Letters of Intent: What do the Courts have to say?

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In order to get a project, or a particular aspect of it, up and running, often an employer will issue a letter of intent to a contractor (or a contractor to a sub-contractor), allowing said contractor (or sub-contractor) to begin carrying out works in anticipation of a formal contract being finalised. Perhaps the most common question I am asked is whether letters of intent are binding contracts and, if so, to what extent.

The meaning and subsequent effect of a letter of intent is dependent upon each individual case and resultantly, with no hard and fast rules in place, there is much ambiguity surrounding their contractual worth. In *ERDC Group v Brunel University* (2006) EWHC 687 (TCC), HH Humphrey Lloyd QC succinctly alludes to this issue, the malleable nature of letters of intent and the problems that can, and quite often do, arise as a result: "*Letters of intent come in all sorts of forms … there can therefore be no prior assumptions*" [27].

This article outlines where exactly the courts stand when considering if a letter of intent can be taken as a contract, and the practical takeaways which can be gleaned from the authoritative judgments that have been handed down on this issue.

Considering the contractual worth of a Letter of Intent

For any letter of intent to be considered a contract, it must contain all the features of a contract: offer, acceptance, consideration and intention to create legal relations. It must also contain the key particulars.

Ordinarily, acceptance of a letter of intent would require a contractor (or sub-contractor) to sign and date a duplicate copy of the letter (the offer) and returning it to the employer. However, this is not an established rule. Many cases in which no signed agreement is in place, a contract is instead taken to be based on the conduct of the parties.

In *Arcadis Consulting (UK) Ltd v AMEC (BCS) Ltd [*2018] EWCA Civ 2222, the Courts were asked to decide in part whether a contract existed between the parties having regard to the fact that the Protocol Agreement (issued with the letter of intent) was never signed.

The Court took evidence of acceptance from the conduct of Arcadis, who carried out the work irrespective of the fact that there was no signed Protocol Agreement. The Court of Appeal held, "*The best evidence that [Arcadis]... had indeed accepted was its conduct in undertaking the work*" (Dame Elizabeth Gloster [90]).

RTS Flexible Systems v Molkerei Alois Muller GmbH & Co. KG [2010] UKSC 14 is a foundational case in which the letter of intent included a 'subject to contract'

clause; a move which, despite the inclusion of some agreed terms between the parties, seemingly negated the requisite level of intention between the parties, particularly on the employer's part, to engage in legal relations. Rather, Lord Clarke held, handing down the judgment of the court, that when a court considers the credibility of a letter of intent as a contract it should objectively interpret the words and conduct of the parties to gauge whether "*they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations*" [45]. This is irrespective of whether certain terms of the letter had not been finalised.

For a letter of intent to function in a practical sense, it is important that it clearly expresses the manner of contract, the terms contained therein, and other relevant particulars. In *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC), Akenhead J, writing in the context of the letter of intent referencing and operating on the basis of a 'JCT Intermediate Form of Contract, 2005 Edition with further amendments as specified in the Specification' and other particulars underlying the finalised contract, held the letter of intent was a simple contract which had:

> "*sufficient certainty: there is a commencement date, requirement to proceed regularly and diligently, the completion date, and overall contract sum and an undertaking to pay reasonable costs in the interim*" [52].

Twintec Ltd v Volkerfitzpatrick Ltd [2014] EWHC 10 (TCC) is a more sobering example of the need for specificity. Although the Court acknowledged that the letter of intent was a simple contract that obliged Twintec to act "*in accordance*" with a standard DOM/2 Sub-Contract, the lack of express specificity as to "*secondary obligations, such as compliance with indemnity clauses*" led Mr Justice Edward-Stuart to conclude that such terms "*were not incorporated into the [letter of intent]...as a matter of construction*" [45].

The ramifications of this: there were "*no prospects of showing that the adjudicator was validly appointed under a relevant contractual provision [and so] absent any agreement of the parties to the contrary ... any decision that he or she makes will be a nullity*" [88-89].

This case should illustrate that it is wise to be as specific as possible in the particulars of the letter of intent. Ultimately, if the letter of intent is a contract under section 104 of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996), for best practice, parties should endeavor to refer fully to the specifications and timescale that will apply to the works, the cap on liability and the form of payment in accordance with the Construction Act 1996.

Conclusion

The short answer is that a letter of intent can be a binding contract if the requisite elements for the creation of a contract are in place.

Practitioners and parties looking to engage in legal relations should continue to finalise a contract which contains the necessary amount of clarity and security, and balances the commercial risk and commercial aims of both employer and contractor (or contractor and sub-contractor). A letter of intent can be a contract, but this does not mean it should be a permanent contract:

> "*They do not protect, and are not intended to protect, the employer's interests in the same manner as would the formal contract; that is why their "classic" use is for restricted purposes*."
> (*Ampleforth Abbey Trust v Turner and Townsend Project Management Ltd* [2012] EWHC 2137 (TCC) Keyser QC HHJ [97]).

Or, if you want to avoid the risk and uncertainty altogether, you could revisit Lord Clarke in *RTS v Muller* where he noted, apparently oblivious to the nature of the construction industry, that:

> "*The different decisions in the Courts below and the argument in this Court demonstrate the perils of beginning work without agreeing the precise basis upon which it is to be done. The moral of the story is to argue first and to start work later."*

If you are experiencing any issues related to those discussed in the article, get in touch with Robert Burns at Robert.Burns@QuiggGolden.com