

# The Legal Beagle <sup>37</sup>

## Letters of intent

**A well sorted** out and designed project with a clear procurement route arrived at the point of accepting the tender the other day. The call went out to issue the letter of intent! - even though preparation of the contract was potentially a very quick process.

That rang a bell - hadn't I stated in the last **Scalanews** that I would discuss letters of intent in some future edition? Consulting the mag' I noted a cartoon showing contractor and QS on site, architect towing a trolley load of files and contractor saying "*The discussed amendments? No problem. Our well established supply chain and lean process techniques will sort it.*" Another get the "job done, spirit of cooperation" instruction that can be followed up later. Surely no problem. Time to talk letters of intent!

A recent student study identified a range of reasons for using letters of intent:- 60% to meet programme; 20% awaiting formal contract documentation; 10% to commence design process; 10% to secure finance and other reasons. In the case of awaiting documentation, if everything is agreed, I can't see why there would be much time saved - but case law has shown that the issue is often that everything isn't agreed. Of more concern is the 60% motivated by the need to meet programmes, as by inference they would seem to be pressing on regardless of the degree of agreement as to terms.

The difficulty with letters of intent is the ambiguity as to rights and obligations which may or may not be created by their specific content - which become an issue either when the project doesn't go ahead or disputes arise. Of course, that doesn't happen often, so an exhaustive trawl for several minutes over case law immediately to hand has thrown up a mere half dozen seminal cases (irony there...).

What's the fuss? In *British Steel Corporation-v-Cleveland Bridge & Engineering Co Ltd (1984)* Mr Justice Goff stated that in most cases it doesn't matter whether or not a letter of intent made a contract - payment would usually be made on a quantum meruit basis. However, in *British Steel* one of the

parties was claiming damages for breach of contract - which, of course, required a contract! In this case it was held that there was no binding contract, despite the letter of intent declaring the intention to enter into a sub-contract in a specified standard form. Claims for set-off and a counterclaim failed. In common law there was simply an obligation for payment of a reasonable sum for the work done.

So, when you write a letter of intent you think you know what your (contractual or otherwise) obligations are, but do you? In *British Steel* there wasn't a contract, in *Hall and Tawse Ltd-v-Ivory Gate Ltd (1998)* there was. In *Hall & Tawse* the existence of a contract determined a right to arbitration - quite important if there is a major dispute. The letter of intent provided that in the event that the works did not proceed, or if *Hall & Tawse* was not appointed for the project, payment was to be made on the basis of "*...all reasonable costs properly incurred...with a fair allowance for overheads and profit...*" ie. in the event of no contract being made. However, there was a contract and, therefore, that payment term did not apply - payment was by reference to an implied term that *Hall & Tawse* would be paid a reasonable sum. That was not quantum meruit, and the intention of the parties, so far as discernible, was used as the relevant basis in determining remuneration. The contract, however, was in the form of the letter of intent itself. HHJ Thornton described this as a "*provisional contract*", which the parties had agreed would later be superseded by a "*permanent contract*" when all the terms of the latter had been agreed.

The judgement in *J Jarvis & Sons plc-v-Galliard Homes Ltd (1999)* further illustrates this. *Jarvis* was to enter into a formal contract on JCT Standard Form 1980 Edition. They commenced work with various matters, including the contract price, unresolved. ▶



**Rob Tate**

E: [rob.tate@ntlworld.com](mailto:rob.tate@ntlworld.com)

**Rob Tate** is an architect, a Past President of SCALA and a former Head of Property Services at the LB of Enfield. He is a construction consultant, expert witness and a member of the President's Panel of Adjudicators of both the RICS and Chartered Institute of Arbitrators.

Rob, author of the SCALA and LGTF '*Guide to Standard Forms of Construction Contracts*', has offered to share his experience and expertise with you and looks forward to hearing from readers.

“That may seem to be the case in a lot of cases where the agreed contract sum is stated in the letter of intent.”

Subsequently the parties shook hands on a price for the work. The court of first instance held that there was no contract, as the parties were never *ad idem* as to the basis on which the price had been agreed. Given the letter of intent, the dealings had been “*subject to contract*”. The Court of Appeal held that a formal contract was required and two reasons are interesting. Firstly, the letter of intent had dealt with how Jarvis would be remunerated if a formal contract was not subsequently entered into - evidence that the letter of intent was “*subject to contract*” and not the contract itself. Secondly, the formal contract was to be entered into under seal (as a deed) and would not be made until signed by both parties. Interestingly, however, Evans LJ said “*The correct analysis of the legal situation, in my judgement, is that a contract came into existence on the terms of the letter of intent, either when it was acknowledged by Jarvis ... or when Jarvis began work, or, at latest, when Jarvis entered onto the site at Galliard’s request.*” The point here is that whilst there was not a contract in the form proposed for the formal contract, there was a contract in the terms set out in the letter of intent - to adopt the analysis of HHJ Thornton, in *Hall & Tawse*, the letter of intent made a “*provisional contract*” rather than the “*permanent contract*”.

Its beginning to look as if a letter of intent forms a contract in its own terms until superseded by a permanent contract. However, in *Harvey Shopfitters Ltd-v-ADI Ltd (2003)* it was held that a permanent contract had come into existence, but in that case the parties had agreed all of the terms of the contract and the formal documents were only to confirm what had already been agreed. That may seem to be the case in a lot of cases where the agreed contract sum is stated in the letter of intent. However, in a recent case in which I adjudicated, where the agreed sum was stated, counsel’s opinion was that it was still clear that there were a number of matters still to be agreed.

Space does not permit me to refer to *Murphy & Sons Ltd-v-ABB Daimler-Benz Transportation (Signal) Ltd (1999)*, *Serk Controls Ltd-v-Drake & Scull Engineering Ltd (2000)*, *Durabella Ltd-v- J Jarvis & Sons Ltd (2001)* or *Westminster Building Co-v-Andrew Beckingham*, but I guess I have made my point that letters of intent are often not as clear cut as we think and that they

have given rise to many disputes and not a little case law. Best avoided? Perhaps, but sometimes they are unavoidable, in which case:-

- Provide an accurate description of the extent of the works authorised by the letter;
- State the maximum amount payable under the letter - making it clear that any payments are to be treated as payments made in accordance with any subsequent appointment or building contract;
- State the basis for valuation of any amounts to be paid to the contractor;
- List the contract documents that will eventually form the contract;
- Set out the outstanding points that are subject to further negotiation and indicate if these are considered to be essential terms;
- State whether the parties will be obliged to formally execute the contract documents;
- Include a termination clause;
- Consider whether the letter should state it is intended to be legally binding. ■