

Insights

LUMLEY V FOSTER – THE DANGER OF ORAL CONTRACTS AND CONTRACTING WITH THE CORRECT ENTITY

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Despite the volumes of case law illustrating the dangers of not having a written contract when carrying out a construction project, it is still common practice, particularly for smaller domestic projects and in this current market where builders are in high demand, for parties not to have a *formal contract*.

Nine times out of ten all will be absolutely fine: works will progress, any small issues will be amicably overcome between the parties, the project will complete and everyone will be satisfied with the result.

But construction projects can be uncertain beasts. Every now and then, things won't run so smoothly. There may be *defects*, *delays*, cost pressures, design changes, or any variety of *unforeseen issues*. This is when not having a written contract to fall back on can become a real problem.

The case of *Lumley v Foster* is a good reminder of what can happen if a written contract is not put in place.

Cases about oral contracts usually involve a disagreement over whether there actually was a contract, and if so, what the terms were and then, whether they had been breached. But here, the dispute hadn't even had a chance to get to that stage because the first issue the court had to decide was: which entity did the claimant homeowner contract with? Unbelievably, there were six possible contenders in the frame.

This blog takes a closer look at this case and how the court reached its conclusion.

WHAT HAPPENED?

The claimant homeowner contracted with one of the six defendants listed below to carry out construction works on her home. No written contract was agreed.

It was decided as common ground in this case that the contract was concluded at a meeting at the property on 21 June 2016 which was attended by the builder, Mr Foster (D2 – see below) and the

claimant. Here, the parties agreed the scope of the works in broad terms as well as a contract price (£100K).

Apparently, Mr Foster's normal business practice was to provide his clients with a formal written contract and he alleged that he delivered a quotation to the property a few days later, on 24 June 2016 (this was rejected by the court for the reasons summarised below).

The works were duly carried out but they were so sub-standard that the property was "scarcely habitable" and substantial remedial works were required. Eventually, the defendant builders downed tools with the works incomplete and left the claimant living in what had become a building site. The claimant issued proceedings for *breach of contract*.

The claim form named six different defendants:

- Foster & Co Group Ltd (D1)
- Mr Nicholas Foster (D2)
- Mrs Joanna Foster (D3)
- Foster and Co Developments Ltd (D4)
- Foster and Co Construction Ltd (FCCL) (D5)
- Foster and Co Ltd (D6)

The particulars of claim stated that the contract had been concluded by Mr Foster on behalf of all of the defendants. However, the defence responded that the contract was concluded between the claimant and FCCL (D5). This was problematic for the claimant because FCCL was in liquidation and if the defence was correct her claim would be worthless.

In her reply, the claimant alleged that the contract was between her and Mr Foster, alternatively Mr Foster and Mrs Foster (D3), who together traded as Foster and Co or the Foster & Co Group.

The question for the court was: who was the defendant?

JUDGMENT

The court started by setting out the following objective test to determine who the counterparty to the contract was:

"The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible."

(Jackson LJ, paragraph 57(ii), *Hamid v Francis Bradshaw Partnership*.)

To establish what a reasonable person would conclude, the judge put himself in the position of a reasonable person and sought to garner the views of witnesses, and consider the limited documentary evidence and the persuasiveness of each witness' statement.

The *judgment* goes into great detail about the conflicting accounts provided by the parties but to give an idea of the evidence the court had to decipher, some examples are:

- Company flyer: The claimant said she had first contacted the defendants by telephone, having seen a flyer advertising "Foster & Co". She spoke to the sister-in-law of Mr Foster, who answered the phone: "Foster & Co".

The defendants disagreed and said that the claimant had heard about the defendants as a result of the claimant seeing signs in her neighbourhood that had FCCL's name on them. (The claimant denied this, and the court accepted her denial. No evidence was provided that such signs were in existence at the material time).

- Company car: Mr Foster arrived at the property for the 21 June meeting in a car bearing the livery of "Foster & Co".
- At the 21 June meeting:
 - Mr Foster made several statements to the claimant to the effect that he would **personally** ensure that her project was completed. (Mr Foster flatly denied making any of these statements. The court rejected his denials).
 - Mr Foster claims that he showed the claimant FCCL's website. The claimant denied this and the court agreed with her. In the judge's words this:
"was in my judgment not merely a failure of recollection on Mr Foster's part but a dishonest attempt to fix the Claimant with knowledge that she would be contracting with FCCL..."
- Mr Foster provided reassurance that he and his wife would be taking personal responsibility for the project.
- Witnesses reported that Mr Foster spoke about the "Foster & Co" brand but did not mention FCCL or any other corporate entity.
- Invoices: The claimant was sent invoices in the name of Foster & Co, which did not mention FCCL. These were sent by Mrs Foster, in emails which identified her as Company Secretary of the "Foster and Co Group".
- Conflicting bank accounts: Invoices were paid to an account which the claimant thought was in the name of Foster & Co. In fact, the account was in the name of FCCL.

- Company sign and livery: When works at the property were being carried out, a sign was erected stating: “Foster & Co” and the workmen deployed at the property had uniforms with “Foster & Co” livery.

The court held that the contract was concluded between the claimant and Mr Foster **personally**. Although a quotation was produced by Mr Foster with documentary evidence that the intended contracting entity was FCCL, there was no reference to the quotation in any communication between the parties.

The court concluded that Mr Foster did not deliver the quotation to the property and the quotation was created by Mr Foster after the event to support his case that FCCL was the defendant.

THOUGHTS

The key practical takeaways from this case are:

- Make sure you know who you are contracting with and that your contract clearly and correctly states this. If it's not clear, then find out and don't sign the contract until you are sure.
- Always do your due diligence on your counterparty. Check their financial health, follow up on any references/testimonials and ensure adequate *insurances* are in place.
- Always document your contractual relationship: even for small domestic projects, standard forms which are straightforward to complete are available such as the *JCT homeowner building contract*. A paper trail of emails, brochures, plans and invoices can also help with this.
- Having a contract in place will help avoid disputes and ensure the parties have agreed how to deal with common issues (for example, delay, *cost issues* and *scope changes*) at the start of the project, hopefully giving you the best possible chance of a smooth running project.

This article first appeared on the [Practical Law Construction blog](#) dated 9 March 2022

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