

**Notes on the Court of Appeal decision in RTS Flexible Systems Ltd v Molkerei  
Alois Muller GmbH & Co KG on 12 February 2009.**

*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* (decided on 16 May 2008) was a decision in the Technology and Construction Court (TCC) between a designer / supplier of machines for packaging in the food industry (RTS) and its client, a dairy product supplier (Muller). A dispute arose over the supply of the equipment, which led to the litigation. The parties referred preliminary issues regarding the formation of the contract and incorporation of terms to the court for determination.

As the trial judge (Mr Justice Clarke) remarked, the case was “*another example of the perils of proceeding with work under a letter of intent*”. RTS had started works before terms had been agreed, on the assumption that terms would ultimately be finalised. The letter of intent stated the scope of the project, the price and date for completion and confirmed Muller’s wish to proceed with the project subject to, among other things, the full contractual terms being finalised, agreed and signed within four weeks of the date of the letter of intent. By the expiry of the letter of intent, the parties had largely agreed Muller’s terms, but not the accompanying schedules. Despite this, RTS continued to build and deliver the equipment and was partially paid for it.

In the TCC, RTS argued for a continuance of the terms of the letter of intent so as to have in place a contract under which RTS continued to work despite the expiry of the letter of intent. Muller argued that after the letter of intent had expired, there was no obligation by RTS to continue working, and that Muller would have no obligation in relation to work performed by RTS after that date.

The trial judge found there was a concluded contract but it did not incorporate the conditions known as MF/1. Those conditions, if incorporated, would have contained an overall cap on liquidated damages and limitations on RTS’s liability.

RTS appealed to the Court of Appeal. RTS altered its stance in the Court of Appeal: in the lower court, RTS had argued for a continuance of the terms of the letter of intent; before the Court of Appeal, RTS argued that no contract had been concluded after the expiry of the letter of intent. Despite altering its position in the Court of Appeal, RTS was allowed to argue the “no contract” point. The Court of Appeal allowed the appeal, and declared that there was no contract post termination of the letter of intent.

Central to the Court of Appeal's decision were two factors:

First, it was a continuing stipulation agreed by the parties during negotiations that a contract did not come into being until a written agreement had been entered into. The proposed agreement included the conditions of MF/1 and the accompanying schedules. After the expiry of the letter of intent, the schedules had not been finalised and no written agreement had been entered into. We pointed out in our Legal Review that the trial judge had held that in circumstances where works have been completed, it was unrealistic not to conclude that a contract had been formed. The Court of Appeal preferred to look at the factual matrix of the case, and said that the trial judge ought to have considered whether the parties intended to create a legal relationship. Having analysed the wording of the stipulation to which the parties had agreed, it was very clear that there was no intention for there to be a contract after the expiry of the letter of intent unless a written agreement was entered into.

Secondly, the MF/1 conditions contained limitations of liability to which both parties had agreed. When the trial judge declined to incorporate the MF/1 conditions into the contract, he achieved a bargain which neither party intended to enter into.

## **Comment**

Building projects are often time critical and it is common for a client to instruct a contractor (or supplier, as in this case) to commence work pending the parties entering into a formal contract. If, for good commercial reasons, it is necessary to start works before terms are finalised, it is crucial that essential terms are agreed early in the project. In *RTS*, essential terms had not been agreed at the outset, and the parties continued to negotiate essential terms. In this case, it was easy for the Court of Appeal to look at the parties' intention because this was clear from their conduct and the documents.