

On bad terms

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A trio of recent cases underline the need for agreeing clear contracts before commencement, writes Shy Jackson

When things go wrong on a project, the first step will usually be to check what the agreed contract says and which provisions apply. The position will be worse if it is not possible to identify what contract, if any, determines the parties' rights and obligations, as 3 recent cases demonstrate.

Parties to the contract

The lack of a written contract was the cause of uncertainty in [Dacy Building Services Limited v IDM Properties LLP \[2016\] EWHC 3007 \(TCC\)](#) . The main contractor encountered financial difficulties, which led to direct payments being made to its subcontractors by IDM Construction London Ltd. When the problems continued, the main contractor approached Dacy Building Services Limited, the claimant, and, following an informal meeting at a bus stop, Dacy started work on site. IDM Properties Ltd, the defendant, was the employer's agent, and one of its employees also attended this meeting.

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When Dacy did not receive payments following its 5th and 6th applications, it began adjudication proceedings against the defendant, with the aim of avoiding a lengthy and costly court case. It relied on email exchanges, a business card given at a meeting by the defendant's contracts manager, an SMS text and payments already made to argue that its contract was with IDM Properties LLP. The adjudicator accepted its argument and ordered the defendant to pay the claimant ?247,250.

Dacy took the adjudicator's decision to court to enforce, but it refused to do so. After looking at the evidence in detail, the judge held that it was unclear with whom Dacy had contracted, if anyone, and that there was a direct conflict of evidence, both in terms of the background to and circumstances of the meeting at the bus-stop. It was noted that the subsequent conduct of those involved pointed at different times in different directions. As a result, Dacy could not enforce the adjudication and faces the uncertainty of having to prove with which party it had contracted.

Letters of intent

The decision in [Spartafield Ltd v Penten Group Ltd \[2016\] EWHC 2295 \(TCC\)](#) is a reminder

of the uncertainty that the use of letters of intent as part of a contract can cause. In this case, the tender stipulated that the terms of the [JCT Intermediate Building Contract with Contractor's Design 2011](#) would apply. However, the works commenced on the basis of a letter of intent, which stated that the execution of a formal contract would follow.

The parties sought to agree the terms of the contract, and final versions for execution were prepared. The works were managed on the basis of the JCT form Conditions of Contract, but, owing to the need to resolve responsibility for delay to the works, the contracts were never signed. The contractor then commenced adjudication proceedings.

The adjudicator found that the parties' relationship was governed by the letter of intent. When the employer took the matter to court, however, it came to a different conclusion, noting first that the letter of intent was not well drafted ? describing it as "a patchwork of individually familiar provisions that in combination do not always sit easily with one another". The court also held that the conduct of the parties among other things showed that the JCT terms did apply, despite the lack of formal execution. The JCT terms were still subject to those of the letter of intent and to the ability of both parties to withdraw from the contract. The decision allowed the employer to pursue its claim to set aside the previous adjudication decisions.

Clear conclusions

The importance of having a contract was stressed in [Harlequin Property \(SVG\) & Anor \(a firm\) v Wilkins Kennedy \[2016\] EWHC 3188 \(TCC\)](#), where the defendant's advice not to enter into a contract was found to be negligent. The judge stated it "should have known and should have advised that not having a contract regulating the work being undertaken was ridiculously risky".

All 3 cases demonstrate the uncertainty that can arise in relation to issues such as delay and additional payment when the contractual position is unclear. Ambiguity can often be caused by oral agreements or the use of letters of intent, but the position will be worse when there is an issue over whether there is in fact any contract between the parties. A contract in writing with clear terms, signed by both parties, will go a long way to avoiding that uncertainty and reducing the chance of dispute.

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