

AN INTRODUCTION TO CONTRACT LAW AND ADMINISTRATION

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The Course

- Formalities of contract - offer and acceptance
- Variations to the contract
- Letters of Intent
- Payment
- Programme
- Liquidated delay damages
- Extensions of time
- Damages
- Force majeure
- Record keeping
- Documents
- Notices

Formalities of Contract

- **General rule** of law - **no formalities** required for the formation of a contract.
 - ◆ May be written, oral or partly oral and partly in writing.
 - ◆ Two exceptions to the rule - sale of land and contracts of guarantee.
- A contract will have been formed if the following criteria are satisfied:
 - ◆ the contracting parties have **legal capacity** to enter into a contract;
 - ◆ the contracting parties had an **intention to enter into a contract**;
 - ◆ the contract is supported by **consideration**;
 - ◆ the contract is **not for an illegal purpose**; and
 - ◆ there has been **offer and acceptance**.

Offer

- First stage - employer/client/contractor invites contractor/subcontractor to submit a tender.
- Second stage in the formation of a contract e.g. a contractor's tender.
- Proposal or promise by one party to enter into a contract, **on a particular set of terms**, with the intention of being bound as soon as the party to whom the offer is made signifies acceptance.
- Document described as an estimate may still amount to an offer.
- **Offer may be revoked** at any time before acceptance unless consideration has been given to keep it open.

Acceptance

- Has to be a **final and unqualified** expression of assent to the offer.
- **Must be communicated** - does not become effective until it reaches offeror.
- **If new terms proposed** then no acceptance – likely to amount to a fresh offer.
- Request for information about the offer does not amount to a counter-offer.
- Where **specified means of acceptance**, may still be agreement if that specified means of acceptance has not been complied with.

Has a contract been formed?

- ◆ A contract will have been formed if an offer can be shown to have been **accepted**.
- ◆ Parties' exchanges labelled "**Subject to Contract**" indicates that they both intended that no agreement would arise unless and until a formal contract was completed.
- ◆ Where the parties have acted throughout as if there was a contract in place, **court will be reluctant to conclude that no contractual relationship was entered into**.
- ◆ **Not necessary** for the parties to have physically signed the contract document(s). If the parties eventually sign a contract, that contract will have **retrospective effect**.
- ◆ Whether or not a contract has been formed or particular terms agreed will depend upon an **objective analysis of the entirety of the negotiations**. Each case will turn on its own facts.

Variations to the Contract

- Contract terms may be varied **by the parties' agreement**, provided there is **consideration** (unless the agreement is documented in a deed under seal when consideration is not needed).
- If, at the time the agreement is made, **obligations under the contract remain unperformed**, then there will almost invariably be consideration for the new agreement.
- Usually a provision in the contract for any amendments to the contract terms to be in writing - recommended in any event.

Letters of Intent

- Cunningham and others v Collett and Farmer (2006):

*“Letters of intent are used unthinkingly in the UK construction industry, and they can **create many more problems than they solve**. In my view, the principal problem with letters of intent is a practical one: once they have been sent, and the contractor has started work pursuant to that letter of intent, all those involved, including the professional team, can easily take their eye off the ball and forget about the importance of ensuring that the full contract documents are signed as quickly as possible. Everybody is then so busy dealing with the day-to-day problems being thrown up by the commencement of the works themselves that the task of signing off an often complicated set of contract documents is relegated to an item of secondary importance. Then, very often, something goes wrong on site and, in the absence of a full contract to regulate the parties' rights and obligations in such circumstances, **the result is confusion and acrimony.**”*

Letters of Intent

- Can cover one of **two situations**:
 - ◆ **Comfort letter** which is no more than the expression of a party's present intention to enter into a contract at a future date.
 - **Creates no contractual obligations.**
 - **Contractor proceeds at own risk.**
 - ◆ **Letter which is intended to create a binding contract pending conclusion of the contract for the whole works.**
 - May be for work **limited in time or in cost**, or for substantially the whole works.
 - **What happens if the contractor goes over the amount of expenditure stated?**

Payment

- The Housing Grants, Construction and Regeneration Act 1996 (as amended) sets out payment provisions to be implied where a contract does not provide an adequate payment mechanism.
- Act applies to 'construction contracts' for carrying out 'construction operations'. Certain activities are excluded from the definition of 'construction operations' by virtue of s.105(2) including:
 - ◆ extraction of oil, natural gas and minerals,
 - ◆ installation or demolition of plant/machinery on nuclear, power or water treatment sites,
 - ◆ supply of materials.
- Contracts for excluded operations may however replicate the provisions set out in the Act.
- Always comply with the payment provisions and issue requisite notices or you may be liable to pay the full amount applied for.

Programme

- A programme is an effective management tool – ensures effective planning, measures progress and assists with compensation events and extensions of time.
- If the programme is a contract document, additional obligations on employer and contractor - any slip up would amount to a breach of contract.
- Usually the programme is not a contract document, in which case parties not legally bound by it. That said, contract should seek to establish:
 - ◆ Agreed initial form of the master programme.
 - ◆ Agreed methodology.
 - ◆ Frequency of updates - should not be overly onerous as can cause unnecessary cost and increase in administrative burden, and become unworkable.
 - ◆ Information requirements for future versions.

Liquidated Delay Damages

- Amount of money paid or allowed by the contractor to the employer/client for completing the works late, usually stipulated on a weekly basis.
- **Fixed in advance** and written into the contract.
- **Advantages** of liquidated damages provision:
 - ◆ For the contractor, he knows in advance potential exposure.
 - ◆ No need to wait for the loss to crystallise.
 - ◆ Avoid difficulty of assessing and proving actual loss (i.e. unliquidated damages) where a delay occurs.
 - ◆ No need to mitigate the loss.
 - ◆ Question of remoteness does not arise.
- Advantages lost if the clause is not legally enforceable i.e. penal.
- Construed strictly contra proferentem against the employer (or the party relying upon the provision).

When is a liquidated damages provision penal?

- True test is whether the remedy is disproportionate to the legitimate interest it was designed to protect.
- Four helpful points:
 - ◆ Provision will be penal if the sum is "extravagant and unconscionable" in comparison to the greatest loss that could conceivably be shown to result from the breach.
 - ◆ Provision will be penal if breach consists solely of the non-payment of money and it stipulates a larger sum.
 - ◆ Provision presumed penal if same sum is payable for a number of breaches of varying degrees of seriousness.
 - ◆ Provision not treated as penal solely because it is impossible to estimate in advance the true loss likely to be suffered.

Extensions of Time

- Mechanisms allowing extensions of time are **not simply for the Contractor's benefit**.
- Extension of time request:
 - ◆ Refer to the precise terms of the contract.
 - ◆ Demonstrate:
 - the event;
 - the event is recognised under the contract as being one where an extension of time is available; and
 - the event has delayed or is likely to delay the works beyond the contractual completion date.
 - ◆ Should be supported with evidence.

Recoverable damage

- Two limbs of *Hadley v Baxendale* (1854)
 - ◆ **Direct loss and damage**
 - Losses flowing naturally from the breach.
 - Damages for breach of contract can be recovered if the loss could **fairly and reasonably** be considered to arise naturally according to the **usual course** of things from the breach.
 - ◆ **Indirect (or consequential) loss and damage**
 - Losses arising from a special circumstance of the case which can **reasonably be supposed to have been in the contemplation of the parties** (at the time they made the contract) as the probable consequence of the breach.
 - **Only the type** of damage need to have been contemplated as opposed to the amount of damages.

Direct and Indirect Losses

- Limiting liability for **indirect** losses requires clear unambiguous wording.
- Exclude/limit liability by a financial cap in relation to **certain defined categories of loss** - direct or indirect (e.g. no liability for loss of profits).
- **Alternatively**, accept liability for all losses, direct or indirect, but limit liability by a **financial cap or time cap** (e.g. defects liability period).
- *McCain Foods v Eco-Tec (Europe) Ltd*:
 - ◆ Clause said “*in no event will the Seller be responsible for indirect, special, incidental and consequential damages*”.
 - ◆ Damages claimed included - costs of replacing the system, loss of revenue, the extra costs in having to buy electricity (for period system should have been generating biogas), costs of contractors and personnel, costs of staff time to resolve issues etc.
 - ◆ Supplier accepted liability for the **direct loss of replacing the system** but said all the other losses were indirect and excluded.
 - ◆ Court held **all the losses were direct losses** and recoverable.

Force Majeure

- The term "force majeure" - the literal meaning of which is "superior force" - has its origins in French civil law.
- Under common law (whether under English law or the law of another common law jurisdiction such as Australia) there is no doctrine of force majeure. It must be written into the contract.
- In the UK, "force majeure" is a label used to refer to clauses which relieve a party from performance of its contractual obligations where that performance is impacted by events outside its control, such as natural disasters or war.

Force Majeure

- Whether a particular clause is triggered will depend entirely on the words that the parties have used.
- Be mindful of requirements in relation to:
 - ◆ Notices - condition precedent?
 - ◆ Mitigation.
 - ◆ Records to be maintained to substantiate your claim.
- Future contracts - COVID-19 no longer an unforeseen event.

Record Keeping

- Records will put you at a **commercial advantage** and, in any event, are required:
 - ◆ to establish entitlement to **money/time** against employer;
 - ◆ to **defend allegations**/claims by subcontractors; and
 - ◆ to comply with any **reporting obligations** under the contract.
- The standard of the records should be maintained and regularly reviewed.

Notices

- Official form of communication between the parties - used by one party to notify the other party of important matters.
- Questions to consider before sending a notice:
 - ◆ **Where** should the notice be served?
 - ◆ **How** should the notice be served?
 - ◆ **To whom** should the notice be served?
 - ◆ What should the notice **contain**?
 - ◆ Are there any **time limits** on serving the notice and, if so, what are they? Is valid service a **condition precedent**?
- **Read the contract** for the answers and **comply with it!**

Documents

- Contracts usually require the production of **operation and maintenance** manuals and/or **as-built drawings**.
- If not provided in accordance with the contract, **can prevent take-over** and/or **acceptance** which, in turn, leads to no payment and delay damages.
- Make sure:
 - ◆ the manuals and drawings are produced if required; and
 - ◆ the correct information is included in the correct form i.e. hard copies, electronic copies.

Questions?