Chapter 2

The Act: the Overarching Provisions Sections 104–107 and 114–117, 146, 148–151

This chapter examines the provisions of Part II of the Act other than the specific sections that apply to adjudication, payment and suspension of performance which are considered in Chapters 3 and 4. The majority of this chapter relates to sections 104 to 107 which define the ambit of application of the adjudication and payment provisions, but we also consider various other sections mainly of an administrative nature. It is not intended to provide a legal treatise on the Act. It is however necessary to provide the reader with both legal and lay interpretation of the Act so that adjudicators and those using adjudication understand the full effect of the legislation.

There have been nearly 200 judgments of the court relating to adjudication at the time of writing. These primarily deal with the enforcement of adjudicators' decisions and it is really only when sections 104 to 107 inclusive are examined by the courts that any law is made. This is because judicial interpretation is required to decide whether or not the contract in question is a qualifying construction contract within the meaning of the Act. Those court judgment decisions relating to section 108 onwards are only in essence an interpretation of what the Act says.

Section 104: Construction contracts

Section 104 gives the basic definition of construction contracts. The points to note are that the definition is complex in that it relies on a further set of definitions for construction operations. Its coverage is also much wider than was anticipated in the Latham Report. The types of contract to which the adjudication and payment provisions apply are defined. These include professional service contracts in relation to construction contracts.

The secretary of state had the option to further define types of construction contract that would fall within or outside the provisions of the Act. This option has been exercised in the form of the The Construction Contracts (England and Wales) Exclusion Order 1998. This is discussed fully in Chapter 5.

The territorial operation of the Act originally applied to England, Wales or Scotland. This has been extended to Northern Ireland under the powers in section 149.

Section 104(1)

(1) In this Part a 'construction contract' means an agreement with a person for any of the following–
  (a) the carrying out of construction operations;
  (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

This sub-section gives a wide definition of a construction contract. The word 'person' includes corporations, limited companies and individuals by reference to the Interpretation Act 1978.[1] 'Person' also includes the Crown. This is dealt with in detail in section 117.

Construction operations, which are an essential part of the definition of a construction contract, are defined in detail in section 105. There is a two part test. The basic requirements of section 104 must be satisfied before examining the definitions of construction operations in section 105. If the basic test of the section 104 parameters cannot be satisfied there is no need to examine section 105. In the broad sense a construction contract will include the traditional main contracts, sub-contracts and sub-sub-contract arrangements that the industry is familiar with. Many of the collateral warranties used in the construction industry also fall within the scope of section 104(1)(a).

Section 104(1)(b) which uses the term 'arranging for the carrying out of construction operations' places management contracts and other similar methods of procurement within the scope of the Act.

Section 104(1)(c) covers labour only, self-employed and gang master-type arrangements.

Agreements which vary a construction contract[2] are not construction contracts in themselves. The reference point is the original contract.

A dispute under a compromise agreement is not a construction contract albeit that the contract it settled was a construction contract.[3]

Section 104(2)

(2) References in this Part to a construction contract include an agreement–
(a) to do architectural, design, or surveying work, or
(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,
in relation to construction operations.

The services of construction professionals in relation to construction operations also constitute construction contracts. As a result the professional relationship between the employer and the design team is within the provisions of the Act. Equally design work carried out by professionals for contractors under design and build arrangements is also within the provisions of the Act. Providing advice in connection with construction operations is also within the provisions of the Act, but giving advice on the merits of a claim or a dispute concerning construction is not; neither is acting for one of the parties to a construction dispute or the giving of evidence as an expert. All the normal post contract services that involve, amongst other matters, claims and disputes would fall within surveying work and are thus within the definition in the Act.

This facility is a 'double-edged sword' for professionals. The right to pursue disputes over outstanding fees by using adjudication is counterbalanced by the opposing right of the employer to pursue damages for professional negligence. Professional negligence arises

[1] Interpretation Act 1978 Chapter 30 Schedule 1, 'Person' includes a body of persons corporate or unincorporate.
[2] *Earls Terrace Properties Limited* v. *Waterloo Investments Limited* (14 February 2002).
[3] *Shepherd Construction Limited* v. *Mecright Limited* (27 July 2000); *Quality Street Properties (Trading) Limited* v. *Elmwood (Glasgow) Limited* (8 February 2002).

predominately under contract[4]. The position was thought to be different in Scotland until the *Gillies Ramsay* v. *PJW Enterprises*[5]. This case held that the adjudicator has the power to award damages for breach of contract and professional negligence.

In the Gillies Ramsay case it was argued that the role of contract administrator under the terms of that particular contract did not fall within the provisions of section 104(1) and 104(2) of the Act in the following terms:

> '. . . a contract administrator . . . was not ''carrying out construction operations'' within section 104(1)(a) of the 1996 Act, nor was he ''providing labour'' within section 104(1)(c). Further, in relation to section 104(1)(b), counsel submitted that the contract administrator was not ''arranging'' for others to carry out work: he was taking decisions about parties' rights under the contract, for example, by granting extensions of time, or by issuing instructions. So far as section 104(2)(a) was concerned, counsel submitted that contract administration was not ''surveying work''. A contract administrator was the man in the middle. He had to determine parties' rights. It was wrong that such a man should have claims made against him. It was one thing for an adjudicator to order that a contractual payment should be made; it was quite another matter to have claims for damages for professional negligence being decided by an adjudicator.'

The Scottish Courts rightly rejected these arguments and upheld that the 'man in the middle nature' of contract administration did not exclude this type of work from the provisions in section 104.

When, however, the services provided relate to arbitration or litigation by way of expert witness work or advice or acting as a witness of fact, they do not fall within section 104.

> 'The result is that the adjudicator did not in my judgment upon the true construction of S.104 (2) of the 1996 Act have jurisdiction to rule upon the entitlement of the defendant to payment for the services rendered by it as a witness of fact or by way of assistance at the arbitration..'[6]

A novation agreement may fall within section 104 even where this would give the legislation retrospective effect over the original contract[7].

Section 104(3)

(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).

This is straightforward. The employer/employee relationship is not subject to the Act.

Section 104(4)

(4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.
No such order shall be made unless a draft of it has been laid before and approved by a resolution of each of *(sic)* House of Parliament.

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[4] *Heyman and Another* v. *Darwins Limited* AC [1942] 1 All ER 337, HL; [1942] AC 356.
[5] *Gillies Ramsay Diamond* v. *PJW Enterprises Ltd* (27 June 2002).
[6] *Fence Gate* v. *James R Knowles Limited* (31 May 2001).
[7] *Yarm Road Limited* v. *Costain Limited* (30 July 2001).

There is a drafting error in the last sentence of this subsection. It is clear however that any amendment to the scope of the preceding subsections would require approval by resolution of both the House of Commons and the House of Lords.

Section 104(5)

(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.
An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

It would have been much simpler if, where an agreement is a mixture of construction operations and non-construction operations, the whole of the contract had been subject to the Act. This sub-section provides severability between parts of the agreement that contain construction operations and those parts that do not. The parts which do contain construction operations will be subject to the Act; the remainder of the contract will not. Where an agreement is made for design and off-site fabrication of goods or components but the designer/fabricator is not to fix those goods or components, the design work will be subject to the Act but the fabrication work will not[8].

There is nothing however to prevent the parties from agreeing that the whole of the agreement is subject to adjudication and/or payment provisions. These may comply with the Act or they may be wider in scope. Such an agreement would then be a contractual matter and enforceable through the contract itself and not through the provisions of the Act. The standard form building contracts have been amended to take account of the provisions of the Act. These are discussed in later chapters. They do not attempt to make the distinction between construction and non-construction contracts. Therefore any contracts that are entered into on the basis of these standard forms will be subject to a contractual right to adjudication and the payment provisions of the contract. The Act becomes redundant for these purposes and the contract prevails. Parties who contract on this basis will not be able to use the Act to seek to limit contractual provisions that provide more than required by the Act.

Equally there is nothing to prevent the parties from identifying the parts of the contract which fall within the Act and those which do not. However, where the parties identify the parts of their agreement to which the Act applies incorrectly, the Act would still apply by virtue of this sub-section insofar as the work relates to construction operations.

This is one of the areas of difficulty for adjudicators and the parties. If the work over which the dispute exists does not fall within the provisions of the Act, the adjudicator will not have jurisdiction to deal with it[9]. It is likely that there will be some contracts where the work which constitutes construction operations and that which does not is either difficult to distinguish or indistinguishable.

This difficulty has been examined in a number of cases[10]. The simple rule from these cases is to distinguish between those parts of works which are construction operations and those parts which are not. It is only on those parts which are construction operations that an

[8] See section 105(2)(d).
[9] See Chapter 9.
[10] See *Homer Burgess Limited* v. *Chirex (Annan) Limited* (10 November 1999); *ABB Power Construction Ltd* v. *Norwest Holst Engineering Ltd* (1 August 2000); *Gibson Lea Retail Interiors Limited* v. *Makro Self Service Wholesalers Limited* (24 July 2001); *Palmers Limited* v. *ABB Power Construction Limited* (6 August 1999); In the Petition of Mitsui Babcock Energy Services Limited (13 June 2001).

adjudicator will have jurisdiction. This does of course only apply where the contract is not one where the parties have agreed that the adjudication provisions apply to the whole of the work involved and thus to both those parts of the works that come within the statutory definition of a construction contract and those that do not.

The final part of this sub-section refers back to sub-sections (1) and (2) above. So far as the agreement makes provision of any kind, those parts of the agreement are within the Act. It is not sufficient to seek to argue that the primary purpose of the agreement is not construction operations and that the construction operations are subsidiary to the overall agreement. Those parts that are construction operations are caught within the Act.

Section 104(6)(a)

(6) This Part applies only to construction contracts which–
  (a) are entered into after the commencement of this Part, and

The commencement order (Statutory Instrument 1998 No. 650 (C. 13) The Housing Grants, Construction and Regeneration Act (England and Wales) (Commencement No. 4) Order 1998) made Part II sections 104 to 117 operative from 1 May 1998. This gave rise initially to a number of difficulties where a main contract entered into before the operative date which was not subject to the Act could have sub-contracts which were. The main contractor was not in a position to start his own adjudication with the employer to offset the effect of a sub-contractor's adjudication that results from the employer's actions. This was a temporary problem and apart from the possibility of an adjudication on a very long outstanding final account is now unlikely to occur.

Section 104(6)(b) and (7)

(6) (b) Relate to the carrying out of construction operations in England, in Wales or Scotland.
(7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

Section 104(6)(b) gives the locality of the carrying out of the construction operations. Any work involving construction operations carried out in England, Wales or Scotland is covered by the provisions of the Act.[11]

Section 104(7) deals with the applicable law of the contract. The parties may choose to make a contract governed by any regime of law that they wish. One or both of the parties may be an overseas concern. The Act applies to any construction contract carried out in England, Wales or Scotland whatever the law stated in the construction contract.

The Act applies to Northern Ireland. This was brought in under the Act through the powers in section 149. The instrument made was the Construction Contracts (Northern Ireland) Order 1997 No. 274 (NI 1). The NI Order follows the Act repeating the provisions of sections 104 to 117. The Order, the Scheme and the Exclusion Order became operative for Northern Ireland on 1 June 1999.

[11] For Northern Ireland see section 149 later in this chapter.

Section 105: Meaning of 'construction operations'

Those matters included as construction operations and those matters excluded are listed in two sub-sections. The 'in' or 'out' lobbies had their extensive interests aired when the Bill which formed this part of the Act was debated in Parliament. The definition of construction operations is an essential part of what constitutes a construction contract and therefore that work which is within the Act and that which is not covered. The definition is taken from section 567 of the Income and Corporation Taxes Act 1988.

It is arguable that the more liberal definition of construction found in Regulation 2 of the Construction (Design and Management) Regulations 1994 (SI 1994 No. 3140 would have been more appropriate and consistent with the 'mischief' the Act is seeking to correct.

The definition of construction operations read in conjunction with section 104 gives the scope of the types of work and agreements that are covered by the Act and are therefore construction contracts.

Whether or not a contract is in fact a construction contract as defined by the Act has proved to be an area rich in arguments concerning jurisdiction (see Chapter 9). Disputes concerning definitions often result in litigation. Some of those that have been subject to adjudication are discussed below.

The definition of construction operations is in two parts: those types of work which are included in sub-section 105(1) and those types of work which are excluded in sub-section 105(2).

Section 105(1)(a)

(1) In this Part 'construction operations' means, subject as follows, operations of any of the following descriptions–

(a) Construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

Sub-section 105(1)(a) gives a broad definition of works which are construction operations. The governing factors are 'forming, or to form, part of the land (whether permanent or not)'. Temporary works such as falsework, formwork and scaffolding and any form of enabling works that do not form part of the final product are within this definition of construction operations.

Part of the land is an important point. Land covered by tidal land is within the confines of section 567 of the Income and Corporation Taxes Act 1988. This matter was visited in *Staveley*[12] which concerned works for the supply and installation of fittings into steel modules which were being constructed in England. The modules were intended for use as living quarters for operatives of an oil platform in the Gulf of Mexico. They were to be towed to location and welded onto platforms which were supported by legs founded in the bed of the sea. The court ruled 'structures which were, or were to be, founded in the sea bed below low water mark were not structures forming, or to form, part of the land for the purposes of section 105(1) of the 1996 Act'.

A shop-fitting contract was also subject to a dispute as to whether the shop-fittings formed part of the land[13]:

[12] *Staveley Industries Plc (t/a El.WHS)* v. *Odebrecht Oil & Gas Services Ltd* (28 February 2001).
[13] *Gibson Lea Retail Interiors Limited* v. *Makro Self Service Wholesalers Limited* (24 July 2001).

'What might be involved in a structure or fittings ''forming part of the land'' is not something which is addressed in the Act. However, in the context of the law of real property the concept of a fixture is well-established, and it seems to me that that to which the part of the definition of ''construction operations'' in section 105(1) of the Act which I have just set out is directed is whether the particular structure or fittings will, when completed, amount to a fixture or fixtures. In the law of real property one of the factors which is relevant to a determination of whether a chattel attached to a building is a fixture or not is whether the attachment is intended to be permanent – see, for example, *Billing* v. *Pill* [1954] 1 QB 70.'

Judge Seymour QC thought it clear that shop-fitting did not amount to construction operations unless it consisted of the construction of 'structures forming, or to form, part of the land (whether permanent or not)' or 'installation in any building or structure of fittings forming part of the land', as per sections (105)(1)(a) and (c) of the HGCRA. None of the items supplied by Gibson Lea were fixtures. The Act did not apply.

The maintenance of heating systems in housing has been held to be operations of repair or maintenance forming or to form part of the land[14].

Section 105(1)(b)

(1) (b) Construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

Sub-section 105(1)(b) lists in further detail the types of work which are included. The wide field of works covered by the construction industry, collectively in building and civil engineering, are included. In both sub-sections 105(1)(a) and (b) repair and maintenance are included. The word maintenance was a late addition at the draft bill stage. It is difficult to distinguish repair and maintenance. The construction industry has an industry within itself simply devoted to repair and maintenance. To leave maintenance work outside of the definition would have left a major part of construction free to carry on its disputes in a way the Act was seeking to prevent. The inclusion of maintenance work will bring facilities management contracts, which involve a maintenance function, within the Act.

Schedule 17 to the Communications Act 2003 makes the following amendment to sub-section 105(b):

137 In section 105(1)(b) of the Housing Grants, Construction and Regeneration Act 1996 (c. 53) (meaning of 'construction operations'), for 'telecommunication apparatus' there shall be substituted 'electronic communications apparatus'.

Section 105(1)(c)

(1) (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

[14] *Nottingham Community Housing Association Limited* v. *Powerminster Limited* (30 June 2000).

Sub-section 105(1)(c) includes the whole of the mechanical, electrical and engineering services industries. In the CDM Regulations, Regulation 2(1)(e) includes commissioning of the services installations listed. It is not thought that the omission of the word commissioning here is sufficient to exclude such an integral part of the services installation from the Act. The list of services is not exhaustive and will include any service that constitutes fittings forming part of the land. There is a distinction between fittings forming part of the land and chattels. Chattels in this sense are movable, tangible articles of property. The movement of loose furniture in an existing building as part of the preparatory work for refurbishment would not be caught by the Act.

> 'materials worked by one into the property of another becomes part of that property. This is equally true whether it be fixed or moveable property. Bricks built into a wall become part of the house, thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship.'[15]

Section 105(1)(d)

(1) (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

Sub-section 105(1)(d) would exclude separate cleaning contracts in connection with the building after its completion but would include the cleaning operations executed before handover.

Section 105(1)(e)

(1) (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earthmoving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

Sub-section 105(1)(e) is a 'catch all' provision to cover any eventualities not covered in the previous sub-sections. It will cover such operations as geotechnical surveys, dredging, exploration work and the provision and relaying of services by utility companies.

A boiler plant and the supporting steelwork have been held to be construction operations under this sub-section:

> 'The nature, size and method of fixing into position of the steel structure and the boiler itself clearly have the consequence that the boiler forms part of the land once assembled and fixed into position. Indeed, it would be hard to conceive a more rigid and permanent structure than the steelwork in question. The fact that much of the boiler is assembled on the site but away from its permanent resting place and then lifted into position cannot affect the conclusion that a construction activity is involved. Since much industrial plant will be assembled and erected in this way and since such plant is expressly included in the definition of a construction operation, the only reasonable conclusion is that ABB's work is a construction operation.'[16]

It followed that scaffolding work in connection with these works was also a construction operation.

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[15] See *Appleby* v. *Myers* [1867] LR 2CD 651, Blackburn J.
[16] *Palmers Limited* v. *ABB Power Construction Limited* (6 August 1999).

The hire of plant and labour has been held to fall under this sub-section where the plant and labour is preparatory to or for the purposes of rendering work complete:

> 'It is common ground that a contract for mere plant hire is not a construction contract within HGCRA. Baldwins' case is that the labour element in the contract is crucial. The crane plus the labour provided by Baldwins was an integral part of the building works being carried out by Barr in the construction of the football stadium. The supply of a mobile crane plus labour is clearly an operation within the scope of section 105(1)(e) because it is one which forms an integral part of, or is preparatory to, or is for rendering complete, works of ''. . . construction, alteration, repair, maintenance. . .'' etc., being Barr's works in building the stadium. This was a contract for the hire of a crane with operator for use by Barr in construction operations, i.e. construction of a new football stadium and thus a construction contract.[17]

Section 105(1)(f)

(1) (f) painting or decorating the internal or external surfaces of any building or structure.

Sub-section 105(1)(f) covers the painting and decorating processes to the whole of the work covered in the previous sub-sections. This covers existing buildings as well as new buildings.

The following sub-section 105(2) defines operations that are not construction operations. The industry would contend that some of the exclusions would normally be accepted as construction operations in practice. They include the trades and skills that are used throughout the industry. They are generically part of the industry even if not for the purposes of this Act.

Section 105(2)(a)

(2) The following operations are not construction operations within the meaning of this Part–
(a) drilling for, or extraction of, oil or natural gas;

Sub-section 105(2)(a) excludes the activities of the gas and oil industries only for the purposes of extraction of their products. This does not exclude the pipelines or installations for distribution but see sub-section 105(c) below.

Section 105(2)(b)

(2) (b) Extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

Sub-section 105(2)(b) excludes the activities of the mining industry. This only excludes the extraction process itself. Any works which are ancillary to that process will fall within the Act, e.g. buildings, roads, services, etc.

Section 105(2)(c)

(2) (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is–

[17] *Baldwins Industrial Services PLC* v. *Barr Limited* (6 December 2002).

(i) nuclear processing, power generation, or water or effluent treatment, or
(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

At first glance this seems to be a wide ranging exclusion but it applies only to work on a site where the primary activity is those listed in (i) and (ii) and then the only operations that are exempt are those to do with the plant and machinery itself and the steelwork for the purposes of giving support or access. This does mean that precisely the same works can be outside or caught by the Act simply on the distinction of the primary activity of the site. A small sewage treatment plant would be outside the Act if sewage treatment were the primary purpose of the site. The provisions of the Act would catch exactly the same installation if it were merely part of a larger development of which the primary purpose was not sewage treatment. It is only the work connected with the process that is exempt from the provisions of the Act. The buildings that enclose the process plant and equipment are within the Act. The exemption only applies to those industries listed in (c)(i) or those processes listed in (c)(ii).

This is the type of work often covered by the Institution of Mechanical Engineers/ Institution of Electrical Engineers Model Forms (MF/1 and MF/2) and Institution of Chemical Engineers standard forms of contract (the Red, Green, Yellow, Brown, and Orange Books). This exemption was secured by the persistent lobbying of the Process Industries Latham Group (PILG).

> 'Divergent views of the process industry and the building and civil engineering industries and their history regarding dispute resolution.'[18]

The process industry exemption was reduced during the passage of the Bill:

> 'I want to make it clear that we do not intend all the work on a process engineering site to be excluded from the fair contracts provision. We want to exclude only work on the machinery and plant that is highly specific to the process industry, together with work on steelwork that is so intimately associated with that plant and machinery that it could not possibly be reasonably considered apart. To that end, we have made it clear that the steelwork mentioned in the exclusion is only that which relates to support and access... I repeat that all normal construction activities on a process engineering site will be subject to the provisions of the Bill. That includes building roads, erecting fences, laying foundations, and building offices or factories even if they are made of steel.'[19]

Somewhat to the authors' surprise, the IChemE did include adjudication provisions within its contracts but it is interesting that the introduction to its adjudication rules almost seems to be an apology for its inclusion.

The distinction between plant and construction may be difficult in some instances, e.g. sewerage and power generation plant. It is not unusual that plant and the buildings that house the plant will be procured under a single contract. In the eventuality of a dispute the work which constitutes construction will have to be separated from that which is plant and connected with the plant.

In practice the definition of plant and machinery ought to be straightforward. The distinction of what constitutes plant and machinery as opposed to construction may be assisted by those cases which have been before the courts in relation to the legislation on capital allowances (now the Capital Allowances Act 1990). The distinction often proves difficult.

[18] Viscount Ullswater, *Hansard*, Vol. 570, No. 70, col. 1845.
[19] Robert Jones, MP, Minister for Construction at Committee Stage in the House of Commons. Official Report – Standing Committee F: 13 June 1996, cols 301–302.

Expenditure on an underground sub-station for transforming electricity was held not to be expenditure on plant[20]. A grain silo has been held to be plant[21]. The test is whether the structure in question is forming a plant-like function.

For a distinction between plant and building services see *Comsite* v. *Andritz*[22]. Although the primary activity on this site was water treatment, the ordinary building services for the buildings themselves were held not to be part of the plant or machinery.

It does not matter that the qualifying activity will not come into existence until after the work on site is complete:

> 'This in itself may show that nobody thought that the exemption in section 105(2)(c) did not extend to work on site where the qualifying activity would only come into existence on completion of the work.
>
> In any event even if I am wrong in concluding that section 105(2)(c) applies as much to the future as to the present the evidence of Mr Merton shows that the installation work is taking place on a site where the primary activity is now power generation. The facts that a fence has been erected and that for operational reasons one side is designated a construction site are in my view irrelevant. Even if the fence is not required for reasons of health and safety or under the CDM Regulations, it denotes no more than the customary separation of the ''live'' side. For the purposes of section 105(2)(c) there is here only one site.'[23]

Pipework linking pieces of equipment, plant, have been held to be plant for the purposes of this sub-section[24].

Section 105(2)(d)

(2) (d) manufacture or delivery to site of–
- (i) building or engineering component
- (ii) materials, plant or machinery, or
- (iii) components for systems of heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation;

This sub-section provides a surprising exemption from the Act. Over a number of years the industry has been encouraged to mechanise and industrialise its operations so that more is carried out off-site. This is currently one of the key thrusts in the Egan Report.[25] This sub-section exempts all supply only arrangements even where extensive work is carried out by way of pre-fabrication off-site. If a manufacturer of components is carrying out the whole of his work on a supply only basis, with no installation and the components are delivered late, a dispute with the manufacturer which arises from a delay to the main contract is not within the Act and would not be subject to the adjudication provisions. The contractor might however find himself in receipt of an adjudication referral from the employer in respect of the same delay, as the main contract includes for installation as well as manufacture and delivery and is thus not exempt.

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[20] *Bradley (Inspector of Taxes)* v. *London Electricity*, The Times, 1 August 1996.
[21] *Schofield* v. *R & H Hall* (1974) 49 TC 538.
[22] *Comsite Projects Limited* v. *Andritz AG* – TCC Birmingham (30 April 2003).
[23] *ABB Power Construction Ltd* v. *Norwest Holst Engineering Ltd* (1 August 2000).
[24] *Homer Burgess Limited* v. *Chirex (Annan) Limited* (10 November 1999).
[25] Department of the Environment, Transport and the Regions, *Rethinking Construction*, 16 July 1998.

Windows manufactured off-site and delivered for installation by the main contractor or one of his sub-contractors would be an exempt contract. If the supplier carries out the installation the contract would then not be exempt. Similarly, where the manufacture of a boiler includes for the testing and commissioning this would be a non-exempt contract. The testing and commissioning element would be 'for rendering complete' under sub-section 105(1)(e).

Section 105(2)(e)

(2) (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

Wholly artistic would suggest if there were some functional benefit from the work that it would not be exempt.

Section 105(3) and (4)

(3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.
(4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

The promised 'watching brief' has borne fruit in terms of the consultation process that resulted in the proposed amendments to the Scheme. This has been dealt with in Chapter 1. It is unknown at the time of writing whether or not any amendment will be made to primary legislation.

Section 106: Provisions not applicable to contract with residential occupier

The provisions of the Act do not apply to residential occupiers as defined in section 106. There is a strong argument that says that a householder in dispute with a builder would greatly benefit from the adjudication provision in the Act. The short and effective means of resolving a dispute, at least in the immediacy, must be more beneficial than the alternatives. There is nothing that prevents the parties making an arrangement for adjudication in their contract, as they will if the JCT minor works contract is used, but note should be taken of the position with regard to consumers which we discuss below.

Section 106(1)

(1) This Part does not apply—
  (a) to a construction contract with a residential occupier (see below), or
  (b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.

Sub-section 106(1)(a) exempts construction contracts with a residential occupier from the Act. There is nothing to prevent the parties to such a contract from making their own terms which include adjudication as one of the means of resolving their disputes. This would then provide for contractual adjudication and would not be under the statutory rights to adjudication. For an example of this see *Jamil Mohammed* v. *Dr Michael Bowles*[26]. Interestingly

[26] *Jamil Mohammed* v. *Dr Michael Bowles*, High Court of Justice Bankruptcy proceedings (11 March 2003).

enough in this case, Mr Mohammed included an adjudication provision in his contract with Dr Bowles. Having lost the adjudication he tried to avoid enforcement on the grounds that Dr Bowles was a residential occupier. He failed.

This is of itself an interesting point in view of the degree of protection afforded to consumers under European and UK consumer protection legislation. There may be instances that even where the consumer has entered into a contract which contains an adjudication clause there is still an exemption. This does not arise under section 106 but under the Unfair Terms in Consumer Contracts Regulations 1999. See *Picardi* v. *Cunibert*[27]. This is a complex case. One of the bases on which an adjudicator's decision was not enforced was the exemption as a consumer and more precisely that the inclusion of adjudication had not been explained by Mr Picardi who was the Cunibertis' architect and who sought to recover his fees by adjudication:

> 'I conclude that a procedure which the consumer is required to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer's right to take legal action. The fact that the consumer was deliberately excluded by Parliament from the statutory regime of the HGCRA reinforces this view. Costs in an adjudication can be very significant. Unless it is properly explained to the consumer, the fact that the adjudicator is to be a neutral, even if nominated by the architect's own professional body, also may give the appearance of unfairness.'

There was a third similar case in 2003 where the residential occupiers were unable to resist enforcement on the grounds that they had put forward the contract which included adjudication provisions having been professionally advised when doing so[28].

The Act does not exempt sub-contracts made under a main contract. The main contract will be made between the main contractor and the residential occupier. The sub-contracts will be made between the main contractor and the various sub-contractors and will not be with the residential occupier. They are therefore caught by the Act and are subject to the adjudication and payment provisions. The main contractor may find himself in a dispute which is subject to adjudication and he would not be able to issue a reciprocal notice to seek to have the same matter adjudicated on with the employer.

Sub-section 106(1)(b) deals with the prospect of other descriptions of construction contract being excluded from the operation of the Act. The first of these are covered by The Construction Contracts (England and Wales) Exclusion Order 1998. This is discussed in Chapter 5.

Section 106(2)

(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection ''dwelling'' means a dwelling-house or a flat; and for this purpose— ''dwelling-house'' does not include a building containing a flat; and ''flat'' means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

[27] *Picardi* v. *Mr & Mrs Cuniberti* (19 December 2002).
[28] *Lovell Projects* v. *Legg and Carver* (July 2003).

Sub-section 106(2) gives the definition of a construction contract with a residential occupier referred to in sub-section 106(1)(a). The contract must principally relate to operations on a dwelling which one of the parties occupies or intends to occupy, as his residence. An individual having work done on his dwelling house or flat would be exempt from the provisions of the Act. However, a Residents Association commissioning work on a block of flats, as a collective, would not be exempt from the Act. The residents themselves are individual occupiers but the Association is not.

Normal housing contracts built on a speculative basis or housing built for Local Authorities or Housing Associations are within the Act. A penthouse flat built on top of an office block or a hotel is within the scope of the Act being a part of the primary construction contract.

A contract where residential occupiers were to occupy one of the units as part of a development was held not to come within the provisions of section 106 even though the part that they were to occupy was about two-thirds of the whole contract[29].

A limited company cannot be a residential occupier.

> 'The defendants' original contention that the contract was for work done on a residential dwelling, and therefore fell within the exception contained in section 106 of The Housing Grants, Construction and Regeneration Act of 1996 (the Act) was not pursued before me. A limited company cannot be the residential occupier of a dwelling house.'[30]

Section 106(3) and (4)

(3) The Secretary of State may by order amend subsection (2).
(4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

As with other sections of part two of the Act this is a provision for the secretary of state by order to amend the definition in sub-section (2). The importance of such an order to amend is emphasised in sub-section (4) by the need for approval by each House of Parliament.

Section 107: Provisions applicable only to agreements in writing

The provisions of Part II of the Act only apply to construction contracts or other agreements where they are in writing. The definition of writing is much wider than would be accepted as the common form of writing.

Section 107(1)

(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.

This section is almost identical to section 5 of the Arbitration Act 1996. The more liberal definition of what constitutes a written agreement in the Arbitration Act 1996 is, among

[29] *Samuel Thomas Construction* v. *Mr & Mrs Bick* (t/a J&B Developments) (28 January 2000).
[30] *Absolute Rentals Limited* v. *Gencor Enterprises Limited* (16 July 2000).

other matters, there to avoid those arguments which have persisted over recent years concerning whether or not the arbitration agreement is incorporated in the contract[31]. The more liberal definition was intended to widen scope in the Arbitration Act 1996 of what constituted the essential criteria for writing and written agreements.

Sub-section 107(1) deals with the need for the construction contract to be in writing. There are two parts to this sub-section.

The first refers to the construction contract being in writing and the second to 'any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing'. A construction contract that is not in writing will not be subject to the provisions of the Act. Such a contract may be actionable in law but the parties will not receive the benefits and rights that the Act provides.

The second part of this sub-section probably gives wider scope to the Act than was ever intended. 'Any other agreement as to any matter' will include amendments the parties make to their contract. If such an amendment were made it would have to be in writing. The agreement may lack some of the common law characteristics to make it a contract but its scope would nevertheless be within the Act. The parties may have been silent as to their terms of payment within the original contract and rather than rely on the default provisions of the Act they may agree terms at a later date. This new agreement recorded in writing would then be governed by the Act.

It is arguable that agreements that rely on a quantum meruit for payment would be within the Act, if recorded in writing. The use of letters of intent is common in the construction industry. Often the letter of intent will cover the whole of the relationship, as it is never replaced by a contract. Depending on the terms, they may be sufficient in a letter of intent to bring the relationship within the Act.

Section 107(2)

(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.

Sub-section 107(2) gives the definition of what constitutes an agreement in writing. Sub-section (a) is straightforward where the parties have both signed the construction contract. It is not unusual in the construction industry for contract documents to be prepared and then to remain unsigned by one or both of the parties. In this case it will be for the party seeking to rely on the written agreement to prove that this in fact was the agreement made.

This was examined in Oakley[32] where although there was standard documentation which the parties had made some attempt to complete, there was insufficient evidence of their agreement to allow recovery of the amount in an adjudicator's decision to be pursued by a statutory demand.

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[31] See *Aughton Ltd* v. *M.F. Kent Services Ltd* [1991] 57 BLR 1; *Ben Barrett & Son (Brickwork) Ltd* v. *Henry Boot Management* [1995] CILL 1026; *Lexair Ltd (in administrative receivership)* v. *Edgar Taylor Ltd* 65 BLR 87; *Smith & Gordon Ltd* v. *John Lewis Building Ltd* [1994] CILL 934, CA; *Giffen (Electrical Contractors)* v. *Drake & Scull Engineering Ltd* (1993) 37 Con LR 84; *Alfred McAlpine Construction Ltd* v. *R.M.G. Electrical [1994] 29 Bliss 2; Extrudakerb (Maltby Engineering) Ltd* v. *White Mountain Quarries Ltd.*, QBD Northern Ireland (18 April 1996) TLR 10 July 1996 p23.

[32] *(1) William Oakley (2) David Oakley* v. *(1) Airclear Envirionmental Limited (2) Airclear TS Limited* (4 October 2001).

Sub-section (b) deals with a commonplace occurrence. It is not unusual for the agreement to be reached by an exchange of documents in writing, letters, facsimile, orders, etc. There may, in the final analysis, be some difficulty as to final terms as in 'battle of the forms'[33] cases but this is no different to other non-construction contractual relationships.

Sub-section (c) only requires that the agreement is evidenced in writing. This may be something as sketchy as an invoice that refers back to an agreement[34]. This was our original view and was supported at first instance in *RJT Consulting Engineers* v. *DM Engineering*[35]:

> 'What the defendants to this application say is that the terms of section 107 are a widening process. In their skeleton argument DM say: ''Evidence in writing of a contract dealt with by sub-section 107(2)(c) leaves the door open for such evidence to come into existence after the commencement, or even the completion, of the contract's performance. Thus, an invoice submitted by one party to the other may be sufficient evidence, as might a confirmation of verbal instructions set out in the letter.'' . . .
>
> It seems to me that if I were to find that it is necessary to have a recitation of the terms of an agreement when the existence of the agreement, the parties to the agreement and the nature of the work and the price of the agreement are plainly to be found in documentary form, but nonetheless in a contract worth more than three-quarters of a million pounds because the initial agreement was oral, it is not caught by the Act, then it seems to me such an attempt would run contrary not only to the terms of the Act but contrary to my duty to carry out what I believe to be the law at any particular time. And therefore, adopting that methodology, I hold that it is not necessary to have the terms identified and the extensive documentary evidence in this case is well sufficient to bring it within the adjudication proceedings and therefore I refuse this declaration.'

At the time of this judgment this appeared to support the interpretation of section 107 in the first edition of this book in that it gave wide scope as to what might constitute an agreement in writing. The Court of Appeal, however, re-examined this case and took a different view on what was necessary to be recorded in writing[36]:

> 'LJ WARD — 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 sub-section 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 sub-section 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. It must be remembered that by virtue of section 107(1) the need for an agreement in writing is the precondition for the application of the other provisions of Part II of the Act, not just the jurisdictional threshold for a reference to adjudication. I say ''unfortunately'' because, like Auld LJ whose judgment I have now read in draft, I would regard it as a pity if too much ''jurisdictional wrangling'' were to limit the opportunities for expeditious adjudication having an interim effect only. 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. Here we have a comparatively simple oral agreement about the terms of which there may be very little, if any, dispute. For the consulting engineers to take a point objecting to adjudication in those circumstances may be open to the criticism that they were taking a technical point but as it was one open to them and it is good, they cannot be faulted. In my judgment they were

[33] See *Petredeck Ltd* v. *Takumuru Kaiun Co. 'The Sargasso'* [1994] 1 Lloyd's Rep 162, for agreement evidenced in writing.
[34] *Butler Machine Tool Co Ltd* v. *Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401.
[35] *RJT Consulting Engineers Ltd* v. *DM Engineering (NI) Ltd* Liverpool TCC (9 May 2001).
[36] *RJT Consulting Engineers* v. *DM Engineering (NI) Ltd*, CA (8 March 2002).

> entitled to the declaration which they sought and I would accordingly allow the appeal and grant them that relief.
>
> LJ ROBERT WALKER – I agree that this appeal should be allowed for the reasons set out in the judgment of Ward LJ. It is the terms, and not merely the existence, of a construction contract which must be evidenced in writing. The judge aimed at a purposive approach but he did not in my view correctly identify the purpose of section 107. . .
>
> LJ AULD – 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. 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. 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. As Ward LJ has observed, the exchange constitutes an agreement in such terms as it may be material to allege for the purpose of the particular adjudication. In my view, it would make no sense to confine that sensible outcome to the written form of agreement provided by section 107(5) whilst excluding it in the other forms for which the section provides.'

It seems to us that this judgment has not brought clarity to what constitutes the agreement in writing for purposes of the Act. There is a conflict here between 'what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it', against the comments of Robert Walker LJ which we prefer: '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.'

To read these potentially conflicting statements in context it must be remembered that the terms of an agreement can be minimal. It is not essential, for example, that time for performance be recorded in the terms of a construction contract and the payment terms in the Scheme may well be an adequate provision on an implied basis where they are otherwise absent.

In *Debeck* v. *T&E Engineering*[37] Judge Kirkham applied *RJT* on the basis that all the terms relevant to the claimant's claim were to be recorded in writing.

[37] *Debeck Ductwork Installation Ltd* v. *T&E Engineering Ltd* (14 October 2002).

In *Ballast* v. *Burrell*[38] the parts of an agreement that were in writing and those parts which were not were examined:

> 'Counsel for the respondents adopted a broader approach. He submitted that the claim as originally focused in the notice of adjudication and the subsequent referral notice was a claim for valuation of works performed within the terms of the contract. It was necessary, he submitted, to recognise the broad terms of section 107 with regard to the importance or requirement that contractual terms relied upon had to be in writing. It was not necessarily restricted, he said, to the original terms of the contract, having regard particularly to subsections 2 and 3 of section 107 of the Act. It could, he submitted, be extended to instructions subsequently reduced to writing. He accepted that there might be some parts of the claim that were encompassed by the referral notice which were not in writing or at least not supported by section 107. However, that was a matter for the adjudicator to determine as part of the exercise of his function.'

An agreement formed partly in writing and partly orally was examined again in *Cowlin Construction* v. *CFW Architects*[39]:

> '74. It appears that the contract was made partially in writing and partly orally on 21 June 2000. It is clearly evidenced in writing. Pursuant to section 107(2) of HGCRA, this was a construction contract.
> 75. It would not normally be relevant to consider documents which were created after the contract is said to have been formed, but Mr Brannigan submits that I should have regard to the correspondence after June 2000 and to the documents in the first adjudication which, he submits, throw light on whether the parties considered there was a contract. These all reinforce my conclusion as to the formation of the contract. The invoices all indicate an acceptance by CFW that there was a contract in place, as does the letter from CFW dated 29 August 2000 which makes a number of specific references to the contract.'

Section 107(3)

> (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

Sub-section 107(3) would include oral agreements (or other non-written means) as writing insofar as they refer to written terms. There would need to be evidence that an agreement had been reached between the parties.

For example, if parties agree orally to adopt DOM/1 as the terms of their contract this would be within the provisions of the Act. It is however for the party averring that the oral contract exists, to prove it. The terms agreed can be partly written and partly oral. There is no requirement that the agreement refer to one document only. The oral agreement can refer to several documents.

The case of *Total* v.*ABB Building*[40] gives an interesting view on the scope of what amounts to oral agreements under this sub-section. The contract contained no clause to deal with variations or extra work.

The judge dealt with the matter in a pragmatic way:

> '34. What has to be considered here is not the enforceability of the contract but whether the statutory adjudication scheme can be invoked in relation to a particular construction contract. That is governed by section 107 of the Act. (supra) There is reference in sub-section 3 to an agreement

[38] *Ballast PLC* v. *The Burrell Company (Construction Management) Limited* (21 June 2001).
[39] *Cowlin Construction Limited* v. *CFW Architects (a firm)* (15 November 2001).
[40] *Total M & E Services Limited* v. *ABB Building Technologies Limited (formally ABB Steward Limited)* (26 February 2002).

> otherwise than in writing, such an agreement, provided it refers to terms which are in writing, is an agreement in writing. In my judgment; the adjudicator made his decision on the basis of dispute arising out of the single written construction contract as varied orally by the parties. The contract as varied is clearly within the provisions of section 107. Notwithstanding that it is a contract evidenced partly in writing and partly oral. The adjudicator therefore had jurisdiction to make determinations as to the additional works.'

An appeal from this judgment was commenced but abandoned when the parties finally settled their differences.

For a different view see *Carillion* v. *Devonport*,[41] which was decided after *RJT Consulting* v. *DM Engineering* where the key to the argument was whether the project was cost reimbursable. As this was a material term, following the Court of Appeal decision in *RJT Consulting*, that term must have been evidenced in writing for the dispute to be referable to adjudication. What was in issue was an alleged oral agreement that radically changed the written agreement. The change was far greater than a typical variation made pursuant to the terms of a construction contract. Thus the judge held that the adjudicator did not have jurisdiction.

Section 107(4)

> (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.

Sub-section 107(4) deals with what evidences a written agreement. The important qualification here is that any means of recording the agreement has to be with the authority of the parties. Without such authority the recorded evidence cannot be used. There is nothing to say that the authority of the parties to the agreement has to be recorded in writing. The authority could be given orally. A simple example of a compliant record is the minutes of a meeting prepared by a third party with the consent of the contracting parties.

The concept of one of the parties obtaining permission to make a record of the agreement was examined in *Millers* v. *Nobles*[42]:

> 'Miss Pennifer submitted that there was no evidence that Mr Dalton had ever been authorised by Mr Dunbar to record in writing what had been agreed and that accordingly section 107(4) had not been satisfied. That submission is I consider correct. There is nothing to indicate that Mr Dunbar or anyone else from the claimant ever authorised Mr Dalton to write the letter as a record of what had been agreed and I do not accept that such an inference should be drawn from the use of the word ''confirm''. On its face the letter is simply a letter written by one party recording what he understood had been agreed. The fact that Mr Dunbar also wrote a similar letter to Mr Dalton also indicates to me that he had not authorised Mr Dalton to record the terms on his behalf. The inference is that he intended to provide Mr Dalton with his own record of what had been agreed. This would have been entirely unnecessary if it had been understood expressly or impliedly that Mr Dalton had been authorised to produce the record of what had been agreed. Paragraph 7 of Mr Scarisbrick's witness statement cannot be treated as a ratification of any lack of authority because Mr Dalton did not purport to write the letter as agent.'

[41] *Carillion Construction Ltd* v. *Devonport Royal Dockyard Ltd* TCC (27 November 2002).
[42] *Millers Specialist Joinery Company Limited* v. *Nobles Construction Limited* (3 August 2001).

Section 107(5)

(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.

Sub-section 107(5) does not create an agreement where there was no previous agreement, save if a party fails to deny the existence of that agreement in proceedings. This sub-section supports agreements made otherwise than in writing. Where in adjudication, arbitral or legal proceedings one party in its response fails to deny the existence of the agreement, this admits that the agreement exists and is binding for the purposes of the Act. It is not binding where the party fails to respond at all. There must be a response that fails to deny the existence of the agreement. This may have the effect of creating an *ex post facto* (by subsequent act) agreement in writing. A mere exchange of statements therefore may be sufficient to create an agreement. English authority under the Arbitration Act 1950 was in favour of such solutions in construing arbitration agreements. The mere fact that an exchange of submissions exists may also be sufficient to create an ad hoc agreement to arbitrate[43].

At first instance in *Grovedeck*[44] v. *Capital Demolition* Judge Bowsher QC gave an interpretation of this subsection that we would not have anticipated:

> '29. I think this is a case where it is permissible, following the decision of the House of Lords in *Pepper* v. *Hart* [1993] AC 593, to look at Hansard. It appears from the Hansard Report of the proceedings in the House of Lords for 23 July 1996 that section 107(5) originally contained no reference to adjudication proceedings. The House of Lords accepted a Commons amendment that after the word ''submissions'' there should be inserted the words ''in adjudication proceedings or''. If one reads section 107(5) without the words ''in adjudication proceedings or'' it is clear that the intention of Parliament was that a contract should be treated as a contract in writing if in arbitral or litigation proceedings before the adjudication proceedings in question an oral contract had been alleged and admitted. I also would read the words ''and not denied'' as meaning that the alleged terms of the contract were not denied. By adding the words ''in adjudication proceedings or'', Parliament intended to add a reference to other preceding adjudication proceedings. There was no intention by Parliament to provide that submissions made by a party to an unauthorised adjudication should give to the supposed adjudicator a jurisdiction which he did not have when he was appointed.'

For subsection 107(5) to apply, the allegation that an agreement existed would have to have been made in previous proceedings and not in a current adjudication.

This is not the interpretation placed on this subsection in *A&D Maintenance* v. *Pagehurst*[45]:

> '15. In the course of the lengthy submissions, both parties made reference to the sub-contract. Whilst the parties do not agree upon the precise terms evidenced by the sub-contract confirmation form, nonetheless there is sufficient, in my judgement to warrant finding that those exchanges in the reply and response complied with section 107(5) of the Act. In other words there was a further and alternative basis for holding that there was an agreement in writing under the Act to which the Scheme applied.'

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[43] See *Altco Ltd* v. *Sutherland* [1971] 2 Lloyd's Rep 515 where Donaldson J had been of the view that the agreement remained oral, but the contrary appears to have been decided in *Jones Engineering Services* v. *Balfour Beatty Building Ltd* [1994] ADRLJ 133.

[44] *Grovedeck Limited* v. *Capital Demolition Limited* (24 February 2000).

[45] *A & D Maintenance and Construction Limited* v. *Pagehurst Construction Services Limited* (23 June 1999).

This seems to conflict with *Grovedeck*. It also seems that Judge Bowsher's views may not be supported by the Court of Appeal's decision in *RJT*[46]:

> 'The only exception to the generality of that construction is the instance falling within sub-section 5 where the material or relevant parts alleged and not denied in the written submissions in the adjudication proceedings are sufficient.'

Section 107(6)

> (6) References in this Part to anything being written or in writing include its being recorded by any means.

Recorded by any means gives immense scope in terms of present day technology. Any imaginable means of recording will apply here. The only exception is in sub-section 107(4) above where permission of the parties is required to make the record. Save for that sub-section the possibility of recording without a party's permission is permissible, the only proviso being compliance with 'the rules of evidence' to establish the validity of the recording. Strict rules of evidence do not apply in adjudication but there has to be an evidential worth and basis for anything which is sought to be proved.

The supplementary provisions

The supplementary provisions provide the necessary definitions and powers to make Part II of the Act operative.

Section 114: The Scheme for Construction Contracts

Section 114(1)

> (1) The Minister shall by regulations make a scheme ('the Scheme for Construction Contracts') containing provision about the matters referred to in the preceding provisions of this Part.

At the time the Act was enacted there was no Scheme in place. The Scheme for Construction Contracts was to be made at a later date by regulation.

Section 114(2)

> (2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.

There was a wide consultation process throughout the industry and professions on the content and drafting of the Scheme. The first draft was rejected on the grounds that, among other matters, it resembled too closely arbitration rather than the adjudication the industry was seeking. The final consultation document, entitled *Making the Scheme for Construction Contracts* was issued by the Department of the Environment in November 1996. Commencement Order 1998 No.649 made the Act and the Scheme became operative from 1 May 1998.

[46] *RJT Consulting Engineers Ltd* v. *DM Engineering (NI) Ltd*, CA (8 March 2002).

Section 114(3) and (4)

(3) In this section 'the Minister' means–
  (a) for England and Wales, the Secretary of State, and
  (b) for Scotland, the Lord Advocate.
(4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

Sub-section (4) deals with the status of the Scheme. The Scheme is of effect by default where contracts fail to comply with some provision of the Act. The regulations in the Scheme have the effect of implied terms under the contract in question. They are not required to satisfy the legal tests for implying terms. There seems to be no doubt by this terminology that the parties cannot contract out of the effects of the Act.

Section 114(5)

(5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

Section 115: Service of notices, &c.

Section 115(1)

(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.

This deals with the service of notices referred to in all of the preceding sections. The service of notices should form part of the contract although there is nothing to prevent the parties agreeing the manner of service subsequently.

Section 115(2)–(4)

(2) If or to the extent that there is no such agreement the following provisions apply.
(3) A notice or other document may be served on a person by any effective means.
(4) If a notice or other document is addressed, pre-paid and delivered by post–
  (a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or
  (b) where the addressee is a body corporate, to the body's registered or principal office, it shall be treated as effectively served.

If there is no manner of service agreed, these provisions apply in default. Although a notice or document can be served by any effective means, sub-section (4) gives the position on valid service by post. Save for any provision in the contract there is no reason that service should not be effected by facsimile or e-mail. What was envisaged in the *Strathmore* v. *Hestia Fireside*[47] case was written form.

[47] *Strathmore Building Services Limited* v. *Colin Scott Greig t/a Hestia Fireside Design* (18 May 2000).

Section 115(5)

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

The service of documents in respect of legal proceedings is excluded here, the appropriate rules of court being applicable.

Section 115(6)

(6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

A notice or document includes any form of communication in writing. This is a minimum requirement and may be modified by the contract.

Section 116: Reckoning periods of time

Section 116(1)–(3)

(1) For the purposes of this Part periods of time shall be reckoned as follows.
(2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
(3) Where the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales or, as the case may be, in Scotland, that day shall be excluded.

This section deals with the reckoning of periods of time. The periods of time are reckoned after any specified date. Therefore if a notice is issued on a given date, time begins to run on the following day. Weekends are not excluded from the periods for reckoning time. If a notice is served on a Saturday, time begins to run on the Sunday. Only bank holidays, Christmas Day and Good Friday are excluded from the days to be counted in reckoning time. If a notice is issued prior to the industry close-down at Christmas, the periods of time will run over that break period.

Section 117: Crown application

Section 117(1)–(4)

(1) This Part applies to a construction contract entered into by or on behalf of the Crown otherwise than by or on behalf of Her Majesty in her private capacity.
(2) This Part applies to a construction contract entered into on behalf of the Duchy of Cornwall notwithstanding any Crown interest.
(3) Where a construction contract is entered into by or on behalf of Her Majesty in right of the Duchy of Lancaster, Her Majesty shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by the Chancellor of the Duchy or such person as he may appoint.
(4) Where a construction contract is entered into on behalf of the Duchy of Cornwall, the Duke of Cornwall or the possessor for the time being of the Duchy shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by such person as he may appoint.

The Crown as an entity is included within the provisions of the Act. Contracts entered into in the private capacity of the Queen are exempt from the provisions of the Act. Contracts entered into by the Duchy of Lancaster, Duchy of Cornwall or the Duke of Cornwall are included within the provisions but appointees will deal with any matter under the Act should it arise.

Part V of the Act

There are general provisions in Part V of the Act that affect Part II.

Section 146: Orders, regulations and directions

(1) Orders, regulations and directions under this Act may make different provision for different cases or descriptions of case, including different provision for different areas.
(2) Orders and regulations under this Act may contain such incidental, supplementary or transitional provisions and savings as the Secretary of State considers appropriate.
(3) Orders and regulations under this Act shall be made by statutory instrument which, except for–
  (a) orders and regulations subject to affirmative resolution procedure (see sections 104(4), 105(4), 106(4) and 114(5)),
  (b) orders under section 150(3), or
  (c) regulations which only prescribe forms or particulars to be contained in forms,
  shall be subject to annulment in pursuance of a resolution of either House of Parliament.

There is potential for further orders to be made except under sections 104, 105, 106, 114 and 150(3). The orders will be made by statutory instrument. The orders made under Part II cannot be annulled pursuant to a resolution of either House of Parliament.

Section 148: Extent

(1) The provisions of this Act extend to England and Wales.
(2) The following provisions of this Act extend to Scotland — Part II (construction contracts), Part III (architects), sections 126 to 128 (financial assistance for regeneration and development), and Part V (miscellaneous and general provisions), except–
  (i) sections 141, 144 and 145 (which amend provisions which do not extend to Scotland), and
  (ii) Part I of Schedule 3 (repeals consequential on provisions not extending to Scotland).
(3) The following provisions of this Act extend to Northern Ireland — Part III (architects), and Part V (miscellaneous and general provisions), except–
  (i) sections 142 to 145 (home energy efficiency schemes and residuary bodies), and
  (ii) Parts I and III of Schedule 3 (repeals consequential on provisions not extending to Northern Ireland).
(4) Except as otherwise provided, any amendment or repeal by this Act of an enactment has the same extent as the enactment amended or repealed.

The Act applies to England, Wales and Scotland with the stated exceptions.

Section 149: Corresponding provision for Northern Ireland

An Order in Council under paragraph l(l)(b) of Schedule I to the Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which states that it is made only for purposes corresponding to those of Part II (construction contracts) or section 142 (home energy efficiency schemes)–

(a) shall not be subject to paragraph 1(4) and (5) of that Schedule (affirmative resolution of both Houses of Parliament), but

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Corresponding provisions were made to bring Part II into operation in Northern Ireland. The Construction Contracts (Northern Ireland) Order 1997 No. 274 (NI 1) is the instrument which commences the process of providing legislation for Northern Ireland. The commencement date for Northern Ireland is 1 June 1999.

Section 150: Commencement

(1) The following provisions of this Act come into force on Royal Assent–
section 146 (orders, regulations and directions),
sections 148 to 151 (extent, commencement and other general provisions).

(2) The following provisions of this Act come into force at the end of the period of two months beginning with the date on which this Act is passed–
sections 126 to 130 (financial assistance for regeneration and development), section 141 (existing housing grants: meaning of exempt disposal),
section 142 (home energy efficiency schemes), sections 143 to 145 (residuary bodies),
Part III of Schedule 3 (repeals consequential on Part IV) and section 147 so far as relating to that Part.

(3) The other provisions of this Act come into force on a day appointed by order of the Secretary of State, and different days may be appointed for different areas and different purposes.

(4) The Secretary of State may by order under subsection (3) make such transitional provision and savings as appear to him to be appropriate in connection with the coming into force of any provision of this Act.

None of Part II of the Act came into effect on Royal Assent or in the two months after Assent mentioned in sub-section (2). Part II became operative on 1 May 1998.

Section 151: Short title

This Act may be cited as the Housing Grants, Construction and Regeneration Act 1996.

The parts of the Act that concern construction contracts, adjudication and payment provisions are often referred to as the Construction Act in the trade and professional press.