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Adjudication without a cause

Mott MacDonald Ltd v London & Regional Properties Ltd [2007]

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Mott MacDonald relates to letters of intent, which can be problematic at the best of times, but more so when combined with the restrictive definition of which contracts fall within the Housing Grants, Construction and Regeneration Act 1996.

The Act only applies to the construction industry, and it provides a definition for a 'construction contract', which will lead to certain non-qualifying contracts falling outside of it. Consequently, whilst a contractor may be able to adjudicate against their sub-contractor in relation to a particular matter, that sub-contractor will not be able to adjudicate against their supply-only sub-contractor because supply-only contracts are not covered by the Act.

It also requires the construction contract to be 'in writing'. This has caused some previous controversy, partly because of the complicated definition of 'in writing' contained in the Act, and partly because of the arguments over whether all the terms must be written. The general consensus among most practitioners before the Court of Appeal's decision in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] was that provided all the substantial terms (as well as all the terms in issue) were in writing, then the definition was met and the contract was covered by the Act.

However, the Court of Appeal in *RJT Consulting* took a different view, holding that all the terms had to be in writing. Ward LJ said:

> 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.

With that background in mind, it is easy to see how a letter of intent, possibly drafted in haste and supplemented later by oral agreements, may well not pass the Court of Appeal's strict test. And so it came to pass in *Mott MacDonald*.

Mott MacDonald commenced work under a letter of intent that was limited to a particular duration; thereafter a further letter was issued. However, there were substantial amendments that were partly evidenced in writing, partly formed by conduct, and partly to be inferred from conduct. Disputes arose and Mott MacDonald referred them to adjudication, with a positive result. London & Regional refused to pay, citing the adjudicator's lack of jurisdiction on the ground that not all the terms were in writing. That argument was successful.

Contractors are likely to be the most concerned by this decision, as they will be the recipients of letters of intent and generally want to use the adjudication and payment provisions of the Act. Working under letters of intent for extended periods (as here) is not unusual. Contractors should ensure that contractual negotiations are not allowed to stagnate.

There is also a further lesson to be learnt from this case. The rush to adjudication is not always wise, as HHJ Thornton QC remarked at the end of his judgment:

> This case shows that adjudication is not always a desirable and useful means of resolving a dispute. The dispute was for a sum of less than £70,000 and involved a claim brought by a consultant against its client in circumstances in which £2.5m had already been paid out in fees in relation to this engagement. The parties remain in a continuing professional relationship in the engagement and there does not appear to be any substantive dispute about the quantification of the claim or as to MM's entitlement to be paid the fees being claimed. Had adjudication not been available, I have no doubt that the parties would have reached a rapid commercial understanding as to the size and timing of any payment of this claim. ■

Storm in a teacup

Trustees of the Edmond Stern Settlement v Levy [2007]

Cases are supposed to be tried 'on the pleadings', but where the arbitrator fails to follow that principle, their awards will not necessarily be set aside for serious irregularity (see s68 of the Arbitration Act 1996). The base question is: has there been a substantial injustice?

In *The Trustees of Edmond Stern Settlement v Levy* [2007] the respondent had pleaded before the arbitrator a point about the 'contract period' (that it was of a particular duration). The applicant agreed with that pleading and hoped therefore that it was an admission, and that the arbitrator would make a finding in accordance with the common view. However, the arbitrator did not do so, saying that he could not make such a finding because he took a different view.

The applicant claimed that it was disadvantaged by not being able to make submissions on that point. As such, the applicant alleged that the arbitrator was guilty of 'serious irregularity', giving rise to 'substantial injustice' (s68 of the 1996 Act), in that there had been a failure by the arbitrator to follow the general duties (s33 of the 1996 Act) upon him, particularly in relation to the duties outlined in s33(1)(a) (see box, right).

Under other circumstances, this could have been a problem for an arbitrator, but in this area of natural justice there has been quite a lot of recent case law showing leniency towards such procedural lapses, given the time pressures and non-final nature of adjudication. However, arbitrators should be more punctilious. In this particular instance, HHJ Coulson QC obviously concluded that this lapse did not produce a substantial injustice to the applicant, given the small sums in issue, and certainly did not warrant overturning the award.

What lessons can be learnt? It is clear that the case must be an extreme one: 'where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.' As the judge said, 'questions of construction are often a matter of impression', and the impression here was more storm in a teacup than major injustice. ■

Section 33 Arbitration Act 1996

(1) The tribunal shall -

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

Great Hill Equity Partners II LP v Novator One LP & ors
[2007] EWHC 1210 (Comm)

Mott MacDonald Ltd v London & Regional Properties Ltd
[2007] EWHC 1055 (TCC)

Prenn v Simmonds
[1971] 1 WLR 1381

Proforce Recruit Ltd v The Rugby Group Ltd
[2006] EWCA Civ 69

RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd
[2002] EWCA Civ 270

The Trustees of the Edmond Stern Settlement v Levy
[2007] EWHC 1187 (TCC)

A case of certain uncertainties

Great Hill Equity Partners II LP v Novator One LP & ors [2007]

As can be seen from *Mott MacDonald*, discussed opposite, construction contracts often fall victim to prolonged contractual negotiation. When the court eventually comes to interpreting the contract terms, some of the old certainties of what is and is not admissible are becoming blurred. In the good old days one could rely on cases such as *Prenn v Simmonds* [1971] to set down clear rules. Classically, Lord Wilberforce said:

> *In my opinion, evidence of negotiations, or of the parties' intentions… ought not to be received [the exclusionary principle], and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction…*

But then came *Proforce Recruit Ltd v The Rugby Group Ltd* [2006], where the Court of Appeal (Mummery LJ) appeared to recognise that:

> *The preferable approach is to recognise that pre-contract negotiations are relevant and admissible if they would have influenced the notional reasonable person in his understanding of the meaning the parties intended to convey by the words used.*

Faced with these diverging views, Field J had to carefully navigate a route through them in *Great Hill Equity Partners*:

> *… whilst Mummery and Arden LJJ [in* Proforce*] recognised the possibility that the boundaries of the exclusionary principle might be redrawn in the future, the Court of Appeal did not change the law on the admissibility of pre-contract negotiations as an aid to the construction of a written contract which was intended to contain all of the agreed terms. If it is contended on proper grounds that the parties negotiated on an agreed basis or that there is an estoppel by convention, or that the contract should be rectified, evidence of pre-contract negotiations is admissible, but not otherwise.*

That may have kept the lid on the argument for now, but one senses that the old certainties are no longer so certain.