

Insights

CAPS ON EMPLOYER LIABILITY: LETTERS OF INTENT AND CLS V WJGE

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SUMMARY

In this Insight, Zaynah Mirza considers the case of CLS Civil Engineering Ltd v WJG Evans and Sons (a partnership) [2024] EWHC 194 (TCC) which concerned a number of issues including whether the terms of the letter of intent or the terms of the contract yet to be entered into governed the project.

Letters of intent are commonly used in the construction industry typically when negotiations for a building contract are underway but the parties are keen to start work before the contract is completed.

Despite their widespread use, parties are well advised to take care when proceeding with works under a letter of intent as using them can have unintended consequences should a dispute arise as was demonstrated by the recent case of CLS Civil Engineering Ltd v WJG Evans and Sons (a partnership) [2024] EWHC 194 (TCC) which concerned a number of issues including whether the terms of the letter of intent or the terms of the contract yet to be entered into governed the project.

This Insight takes a closer look at this case and considers the practical implications.

BACKGROUND

CLS Civil Engineering Limited ("CLS") was the employer on a project for the construction of a library, retail provision and three apartments in Narberth. CLS engaged WJG Evans and Sons ("WJGE") to carry out the construction works subject to a letter of intent whilst negotiations continued in respect of the main building contract.

Following its response to CLS's invitation to tender, WJGE advised CLS that its submission was priced on the basis of the JCT Intermediate Form of Contract 2016 with no contractor's design and no liquidated damages.

On 16 August 2021, CLS sent WJGE a letter of intent which contained a £150K cap on CLS's liability and set out the documents which together were labelled the "Proposed Contract". The Proposed Contract did not align with WJGE's expectations as to the form of JCT contract to be entered into and therefore WJGE did not sign the letter of intent.

Between November 2021 and October 2022, the parties exchanged numerous emails in relation to the cap on liability and the form of JCT contract. During this time, work progressed on site and CLS provided WJGE with a number of revisions to the letter of intent, steadily increasing the liability cap from £150K to £1.1m. WJGE accepted this on each occasion (either expressly via email or impliedly by continuing with the works). Whilst each of the revised letters of intent clearly set out that the parties anticipated entering into a building contract, there was significant disagreement as to the specific details.

Following a final request from WJGE to increase the cap on liability, on 15 February 2023, CLS wrote to WJGE to advise that it could not award a building contract to WJGE as the parties would not be able to resolve the outstanding issues. Furthermore, CLS removed WJGE's site licence and instructed WJGE to demobilise immediately. In response, WJGE alleged a repudiatory breach of contract and CLS issued a Part 8 claim.

Neil Moody KC, sitting as a deputy High Court judge in the Technology and Construction Court granted declarations that the parties relationship was not governed by JCT terms and that CLS's liability in respect of the works was limited to £1.1m plus VAT in accordance with the letter of intent and the subsequent revisions dated between 20 November 2021 and 18 October 2022.

'THE REAL DISPUTE'

The key issues for the Court to consider in this case were:

- whether the cap on liability of £1.1m, as set out in the revised letter of intent, was agreed;
- whether the parties' relationship was governed by the JCT Intermediate Form of Contract 2016;
- whether CLS should be estopped from arguing 1) that there was no agreement that the JCT Intermediate Form of Contract 2016 would apply and 2) that there was a liability cap; and
- whether the claim was suitable for Part 8 determination due to WJGE's submissions that there were disputes of fact.

Neil Moody KC made the preliminary observation that the real dispute between the parties centred on whether the cap was agreed.

WJGE's final valuation valued the works in the sum of £1,413,669 whilst CLS argued that WJGE should be held to the cap of £1.1m – the value of the dispute was therefore £313,669. If the Court could not overcome the issues in accordance with Part 8, the matter would likely have to be

transferred out of the Court to be dealt with by way of Part 7 proceedings, leading to increased costs and delay for the parties. It is through this lens that the above issues were considered.

KEY ELEMENTS OF THE JUDGMENT

WJGE admitted and agreed in its acknowledgment of service and through witness evidence that the letter of intent contained a limit of liability of £1.1m. Absent such compelling evidence, the same conclusion would have been reached based on an objective construction of the communications between the parties. WJGE commenced work following receipt of the letter of intent, requested increases to the cap, threatened work would stop if the limit was not increased and noted the existence of the cap in various emails (and expressly noted that WJGE were working subject to the cap).

The Court rejected that a formal building contract had been entered into by the parties and found that negotiations as to the precise contract terms continued after the works had commenced and that the parties had reached no agreement as to which JCT terms would apply.

Although estoppel is not generally suited to Part 8 proceedings, the Court carefully considered these arguments on a summary judgment basis, ie. whether WJGE had a real prospect of success on the relevant issues. If so, the arguments would need to be pleaded in full and heard under Part 7 proceedings instead. In respect of WJGE's first estoppel argument, it was clear from the correspondence between the parties that CLS were not proceeding under an assumption that JCT terms had been agreed and that the parties were still in negotiations. Even if WJGE's submissions had been accepted, this would not have affected the Court's decision regarding the applicability of the liability cap. As to WJGE's estoppel argument in relation to the cap, CLS could not be estopped from contending that there was a liability cap when WJGE had 'repeatedly agreed to it and relied upon it when seeking an increase'. The Court found that WJGE's estoppel arguments did not have any real prospect of success and were therefore not an impediment to Part 8 determination.

Finally, the Court concluded that there were no disputed issues of fact which made the proceedings unsuitable for Part 8 determination (which we do not expand upon here).

PRACTICAL LESSONS

Letters of intent take a variety of forms and should be drafted on a project by project basis. Employers will often want to cap their liability under a letter of intent and great care should be given to drafting such provisions as the applicability of a cap will often turn on the facts in the event of a dispute, including the form of letter of intent and the subsequent conduct of the parties. As such, the parties should contemplate both the intended meaning and effect of a letter of intent and ensure that their subsequent conduct aligns with this intention. Parties should be mindful that letters of intent are still contracts in their own right and should be entered into on the assumption that the formal building contract may never be completed.

Some useful provisions to consider incorporating in a letter of intent include:

- clear recitals spelling out the reason for the letter of intent;
- confirmation that the parties intend to enter into a formal building contract, the industry standard form (if applicable) this will be based on and the contract documents which will comprise the building contract (schedule of amendments, Employer's Requirements, Contractor's Proposals etc.) and that this will supersede the letter of intent once entered into;
- authorised levels of expenditure and the activities and works this relates to;
- a cap on the Employer's liability; and
- an expiry date.

To avoid inadvertently undermining the letter of intent, parties should ensure that any letter of intent is kept up to date and extended (where necessary) if it contains an expenditure cap, expiry date, or specific scope of works, **before** they are exceeded.

RELATED CAPABILITIES

- Commercial Construction & Engineering

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