JUDGMENT : MR JUSTICE JACKSON : TCC. 17th May 2007

1. This judgment is in eight parts, namely Part 1 – Introduction; Part 2 – The Facts; Part 3 – The Present Proceedings; Part 4 – The Law; Part 5 – Vale House; Part 6 – Maytree House; Part 7 – Hawthorn Estate; Part 8 – Conclusion.

Part 1: Introduction

2. This is a claim by a sub-contractor for declarations that certain documents passing between sub-contractor and main contractor constituted contracts in writing for the purpose of section 107 of the Housing Grants, Construction & Regeneration Act 1996.

3. The sub-contractor, which is claimant in these proceedings, is Mast Electrical Services (a trading division of John W & S Dorin Limited). I shall refer to the claimant as "Mast". The main contractor, which is defendant in these proceedings, is Kendall Cross Holdings Limited. I shall refer to that company as "Kendall".

4. The three construction projects with which this court is concerned comprised the refurbishment of local authority accommodation in Newcastle. The employer for those three projects was Your Homes Newcastle Limited, to which I shall refer as "YHN". YHN is an arms length management organisation which manages the housing stock of Newcastle City Council.

5. In the course of this judgment I shall refer to the Housing Grants, Construction Regeneration Act 1996 as "the 1996 Act". The 1996 Act confers a right to refer construction disputes to adjudication, but only if such disputes arise out of an agreement "in writing". The requirements for an agreement in writing are set out in section 107 of the 1996 Act.

6. Mast contends, but Kendall denies, that in respect of each of the three projects certain identified documents satisfy the requirements of section 107. Mast's objective in bringing this action is to pave the way for future adjudication proceedings.

7. After those introductory remarks it is now time to turn to the facts.

Part 2: The Facts

8. By letter dated 28th May 2004 YHN invited Kendall to tender for refurbishment work to a large number of local authority homes. Kendall in turn sought tenders from sub-contractors in respect of those parts of the work which would be sub-contracted. One of the trades to be sub-contracted was the electrical work. On 11th June 2004 Kendall sent out tender documents for the electrical works to six prospective sub-contractors.

9. Let me now turn to Mast. Mast learnt of the YHN project from another source and voluntarily submitted a tender to Kendall for the electrical works by letter dated 19th July 2004. Mast's tender related to four sections of electrical work, namely multi storey blocks, traditional housing, non traditional housing, and void and acquired accommodation.

10. By letter dated 21st July 2004 Mast made some small revisions to its tender. A schedule showing rates, quantities and the build up of the tender was attached to Mast's letter dated 21st July. Thus, by late July Kendall had received tenders for the electrical works from seven different prospective sub-contractors. Kendall then submitted its tender to YHN for refurbishment works. Kendall's tender covered four sections of refurbishment work, namely internal refurbishment of traditional housing, external refurbishment of traditional housing, internal refurbishment of multi storey blocks, and external refurbishment of multi storey blocks. Kendall's tender for the internal refurbishment of multi storey blocks (but the remainder of Kendall's tender) was based upon the relevant part of Mast's quotation of 21st July 2004.

11. In due course, Kendall's tender for the internal refurbishment of the multi storey blocks was successful, but Kendall's tender for the other sections of the works was unsuccessful. Accordingly, Kendall indicated to Mast that Mast's tender for the electrical work on the multi storey blocks was successful but that the remainder of Mast's tender was not successful.

12. Thereafter, there was some discussion about contractual arrangements. During 2004 and 2005 it was envisaged, both by YHN and by Kendall, that there would be a partnering agreement under which the sub-contractors would be specialist members of the team. Ultimately, however, that partnering agreement did not come to fruition.

13. On 11th April 2005 Mast wrote to Kendall setting out a revised quotation for the electrical services to the interior of the multi storey blocks. This quotation was prepared by reference to "Leslie" flats and "Brims" flats. These flats were believed to be comparable to, but not the same as, the flats upon which Mast would be working. This quotation has been referred to as a "virtual tender".

14. In paragraph 12 of his witness statement Mr. Sharp of Mast put the matter in this way: *"As the Court will be aware, it is commonplace for construction contracts to be concluded on the basis of rates calculated using proximate bills of quantities, with a final price to be agreed upon at the conclusion of the contract by applying the agreed rates to the measured quantities".*

15. The rates set out in Mast's quotation dated 11th April 2005 were in principle acceptable both to YHN and to Kendall. YHN decided to engage Kendall to do the internal refurbishment of two multi storey blocks, namely Vale House and Maytree House.

16. On 12th April 2005 Kendall wrote to Mast as follows:

"Vale House

We would inform you that we are the successful contractor to carry out internal works at the above project.

As our preferred electrical contractor, we would instruct you to proceed with surveys to flats as directed.

The charges applicable to these surveys will be subject to the following:
(i) Establishing the full extent of the works to be carried out.
(ii) Agreement with Your Homes Newcastle to your revised quotation submitted on 11th April 2005.

We trust the foregoing will enable you to commence the initial surveys on the 13th April 2005".

17. On 22nd April 2005 Kendall sent a letter to Mast in the same terms but relating to Maytree House.

18. Mast carried out the surveys of Vale House and Maytree House as requested. On 9th May 2005 Mast submitted a quotation which was specific to Vale House. On 16th May 2005 Mast submitted a quotation which was specific to Maytree House. Whether those quotations were accepted and gave rise to binding contracts are two of the issues between the parties.

19. Thereafter, correspondence and further quotations passed between the parties, to which I shall refer later. Mast duly carried out and completed the electrical works to Vale House and Maytree House during 2005 and 2006. However, the parties fell out over payment and over the question what rates, if any, had been agreed.

20. In January 2006 Mast submitted quotations for electrical work to the interior of Hawthorn Estate. Mast's first quotation was dated 5th January. Mast's revised quotation was dated 12th January. Thereafter, further correspondence and a further quotation passed between the parties while Mast proceeded with the work to Hawthorn Estate. In late 2006 the parties fell out over payment and over the question what rates, if any, had been agreed in respect of Hawthorn Estate. On 24th November Mast suspended work on the Hawthorn Estate and withdrew from site.

21. Thus, it can be seen that by November 2006 the parties were in dispute about payment in respect of all three projects. On 30th November 2006 Mast commenced an adjudication in respect of Vale House. In that adjudication Mast claimed £169,298.00.

22. Kendall defended the Vale House adjudication on a number of grounds, one of which was that there was no contract in writing between the parties and therefore the adjudicator lacked jurisdiction. The adjudicator, Mr. Timothy Bunker, acceded to that submission and by letter dated 21st December 2006 he resigned his appointment. The reason given by the adjudicator for this conclusion was that the rates within the 11th April quotation and the rates within the 9th May quotation were different; accordingly, without certainty as to price, there could be no agreement between the parties.

23. Thus, Mast was unsuccessful in its attempt to refer the Vale House dispute to adjudication. It was clear that if Mast served adjudication notices in respect of its claims on Maytree House and Hawthorn Estate those claims would be met with a similar "no contract" defence. Accordingly, in order to establish its entitlement to adjudicate in respect of all three contracts Mast commenced the present proceedings.

Part 3: The Present Proceedings

24. By a claim form issued in the Technology and Construction Court on 27th March 2007 Mast sought declarations that the sub-contract arrangements in respect of Vale House, Maytree House and Hawthorn Estate constituted contracts in writing for the purposes of section 107 of 1996 Act. Mast also sought declarations that disputes had crystallised concerning the sums owed by Kendall to Mast in respect of those three projects.

25. These proceedings were brought pursuant to the procedure set out in CPR Part 8. Accordingly, the claim form did not particularise Mast's claim in any detail and did not identify the documents relied upon as satisfying the requirements of section 107 of the 1996 Act. The detailed formulation of Mast's claim was set out in the witness statement served in support of the claim form. That witness statement was made by Mr. David Sharp, Mast's managing director.

26. In his witness statement Mr. Sharp set out the history of the tendering process and of the three projects in which Mast carried out electrical work. In respect of Vale House, Mr. Sharp asserted that the following documents constituted a contract in writing for the purposes of section 107: (1) The tender enquiry documents; (2) Mast's three quotations dated 19th July 2004, 21st July 2004 and 11th April 2005; (3) Kendall's letter dated 12th April 2005; (4) Mast's quotation dated 9th May 2005; (5) Kendall's letter of 3rd June 2006; (6) Kendall's letter of 25th July 2005.

27. In respect of Maytree House, Mr. Sharp asserted that the following documents constituted a contract in writing for the purposes of section 107: (1) The tender enquiry documents; (2) Mast's quotation dated 11th April 2005; (3) Kendall's letter dated 22nd April 2004; (4) The minutes of a pre-start meeting on 6th May 2005.

28. In respect of Hawthorn Estate, Mr. Sharp asserted that the following documents constituted a contract in writing for the purposes of section 107: (1) The tender enquiry documents; (2) Mast's quotation dated 12th January 2006; (3) Kendall's e-mail of 16th January 2006; (4) Minutes of a pre-start meeting on 24th February 2006.

29. Following service of these proceedings a directions hearing was held on 3rd April 2007. I gave directions for the service of further witness statements and left open the question whether limited oral evidence should be permitted at trial. The trial was fixed to start on 8th May.

30. On 24th April Kendall served its evidence. This comprised the witness statements of Mr. Innes (contract manager), Mr. Young (project quantity surveyor for Vale House), Mr. Hayes (surveying director), and Mr. Metcalfe of Knowles Limited. On 2nd May Mast served evidence in reply comprising a second witness statement of Mr. Sharp and a statement made by Mast's solicitor.

31. At this point may I make reference to the tedious matter of case administration? Although the chaos theory has become fashionable in recent years, it is not useful as an aid to preparation of the trial bundle. Documents are much easier to find if they are placed in chronological order as opposed to chaotic order. Furthermore, the powerful temptation to insert multiple copies of the same document, dotted around the bundle in different places, is a temptation that must be resisted. Hoping that no one will take these comments amiss, I now return to the narrative of the present case.

32. The trial of this action commented on 8th May. Ms. Lynne McCafferty represents Mast, as she did at the directions hearing, Ms. Sarah Hannaford represents Kendall, as she did at the directions hearing. At the start of the hearing Ms. Hannaford, on behalf of Kendall, accepted that disputes had crystallised. In the light of that admission Mast does not pursue its claim for declarations in respect of the crystallisation of disputes. On the first day of trial both Mr. Sharp and Mr. Innes gave oral evidence concerning certain discussions which they had in relation to Maytree House and Hawthorn Estate. I will refer to that evidence in Parts 6 and 7 below.

33. Turning to the legal submissions, Ms. McCafferty in her skeleton relied only upon the documents identified in Mr. Sharp's witness statement as satisfying the requirements of section 107 of the 1996 Act. On the morning of day two, however, Ms. McCafferty served a second skeleton argument which identified four further documents as satisfying the requirements of section 107. These were Kendall's letters dated 20th June and 12th August 2005 in relation to Vale House, and an exchange of letters between the parties on 2nd and 3rd March 2006 in respect of Hawthorn Estate.

34. In the course of her oral submissions on day two, Ms. McCafferty also relied upon Mast's quotation dated 16th May 2005 as constituting one of the contractual documents for Maytree House. Ms. Hannaford objected to that addition as coming too late in the day, but her objection did not succeed. Thus, the quotation of 16th May 2005 is added to the list of documents relied upon in respect of Maytree House.

35. On behalf of Kendall, Ms. Hannaford submitted that this case falls into the not uncommon category of cases where building work has been carried out but no contract was concluded. Thus, Mast is entitled to remuneration but on a quantum meruit basis. In the alternative, Ms. Hannaford submits that even if there was a contract between the parties it was not a contract in writing for the purposes of section 107 of the 1996 Act. In relation to this issue, Ms. Hannaford submits that the court should focus upon the documents relied upon by Mast. It is not appropriate for the judge to ferret through the bundle and try to find other documents which might satisfy the requirements of section 107.

36. I have come to the conclusion that the approach advocated by Ms. Hannaford (and not challenged by Ms. McCafferty) is correct. My task is to determine whether the documents relied upon by Ms. McCafferty satisfy the requirements of "*agreement in writing*" as defined in section 107. I must not embark upon my own Odyssey through uncharted regions of the bundle to see if I can find other documents which might fit the bill. My first task, however, before I consider the evidence, must be to review the law.

Part 4: The Law

37. From time to time building projects proceed without the parties ever getting round to executing a formal contract. It then becomes necessary to analyse the correspondence, minutes of meetings and so forth, in order to ascertain whether a contract was ever concluded. Where performance has been rendered, the court will lean in favour of finding a contract if it is possible properly to do so. See Chitty on contracts 29th Edition at paragraph 2-026 (upon which Ms. McCafferty relies). Nevertheless, sometimes the reality is that construction contracts proceed to completion without the parties ever reaching agreement, either orally or in writing, on all material terms. See, for example, ***Peter Lind & Co. v Mersey Docks & Harbour Board*** [1972] 2 Lloyds Rep 234. In that situation the contractor, or sub-contractor, as the case may be, is entitled to be paid on a quantum meruit basis. Indeed, despite the strictures in Chitty at paragraph 2-026, such a situation is not particularly uncommon. For a recent example of such a case in this court see ***Claymore Services Limited v Nautilus Properties Limited*** [2007] EWHC 805 (TCC).

38. In order to obtain the benefit of the adjudication provisions of the 1996 Act a claimant must establish not only that there was a construction contact between the parties but also that the contract satisfied the requirements of section 107. Section 107 provides:

> *"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.*
>
> *The expressions "agreement", "agree" and "agreed" shall be construed accordingly.*
>
> *(2) There is an agreement in writing*
> *(a) if the agreement is made in writing (whether or not it is signed by the parties),*

(b) if the agreement is made by exchange of communications in writing, or
(c) if the agreement is evidence in writing.

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

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

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

39. In ***RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*** [2002] EWCA Civ 270; [2002] 1 WLR 2344 the Court of Appeal held that an oral agreement which was insufficiently recorded in writing did not satisfy the requirements of section 107. Accordingly, the adjudicator did not have jurisdiction. Ward LJ, who delivered the leading judgment, gave the following guidance about the interpretation of section 107.

"12. I turn to the construction of section 107. Section 107(1) limits the application of the Act to construction contracts which are in writing or to other agreements which are effective for the purposes of that part of the Act only if in writing. This must be seen against the background which led to the introduction of this change. In its origin it was an attempt to force the industry to submit to a standard form of contract. That did not succeed but writing is still important and writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are.

13. Section 107(2) gives three categories where the agreement is to be treated in writing. The first is where the agreement, whether or not it is signed by the parties, is made in writing. That must mean where the agreement is contained in a written document which stands as a record of the agreement and all that was contained in the agreement. The second category, an exchange of communications in writing, likewise is capable of containing all that needs to be known about the agreement. One is therefore led to believe by what used to be known as the ejusdem generis rule that the third category will be to the same effect namely that the evidence in writing is evidence of the whole agreement.

14. Subsection (3) is consistent with that view. Where the parties agree by reference to terms which are in writing, the legislature is envisaging that all of the material terms are in writing and that the oral agreement refers to that written record.

15. Subsection (4) allows an agreement to be evidenced in writing if it (the agreement) is recorded by one of the parties or by a third party with the authority of the parties to the agreement. What is their contemplated is, thus, a record (which by subsection (6) can be in writing or a record by any means) of everything which has been said. Again it is a record of the whole agreement.

16. Subsection (5) is a specific provision. Where there has been an exchange of written submissions in the adjudication proceedings in which the existence of an agreement otherwise than in writing is alleged by one party and not denied by the other, then that exchange constitutes "an agreement in writing to the effect alleged". The last few words are important. The exchange constitutes an agreement in writing which does more than evidence the existence of the agreement. It also evidences the effect of the agreement alleged, and that must mean such terms which is may be material to allege for the purpose of that particular adjudication. It is not necessary for me form a view about ***Grovedeck Ltd v Capital DemolitionLtd*** *[2000] BLR 181…*

I agree. That is why a record in writing is so essential. The written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute."

40. Robert Walker LJ agreed with the judgment of Ward LJ. Auld LJ, who gave the third judgment, made some interesting observations on the issue, but these represented a minority view. This court is obliged to follow the approach set out in paragraphs 12 to 16 of the judgment of Ward LJ. See ***Trustees of the Stratfield Saye Estate v AHL Construction Ltd*** [2004] EWHC 3286 (TCC) at paragraphs 44 to 47.

41. With the Court of Appeal's guidance in mind I must now tackle the issues in the present case. I shall deal separately with each of the three projects.

Part 5: Vale House

42. Of the three initial quotations relied upon by Mast it seems to me that only the third quotation can be relevant. I say this for two reasons:

(i) Each of the second quotations revised and superseded the preceding one.

(ii) The quotations of 19th and 21st July related not only to the interior of the multi storey blocks, but also to many other buildings as well. On the other hand, Mast's quotation of 11th April 2005 was specifically focused upon the interior of the multi storey blocks.

43. Mast's case, as presented in the skeleton argument, is that by its letter of 12th April 2005 Kendall accepted Mast's quotation dated 11th April. Thereafter, Mast's project specific quotation of 9th May was simply a matter of applying the rates of 11th April quotation to the quantities of work found to be required in Vale House after the Vale House flats has been surveyed. See paragraph 17.4, 25.2 and 25.3 of Ms. McCafferty's skeleton argument. Therefore, submits Ms. McCafferty, there was sufficient certainty as to price in the documents passing between the parties.

44. This analysis cannot be sustained. As Ms. Hannaford has demonstrated, by taking the court through the two quotations, there are substantial differences between the rates attached to the quotation dated 11th April and the rates attached to the quotation dated 9th May. The adjudicator highlighted these differences in his resignation letter dated 21st December 2006 and gave three specific examples. The examples given by the adjudicator were as follows. The rate within the 11th April quotation for stripping out wiring and accessories was £31.13. The rate for that item within the 9th May quotation was £51.41. The rate in the 11th April 2005 quotation for a Fern Howard Mini Meridian FHSPX242 was £36.24. The rate within the 9th May quotation for that item was £30.16. The rate within the11th April 2005 quotation for a One Gang One Way Switch was £33.24. The rate within the 9th May quotation was £21.98. It is clear from a comparison of the rates annexed to the two quotations that the adjudicator could have given many other similar examples.

45. Mr. Sharp's two witness statements do not demonstrate how the rates in the 11th April quotation can be reconciled with the rates in the 9th May quotation. When pressed about this point in argument Ms. McCafferty was unable to assist the court. In those circumstances, Ms. McCafferty in oral argument developed the submission that the rates in the 9th May quotation should prevail. She submitted that Kendall had accepted Mast's quotation of 9th May by conduct. She submitted that the rates attached to the 9th May quotation were the basis of Mast's interim applications 1 to 8 and those rates were paid by Kendall.

46. Unfortunately, there is very little evidence in the bundle about what was claimed and what was paid on interim applications. Such evidence as there is does not support the proposition that interim payments were dealt with on the basis of the 9th May rates. It should also be noted that at the adjudication Mast presented its case on the basis of the 11th April not the 9th May rates. The correspondence passing between the parties is such that it is impossible to discern any agreement, or any evidence of agreement, as to what rates would be paid in respect of electrical work to Vale House.

47. Let me now turn to the other documents upon which Mast rely. These are Kendall's letters to Mast dated 3rd June 2005, 20th June 2005, 25th July 2005, and 12th August 2005. This correspondence neither constitutes nor evidences any agreement in writing. First, it can be seen that YHN never agreed to Mast's rates. Such agreement was a pre-condition for any contract between Mast and Kendall. See Kendall's letter dated 12th April. Secondly, Kendall's letter of 3rd June does not accept either of Mast's two quotations. It raises specific objections to the tender qualifications in Mast's letter dated 9th May. Thirdly, Kendall's letters of intent dated 20th June and 12th August 2005 envisaged partnering contracts being executed in the future, an event which never occurred. Fourthly, Mr. Sharp made a manuscript note on 20th June letter which shows that all parties knew there was no contract between Mast and Kendall unless and until YHN reached agreement with Kendall. Finally (if relevant), it is common ground that the early works agreement referred to in Kendall's letter dated 25th July was never sent to Mast.

48. Let me now draw the threads together. The documents relied upon by Mast do not satisfy the requirements of section 107 of the 1996 Act. This is because those documents do not set out, evidence or record all material terms of Mast's sub-contract. In particular, they do not set out, evidence or record any agreed rates of payment for Mast's work. It seems to me highly probable that there was no contract at all between Kendall and Mast in respect of Vale House. In other words, Mast's entitlement to payment is probably based upon quantum merit. However, that is not an issue which I am required to decide in this litigation. My decision in respect of Vale House is that Mast is not entitled to the declaration which it seeks.

Part 6: Maytree House

49. Mast's quotation dated 11th April 2005 was intended to be applicable to Maytree House as well as Vale House. By letter dated 22nd April 2005 Kendall instructed Mast to proceed with surveys of the flats in Maytree House. Kendall's letter included the following paragraph:

> *"The charges applicable to these surveys will be subject to the following:*
> *(i) Establishing the full extent of the works to be carried out.*
> *(ii) Agreement with Your Homes Newcastle to your revised quotation submitted on the 11th April 2005."*

50. It is Mast's case that Mast's appointment as electrical sub-contractor for Maytree House was confirmed in a telephone conversation between Mr. Sharp and Mr. Innes during the period 22nd April to 5th May. Both Mr. Sharp and Mr. Innes have given oral evidence about this matter.

51. It is clear from the oral evidence that during the period 22nd April to 5th May Mr. Innes understood that Mast was the designated sub-contractor for electrical works on Maytree House. Mr. Innes was contract manager. He dealt with site matters and getting the work done. It was not his function to negotiate contractual terms or agree rates. I accept Mr. Sharp's evidence that they had a telephone conversation during this period. I find as a fact that the gist of this conversation was that Mr. Innes told Mr. Sharp that Mast would be the electrical sub-contractor for Maytree House. However, Mr. Innes did not accept Mast's quotation dated 11th April. Both men knew that the

rates annexed to that quotation were subject to the approval of YHN. Furthermore, the detailed terms of sub-contracts and rates of payment were not matters within Mr. Innes' remit.

52. The next document relied upon by Mast is the minutes of the pre-start meeting on 6th May 2005. These minutes certainly confirm that Mast would be the sub-contractor for Maytree House. Indeed, they record that work to the pilot flat would commence in the week beginning 23rd May 2005. On the other hand, these minutes do not record or evidence any agreement as to rates or as to any other contractual terms.

53. On 16th May 2005 Mast submitted a project specific quotation for the flats in Maytree House. This was not originally said to be a contractual document, but Mast changed its position on day two of the trial and obtained leave to rely on this document. The 16th May quotation sets out lump sum figures with no obvious correlation to the 11th April quotation. Having regard to the history of events on Vale House, the inference must be that the 16th May quotation was built up using different rates from the 11th April quotation. Unfortunately, however, no rates were attached to the 16th May quotation so it was not apparent what those new rates were.

54. Ms. McCafferty submits that the rates underlying the 16th May quotation were the rates set out in a document appearing later in the bundle and bearing in manuscript the date 10th October 2006. She stated that this document was produced by Mast at a meeting on 19th October 2006. Ms. McCafferty further stated, on instructions, that these rates were used by Mast in interim applications.

55. The difficulty with these submissions made by Ms. McCafferty is twofold. First, there is no evidence in the witness statements or the bundle to support these submissions. Secondly, even if Ms. McCafferty's instructions are correct, the fact remains that no rates were annexed to the 16th May quotation. It is impossible to discern from the documents any agreement by Kendall to the rates which Mast claim to have had in mind when preparing their 16th May quotation. It is also impossible to discern any agreement to the lump sum figures in the 16th May quotation without regard to the underlying rates. Indeed, those lump sums, without reference to the underlying rates, could not sensibly have been used for valuation purposes.

56. The picture in relation to Maytree House becomes even more confused when one looks at the later correspondence. On 13th July 2005, 8th August 2005, and 5th January 2006, Mast submitted further revised quotations. Ms. McCafferty states that she does not rely on these later quotations as they were not accepted. Nevertheless, as Ms. Hannaford points out, the submission of these further quotations is inconsistent with the proposition that the 11th April quotation, or, alternatively, the 6th May quotation, had become the agreed basis of sub-contract.

57. Let me now draw the threads together. In relation to Maytree House, the documents relied upon by Mast do not satisfy the requirements of section 107 of the 1996 Act. This is because those documents do not set out, evidence or record all material terms of Mast's sub-contract. In particular, they do not set out, evidence or record any agreed rates of payment for Mast's work. It seems to me highly probable that there was no contract at all between Kendall and Mast in respect of Maytree House. In other words, Mast's entitlement to payment is probably based upon quantum merit. However, that is not an issue which I am required to decide in this litigation. My decision in respect of Maytree House is that Mast is not entitled to the declaration which it seeks.

Part 7: Hawthorn Estate

58. On 5th January 2006 Mast submitted a quotation for electrical works to Hawthorn Estate. A schedule rates was attached to that quotation. Somewhat confusingly, a copy of this quotation produced by Mr. Sharp appears in the bundle without any rates. However, at pages 478 to 490 of the exhibit to Mr. Hayes' witness statement one can find the schedule of rates attached to that quotation.

59. On 12th January 2006 Mast submitted a revised quotation for electrical works to Hawthorn Estate. Ms. McCafferty originally submitted that rates would probably have been attached to that quotation, but were probably omitted from the bundle through oversight. On the afternoon of day two, however, Ms. McCafferty stated, on instructions, that no rates were ever attached to this quotation. Ms. McCafferty also stated that the 12th January quotation was calculated by adding a mark up to the figures in the 5th January quotation. However, Ms. McCafferty was unable to say what that mark up was, what it was applied to, or how the 12th January figures were calculated. None of these matters are apparent from the documents in the bundle or from the witness statements.

60. Kendall's e-mail to Mast dated 16th January 2006 (upon which Mast rely as a contractual document) invited Mast to attend a pre-start meeting on 8th February. The next relevant event was a telephone conversation between Mr. Sharp and Mr. Innes on 7th February 2006. Mr. Sharp's typed note of that conversation reads as follows:

"This is a record of a telephone conversation held on Tuesday 7th February 2006 regarding an official order to carry out works to the above.

The conversation was between myself and Foster Innes of Kendall Cross.

I asked if an order was being issued to us prior to commencement of the works.

Foster Innes stated that Mast Electrical Services were to carry out the work as previously advised verbally and at present they themselves did not have an order from Newcastle City – YHN for any works.

Foster Innes went on to say that their client, Newcastle City – YHN were so far behind that any progress regarding issuing of orders in the near further was unlikely.

I confirmed to Foster Innes that Mast Electricial Services would proceed with the works and that the latest quotation submitted by Mast Electrical Services to Kendall Cross would form the basis of the contract.

Foster Innes accepted this proposal without objection."

61. Both Mr. Sharp and Mr. Innes have given oral evidence about this conversation. Having heard that evidence I make findings of fact as follows. Mr Sharp and Mr. Innes did indeed have a telephone conversation on 7th February. Mr. Innes said that Kendall could not issue an order to Mast, because Kendall did not yet have an order from YHN. Nevertheless, Mr. Innes requested that Mast should commence the electrical works to Hawthorn Estate. Mr. Sharp confirmed that Mast would start work. Mr. Sharp also referred to Mast's revised quotation, of 12th January. Mr. Innes did not specifically reject that quotation but he did not accept it either. Instead, Mr. Innes pointed out that figures were not his responsibility and that Mr. Sharp would have to talk to Gordon Bell (Kendall's quantity surveyor) about those matters.

62. The next relevant event was a pre-start meeting of 8th February 2006. Mast relies upon the minutes of that meeting as a contractual document. The minutes record, and I accept, that at that meeting the following commencement dates were stipulated. Site set up 13th February 2006, first flat opening up 20th February 2006, re-wiring of first flat to commence 24th February 2006. Mast duly started work on Hawthorn Estate during February 2006.

63. On Thursday 2nd March Mr. Sharp had a meeting at Kendall's offices about which I have heard some oral evidence. Mr. Sharp had gone to Kendall's offices to discuss an unrelated matter. As he was leaving he met Mr. Innes and Mr. Bell who were just entering the building. Mr Innes and Mr. Bell said that they had been to a meeting with YHN and that Mast's rates were not accepted. Mr. Sharp returned to his office. Upon getting back he wrote the following letter to Kendall.

"We have always advised you that our quotations are effective for works executed between 1st January and 31st December of any year.

At the beginning of this year we submitted our quotation in respect of Hawthorn Estate. Shortly thereafter you requested that we revise this to cover the full contract period. We did this in our quotation to you of 12th January 2006 and until 7th February 2006 no further dialogue arose.

On 7th February 2006 the undersigned telephoned your Mr. Innes requesting an instruction for the works which we had previously been advised verbally were to be placed with us. The outcome of this conversation was an understanding that we would proceed using our latest quotation. A copy of our file of that conversation is enclosed.

Thereafter we proceeded with material acquisition and design development.

On 16th February 2006 at your request we commenced work on this project.

We accordingly feel that a contract exists between us based on the abovementioned occurrences.

Whilst at your offices this morning, on an entirely different matter, your Messrs. Bell and Innes initiated an impromptu discussion wherein we were advised that our quotation was not agreed and that further information, i.e. a quotation based on 2005 rates was required and upon which increased costs would be discussed.

To present us with this situation after we have sought and achieved an understanding causing us misgivings and feelings of vulnerability and before proceeding further we feel it prudent to request your written instructions and acceptance of our quotation.

Clearly we are not pleased to have to act in this way but we feel it would be foolish in the extreme to proceed without certainty of contract value."

64. Mr. Sharp enclosed with that letter the file note of the telephone conversation which I read out earlier. Mr. Sharp says in his witness statement that he made that file note on 7th February, but I am satisfied that he is mistaken in that regard. Having considered Mr. Sharp's oral evidence, as well as the contemporaneous documents, I conclude that Mr. Sharp made the file note on 2nd March when he was preparing the letter. I do not for one moment suggest any dishonesty in this regard. It was simply the case that the need for a formal file note became apparent to Mr. Sharp on 2nd March. Furthermore, the file note itself is written in a formal style. I also find that Mr. Sharp's letter dated 2nd March, whilst written in good faith, somewhat overstated Mast's case. The reality was that Mast had started work at a time when its quotation of 12th January had neither been accepted nor rejected.

65. On Friday 3rd March Mast withdrew its men from site. This put pressure on Kendall and a short term compromise was negotiated as set out in Kendall's letter dated 3rd March 2006. This letter reads as follows:

"Further to your letter dated 2nd March 2006 and our telephone conversation earlier today regarding the above project.

We would confirm our agreement that Kendall Cross will undertake to pay Mast Electrical Services for your work at the rates contained in your recent quotation. This agreement is limited to work carried out within two weeks of the date of this letter, and will expire on the 17th March 2006.

As discussed, we just use the above period to meet with representatives of Your Homes Newcastle and come to an agreement on the rates which will apply to the rest of the project.

We would further confirm that your operatives will attend site on Monday the 6th March 2006 to re-commence your works on the basis of the above."

Following receipt of that letter, Mast recommenced work on site on Monday 6th March.

66. The exchange of letters on 2nd and 3rd March 2006 comprise the last documents in the sequence of documents relied upon by Mast as satisfying the requirements of section 107 of the 1996 Act.

67. I have come to the conclusion that the documents relied upon by Mast do not satisfy the requirements of section 107 in any of the ways permitted by sub-sections (2), (3) or (4). I reach this conclusion for four reasons:

(i) Kendall did not agree to pay the rates which Mast were seeking save for a two week period.

(ii) There is no document (or at least none has been put in evidence) recording what those rates were.

(iii) After 3rd March the debate about what rates should be paid rumbled on in parallel with the construction works. Mast was working on the basis of rates to be agreed.

(iv) The terms on which Mast would carry out electrical works to Hawthorn Estate are not set out in the series of documents between 16th January and 3rd March 2006, even when those documents are read in conjunction with the original tender enquiry documents.

68. The correspondence passing between the parties after March all tends to confirm that no agreement, whether written or otherwise, had been reached by March. See Mast's quotation dated 14th March with revised rates attached; Mast's letter dated 16th March recording that no agreement had been reached on rates; Kendall's letter dated 17th March complaining that Mast had failed to provide cost data as promised; the series of letters passing between the parties on 20th March in which Mast sought, unsuccessfully, to establish agreement as to rates; the series of letters in April in which Kendall proposed and Mast rejected a compromise agreement in respect of rates. Kendall's letter dated 3rd November 2006 records that still no rates had been agreed. It was shortly after this letter that Mast withdrew from site.

69. I am bound to say that I have some sympathy with Mast's position. On Hawthorn Estate, as on the two earlier projects, Mast was permitted and indeed invited to start work before rates had been agreed between the three parties involved, namely YHN, Kendall and Mast. YHN were funding the whole operation, so Kendall needed YHN's approval of Mast's rates even though YHN would not be party to the sub-contract with Mast. YHN are not represented in these proceedings so it would not be proper for me to make any comments about the stance which YHN adopted during 2005 and 2006.

70. On Hawthorn Estate, as on Vale House and Maytree House, Mast would have been quite entitled to refuse to start work before all contractual terms, in particular as to payment, had been agreed and recorded in writing. However, in this case, as in a number of other cases, commercial pressure on the contractor or sub-contractor overrode legal considerations. The parties decided to get on with the project and hope for the best.

71. Let me now draw the threads together in relation to Hawthorn Estate. The documents relied upon by Mast do not satisfy the requirements of section 107 of the 1996 Act. This is because those documents do not set out, evidence or record all material terms of Mast's sub-contract. In particular, they do not set out, evidence or record any agreed rates of payment for Mast's work. It seems to me highly probable that there was no contract at all between Kendall and Mast in respect of Hawthorne Estate. In other words, Mast's entitled to payment is probably based upon quantum meruit. However, that is not an issue which I am required to decide in this litigation. My decision in respect of Hawthorn Estate is that Mast is not entitled to the declaration which it seeks.

Part 8: Conclusion

72. For the reasons set out in parts 5, 6 and 7 of this judgment, Mast is not entitled to any of the declarations which it seeks. Accordingly, Mast is unable to take advantage of the adjudication procedure in respect of its claims for payment on Vale House, Maytree House and Hawthorn Estate.

73. It is unfortunate that Mast's claims for outstanding payments have so far been thwarted. In December 2006 the adjudicator resigned because he concluded that Mast had no entitlement to adjudicate. Now, five months later, this court has come to a similar conclusion. The only thing that I can do to assist Mast in this predicament is to indicate my view that if Mast pursues its claims for outstanding payment by litigation, it would be appropriate for such litigation to be expedited.

74. For the reasons indicated above, this claim is dismissed.

MS LYNNE McCAFFERTY (instructed by Messrs. Dickinson Dees) appeared on behalf of MAST ELECTRICAL SERVICES
MS SARAH HANNAFORD (instructed by Bermans) appeared on behalf of KENDALL CROSS HOLDINGS LIMITED