

Contract Formation in Construction Projects

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A well drafted contract is a major component of any successful construction project. The contract will not only set out the commercial agreement between the parties but also states the legally enforceable obligations of each party and sets out the process for resolving any disputes.

As with all contracts, in forming a construction contract the usual principles of Offer, Acceptance, Intention to Create Legal Relations and Consideration apply, however Employers and Contractors alike should be aware that it is not only formally drawn up contracts which can be held to be binding; tenders, pre-contract negotiations and letters of intent are capable of being enforceable contracts and therefore care should be taken before embarking on either.

Letters of Intent which are widely used in the construction industry before a formal contract is executed present both benefits and difficulties to Employers and Contractors. The main issue is whether or not they are binding. In the English case of *Cunningham v Collet* [2006] Judge Coulson stated that “*Letters of Intent are used unthinkingly in the UK construction industry and they can create many more problems than they resolve*”. Both Employers and Contractors should therefore use the upmost care when issuing Letters of Intent.

Whilst the majority of terms of a construction contract will be expressed within the actual contract itself, there may be implied terms. An example of an implied term is the implied duty of the contractor to carry out the works using the proper skill and care. Whilst many contracts will state the requisite skill and care, in the absence of same the courts will consider any skill/expertise which the contractor professes to have together with the general standard applicable to the contractor’s profession.

It is not only the courts which will imply terms into a construction contract; the Construction Contracts (Northern Ireland) Order 1997 (“the Order”), implies a number of provisions in relation to timing of payments and the referral of disputes to adjudication. Should a construction contract fall short of the standards specified in the Order, the provisions of the Order will be implied into the contract and take precedence over the contractual terms. Breach of the Order constitutes breach of contract and thus the “injured” party would be entitled to commence an action against the “defaulting” party.

Currently many standard form construction contracts are used within the industry without seeking legal advice. Whilst these forms can adequately cover the relationship between Contractor and Employer there may be specifics which are not included and therefore advice from a construction lawyer is essential. They can provide advice on the construction contract which a construction industry professional cannot.

If you feel that this may affect you or your business please contact Lisa Boyd or another member of the Construction Unit who will be happy to help you.

Please note: The content of this article is for information purposes only and further advice should be sought from a professional advisor before any action is taken.