JUDGMENT : HHJ Anthony Thornton QC. TCC. 23rd May 2007

1. **Introduction**

1. The claimant, Mott MacDonald Ltd ("MM") is a specialist engineering multi-disciplinary consultancy providing services to the construction industry and the defendant, London & Regional Properties Ltd ("LRP") is a property developer. LRP is developing a business park at Park Royal, London known as First Central Park and MM undertook professional services as Highways and Transport Engineers in relation to the planning and engineering design for the phase 2 infrastructure works for this development, particularly in relation to the necessary planning application and the subsequent detailed engineering design work for various roadworks and bridges, necessary negotiations and liaison with interested parties and site supervision. These services were carried out between December 1997 and February 2006. MM continued thereafter to carry out professional services in relation to this development.

2. A dispute arose as to the non-payment of invoiced fees that had been earned in the period January 2003 until February 2006. The total sum claimed, exclusive of VAT, was £62,767.52. LRP had declined to pay these sums due to disagreements as to whether MM was entitled to claim fees on the grounds that the formal agreement providing for MM's consultancy services on this project had not been finalised and executed and because, at the time that the dispute crystallised into a formal adjudication claim, that it might have a set off. However, since no proper withholding notices had been served, the dispute related entirely to whether MM had a contractual entitlement to claim fees and, if so, on what basis.

3. MM served an adjudication notice dated 25 October 2006 and on 26 October 2006 applied to the RICS to appoint an adjudicator under the construction contract it was contending governed the parties' contractual relationship or under the Scheme for Construction Contracts (England and Wales) Regulations 1998 if there was no contractual adjudication clause in existence. An adjudicator was appointed by the RICS on 31 October 2006. LRP raised a jurisdictional challenge which the adjudicator was not prepared to accede to and, following an agreed extension of the time by which he had to reach his decision until 13 December 2006, the adjudicator issued to the parties a decision dated 13 December 2006 which MM and LRP received by post on 14 December 2006. That decision provided for the payment in full of MM's claim within 7 days of the date of the decision but it declined to direct payment of MM's claims for contractual interest. The decision directed that 90% of the adjudicator's fees, totalling £8,803.69 should be paid by LRP and the balance by MM. Since MM had already paid the entire sum invoiced by the adjudicator to him, the decision directed that LRP should reimburse MM that sum. LRP has declined to pay MM the directed sum or the share of the adjudicator's fees it was directed to pay and, in a claim form issued on 30 January 2007, MM now seeks summary judgment of these sums plus interest by way of enforcement of the decision.

4. The basis on which enforcement is resisted was only finally and clearly established in the detailed written submissions that I directed should be served following the brief one hour oral hearing. This procedure was adopted because the claim is for a relatively small sum but the enforcement issues were complex and only one hour had been fixed for the hearing. This time estimate was inadequate and the hearing would have had to have been adjourned part heard to a different day had written submissions not been directed as an alternative. The parties' advocates are to be commended for the quality and clarity of the written and oral submissions that they provided before, during and following this brief hearing.

2. Issues

5. The challenge to the enforcement application is in two parts, being in part a jurisdictional challenge relating to the adjudicator's alleged lack of jurisdiction when appointed and, in part, a procedural challenge relating to the timing of the delivery of his decision to the parties.

6. The jurisdictional issues are, on analysis, multi-layered. The first two issues were whether there was a contract at all (issue 1) and, if there was, whether it was it a construction contract (issue 2). The principle issue, raised by LRP, was, assuming that there was a construction contract, whether it was in writing as defined by section 107(2) of the Housing Grants Construction and Regeneration Act ("HGCRA") so as to make Part II of the HGCRA applicable (issue 3). If section 107(2) was not applicable, an issue arose as to whether section 107(5) of the HGCRA was applicable (issue 4). Finally, if section 107 did not provide the necessary statutory foundation for the adjudication, MM contended that LRP had nonetheless voluntarily submitted to the jurisdiction of the adjudicator (issue 5) and that the decision of the adjudicator that he had jurisdiction is now unreviewable since the relevant findings were made by the adjudicator within his jurisdiction (issue 6).

7. The procedural issues can be sub-divided into four sub-issues. Firstly, was the adjudicator entitled to impose a pre-condition on the delivery of his decision to the parties that his fees should first be paid by the referring party (issue 7)? Secondly, when did the adjudicator reach his decision (issue 8)? Thirdly, was a copy of the decision delivered to each of the parties as soon as possible after it had been reached (issue 9)? Fourthly, what is the effect on the validity and enforceability of the decision of the answers given to issues (7) - (9) (issue 10)?

3. Jurisdictional Challenges

3.1 Factual Background

8. The first contact between LRP and MM occurred in November 1997 when LRP invited MM to submit a proposal for its appointment to provide professional services in relation to the new business park being planned at Park Royal, London. The appointment was to be in connection with the intended planning application for the

infrastructure works which would involve a significant highways and traffic element. MM's proposal was submitted in a letter dated 3 December 1997. No formal contract resulted but professional services were provided and invoiced by MM and paid for by LRP. Whatever the precise contractual relationship was between the parties during this phase of the design work, that contract came to an end once MM's planning permission services were completed.

9. By a letter dated 4 November 1998, LRP's consultants sent MM a request to provide a proposal for engineering consultancy services in respect of the detailed design and supervision stages of the project, being Phase 2 of the infrastructure works. MM submitted a detailed proposal which split the assumed work into three elements, being the design of the infrastructure roadworks and bridges, the negotiations with the various interested parties in relation to planning, highways and railways agreements and site supervision. The letter made it clear that it would be necessary to define elements of work and the scope of MM's services more precisely at a later stage. It was not clear at that stage whether MM would be engaged by LRP or by the contractor, when appointed, to provide similar design services under a design and build contract arrangement. Different forms of contract were proposed depending on which contracting arrangement was ultimately settled upon.

10. Planning for this phase of the pre-construction work developed somewhat slowly. Thus, on 6 April 1999, MM sent LRP's consultants a document entitled Scope of Services for Detailed Design of The Highways Works. On 14 May 1999, LRP's former solicitors sent MM a proposed appointment document. No schedule of services was appended since these remained to be compiled and agreed. The document was stated to be applicable only to the first of the three phases of the works, being the infrastructure roadworks but as also being the likely document for any other phase undertaken by MM.

11. MM sent LRP's consultants a preliminary fee profile for this proposed appointment on 6 July 1999. The letter stated that a full fee profile could be developed once the scope of works had been better defined and it would also need reviewing once other changes to structural elements had been finalised. A further fee profile was produced dated 6 August 1999 which was sent to the consultants with a letter dated 20 September 1999.

12. On 28 September 1999, the consultants sent MM a letter entitled "Letter of Intent: Highways and Transport Engineers". This was clearly a reference to the proposed engagement to provide engineering consultancy services that had been sent to MM on 4 November 1998. The letter stated that it was the confirmation of LRP's instruction for MM to commence and proceed with the Works pending final agreement and execution of the Contract. The Works were defined as "the Highways and Engineers services for Phase 2 of the infrastructure works" and the scope of the works was stated to be identified in the bid letter dated 4 November 1999 and MM's proposal dated 26 November 1999 and its two subsequent letters dated 6 July 1999 and 20 September 1999 which were stated to be "still under review". Payment for work done was to be on a quantum meruit basis. If and when a Contract was executed, its terms and conditions would supersede the letter and govern retrospectively all work carried out.

13. MM was to proceed under the letter of intent pending final agreement and execution of the Contract and the instruction to proceed could be revoked at any time by seven days' notice in writing. The letter stated: "Unless so revoked, your authority to proceed under this instruction shall continue until 31 December 1999 or until any later date, which we will notify you in writing."

14. Negotiations and discussions about the terms of the Consultancy Appointment, or contract and about the changing scope of the Works to be performed by MM under that appointment continued meanwhile. MM corresponded about the terms of the agreement, about the detailed definition of the consultancy services to be performed, about the changing scope of the engineering design works and about MM's detailed changing fee proposals with LRP's consultants and solicitors for several months. Meanwhile, MM carried out various ad hoc services under the letter of intent which expired on 31 December 1999. Evidently, further services were carried out during 2000 although no extension of the letter of intent was confirmed in writing but, in a letter dated 23 August 2000, LRP's consultants wrote to MM: *"Further to your letter of intent dated 28 September 1999, we are writing to notify you, on behalf of our joint client, London & Regional Properties, that the authority to proceed with your services is extended from 31 July 2000 to 31 October 2000. The extended authority for you to proceed as referred to above is made on the terms and conditions as are contained within the said letter of intent."*

15. No further letter of intent or written confirmation was sent to MM. However, MM continued to undertake certain services. Little further progress was made in the negotiations and discussions about the terms of the contract or the finalisation of the terms of the services to be performed or the scope of work until December 2001 when desultory exchanges of further drafts of the proposed contract documentation occurred. Once these exchanges had resumed, they continued up to March 2003. MM, in its referral notice, suggested that the terms and conditions of the contract, including the services and scope of work documentation, were finally agreed at that time and applied retrospectively and superseded the letter of intent documents. However, the only evidence of such agreement being reached that was adduced before the adjudicator or in the summary judgment application was a letter from LRP's solicitors dated 10 March 2003 which raised a long list of further points of detail on the current draft of the appointment agreement for MM to comment on and agree.

16. Throughout the period starting in September 2000, MM performed and was paid for performing a very substantial volume of professional services. The services covered by the claim dealt with by the adjudicator were performed in and after a date in late 2002. However, from May 2000, MM was remunerated in accordance with

the current draft of the fixed fee schedule which, once finalised and agreed, was to form part of the appointment agreement. This basis of remuneration differed from that proposed in the letter of intent which had merely referred to a quantum meruit basis of remuneration.

3.2 Contractual Basis of MM's Claim in the Adjudication

17. MM sent an application dated 25 October 2006 to the RICS seeking the appointment of an adjudicator that was accompanied by a referral notice and a copy of the consultancy appointment document it alleged formed part of its agreement with LRP. The referral notice stated that a final consultancy appointment had been reached between MM and LRP in respect of the fundamental terms and conditions governing MM's consultancy appointment which had become binding on both LRP and MM and had superseded the letter of intent. The notice also stated that these agreed terms included a consultancy appointment document that contained an adjudication clause. As an alternative, MM stated that it was referring the dispute to adjudication pursuant to the letter of intent which was a construction contract as defined by the HGCRA.

18. It follows that MM was contending that the construction contract under which the dispute had arisen was the consultancy appointment and that it alleged that this contract was either constituted by the consultancy appointment ultimately entered into in 2005 which incorporated the printed consultancy appointment document or by the appointment originally entered into in 1997 or by the contract constituted by the letters of intent.

19. Following the appointment of the adjudicator, LRP's solicitors wrote to him and challenged his jurisdiction. The letter stated that the letter of intent did not contain an adjudication clause and was not construction contract for the purposes of the HGCRA and that the consultancy appointment also relied on by MM was not an agreed or concluded contract.

20. In its response to this letter, MM repeated its previous submissions that: (1) by 10 March 2003, there was an appointment in respect of MM's fee entitlement which incorporated the printed consultancy appointment document; (2) alternatively, there remained in existence a contract formed by the first letter of intent which had been extended beyond its expiry date by the second letter of intent; (3) both the letter of intent and the consultancy appointment were "in writing" since they embodied all but trivial terms of the agreement; and (4) LRP was estopped from contending that the consultancy appointment was not a concluded agreement since its consultants had referred to "the consultancy appointment" in a letter written on 29 September 2003, some months after the suggested date on which the terms of the consultancy appointment had been agreed.

21. The adjudicator decided to issue a non-binding decision letter dated 9 November 2006 which explained his views on the rival contentions as to his jurisdiction. He ruled that he had jurisdiction because the letter of intent was a construction contract and the statutory adjudication scheme applied to it since the contract did not contain an adjudication clause. He stated that he was not persuaded that the so-called "consultancy appointment" referred to in MM's adjudication notice was an agreed or concluded contract. He did not otherwise address the jurisdictional objections raised by LRP.

22. LRP, following the adjudicator's letter, submitted its response document. LRP contended in this document that, at best, the only contractual relationship between the parties was to be found in the first letter of intent, whose validity had expired on 31 October 2000 without being further extended by agreement. The document also referred to the term of the letter of intent which stated that the letter of intent would not continue beyond its expiry date unless LRP notified MM of that extension in writing and it stated that the parties had not waived this contractual requirement at all or in writing. LRP concluded that any claim by MM for services performed after 31 October 2000 could not arise under the terms of the letter of intent, being the only basis of claim left to MM following the adjudicator's ruling excluding a subsequent consultancy appointment.

23. MM in its response document to LRP's response, submitted that its claim arose out of the letter of intent which had been extended by the agreement of the parties as evidenced by the fact that MM had carried on providing services to LRP in the same way as it had before either letter of intent expired. MM also contended that it was an irresistible inference that the parties had agreed to the unlimited continuation of the validity of the letter of intent and had waived the contractual requirement for that continuation to be notified in writing by LRP.

24. Finally, the adjudicator's decision repeated his ruling as to jurisdiction and then considered whether the letter of intent lapsed on 31 October 2000. He concluded that it was not clear that, as LRP had asserted, that: "MM and LRP decided that the LoI would not be extended further but would come to an end as agreed in the letter dated 28 September 1999 and 23 August 2000". Instead, he found: "*It appears to me that LRP continued to instruct MM to carry out work beyond 31 October 2000 and MM continued to carry out the work required by LRP in the same manner as work was instructed and carried out between 1 January 2000 and 30 January 2000, a period not covered by either the LoI or LRP's subsequent letter of 23 August 2000. ... it is clear to me that MM continued to submit invoices beyond 31 October 2000 in respect of work carried out to LRP's instructions ... there is nothing to suggest to me that the parties were doing anything other than proceeding on the basis of the LoI on which they had been operating since September 1999. ...LRP have not adduced any evidence to suggest to me that the commercial relationship between MM and LRP was not being regulated by the LoI ... I am persuaded by MM's submissions that the parties continued to be regulated by the LoI both whilst work continued to be carried out by MM and paid for by LRP and whilst the parties continued to negotiate the terms of the contract which was intended to supersede the LoI and govern retrospectively the work carried out by MM under the LoI.. In view of the above, I am satisfied that the LoI did not lapse on 31 October 2000, the parties having waived that provision as asserted by MM.*"

3.3 Issue 1 - Was there a contract at all?

25. LRP contended, although not with any enthusiasm, that the scope of the work to be performed by MM was so ill-defined that no enforceable contract came into being as a result of the letter of intent or at all. However, Mr Hamish Lal, in his oral and written submissions, accepted that there was an enforceable contract constituted by the letter of intent but that that contract could only be given effect to by reference to its precise terms. Thus, its validity expired no later than 31 October 2000 in accordance with the terms of the second letter of intent and any claim under it could not be enforced since any work that MM had carried out was carried out under a separate and different contract which was not put in evidence or under a contract constituted by the letter of intent that had subsequently been the subject of substantial amendment to its terms that defined its validity period and MM's scope of work obligations and payment entitlement. These amendments were neither in, nor evidenced in, writing since MM had not adduced evidence that identified the documents in which the full extent of these amended provisions were to be found. Instead, MM wrongly contended that the terms of the contract were to be found exclusively in the letter of intent and the documents it referred to and that it did not need to identify the additional documents that evidenced these amendments.

26. It follows that the contract that MM was entitled to rely on was enforceable in law but was not one that had been shown to have been sufficiently in writing to fall within the ambit of section 107(2) of the HGCRA. In consequence, the adjudicator was not entitled to be appointed nor to enforce or give effect to the contract since his jurisdiction could only extend to contracts fulfilling the requirements of section 107.

3.4 Issue 2 - Was the contract a construction contract?

27. LRP contended in the adjudication that the contract on which MM was founding its claim was not a construction contract thereby raising and maintaining its objection to the adjudicator's jurisdiction. This contention was first advanced in its challenge to the adjudicator's jurisdiction where LRP had contended that the letter of intent was not a construction contract for the purposes of the HGCRA and, by virtue of the *RJT Consulting* case, fell outside the ambit of the HGCRA. In its response document, LRP again contended that the letter of intent was not capable of founding MM's claims in the adjudication because the provision in the letter of intent which limited the validity of the letter to a defined date had not been extended in writing. LRP also contended that MM's original appointment relating to planning services was not within the ambit of the HGCRA since it predated the coming into force of that Act and that there was no adjudication agreement contained within any other binding contract between LRP and MM that might be found to exist. LRP also contended that the agreement under which MM was claiming was not a construction contract because all of the terms had not been finalised nor were they in writing in accordance with section 107 of the HGCRA. This was because the final wording and the full content of a significant number of its terms remained for agreement.

28. LRP did not set out its contentions that the relevant contract was not a construction contract with particular structure or clarity in the adjudication documentation. This was largely because of the unstructured way that MM was then putting its case. MM was initially contending that the relevant agreement which founded its claim was the consultancy agreement. However, it was also contending that the letter of intent governed the claim and that its validity had been extended by conduct or by inference since the requirement for writing had been waived. It also was contending that there had been an enforceable contract in place between the parties since 1997 which had provided a single contractual relationship between them throughout the whole period from 1997 until 2006. LRP had to respond to each of these allegations in circumstances in which MM had not clearly distinguished between them.

29. However, in the submissions on LRP's behalf in the enforcement proceedings, it was made clear that LRP was contending that the letter of intent was not a construction contract because the requirements of section 107 of the HGCRA had not been fulfilled. This was because the validity of the letter of intent had not been extended in writing and the scope of work and payment provisions were neither fully set out nor fully evidenced in writing.

30. MM made a detailed submission that these contentions by LRP were not ones that related to the question of whether or not the relevant agreement was a construction contract. MM was seeking to show that LRP had not raised its section 107 jurisdictional objection in the adjudication since this was not encompassed in the pleaded objection that the relevant contract was not a construction contract. MM's contention was that the relevant agreement was a construction contract even if the adjudication provisions were not applicable to it by virtue of section 107. That section had potentially disapplied the adjudication provisions of the HGCRA to a contract that was and remained a construction contract.

31. This argument was circular since section 107, in terms, provides that the provisions of Part II of the HGCRA "apply only where the construction contract is in writing". Part II of the HGCRA includes sections 104 and 105 of the HGCRA. These are the sections which define a construction contract for the purposes of the HGCRA. It follows that an agreement which is not in writing is one to which neither the definition of "construction contract" nor Part II of the HGCRA are applicable. Such an agreement may therefore be properly described as being one which is "not a construction contract".

32. It follows that LRP, in contending that the relevant contract was not a construction contract, was contending in context that the relevant agreement was not in writing and did not comply with the requirements for writing as defined by section 107 of the HGCRA. It was also contending that Part II of the HGCRA did not apply to the agreement so that the adjudicator lacked jurisdiction to decide the dispute that MM had referred to him that it alleged had arisen under it.

3.5 Issue 3 - Was the relevant contract "an agreement in writing"?

33. **MM's basis of claim**. In the light of the procedural history of the adjudication, it is clear that MM's claim in the adjudication was for payment for design services carried out under the letter of intent. However, the work being claimed for had been carried out in a period starting long after 31 October 2000 when the letter of intent's validity had expired if that validity was governed by its written terms. The relevant services involved detailed engineering design work of parts of the infrastructure of the development. The full extent of these services to be carried out, the architectural details of the relevant parts of the infrastructure which were to be subject to MM's engineering design and the payment to be made for these services had all only been finalised long after 31 October 2000.

34. It is necessary to analyse these submissions. It is first helpful to consider what a letter of intent is. In a construction context, the phrase covers any document in which an employer makes an offer to a contractor or consultant that if that other party will start to undertake work pending the finalisation of a formal contract, the employer will pay for the work to be carried out. The letter will usually provide that the work to be carried out and the terms on which that work is to be carried out are to mirror as closely as possible the terms of the intended formal contract once it has been entered into. Once that occurs, the contract created or evidenced by the letter of intent will be subsumed into that formal contract. Whilst work continues under the letter of intent, either party can terminate the contractual arrangement without notice, unless the letter of intent otherwise provides. The clear intention of the parties will usually be that the life of the letter will be short lived and that the formal contract will follow soon afterwards. The letter of intent will usually be accepted by conduct by the contractor or consultant starting work. The parties' intention will usually be that the work to be carried out will be the same as the work that will form the work scope of the executed contract and that the letter of intent contract will mirror the executed contract. If that work scope has not been fully agreed before the letter of intent takes effect and is the subject of continuing discussion and change after the letter of intent takes effect, the work to be performed under the letter of intent will change as the continuing discussion and negotiations unfold. Otherwise, there will be difficulty when the finalised contract is entered into and the letter of intent is subsumed into and is superseded by that finalised contract.

35. The unusual feature of the letter of intent received by MM is that work proceeded under it for several years, the scope of work envisaged by its original terms changed very significantly during that period and the contractual relationship created by the original letter of intent also changed. There were, in reality, four separate phases of this relationship. The first phase lasted from 28 September 1999 to 31 December 1999, the validity period stated in the letter dated 28 September 1999. In the second phase, between 1 January 2000 and 22 August 2000, MM continued to provide professional services without the validity of the letter of intent being formally extended. In the third phase, between 31 July 2000 and 31 October 2000, the work proceeded under the terms of the letter dated 23 August 2000 which extended the validity of the original letter of intent for that period. The fourth phase was from 1 November 2000 until the present when work proceeded without formal extension. The adjudicator decided that the work in this period had been the subject of instructions given by LRP which, by inference, were to the effect that the work should continue as if the validity of the letter of intent had been further extended.

36. Thus, in each phase, MM was under an obligation to undertake the Works, being the work scope in the form and to the detail current at the time that each extension of the validity of the letter of intent was instructed or agreed. Given the nature of a letter of intent, namely a short lived contract whose terms were intended to mirror the contact when finally executed, the most obvious analysis of the contractual relationship in existence between MM and LRP in the period starting on 28 September 1998 and extending over the following nine years was that each extension of the validity of the letter of intent brought into being a new contract. Alternatively, the contract was treated by the parties as a rolling contract whose terms were constantly changing as the work scope and other contract terms were amended in discussion and by agreement. Thus, in order to ascertain what MM's obligations were at any one time, it would be necessary to determine what the precise scope of work and the precise conditions under which that work was to be performed were at the time in question since these were subject to continuous organic development and change.

37. **The law**. Section 107(1) of the HGCRA provides that Part II of the HGCRA is only applicable where the construction contract is in writing and any other agreement between the parties as to any matter is effective for the purposes of Part II only if in writing. The section also provides:

> *"(2) There is an agreement in writing-*
>
> *a. if the agreement is made in writing (whether or not signed by the parties),*
>
> *b. if the agreement is made by exchange of communications in writing; or*
>
> *c. if the agreement is evidenced in writing.*
>
> *(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*
>
> *(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.*
>
> *(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of the 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"*

38. Section 107(2)(c) was considered by the Court of Appeal in ***RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd***.[1] In giving the leading judgment, Ward LJ stated:

> "*19. 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. An exception to the generality of that construction is the instance falling within subsection (5) where the material or relevant parts alleged and not denied in the subsequent submissions in the adjudication proceedings are sufficient.*"

39. It is clear that Ward LJ was concerned only with the third type of agreement in writing, being one evidenced in writing. That is because the first two types of agreement are agreements where the parties agree that the entirety of the terms constituting the agreement are to contained in one or more documents that the parties have agreed are to form the entirety of the contract or are to constitute the entirety of a contractual exchange of communications. Such contracts are subject to the parole evidence rule that is still applicable to contracts. This provides that reference may not be made to any term or provision that is not found within the terms of the document or documents forming the overall contract for the purpose of ascertaining or interpreting its terms. This rule still survives as a rule of contractual interpretation for those contracts which include a term that the contract is exclusively to be contained in the documents forming the contract. The rule is a throw-back to the days when documents were handwritten on parchment and when disputes about their terms arose between contracting parties for decision by jurors, none of whom were literate.

40. Nowadays, the courts will also give effect to oral contracts, to contracts that are evidenced in writing and to contracts which are partly written or partly evidenced in writing and partly oral. Since adjudication is meant to be a quick and readily available remedy, Parliament decided that only those contracts to which the parole evidence rule applied could found adjudication. Other contracts, even if they were construction contracts, could only found an adjudication if all their terms were evidenced in writing. Any other construction contract, for example, one which was oral or partly written and partly oral or which was not in writing or which was based on conduct. In other words, section 107 of the HGCRA was enacted with the intention of excluding from the statutory adjudication regime any construction contract which is not in writing.

41. **Agreement in writing - Parties' submissions**. Mr Nissen's primary submission on behalf of MM was that its claims arose out of an agreement in writing, namely the letter of intent dated 28 September 1998, so that there was no necessity for all its terms to be in writing In other words, the claim was said to arise out of the express or implied terms of an agreement exclusively contained within the letter of intent and the four earlier letters were incorporated into that letter by its wording.

42. Mr Nissen also submitted that if the agreement that was in writing did not contain all the necessary terms but that some of those terms were to be found elsewhere, nonetheless the agreement was "in writing" for the purposes of section 107. This submission would collapse the difference between an agreement in writing and an agreement evidenced in writing since any agreement all of whose terms are set out in written form would be one that is both in writing and evidenced in writing. An agreement can only be "*in writing*" if its terms are intended to be found exclusively in a collection of identifiable documents.

43. Mr Lal submitted on behalf of LRP that MM's claim was not based exclusively on the terms of the letter of intent but relied on those terms in their subsequently amended and extended form. These amendments and extension had been in part agreed orally by the parties, in part evidenced in writing and in part were to be inferred by their post-contract conduct. These amendments and extensions related to the letter of intent's core terms, being those concerned with the period during which it had contractual validity, with the scope of MM's services to be performed under the letter of intent and with the sums that it was to be paid for those services.

44. **Letter of intent's validity**. Mr Nissen contended, in agreement with the adjudicator, that the parties' agreement to extend the validity of the letter of intent was to be inferred from their post-contractual conduct. Equally, he submitted that the parties' agreement to waive any requirement that its validity could only be extended by a written notification was also to be inferred from their conduct.

45. It followed, so Mr Lal submitted in answer to this submission, that MM's claim could not arise under a contract in writing since the contractual term extending the letter of intent's validity period and the agreement providing for a waiver that that extension should be notified in writing were not contained in the agreement in writing contended for by MM but were instead agreed orally or were to be inferred by the parties' conduct.

46. **Scope of work**. It was also submitted on behalf of MM that its scope of work was defined exclusively within the letter of intent documentation. However, this documentation did not fully or clearly define the scope of the work to be designed by MM because the definition of that work scope in the letter of intent documentation was incomplete, provisional and the subject of on-going discussion and amendment. Indeed, the letter of intent stated that the content of two of the incorporated letters defining MM's work scope was "*still under review*".

47. The evidence adduced for the summary judgment application showed that although the work scope was known to both parties in outline at the date of the letter of intent, much of MM's design work and some of the services it was to perform remained to be defined or amended. Mr Rice, MM's Project Director, stated that the letter of intent was never intended to be the final document recording every aspect of the relationship between MM and

[1] [2002] 1 WLR 2344, (CA).

LRP and that the scope of work remained to be finalised after it had been sent to MM. Only the "*basic scope of the work had been agreed*". Mr Rogers, LRP's Development Director, stated that the scope of the work had not been agreed and was subject to change.

48. **Payment**. The payment terms relied on by MM as the basis of its claim were not set out in the contract documentation. The letter of intent stated that MM would be paid under it on a quantum meruit basis. That basis of payment was changed, according to the evidence, by the parties' subsequent agreement reached in about May 2000. From then on, MM was to be paid by reference to a payment schedule that had only come into existence after the period defined in writing for the validity of the letter of intent had expired. The agreement rewriting the payment provisions of the letter of intent was either an oral agreement or one to be inferred from the parties' conduct or one evidenced by documents that had subsequently come into being and which were not adduced in evidence.

49. **Conclusion - section 107(2)(a) of the HGCRA**. MM asserts that its claims in the adjudication had arisen under the letter of intent in the form it stood when it first received it in September 1998. However, the contract which it was claiming under was, on analysis, a different contract, being a contract which had been significantly amended from that letter of intent. The wording of the letter of intent shows that MM's scope of work that was identified in the letter of intent documentation was at that time both provisional and subject to future amendment and finalisation. Moreover, if the governing contract had been the unamended letter of intent. MM's claims could not have been advanced since they would have been based on a contract whose validity was subject to a fixed time period which had already expired when the claims first arose whereas its claims are actually based on a contract with no limit of time and whose scope of work and payment provisions were very different from those provided for in the letter of intent. It is not sufficient for MM to vest the adjudicator with jurisdiction by asserting that it was referring disputes to adjudication under an agreement which appears to comply with section 107. When a jurisdictional challenge is made by the responding party, the court must consider itself under what contract the dispute has actually arisen and then consider whether that contract complies with section 107. This consideration must be made independently of the referring party's characterisation of the contract under which the dispute has arisen since, otherwise, a referring party could obtain an adjudication when it was not entitled to one by purporting to refer a dispute arising under it to adjudication when the dispute referred actually arose under a different contract.

50. Thus, MM's claims that it had referred to adjudication did not arise solely from the agreement in writing set out in the letter of intent documentation but arose out of a different agreement, being one which had been the subject of subsequent and substantial amendment. These amendments were partly evidenced in writing, partly formed by conduct and partly to be inferred from the conduct of the parties. Many of the significant amendments must have been in writing or evidenced in writing but these were not adduced in evidence and were not relied on by MM. It follows that the agreement that MM had in fact referred to adjudication was not an agreement in writing to which the provisions of section 107(2)(a) of the HGCRA applied but was an agreement that was partly in writing, partly evidenced in writing, partly oral and partly formed by conduct. It follows that section 107(2)(a) of the HGCRA was not applicable to this adjudication..

51. **Agreement evidenced in writing**. The letter of intent documentation was not an agreement that was evidenced in writing and LRP did not rely on section 107(2)(c) of the HGCRA which deals with such agreements. This was because many of the core terms of parties' agreement were inferred by conduct or were evidenced in documents which MM did not rely on as evidence of the terms of its consultancy appointment. In particular, both the alleged waiver and the extension agreement were to be inferred from conduct and were not evidenced in writing. Equally, no documents evidencing the finally agreed work scope or payment schedules were placed in evidence by MM in the adjudication or in the enforcement proceedings.

52. **Conclusion - section 107(2)(c) of the HGCRA**. It follows that the requirements of section 107(2) of the HGCRA had not complied with so that although there was a construction contract in place, it was not one which allowed for a statutory adjudication because section 107(2) had not been complied with.

3.6 Issue 4 - Was Section 107(5) of the HGCRA applicable?

53. On behalf of MM, it was contended that even if the contract was not in writing, the agreement was to be treated as if it was in writing because the exchanges within the adjudication constituted by MM's referral notice and LRP's response were sufficient to section 107(5) of the HGCRA and allow an adjudicator to be appointed under that contract.

54. Section 107(5) requires that a contract that does not fulfil the requirements of section 107(2) may nonetheless be subject to Part II of the HGCRA if (1) that had been an exchange of written submission in the adjudication; (2) in that exchange, MM had alleged that there was an agreement otherwise than in writing; and (3) LRP had not denied the existence of that agreement.

55. MM contended that section 107(5) was applicable and relied on exchange of pleadings:

1. This passage in MM's referral notice: "*[LRP's] agents instructed MM to proceed with the services under a contractually binding letter of intent ...*".
2. This passage in LRP's response: "*The adjudicator should give effect to the express, clear and unambiguous wording agreed in the letter of intent between LRP and MM. ... It follows that the LoI, therefore, as agreed by MM and LRP, came to an end on 31 October 2000*."

56. I cannot accept that this exchange of pleadings engaged section 107(5) of the HGCRA. The first reason is that MM's pleading alleges that there was an agreement but does not also allege that that agreement was "*otherwise than in writing*". On the contrary, MM alleged in the pleading that the agreement was fully set out in a series of documents which were referred to in that pleading. Furthermore, LRP's response could not be described as one which did not deny the existence of an agreement that was not in writing, even if MM's pleading had alleged the existence of an agreement which did not comply with the writing provisions of section 107(2). Instead, LRP was accepting that there was an agreement but was then asserting that that agreement was not the agreement under which the dispute had arisen and that the agreement that was relevant to MM's claim was not one which fulfilled the obligations as to writing set out in section 107(2) so that the adjudicator had no jurisdiction to decide the dispute.

57. In order to see that this is the meaning that should be given to LRP's admission that there was a contract in existence between the parties, it is necessary to set those pleadings in their context. The relevant context was as follows:

(1) LRP had already made it clear in its initial letter to the adjudicator that he lacked jurisdiction on various grounds including the ground that MM's consultancy appointment, by whatever contract gave effect to that appointment, did not comply with the statutory requirements for writing provided for by the HGCRA. This reservation was clearly set out by LRP's reliance on the *RJT* case.

(2) The adjudicator had then ruled that he had jurisdiction because the only relevant agreement was that created by the letter of intent. He had not ruled on the section 107 issue, even though it had been raised by LRP and, by inference, the adjudicator must have erroneously concluded, or was to be taken as having erroneously concluded, that the relevant agreement was in writing.

(3) MM then served its response document relying on the agreement that the adjudicator had ruled was the agreement that founded his jurisdiction. LRP pleaded to this claim. This pleading did not withdraw LRP's reservation that the adjudicator lacked jurisdiction for lack of an agreement in writing. Indeed, the *RJT* case is again relied on in paragraphs 28 of that pleading. Thus, this response pleading was intended to respond to MM's pleading on the basis that since the adjudicator was going to proceed with the adjudication, it would attempt to defeat MM's pleaded case on its merits whilst maintaining that the adjudicator lacked jurisdiction on section 107 grounds.

58. In context, therefore, it is clear that LRP was continuing to contend, as its first line of defence, that the adjudicator lacked jurisdiction to adjudicate MM's claim since that claim was based on an alleged entitlement to payment which had arisen under a letter of intent whose validity had expired.

59. It follows that MM was not alleging that the agreement was not in writing and LRP was not admitting the existence of such an agreement but was, instead that the construction contract relied on by MM was both invalid and lacked the necessary writing. Thus, MM cannot rely on section 107(5) of the HGCRA to show that the agreement it was claiming under was subject to Part II of that Act.

3.7 Issue 5 - Did LRP voluntarily submit itself to the jurisdiction of the adjudicator?

60. This issue no longer arises in the light of the issues that I have already decided. My conclusions are, in summary, that LRP reserved its position as to the adjudicator's jurisdiction at the outset of the adjudication in a letter to the adjudicator whose effect was to contend that the adjudicator lacked jurisdiction because the contract relied on by the referring party to found his jurisdiction was not in writing. LRP continued to maintain this position in its subsequent pleading and, in doing so, did not give the adjudicator jurisdiction by virtue of section 107(5).

61. It follows that LRP neither voluntarily submitted itself to the jurisdiction of the adjudicator nor waived its entitlement to rely on section 107 in the enforcement proceedings.

3.8 Issue 6 - Is the decision of the adjudicator unreviewable because LRP is seeking to challenge errors made within his jurisdiction?

62. It was contended on behalf of MM that the adjudicator had decided the only relevant issue in its favour and that that decision had been taken within his jurisdiction. Thus, if that decision was erroneous, it was one that could not be reviewed by the court in enforcement proceedings on the now well-established basis that errors of law within jurisdiction may not be reviewed in enforcement proceedings and do not invalidate an adjudicator's decision.

63. It is first necessary to analyse what the decision was that MM now contends had been made within jurisdiction. On analysis, the decision that MM contends was both non-reviewable and determinative of whether the adjudicator's decision could be impugned for lack of jurisdiction was the adjudicator's ruling that the parties had agreed to extend the validity of the letter of intent, an agreement that was to be inferred from their subsequent conduct. This issue related to the extension of the validity of the letter of intent. However, the adjudicator also had to consider a related second issue, namely whether it was necessary for that validity extension agreement to be evidenced in writing. This was the section 107 issue. He did not address this second issue at all.

64. Both these issues were raised by LRP in the adjudication. The second issue was raised in LRP's letter informing the adjudicator of its jurisdictional objections to his appointment. One of those objections was based on the *RJT* case. LRP stated that: "*In addition, following the Court of Appeal decision in* RJT Consulting Engineers Ltd v DM Engineering Ltd*, it is clear that the "consultancy appointment" [a reference to both contracts relied on by MM in the alternative] does not fall into the ambit of the Construction Act*".

This objection was not spelt out in any detail but, in its context, it raised the jurisdictional objection that the adjudication was invalid because the relevant agreement and any of its core terms were neither in writing nor evidenced in writing and that any disputes under it were therefore not capable of giving rise to a statutory adjudication at all.

65. Had the adjudication been validly started in a way that had referred to adjudication this jurisdiction issue as an issue to be determined within his jurisdiction, his decision on this second issue would not have been capable of being challenged in any subsequent enforcement proceedings because the decision would have been an internal one. However, the adjudication was never validly started because the letter of intent in its amended form, being the construction contract founding both the dispute and the adjudication, did not comply with section 107(2). The only way that the adjudicator could have validly determined the section 107 issue in a non-reviewable manner would have been for him to have been appointed ad hoc to determine that issue or for the parties to have conferred that jurisdiction on him after his purported appointment by the RICS. An adjudicator may not determine his own jurisdiction unless he is appointed ad hoc by the parties for this purpose but no such ad hoc appointment took place.

66. Thus, any erroneous decision by the adjudicator on the first issue was not binding on LRP since it had been taken by an adjudicator who lacked jurisdiction to resolve any dispute since he had been appointed under an agreement which did not comply with section 107(2). The section 107 issue was logically the first issue that had to be determined since it related to the adjudicator's jurisdiction to act at all. The adjudicator could not, of course, determine that section 107 jurisdictional issue in a binding or exclusive way but he never appears even to have considered it and he certainly never ruled upon it. In fact, the adjudicator's decision on the first letter of intent validity extension issue appears to have been correct but, whether it was right or wrong, that decision could not affect the fact that the adjudicator had not been validly appointed to decide any issue.

67. In summary therefore, there was no unreviewable error. However, the adjudicator failed to address the relevant jurisdictional question at all. Had he addressed it correctly, he should have decided that it was necessary to abandon the adjudication since he should he had no jurisdiction to be appointed in the first place.

3.9 Conclusion - Jurisdictional issues

68. I conclude that the adjudication was started and continued with, and decided by, an adjudicator who lacked jurisdiction. This was because the relevant agreement founding the adjudication was neither in writing nor evidenced in writing and the adjudication was not validated by any admission by LRP in its pleadings. Thus, the agreement was not a construction contract. The adjudicator was not given ad hoc jurisdiction to determine the core section 107 issue concerned with his jurisdiction to act. He was asked to consider his jurisdiction and he gave a non-binding decision about it but he failed to address or rule on it. MM wrongly contended that he had decided all jurisdictional issues referred to him in a non-reviewable manner but he neither considered nor ruled on the section 107 issue.

4. Procedural Challenges

4.1 Introduction

69. LRP mounts a challenge to the manner in which the adjudicator delivered his decision to the parties. This procedural challenge no longer arises but it was fully argued and I propose to determine it on the basis that the adjudicator did have, contrary to my findings, jurisdiction to determine MM's referral. The procedural challenge is based on the adjudicator having imposed a precondition on the release of his decision that MM should first pay his fees and then giving effect to that precondition and that he reached a decision but did not deliver it as soon as possible after he had delivered it. The decision had been reached on 8 December 2006 but was not sent out until 13 December 2006. The error of late dispatch was compounded by the decision letter not being faxed to the parties but only being sent out by first class post

70. **Statutory provisions**. It is necessary first to set out the relevant provisions of the HGCRA and the Scheme. These are as follows:

1. HGCRA

CONSTRUCTION CONTRACTS

Adjudication

108(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

(2) The contract shall- [enable, provide, require, allow or impose the matters set out] ... ...

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts shall apply.

114(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. ...

(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.

2. The Scheme for Construction Contracts

Powers of the adjudicator

12. The adjudicator shall-

(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract ...

19(1) The adjudicator shall reach his decision not later than- ...

(b) forty two days after the date of the referral notice if the referring party so consents, ...

(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.

Adjudicator's decision

22. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision.

71. **Factual background.** In his letter to the parties notifying them of his appointment as adjudicator, the adjudicator inserted this provision:

"I request that all correspondence be initially sent by facsimile using the facsimile number detailed above. In addition I require that all correspondence be subsequently sent by first class post or delivered by hand to [my office] ... . I do not intend to take telephone calls form either of the parties or their representatives. ...

Prior to releasing my Decision I will require payment of my fees and expenses by the Referring Party."

72. MM, as the referring party, agreed to the adjudicator's request to extending the date by which he had to reach his decision by up to 14 days. The adjudicator notified the parties on a letter dated 9 November 2006 that he was therefore obliged to reach his decision on or before 13 December 2006. By a letter dated 7 December 2006 that he faxed and sent by post to the parties, the adjudicator stated:

"I have reached my Decision in this adjudication which now requires to undergo final typing and editing.

I am, therefore, on schedule to fully complete my Decision by tomorrow. In accordance with my letter to the Parties dated 1 November 2006, the Referring Party is to pay my fees and expenses prior to me releasing my Decision.

I require the Referring Party to make payment of my fee account in the amount of £9,781.88 inclusive of VAT."

73. MM did not pay the sum stated in the letter and the decision was not sent out in the period 7 December to 12 December 2006. On 13 December 2006, the following sequence of events occurred:

(1) At the start of the business day, MM transferred to the adjudicator's account the sum stated as being payable in the adjudicator's letter of 7 December 2006.

(2) Sometime before 09.59, the adjudicator signed his decision.

(3) MM notified the adjudicator by fax received by the adjudicator at 09.59, that the sum of £9,781.88 had been transferred to his account "as per your instructions".

(4) The adjudicator posted the decision by first class post to the parties at 10.00 am by Recorded Next Day Delivery.

(5) The adjudicator, due to what he described as administrative error, did not send the decision by facsimile.

(6) The decision was received by both MM and LRP on 14 December 2006.

74. On the basis of this chronology, LRP contended that the decision was not sent to the parties as soon as possible after he had reached it and it was therefore invalid and unenforceable.

4.2 Issue 7 - Was the adjudicator entitled to impose a precondition on the delivery of his decision to the parties that his fees should first be paid by the referring party?

75. The adjudicator is obliged to comply with the scheme rules because he is required to comply with any relevant terms of the construction contract and the scheme rules have effect as implied terms of that contract by virtue of section 114(4) of the HGCRA. In complying with the scheme rules, the adjudicator must act impartially, rule 12(a) of the scheme. The adjudicator must reach a decision which must be accompanied by reasons if these are requested, rules 19 and 22. This decision, with the reasons if these are requested, must be delivered to the parties as soon a possible after he has reached his decision, rule 19(3).

76. It follows from these provisions that the adjudicator may not impose a lien on his decision or reasons and not deliver it pending the payment of his fees. This is because he is restricting himself from complying with his obligation to deliver these documents as soon as possible after he has reached his decision which must be reached within 28 days or, if the referring party agrees, within 42 days.

77. Moreover, the adjudicator appeared to lack impartiality in making it a condition of his appointment that his fees would first have to be paid by the referring party before he delivered his decision to the parties and by then appearing to enforce that pre-condition. An adjudicator appointed under a construction contract to which Part II of the HGCRA is applicable, particularly where the agreement does not contain an overriding contractual adjudication clause. His appointment is not consensual in the same way as an arbitrator's appointment is consensual and he has a quasi-judicial function since he is imposed unilaterally by the state onto one of the parties to reach a binding, albeit temporary, decision about their dispute. The adjudicator may not, therefore, be or appear to be financially beholden to one party, particularly the referring party, or place himself in the position in which he might appear to be more partial to one side than the other. The imposition of a lien on his decision which has to be lifted by the referring party in order to obtain his decision gives an appearance of partiality and amounts to a breach of rule 12(a) of the scheme.

78. Thus, the adjudicator was in breach of his contractual obligations imposed by rules 12(a) and 19(3) of the scheme in imposing this condition and, subsequently, in implementing it.

4.3 Issue 7 - When did the adjudicator reach his decision?

79. It was contended on behalf of MM that the adjudicator only reached his decision on 13 December 2006 when he signed it and sent it off. However, the adjudicator informed the parties that his decision would be completed on 8 December 2006 in his letter dated 7 December 2006 and he never subsequently informed them of any revised date. What the adjudicator appears to have done is to have completed his decision on 8 December 2006 but to have waited to sign it until he received payment from MM for his fees. On the last day for delivery of his decision, he signed it in anticipation of receiving his fees from MM and these were duly paid soon afterwards. The adjudicator then sent the decision off but since this was only sent by post, the parties did not receive the decision until 14 December 2006.

80. MM contended that the decision could not have been completed until he had signed it. However, the scheme provides for the decision to be reached and then sent off as soon as possible thereafter. There is no reason not to take the adjudicator at his word so that the decision was completed, or reached, on 8 December 2006 and it was a formality for him then to sign it. That step appears to have been postponed after the completion of the decision because the adjudicator was awaiting payment. However, the signature was not a necessary step that had to be taken to allow the decision to be reached. It follows that the decision was reached on 8 December 2006.

4.4 Issue 9 - Was a copy of the decision delivered to each of the parties as soon as it was reached?

81. The decision was not delivered to each of the parties as soon as it was reached. There were three reasons why the decision was not delivered to the parties on the day it was reached on Friday 8 December 2006 but was instead received on Thursday 14 December 2006. Firstly, the adjudicator imposed a pre-condition that the decision would not be released until MM paid his fees; secondly, the adjudicator implemented that condition and did not release the decision for 5 days whilst awaiting payment; and thirdly, the adjudicator failed to send the decision by fax, despite his direction that all communications in the adjudication should be sent in this way, but only sent it by first class post so that it arrived one day after it had been sent. In the context of the scheme rules, "delivery to each of the parties" means getting the decision into their hands rather than dispatching it to them.

82. It follows that the decision was not delivered in compliance with rule 19(3) since it was not delivered as soon as possible after it had been reached nor was it delivered prior to the end of the 42-day period whose last day was 13 December 2006. There was a delay of five days or three working days in delivering it. There was no reason in principle for the adjudicator to delay delivering his decision as soon as he has reached it even if the time for delivery has not passed. The delay was caused by his breach of rule 12(a) in imposing a pre-condition of the release of his decision that MM should first pay his fees and then enforcing this pre-condition and by his failure to comply with his own stipulated procedure whereby all communications to and from the parties should initially be by fax. However, when the decision has been reached within the relevant 28-day or 42-day period, it is incumbent on the adjudicator to deliver it as soon as it has been finished and certainly to deliver it before the relevant period of 28 or 42 days has expired.

4.5 Issue 10- What is the effect on the validity & enforceability of the decision of the answers given to issues (7)-(9)?

83. There are now a long line of decisions in the Technology and Construction Court that have held that a decision that is not delivered promptly by the most rapid available means of delivery is invalid. These decisions include ***Bloor Construction (UK) Ltd v Bowmer & Kirland (London) Ltd***,[2] *St* ***Andrew's Bay Developments Ltd v HBG Management Ltd***,[3] *Barnes & Elliott Ltd v Taylor Woodrow Holdings Ltd*,[4] ***Ritchie Brothers (PWC) Ltd v David Philip (Commercials)***,[5] ***Hart Investments Ltd v Fidler & Others***[6] and ***Cubitt Building & Interiors Ltd v Fleetglade Ltd***.[7]

84. The rationale for the principle I have already summarised and which is derived from these authorities is as follows:
    (1) Adjudication is intended to be a rapid and informal means of resolving disputes on a temporary basis.
    (2) To that end, the scheme rules, and all other adjudication rules, provide that the adjudicator must deliver his decision promptly.
    (3) Given the rationale for adjudication in its present rapid form, the rules are to be construed as being mandatory. They are rules which the adjudicator is obliged to comply with.
    (4) So as to comply with this rationale, the adjudicator should use the most rapid means of delivery that are reasonably available. This will ordinarily involve use of email or facsimile facilities.
    (5) Any delay after the end of the relevant adjudication period in delivering the decision must be minimal and, if the decision has been reached before the end of that period, it should be delivered within that period.
    (6) Any failure to comply with the requirement of prompt and rapid delivery will render the decision unenforceable and, probably, a nullity.

85. There was no good reason for the adjudicator to have delayed in providing his decision to the parties after Friday 8 December 2006. It follows that since I agree with, and adopt, these principles, the decision of the

[2] [2000] BLR 314, TCC, Judge Toulmin QC
[3] [2003] SCLR 526, Court of Session, Outer House, Lord Wheatley
[4] [2004] 1 BLR 111, TCC, Judge Lloyd QC
[5] [2005] BLR 384, TCC
[6] [2007] BLR 30, TCC, Judge Coulson QC
[7] [2006] EWHC 3413, TCC, Judge Coulson QC

adjudicator, even if it had been reached within the adjudicator's jurisdiction, is unenforceable and, probably, a nullity. An additional reason for reaching this conclusion is that the adjudicator failed to act impartially in imposing a pre-condition that MM should pay his fees prior to the his providing a copy of his decision to the parties.

Overall Conclusion

86. On grounds of lack of jurisdiction, procedural irregularity and lack of impartiality and non-compliance with rule 19(3) of the Scheme, the decision of the adjudicator is unenforceable. Since there is no useful purpose in granting permission to defend, judgment will be entered for the defendant.

87. 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. As it is, they have allowed themselves to be locked into a dispute involving the technicalities of adjudication law and procedure. The overall costs, including the adjudicator's fees, must be disproportionate to the sum in issue. It is to be hoped that the parties will now reach a rapid out of court overall settlement of this dispute.

Alexander Nissen QC (instructed by Shadbolt & Co) for the claimant.
Hamish Lal of Dundas & Wilson LLP for the defendant.