



## LEGAL BRIEFING

### *Put it in writing*

#### *Mott Macdonald Ltd v London & Regional Properties Ltd (2007)*

TCC Judge Thornton QC [2007] EWHC 1055

#### **The Facts**

The claimant, Mott MacDonald Ltd (“MM”), is a specialist construction engineering consultancy. MM undertook a variety of engineering services for the defendant property developer, London & Regional Properties Ltd (“LRP”) in relation to the phase 2 infrastructure works for a business park at Park Royal, London. These services, which included the necessary planning application and subsequent detailed engineering work for various road works and bridges, were carried out between December 1997 and February 2006.

MM initially provided consultancy services to LRP in 1997; operating without any formal agreement. MM continued to provide consultancy services on an informal basis until 1999, when LRP furnished MM with a Letter of Intent. This was originally due to expire on 31 December 1999, but was later extended until 31 October 2000. No further Letter of Intent or written confirmation was sent to MM, however MM continued to undertake services after the Letter of Intent expired.

A dispute arose between MM and LRP as to the non-payment of invoiced fees that had been incurred between January 2003 and February 2006. MM applied to the RICS for the appointment of an adjudicator. MM claimed a total sum (excluding VAT) of £62,767.52. LRP declined to pay those sums, arguing that there was no formal agreement in place between MM and LRP. In an interesting twist to the tale, the adjudicator notified the parties that he had reached his decision on 7 December 2006 (the day before the expiry of the 28-day decision period) but it was not in fact received until 14 December 2006. The adjudicator had insisted that the referring party pay his fees before he sent it out. In terms of the decision itself, the adjudicator held that the Letter of Intent had not lapsed and that it had continued to govern the parties’ relationship. LRP refused to abide by the adjudicator’s decision. MM made an application for summary judgment for enforcement of that decision.

#### **The Issues**

A number of issues arose at trial. The main ones were:

1. Whether there was a contract between the parties and if so, whether it was a “construction contract” for the purposes of the Housing Grants Construction and Regeneration Act 1996 (the “Act”)?
2. When did the adjudicator reach his decision and was he entitled to insist that the referring party pay his fees before he delivered it?

#### **The Decision**

The Judge found that the letter of intent had expired in October 2000. Whilst there was a contract that was enforceable in law, MM had not adduced

---

sufficient evidence to prove that there was a construction contract in place between the parties, and therefore the contract was not captured by the adjudication provisions of the Act. Consequently, the adjudicator was not entitled to be appointed, nor was he entitled to give effect to the contract between the parties. MM needed to show that there was an agreement other than in writing and that LRP had not denied the existence of such an agreement. The evidence in fact showed that LRP contended all along that the contract was invalid.

In addition, the Judge found that the adjudicator was in breach of his contractual obligations by imposing a condition that the referring party pay his fees before he provide his decision, but that his decision was in fact reached on 8 December 2006; within the 28-day period.

The corollary of all these findings was that the adjudicator's decision could not be binding on LRP and MM's application was refused.

***Comment***

Many commercial relationships are not governed by any formal agreement. Arrangements of this kind generally fall into two categories: those which work well and those which go horribly wrong. This case is an example of the latter category: the commercial relationship soured and the parties' rights and obligations were not defined, which meant that the court had to decide what was intended by looking at the evidence adduced by the parties.

If parties to a construction contract want recourse to adjudication, then they need to ensure that the contract is sufficiently recorded in writing such that it falls within the definition of a "construction contract" in the Act. Interestingly the DTI, in its second consultation paper, proposes to remove the requirement that a "construction contract" must be in writing. However, unless that proposed change is implemented, adjudication will not be available unless the contract is recorded in writing.

This case also provides a reminder to adjudicators that they are contractually obliged to provide their decision within 28 days and cannot unilaterally insist upon payment of their fees as a pre-condition to the delivery of their decision.

***Rebecca Saunders***  
***July 2007***

---