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Recent Developments in Letters of Intent

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ABSTRACT

The purpose of a letter of intent is to enable a party to commence works at the request of another before a formal contract has been executed. Their use often enables early commencement of development work. A letter of intent should reassure the parties but they are often unwisely drafted and may lead to disputes over ensuing obligations.

This paper examines case law on the topic to establish the obligations and liabilities arising under English law where works have been carried out pursuant to a letter of intent.

The study concludes that carrying out works under a letter of intent with various permutations will result in one of three situations:

- 1) the letter of intent has no binding effect;
- 2) the letter of intent forms a unilateral, or "if", contract; and
- 3) the letter of intent forms a complete bilateral contract.

KEYWORDS

Letter of Intent; Contract Formation; Liability.

1. INTRODUCTION

The purpose of a letter of intent is to enable a party to commence work at the request of another at a time when, for one reason or another, a full formal contract cannot be executed by the parties. A letter of Intent ordinarily expresses an intention to enter into a contract in the future (Furst & Ramsey, 2006). They are used typically where long lead-in times would adversely affect the overall programme and where there is not enough time to formalise contract documents before work is required to start.

In most cases, the language used within a letter of intent is an indication that the parties are to enter into a contract at a later date, so no contractual obligations are expressed at the time the letter is drafted. There are other instances however, whereby the intent and obligations of the parties will be expressed by incorporating essential terms and the letter will itself be seen as a formal contract. Case law has demonstrated that these terms can often be accepted by the conduct of the other party.

A letter of intent is often meant to give comfort to both parties, however where such a letter lacks clarity, and in the event of the parties failing to enter into a contract, there is a very real risk that the parties will end up in dispute over the extent of the ensuing obligations. The extent of the dangers associated with letters of intent was highlighted in the case of **Texaco Inc. v. Pennzoil Co. (1987)**¹, whereby the loose drafting of the letter of intent led to the defendant paying out \$11.53 billion in damages.

The leading case concerning the effects of letters of intent and the formation of contracts is **British Steel Corporation v Cleveland Bridge & Engineering Co Ltd (1982)**² where British Steel was found to be entitled to payment by quantum meruit because of the failure to conclude a formal contract, in spite of failing to meet Cleveland Bridge's programme.

It is a question upon the facts of each case whether a letter of intent gives rise to any and, if so, what liability (Furmston, 2006). The legal effects of a letter of intent can be categorised into three situations: 1) of no binding effect; 2) a unilateral or 'if' contract; or 3) a complete or 'bilateral' contract (Aeberli, 2003). The implications of each are discussed below.

A common theme amongst disputes involving letters of intent is that the parties are not aware of the risks and obligations they may undertake when commencing work in this way. The courts endeavour to find a contract in order to determine the obligations that rest with each party, but where they fail to discover any such relationship between the parties then a question arises as to the legal effect of the letter of intent and the extent of any ensuing liabilities.

2. FORMATION OF CONTRACTS

The purpose of the law of contract is to protect, support and enforce contracts which Aeberli (2003, p.4) defines as "an agreement that gives rise to obligations and corresponding rights, that the law will recognise and enforce". He adds that "the ability to agree legally enforceable obligations is of fundamental importance to those engaged in construction activity". It is only by forming agreements that are recognised as binding in law that the parties can discharge their rights and obligations safe in the knowledge that these rights and obligations can be enforced if necessary.

¹ Texaco Inc. v. Pennzoil Co. (1987), 481 U.S. 1

² British Steel v Cleveland Bridge & Engineering Co. Ltd (1982) 1 All ER

2.1 Conditions to Contract

In order to establish whether a letter of intent is actually a contract, or can give rise to a contract, the basic requirements of a contract need to be examined. These are identified by Manson (1993) as being:

- 1) Offer and Acceptance (the offer must be accepted on its original terms)
- 2) Consideration (something of value exchanged by the parties);
- 3) Legality (a lawful subject matter and intention to create legal relations);
- 4) Capacity – Individuals must have the capacity to contract;
- 5) Genuineness of consent of the parties.

A fundamental condition to contract formation that Manson fails to address is, as Button (2001, p.1) highlights, “Reasonable certainty of terms”.

The need to identify all of the aforementioned intrinsic elements of contract causes few problems where the parties have made it clear throughout that their contractual relationship is to begin only when a formal document is signed (Murdoch & Hughes, 1998). Given the importance of contract law in structuring commercial relations, it is surprising that those procuring and providing work in the construction industry often deal inadequately with the formation of their contracts as in *Jarvis v Galliard 2000*³. This leads to uncertainties about what was agreed, to disputes about whether an agreement was concluded at all, and to whether legally enforceable obligations are created either to provide work or to pay for it.

3. USES OF LETTERS OF INTENT

Where the construction industry is concerned there is often a conflict between the demand for the immediate commencement of work and the need for further time to conclude the anticipated contract for that work. The familiar solution to this is to issue a letter of intent, or what is sometimes ironically referred to as a “comfort letter” (Judin & Maisels, 1998). McGuniness (1997) points out that of those projects which start with a letter of intent, a high percentage will be completed without agreement being reached at all as to the contract terms. Brewer (2003, p.14) expands on this by adding:

“In the event of there being no subsequent contract, there is a very real risk that the parties will end up in dispute over the extent of the liabilities and obligations which flowed from the letter of intent.”

³ Jarvis & Sons v Galliard Homes Ltd (1999) (Unreported)

Button (2001) holds the opinion that steelwork subcontractors (being an 'early trade') are particularly vulnerable and are therefore frequently requested to carry out preparatory work and fabrication off-site before a formal order is issued. It will be shown however that it is not just the letter of intent per se that is the problem so much as the subsequent actions of the parties. Indeed Price (1994, p.8) comments:

“(many subcontractors) treat them (letters of intent) as if they were as good as, or even better than, a concluded sub-contract. Such optimism is not always justified, because the effect of a letter of intent will depend on its precise terms.”

McGuiness (1997) says that a letter of intent will normally follow an enquiry sent out by the purchaser and a tender (which has been qualified and so not open to acceptance) submitted by the supplier. Post tender discussions will have followed and when the purchaser wishes to start work, he will write to the supplier requesting that he commence work undertaking an obligation himself (e.g. to pay money) if the supplier does.

4. FORMS OF LETTERS OF INTENT

A letter of intent can come in a number of forms and will depend on the actual needs of the purchaser. It is common in construction for a main contractor simply to issue an order for sub-contract works as in the following example given by McGuiness (1997, p.3):

“It is our intention to accept your tender for the XXX works on this contract. Please take this as an instruction to commence work pending the finalisation of the contract documents for signature.”

The subcontractor may be required to sign and return the order which may state that he will not be paid until he has done so. In these situations terms will often have been agreed but due to circumstances (e.g. company procedures) time will be needed to finalise the documentation.

The second form of a letter of intent allows a contractor to start preliminary work such as design, procurement or mobilisation. A limit on spending may be expressed in order to limit the liability of the purchaser. The letter may also define the method of costing the work as 'actual or proven costs' as in ***Monk Construction Ltd v. Norwich Union Life Assurance Society (1993)***⁴. In this case the letter read as follows:

“Our client has instructed us to confirm that this letter is to be taken as authority for you to proceed with mobilisation and ordering of materials up to a maximum expenditure of £100,000.

⁴ Monk Construction v Norwich Union Life Assurance Soc. (1993) 62 BLR 10

In the event that our client should not conclude a contract with you, your entitlement will be limited to the proven costs incurred by you in authority given by this letter.”

This form of letter of intent may also imply that certain essential terms and conditions are still to be agreed, or it may be expressly stated that there is no intention to create legal relations. Quite often the words ‘subject to contract’ are used which has often presented the courts with problems in establishing the formation of contract.

A letter of intent can also be issued for the whole of the works as in **Hall & Tawse South Ltd. v Ivory Gate Ltd. (1996)**⁵ where the wording of the letter meant that the claimant had an option whether to start the works or not, but once started he was under an obligation not to stop. The letter was for the whole of the works, and not for initial works only as in **Monk**⁶.

4.1 The Problem

In the event that the contract is concluded shortly after the issue of a letter of intent, then resultant problems with regards to establishing contract formation are unlikely. However where there is a significant delay in agreeing the contract terms, the chances of the contract concluding successfully will deteriorate as time passes. McGuinness (1997) put this down to the fact that the contractor will feel able to obtain a more advantageous bargain or better able to resist pressures to accept unattractive liabilities. Aeberli (2003) adds that the envisaged contract is rarely concluded because the parties are unable to agree terms, or if they are eventually agreed the supplier is often unwilling to sign because of changed circumstances. This is where the real problems arise, because then the effect of the letter of intent, and the obligations it imposes on the parties will be crucial. Price (1994) highlights that the parties will depend both on the terms of the letter and the circumstances in which it is written.

Where a later agreement is reached, issues may arise as to the terms governing the earlier work carried out. In the case of **Trollope & Colls Ltd. and Holland, Hannen & Cubitt Ltd. v Atomic Power Constructions Ltd. (1962)**⁷, a contract concluded some months after work had started was held to have retrospective effect.

⁵ Hall & Tawse South Ltd. v. Ivory Gate Ltd. (1997) 62 Con LR 117

⁶ Op Cit

⁷ Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd. v Atomic Power Constructions Ltd. (1962) 3 All ER 1035

4.2 The Legal Effects of Letters of Intent

The case law raises the question 'Under what circumstances and to what extent are letters of intent contractually binding?'

In the Court of Appeal judgement in *Monk Construction*⁸, Neil LJ reviewed the judgement in *British Steel*⁹ and summarised the result of a letter of intent as giving rise to three possible situations:

- 1) There may be an ordinary executory contract, under which each party assumes reciprocal obligations to the other;
- 2) There may be what is sometimes called an 'if' contract - a contract under which A requests B to carry out certain work and promises B that if he does so, he will receive a certain performance in return;
- 3) No contract exists, in which case the performance of work is not referable to any contract ... and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for work done pursuant to the request.

Following this judgement Lake and Draetta (1994) state that letters of intent may be classified under six general concepts: offers, acceptances, pre-contractual agreements, complete contracts, enforceable parts and contracts to negotiate. Taking these situations into account, it is now essential to consider the circumstances in which letters of intent are likely to be viewed as giving rise to contractual obligations. These circumstances being that they will have either no binding effect, they will result in a complete binding agreement or they will form an "if" contract.

4.2.1 Letters of Intent Having No Binding Effect

Where a letter of intent fails to create contractual obligations the supplier will not be obliged to comply with the request, nor will the person requesting the works be obliged to pay for it. Under the law of restitution however, the works may have to be paid for by means of a reasonable sum, or what is otherwise referred to as, 'quantum meruit'.

It is well established law that a contract will only be enforceable if the parties had intention to create legal relations (Trietel, 2003). A letter of intent may exclude this intention by including the expression 'subject to contract'. As with the majority of cases concerning letters of intent the outcome will depend on the particular facts surrounding the case in

⁸ Op Cit

⁹ Op Cit

question. This was considered in *Fraser Williams (Southern) Ltd. v Prudential Holborn Ltd. (1993)*¹⁰, where the judge held the following:

“In order to determine whether a contract had been concluded, it was necessary to examine the course of dealing between the parties bearing in mind that the phrase ‘subject to contract’ was normally used to prevent a party from being contractually bound. However when used by experienced businessmen, subject to contract is normally taken as meaning that acceptance must be in writing. On that basis, the proposal was not an offer capable of being accepted.”

The case of *Jarvis & Sons v Galliard Homes Ltd. (1999)*¹¹ highlighted how a ‘subject to contract’ condition can exclude a party from any contractual liability. In this case it was anticipated that the contract be executed as a deed but no contract was ever agreed. The Court of Appeal held there could be no contract until such a deed was established.

Another case where ‘subject to contract’ was the issue is *Comyn Ching v Radius Plc (1997)*¹², where it was held that the correct approach is to look at the letter of intent itself, at the circumstances, and at what happened when it was brought into existence – the fact that it is merely called a letter of intent indicates nothing by way of contractual agreement. The judge noted that the letter was headed ‘Subject to Contract’ and said, “In this instance, I believe that those words were intended to mean what they say, and the parties had no reason to think otherwise.”

The Jarvis and Comwyn cases show how ‘subject to contract’ conditions can supersede any condition essential to contract formation and how the outcome of a case may depend on the behaviour of the parties.

Furmston et al (1998) indicates that for a letter of intent to exclude intention clear wording must be used. This importance was highlighted in *IH Rubenstein & Son Inc. v Sperry & Hutchinson Company (1969)*¹³ concerning ‘subject to contract’ expressions, where the judge commented: “It will suffice to say that the instrument speaks for itself...the language is plain, clear and unequivocal that the parties did not intend to be bound”.

Unresolved Matters

Letters of intent often make reference to standard form contracts and yet critical matters remain to be agreed. Certainty of terms is a prerequisite to contract formation and without it there will be no binding agreement. Discussing this Furmston et al (1998, p.186) state:

¹⁰ Fraser Williams (Southern) Ltd. v Prudential Holborn Ltd. (1993) 64 BLR 1CA (Civ)

¹¹ Op Cit

¹² Comyn Ching v Radius Plc (1997) (Unreported)

¹³ IH Rubenstein v Sperry & Hutchinson Company (1969) 222 So. 2d 329

“If it is clear that the agreement is currently incomplete and uncertain, the letter of intent will merely have the effect of recording the current negotiation position and will contemplate that there is no binding contract until such time as a formal document is issued.”

This was realised in *Emcor Drake & Scull v Sir Robert McAlpine (2004)*¹⁴ where it was intended that a subcontract would be formed by the execution of formal documents, but this never happened, and it was held that Emcor was under no obligation to complete the works. The letter of intent simply represented the extent of negotiations so far. The letter of intent was not an offer that could be accepted, as there were still essential terms to be agreed. Emcor were entitled to be paid a reasonable sum for the works it had carried out, and because there was no contract McAlpine could not claim on the basis of repudiatory breach for the costs of finding a replacement sub-contractor. Brewer (2005) suggests that this type of situation underpins the majority of construction disputes in the UK. A contractor wishing to avoid such a problem should perhaps be more liberal in his choice of contractual terms to avoid protracted negotiations.

4.2.2 Letters of Intent Forming Complete Contracts

Furmston et al (1998) argue that the negotiation process during which letters of intent are drafted is so complicated that analysis of the existence of contract cannot be based simply on the making of an offer that has been accepted. Indeed, Trietel (2003) says that:

“it may be hard to say when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though both parties had reservations not expressed in the correspondence”

It has been established that where a contract is concluded pursuant to the issue of a letter of intent, acceptance is normally in the form of conduct. With such a letter of intent however a contractor may still commence work and yet not be bound as long as they make it abundantly clear that their commencement does not mean they have accepted any offer.

Reference to Standard Conditions

¹⁴ Emcor Drake & Scull v Sir Robert McAlpine (2004) All ER(D) 81

Sometimes a letter of intent will make reference to a Standard Form contract as in ***Killby & Gayford Ltd v Selincourt Ltd (1973)***¹⁵ where it was held that the terms of a Standard Form may be incorporated into a contract even though it was neither signed nor even exchanged.

This was followed in ***Bryen and Langley v Martin Rodney Boston (2004)***¹⁶ where the Court of Appeal held that even though no formal contract had been executed, the parties had acted in a way as if the JCT form of contract was in place, and they were therefore bound by it. The case highlights the importance of the behaviour and attitudes of the parties subsequent to the issue of the letter of intent.

In ***Allen Wilson Shopfitters v Mr Anthony Buckingham (2005)***¹⁷ the contract was in the form of a letter of intent incorporating the terms of a standard form building contract. Commentating HHJ Coulson QC said:

“In particular, it seems to me that these disputes arose because there was not in place a clear lump sum contract at the outset covering the proposed works at the property. If work begins on site without a lump sum agreement in place, events can quickly mean that the parties move apart, rather than together and the prospect of ever agreeing a lump sum recedes into the distance.”

Parties not wishing to be bound by the terms of a standard form referred to in a letter of intent (perhaps until that standard form has been exchanged and agreed) should therefore proceed only on the clearly stated basis that there is no contract until the standard form has been signed.

Contracts Despite Matters To Be Agreed

The courts typically construe there to be no contract where certain matters are yet to be agreed. There are however exceptions to this where it will be deemed that a contract does exist despite there being unresolved matters. The outcome depends on the facts in each case.

In ***Mitsui Babcock Engineering Ltd v John Brown Engineering Ltd (1996)***¹⁸ contract documents were exchanged but certain conditions had been crossed out and were to be the subject of further discussion. The documents were signed and returned but it was subsequently argued that there was no contract due to the conditions that were yet to be agreed. The court held that there was sufficient agreement for a contract to have been concluded even though certain terms were still to be agreed.

¹⁵ *Killby & Gayford Ltd v Selincourt Ltd (1973)* 3 BLR 104

¹⁶ *Bryen and Langley v Martin Rodney Boston (2004)* EWHC 2450

¹⁷ *Allen Wilson Shopfitters v Mr Anthony Buckingham (2005)* EWHC 1165

¹⁸ *Mitsui Babcock Eng. Ltd v John Brown Eng. Ltd (1996)* 51 Con LR 129

Taking this into account, it would therefore appear that a party cannot deny the formation of contract or seek to gain an advantage in the negotiation process where it is clear from the outset that the intention to create legal relations is apparent (Furmston et al, 1998). This was the case in **Texaco Inc. v Pennzoil Co (1987)**¹⁹ where a total of \$11.53 billion was awarded to the claimant on the strength of a letter of intent. The judgement was typical of English law in that if the parties intend to be bound by a letter of intent prior to the execution of a final agreement, effect will be given to its contents despite there being certain details still to be agreed.

Where a letter of intent contains all the essential components of a contract therefore, if any outstanding terms yet to be agreed are important to one of the parties they should take care only to proceed on the basis of clear wording to the effect that there is no intention to be legally bound.

Agreement On All Terms

The essential conditions necessary for the formation of contract will often crystallise during the negotiation process, albeit sometimes unbeknown to the parties in dispute. In **Stent Foundations Ltd. v Carillion Construction (Contracts) Ltd. (2000)**²⁰ the Court of Appeal held that the parties had concluded all the essential terms of the sub-contract subject only to the conclusion of the main contract. Therefore when the main contract was concluded, the sub-contract came into existence despite the absence of any formally executed sub-contract documentation. Similarly in **Birse Construction v St David Ltd. (1999)**²¹ a partnering charter drawn up pre-contract contained all the essential components of contract and it thus formed a binding agreement unbeknown to the parties. Also a letter of intent may be non-binding but the position may well change as a result of further agreement as in **VHE Construction v Alfred McAlpine Construction (1995)**²², where it was noted that a final agreement on price (being the last issue to be resolved) was agreed by telephone.

Parties for whom further particular terms of contract are important should therefore be wary of letters of intent which come close to contract formation because if the final elements of contract are inadvertently agreed then they are in contract and may lose the opportunity to negotiate further terms.

4.2.3 Letters of Intent Forming 'If' Contracts

¹⁹ Op Cit

²⁰ Stent Foundation Ltd. v Carillion Construction Ltd. (2000) 78 CLR 188

²¹ Birse Construction v St David Ltd. (1999) BLR 194

²² VHE Construction v Alfred McAlpine Construction (1997) CILL 1253

A letter of intent may amount to a unilateral or “if” contract. Lake & Draetta (1994) explain an “if” contract as being a standing offer that, if acted on would result in a binding contract. Aeberli (2003) adds that the supplier is not obliged to comply with the request and, having commenced work, is under no obligation to continue. He goes on to say how the party requesting the work is, however obliged to pay for work supplied and may not withdraw its request for that work once the other party starts to perform.

Caps On Expenditure

The cases of ***Eugena Ltd. v Gelande Corporation Ltd.(2004)***²³ and ***Mowlem Plc v Stena Line Ports Ltd. (2004)***²⁴ illustrate how a unilateral agreement can arise due to the incorporation of a cap on expenditure clause in the letter of intent. In Eugena the letter of intent contained an expenditure cap limiting the value of works to be carried out. They failed to agree a contract and an invoice was issued for the value of the work but it was held that Eugena were not entitled to claim for any works above the cap. There was a similar outcome in Mowlem in spite of instructions from the employer as he would have been entitled to stop work at that stage.

The Incorporation of Early Instructions and Other Special Cases

Where formal contracts have been executed some time after works have commenced pursuant to a letter of intent, questions can arise as to the terms under which the work has been carried out – i.e. will it be the terms contained in the letter of intent or the terms detailed in the formal contract? McGuinness (1997) highlights how unless otherwise agreed, instructions and variations given before the contract is concluded and which would be allowable under the contract once concluded, will become instructions or variations under that contract. ***Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd. v Atomic Power Constructions Ltd. (1962)***²⁵ illustrates this where the judge had no difficulties in establishing the retrospective effect of a contract. A similar judgement was held in the case of ***The Atlas Ceiling & Partition Company Ltd. v Crowngate Estates (Cheltenham) Ltd. (2000)***²⁶.

In ***Turriff Construction Ltd. v Regalia Knitting Mills Ltd (1971)***²⁷ a letter of intent constituted an acceptance of an offer made and

²³ Eugena Ltd. v Gelande Corporation Ltd. (2004) (Unreported)

²⁴ Mowlem Plc v Stena Line Ports Ltd. (2004) EWHC 2206 TCC

²⁵ Op Cit

²⁶ The Atlas Ceiling & Partition Company Ltd. v Crowngate Estates (Cheltenham) Ltd. (2000) CILL1639 TCC

²⁷ Turriff Construction Ltd. v Regalia Knitting Mills Ltd (1971) 9 BLR 20

recorded in the minutes of a meeting. It is relatively unusual for a letter of intent to constitute any form of acceptance, as they are usually issued when there are still some matters to be resolved (Price, 2004). Turriff however required such an acceptance as it was becoming heavily involved in design work for Regalia and needed to place several sub-contract orders. The judge commented that since it was understood that a letter of intent would constitute acceptance of the offer, unless the terms of that letter negated acceptance, then upon its receipt the offer was accepted and the ancillary contracts would come into existence.

The decision reached in this case appears to be in contrast to the views on 'if contracts' held by Lord Justice Neil in *Monk v Norwich Union*²⁸ and outlined above. Regalia did not say they would pay for any works done in advance but the judge implied that Regalia understood that Turriff wanted assurances with regards to payment even though the contracts had not been executed.

Contractors should therefore be cautious about carrying out work beyond any cap on expenditure stated in a letter of intent, and refuse to go further without the assurance of an agreed contract or agreement to additional expenditure.

5. CONCLUSIONS

A letter of intent ordinarily expresses an intention to enter into contract in the future. There are three possible outcomes from the issue of a letter of intent: 1) they will have no binding effect; 2) they will form a complete or bilateral contract; or 3) they will form an "if" or unilateral contract. These outcomes may be unintended, much to the dismay of one of the parties, and where the letter lacks clarity the parties may end up in dispute.

If a letter of intent contains in itself all the elements of contract then it will itself form a binding contract. The parties may however circumvent the establishment of a contract by making it clear throughout that notwithstanding the apparent agreement and details in the letter of intent no contractual relationship will exist until formal documents have been signed. Clear wording may also exclude intention.

Letters of intent can come in various forms and can be for the whole works, partial works, initial or preliminary works or simply a statement of future intention representing the state of negotiations so far. They can be issued at various stages of the negotiation between the parties and may constitute offers, acceptances, pre-contractual agreements, complete contracts, enforceable parts or contracts to negotiate. The wording itself and the stage in the negotiations can all introduce obligations and liabilities and the courts will construe these

²⁸ Op Cit

carefully. The apparent behaviour of the parties will also be observed in deciding any liabilities – have they behaved as though a contract exists and if so what were the terms?

In the absence of clear wording a subsequent contract will have retrospective effect. This is especially the case where a standard form contract is incorporated by reference in the letter of intent.

Although a letter of intent may be found to have no binding legal effect, this will not exclude a party of all quantum liability. Under the law of restitution they will have to pay a reasonable sum for the works from which they have benefited.

An 'if' contract (where one party only adopts contractual obligations) will be formed where the work as detailed in the letter of intent is carried out. The party requesting the work is contractually obliged to pay for work supplied in accordance with the terms of the letter of intent, and may not withdraw its request for that work once the other party starts to perform. Caps on expenditure clauses will limit the liability of the procuring party, and will present the supplier with problems should this cap be exceeded. 'Subject to Contract' may also exclude any intention from a letter of intent making it non-binding especially where the wording is clear or the reference is to a contract by deed that has not been established.

Critical matters which remain unresolved will prevent a contract from coming into existence, but the unresolved matters may subsequently and inadvertently be resolved which will then establish a full contract. If these matters are not critical and the parties clearly intended to be bound then a contract may be found despite the outstanding issues.

Formation of contract therefore goes well beyond seeking an expressed offer or acceptance and it may be that intention to create a legal relationship will be the driving force behind the courts decision to uphold an apparent contract found in a letter of intent.

6. REFERENCES

- Aeberli P 2003 *Focus on Construction Contract Formation*, RIBA
Brewer G 2003, 'Examining letters of intent', *Contract Journal*, August 2003
Brewer G 2005, 'Entitlement to payment under a *quantum meruit*', *Contract Journal*, January 2005, Volume 426
Button R 2001, *Contractual Handbook for Steelwork Contractors*, The Chameleon Press Ltd., UK
Furmston, M., Norisada, T. & Poole, J. 1998, *Contract Formation And Letters Of Intent*, John Wiley & Sons Ltd., Chichester
Furmston, M. 2006, *Powell-Smith & Furmston's Building Contract Casebook*, 4th edn, Blackwell Science Ltd., Oxford
Furst, S. & Ramsey, V. 2006, *Keating on Construction Contracts*, 8th edn.

- Judin, J.M. & Maisels, K.D.H. 2005, *Letters of Comfort*, Available:
http://www.elawnet.za/elawnetdata/public000048_publ.PDF
- Lake, R. & Draetta, U. 1994, *Letters Of Intent And Other Precontractual Documents*, 2nd edn, Butterworths, New Hampshire
- McGuinness, J.B. 1997, 'The Effects of Letters of Intent', *CIOB Construction Papers*, No. 91
- Manson, K. 1993, *Building Law for Students*, 5th edn, Cassell Publishers L
- Murdoch, J. & Hughes, W. 1998, *Building Contract Law*, 3rd edn, Longman Group UK Ltd., London
- Price, J. 1994, *Sub-Contracting under the JCT Standard Forms of Building Contract*, Macmillan Press Ltd., London
- Treitel G.H 2003, *The Law of Contract 11th edition*, Sweet & Maxwell,