be able to agree a term which provides for who is to bear that costs of an adjudication until after the adjudicator has been appointed.

The most significant change is the abolition of the requirement for contracts in writing. The amendment will apply across the new Act and cover the payment provisions. This will mean that even purely oral agreements will now have to incorporate the payment provisions and the need for notices.⁴⁴ Nevertheless, some claim that the deletion of the requirement for contracts to be in writing will create greater uncertainty for the adjudication process, leading to a greater potential for injustice. Agreement on material terms, however trivial, is undeniable and for adjudication to be available these have to be in writing. This level of certainty provides the adjudicator with a greater sense of parties' intentions and nature a contract. However, there is a perception that HGCR mechanisms were open to abuse, particularly by those with the greater bargaining power within the industry.⁴⁵ The new legislation may not only provide smaller contractors, often less adept at dealing with contractual matters with greater protection against abusive practices, but also greater access to the adjudication process itself: many verbal contracts or written agreements involving oral variations typically involve smaller, more financially vulnerable sub-contracting firms.

CONCLUSION

⁴⁴ Brawn, D (2010) The circumstances in which an adjudicators decision is unenforceable or inappropriate in construction disputes, International journal of arbitration, mediation and dispute management, volume 76, Number 3, August.

⁴⁵ Gwilliam, R (2010) Open season on Ambush? How disputes have changed, Society of Construction Law, Paper D110, June.

The HGCR Act (s107) required contracts to be in writing (or at least evidenced in writing), to preclude challenges to adjudicator's decisions on jurisdictional grounds. Cases such as *Grovedeck Ltd v Capital Demolition Ltd* [2000]; *RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd* [2002]; and *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2003]; *Allen Wilson Joinery v Privetgrange Construction Limited* [2008] have demonstrated the position of courts pursuant to section 107 of the 1996 Act. It will be interesting to see how the amendments to Section 107 of the 1996 Act will operate in practice. We can only speculate on the likely impact on industry at this time. While the new provisions are unlikely to have an impact in cases where there are formal contracts which incorporate adjudication clauses, the changes are more likely to have an impact where there letters of intent are involved and where written contracts are based on standard terms and conditions supplemented by verbal agreements. While the legislative changes may not have an impact on the role of the Adjudicator, it will affect their modus operandi. The adjudicator will need to find additional time to consider the formation of the verbal contract to ascertain the precise intentions of the parties. Inevitably, where oral agreements are concerned, adjudicators will also need to consult witnesses and where differing views exist there will be need to probe witness statements through some form of cross-examination process. This is likely to be highly contentious, potentially giving rise to grievances, injustice and challenges to adjudicator's decisions.