Letters of Intent

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1 Introduction

What is a “letter of intent”? 

1.1 A letter of intent is an interim form of document setting out basis of parties’ relationship.

1.2 For commercial reasons, contractors commonly commence work under a letter of intent before the terms of a formal contract have been agreed, on the assumption that, ultimately, terms will be finalised.

1.3 When the agreed terms fail to materialise, a number of issues arise and courts typically have to determine whether there was a contract in place between the parties and, if so, what its terms were.

1.4 To the surprise of many, “letter of intent” is not a defined term of art. Letters of intent come in various shapes and sizes. A “pure” letter of intent is simply an expression of intent, and does not create any legal rights or obligations. For example Figure J.01 of the Architects Work book (1995 edition) is a letter which is designed not to create any liability or obligation on either side. It is designed to encourage the contractor to “mobilise” but does not promise payment of any kind for the cost of mobilisation.

1.5 However, typically, when parties enter into a letter of intent in relation to the design and/or construction of works, they intend it to be legally binding.

Why is this topic under discussion today?

1.6 The use of letters of intent is prevalent but not all users (employers and contractors alike) appreciate the risks.

1.7 A number of recent cases have highlighted the issues and pitfalls associated with letters of intent when governed by English law.

1.8 Generally, English law does not look favourably on parties who use letters of intent unthinkingly.

1.9 HHJ Coulson QC commented as follows in Cunningham and others v Collett and another [2006] EWHC 1771 (TCC):

“[Letters of intent are used too often in the construction industry as a way of avoiding, or at least putting off, potentially difficult questions as to the final make-up of the contract and the contract documents. There is no doubt that, sometimes, they are issued in the hope that, once the work is underway, potentially difficult contract issues will somehow resolve themselves. They are plainly not appropriate in such circumstances.”

“I accept the general tenor of [the Claimant's Expert Witness's] evidence, that letters of intent are used unthinkingly in the UK construction industry, and that they can create many more problems than they solve.”

1.10 Other negative judicial comments include the following:

“This case is another example of the perils of proceeding with work under a letter of intent.” (Mr Justice Clarke, RTS v Müller (2008)).

“This is yet another case which relates to a Letter of Intent on a construction project.” (Mr Justice Akenhead, Diamond Build v Clapham Park Homes (2008)).

2 Categories of letters of intent
Legally binding versus non-binding

2.1 As noted above, not all letters of intent are legally binding. The first issue to determine when reviewing / drafting a letter of intent is accordingly to ascertain whether the letter is intended to be legally binding. Having so established, it is then necessary to reflect that intent in the drafting so that the letter of intent is binding, or not, according to what is intended.

2.2 Even where a letter of intent is legally binding, it is necessary to distinguish between different categories of legally binding contracts.

2.3 The question then arises as to the nature of the contract the parties propose to enter into. Two different types of letters of intent were analysed in *British Steel v Cleveland Bridge*, namely an “executory contract” and an “if contract”. The importance to a contractor of knowing which type of contract he has entered into will be readily apparent from what follows.

Executory contracts

2.4 An executory contract arises where the letter of intent creates reciprocal rights and obligations on the employer and the contractor, albeit limited in their scope.

2.5 Typically, the limits will be a limit on the amount the contractor is entitled to be paid under the letter; a limit on the nature of the works the contractor is authorised to carry out; and possibly a limit on the time during which the letter will remain valid.

“If” or “unilateral” contracts

2.6 The classic example of a unilateral contract is where A promises to pay B £100 if he will travel from Beijing to Shanghai. Since B has not made any promise to undertake this journey, the contract is a unilateral, rather than a reciprocal, contract.

2.7 A letter of intent will be categorised as a unilateral contract or an “if” contract if it comprises a standing offer. In other words, the employer offers to pay the contractor (in accordance with the terms of the letter) if the contractor carries out works before the employer’s offer lapses or is validly withdrawn, but there is no obligation on the contractor to carry out or to complete the works.

2.8 If the letter of intent is categorised as a unilateral or “if” contract, since there is no obligation on the contractor to carry out or to complete the works, it follows that there is no obligation on the contractor to complete the works within a reasonable time.

“Limited if” contracts

2.9 A further category of letter of intent was identified in *AC Controls Limited v British Broadcasting Corporation* and can be described as a “limited if” contract.

2.10 A “limited if” contract arises where the letter of intent provides that if the contractor accepts the offer to carry out certain specified work then it is required to perform such work, and cannot cease working before that scope of work has been completed. In other words, it is the contractor’s choice whether to do what is set out in letter of intent in the first place; but if he decides to do so he cannot then pick and choose what work to do.

3 When to use, and when not to use, a letter of intent

3.1 Having made the scathing comments cited above, HHJ Coulson QC confirmed in *Cunningham v Collett:*

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1 [1984] 1All ER 504
2 [2002] EWHC 3132 (TCC)
“[A] letter of intent can be appropriate in circumstances where:

(i) the contract workscope and the price are either agreed or there is a clear mechanism in place for such workscope and price to be agreed;
(ii) the contract terms are (or very likely to be) agreed;
(iii) the start and finish dates and the contract programme are broadly agreed;
(iv) there are good reasons to start work in advance of the finalisation of the contract documents.

In those circumstances I consider that, if the employer wants the work to start on site promptly and the contractor is also keen to commence work, then a careful letter of intent can be appropriate.”

3.2 In essence therefore, the judge was warning against the use of letters of intent where any substantial degree of uncertainty remains over contractual terms. Equally, this confirms the interim nature of letters of intent – they are meant to plug a gap until the contract itself is entered into, and not to form the basis of the permanent contract.

3.3 The commonest practical circumstances in which letters of intent are appropriate include:

(a) to commence off site pre-construction activities;
(b) to place orders for long lead-time plant and equipment; and
(c) to start early site activities such as remediation and enabling works,

in each case where it is not in the interests of the project to wait until the full contract has been negotiated in order to carry out these steps.

4 Issues and pitfalls

Essential Terms

4.1 Binding letters of intent are like any other contract.

4.2 To be legally binding they must be certain as to the key elements of Parties, Scope, Price and Time. These and other matters are dealt with below. A particular issue that can arise is the extent to which (if at all) the terms and conditions of the main contract being negotiated apply to the letter of intent. See below.

Parties

4.3 Letters of intent are frequently issued for signature by the employer’s quantity surveyor or Project Manager, rather than by the employer directly. For the contractor, a key question is therefore whether the employer is actually bound by a letter of intent issued in this manner.

4.4 Usually the QS/PM has ostensible authority to bind the employer. However, no contractor really wants to have to get over the hurdle of proving agency and authority before he has the chance to pursue a claim.

4.5 In short, the contractor should always obtain the letter of intent from the employer and ensure that the named parties/signatories are the contractor and employer.

Scope

4.6 Scope is an essential element of a binding contract.

4.7 As a result, very vague descriptions of scope - such as “mobilise to site” for example - may not be enough to form a binding contract.
4.8 The effect of there being no binding contract is generally unsatisfactory for both parties but marginally favours the contractor.

**Price**

4.9 A letter of intent which does not set out a maximum price is effectively an open-ended obligation to pay - probably on a “quantum meruit” basis.

4.10 Letters of intent often set out a maximum price. Typically, the contractor will be permitted to perform works up to a certain maximum. Difficulties arise under such letters of intent if the contractor then carries out work beyond that price and/or if the cap is reached but the parties are still not in a position to enter into the formal contract.

4.11 *Mowlem plc v Stena Line Ports Limited* [2004] EWHC 2206 (TCC) dealt with this situation under an “if” contract. The effect of the court’s decision is that under a unilateral or “if” contract the contractor’s remedy will be (assuming it has done what it was required to do within the capped sum) to walk off site (since it will not be entitled to any amounts in addition to the capped amount stated in the letter of intent). If, however, the letter of intent obliges the contractor to carry out and complete specified works within the capped sum, then the contractor will be obliged to carry out and complete the works and will be in breach of contract if it threatens to walk off site notwithstanding that its costs have exceeded the capped sum.

4.12 Mowlem claimed that it was entitled to payment for works completed after exceeding the cap on the basis of quantum meruit, waiver or estoppel by convention. Judge Seymour QC rejected each argument. Mowlem could not recover on the basis of quantum meruit because the letter of intent governed payment. Where there is a valid and enforceable contract governing the right of payment, the law will not superimpose an obligation to pay a reasonable remuneration. The waiver argument was rejected because Stena did nothing that could reasonably have led Mowlem to conclude that Stena would not rely upon the cap (in fact on the contrary Mowlem sought repeatedly for the cap to be increased because it knew Stena would rely upon it). The estoppel by convention argument failed because estoppel only arises where there is a common assumption between the parties that Mowlem would be paid a reasonable sum for such works. There was no evidence of such common assumption here (on the contrary, such an assumption would be inconsistent with the agreed fact that the relationship between the parties was governed by the letter of intent).

4.13 From an employer’s perspective, it is therefore best to draft a letter of intent so that the contractor is obliged to carry out the initial works and the employer is required to pay for the initial works, up to a specified maximum sum. If, for whatever reason, the parties are still not in a position to enter into the contract by the time the contractor has performed works to the value of the maximum sum, then the contractor will be obliged to complete the initial works, without being entitled to any further payment.

4.14 *A C Controls Limited v British Broadcasting Corporation* [2002] EWHC 3132 (TCC) dealt with this situation under a “limited if” contract. It is interesting to note that in this case, it was held that the contractor was entitled to payment *in addition to* the cap specified in the letter of intent. Judge Thornton QC’s reasoning was that

(a) the contractor was obliged to continue with the specified works unless the letter of intent was terminated by the BBC;

(b) under the LoI the contractor was entitled to receive payment for the value of the executed work; and

(c) the relevant provision of the letter of intent specifying the cap applied where the BBC determined that it was “not possible” to conclude a formal agreement. It did not apply where it was possible for the parties to enter into a formal agreement, but the BBC decided not to do so because it wished to engage other contractors to carry out the remaining works.
Looking at these cases we can perhaps extract the following points:

(a) Each case turns on its facts and the wording of the letter of intent. It is not necessarily correct to assume that the result of one case will be applied in another.

(b) Contractors should not assume that the general lesson from the Mowlem case is: if you are unhappy with a cap specified in a letter of intent, threaten to stop work and, if that does not work, stop work. This analysis only applies where the letter of intent constitutes an “if” contract.

(c) Contractors and employers entering into a letter of intent should consider carefully whether they wish to enter into an “if” or a “limited if” contract, and draft the letter of intent so that their intention is clear. Before making any threat to walk off site, contractors should make sure that their letter of intent constitutes an “if” contract (and not a “limited if” or executory contract). Under an executory contract, the contractor must carry out the works (for the fixed price if one is specified). Under a limited if contract, once the contractor starts work he has no option to stop work before the agreed scope is complete.

Quantum meruit

As and when the contractor is entitled to be paid on a quantum meruit basis, the case of ERDC Group Ltd v Brunel University [2006] EWHC 687 (TCC) needs to be borne in mind.

This case raised issues relating to the contractor’s right to payment for works carried out where no contract is in place and the employer’s rights against the contractor where such works are defective.

The employer engaged the contractor under a series of letters of intent, pending execution of a formal contract which, it was envisaged, would occur after full planning consent had been granted. Each letter of intent set out details of the works to be carried out, provided that works were to be paid for in accordance with the normal “valuation and certification rules” of a UK standard form of design and build contract (JCT Standard Form of Building Contract with Contractor’s Design), up to a specified maximum amount and provided that the appointment under the letter would terminate with immediate effect if the formal contract was not executed by a specified date. The date specified in the last letter of intent was 1 September 2002.

The contractor continued to carry out works for several months after 1 September 2002. However, no formal contract was entered into following this date. Disputes arose as to the contractor’s entitlement to payment, with the employer alleging that there were defects in the works. The parties agreed that no contract existed after 1 September 2002 (though disagreed as to (i) the basis upon which quantum meruit should be assessed; and (ii) how prolongation costs and defects in the works should be reflected in the assessment of quantum meruit).

HHJ Lloyd QC held that before 1 September 2002 the parties had a clear intention to create legal relations, and that contracts came into existence upon the contractor’s acceptance of each letter of intent (the second and subsequent contracts superseding the previous one). The contractor’s acceptance was demonstrated by its countersignature of the first three letters of intent and its conduct (in continuing to execute the works without demur) in relation to the subsequent letters.

HHJ Lloyd QC noted that there were no hard and fast rules for the assessment of quantum meruit; all factors had to be considered. In this case it was held that quantum meruit should be assessed on the basis of the contractor’s rates (rather than on a “cost plus” basis) as:

(a) there was a move from a contractual to a non-contractual basis during the execution of the works; and

(b) it was clear that the contractor’s tender rates were not abnormally low. When assessing quantum meruit by reference to rates, it would ordinarily be right to see that something was included for prolongation costs incurred if the works were prolonged beyond the
period contemplated in the rates (taking into account the prolongation costs already
allowed for in the rates, to avoid duplication), excluding “delay or inefficiency”
(presumably attributable to the contractor).

4.22 The judge also held that:

(a) Save as mentioned below, the employer could not reduce the amount to which the
contractor was entitled by an amount equal to the costs of putting the works right. This
was because there was no contract between the parties. The employer could not
therefore have a claim for breach of contract, and so had no right of set-off or cross
claim.

(b) The employer could “perhaps” reduce the amount to which the contractor was entitled
where, as a result of what the contractor did or did not do, there was no benefit or value
conferred on the employer. However, in such circumstances, professional fees
(incurred in relation to the remedial works) could never be taken into account and also
there could be no negative result (i.e. the contractor could not be required to pay the
employer).

(c) The employer did not have to pay more than the true value of the benefit realised or
realisable. The benefit had to be assessed overall so that, if, for example, work which
was otherwise up to standard could not be used because other work was not done or
was not up to standard, then the value had to reflect that result.

(d) The net benefit to the employer could not be affected by whether the contractor was or
was not given the opportunity to put the work right or whether it was willing to do so.
This is because, since there was no contract, it could not be relevant to consider
whether a party had mitigated its losses.

4.23 In relation to the numerous alleged defects in the works it was held that:

(a) Where the employer had established that the works were not up to standard and the
employer had paid to remedy the defects, the judge made an adjustment which
approximated to the cost of the remedial works carried out.

(b) Where the employer alleged that the works were not up to standard, but had not carried
out remedial works, the judge inferred that (since the employer had money) either it had
no intention of carrying out the work or, more likely, the supposed defect was either
non-existent or exaggerated and that there had been no real effect on the employer.
The judge declined, in such cases, to make an adjustment.

(c) Where the defects comprised incomplete works, the judge made no adjustment to the
extent that the employer had not paid for the work which had not been completed.

4.24 The employer’s right “perhaps” to reduce the contractor’s entitlement where the employer could
establish that the works in question conferred no benefit or value on the employer has clear
limitations. Professional fees incurred in relation to the remedial works cannot be taken into
account and there can be no negative result (i.e. the contractor can never be required to pay the
employer).

4.25 This case does not merely illustrate the uncertainties that may arise when parties enter into a
letter of intent, rather than a formal contract. It also provides a salutary warning to employers of
the real disadvantages of allowing a contractor to continue to carry out works without a contract
being in place.

4.26 In short, from an employer’s perspective it is better not to have a “cut off” date. If a “cut off” date
is insisted upon employers should avoid a situation in which the parties overlook the “cut off” date
and work continues without any contract in place. Indeed, for an employer it would be advisable
to consider whether there should be a “built in” mechanism enabling the employer to extend the
letter if the “cut off” date arises but work needs to continue, or even a deeming provision to that effect.

The extent to which the terms of conditions of the contract being negotiated applies to the LoI

4.27 We consider this topic against two recent cases.

*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2009] EWCA Civ 26

4.28 The contractor carried out works and was paid by the employer while negotiations proceeded on the terms of the MF/1 contract which the parties proposed to enter. Although final drafts of the MF/1 contract were prepared, several of the schedules had not been agreed and no formal contract was ever executed between the parties. At first instance, Clarke J decided there was a contract between the parties during the period of the letter of intent (when the parties were negotiating the terms of the MF/1 contract) for the contractor to carry out works for an agreed price on the terms of the letter of intent, without agreement having been reached as to the applicable contract conditions that applied.

4.29 After the expiry of the letter of intent (when the parties continued negotiating the terms of the MF/1 contract) the natural inference was that the parties continued just as they had done before (although the contract also included certain documents which had been agreed by the parties after the expiry of the letter of intent). In other words, after the expiry of the letter of intent there was a contract between the parties (for the contractor to carry out the works for an agreed price) and this contract did not include any contract conditions - neither the contractor's terms and conditions nor the MF/1 conditions.

4.30 This had a significant impact on the contractor's liability to the employer; the fact that there was a contract between the parties meant that the contractor *could* be liable to the employer for breach of contract. Further, in principle the contractor's liability for any breach of contract could exceed the amount it had been paid by the employer. The court at first instance’s finding that the contract between the parties did not incorporate the MF/1 conditions meant that the contractor's liability would not be limited by reference to any of the MF/1 conditions which (if incorporated) would limit both the scope and amount of the contractor's liability.

4.31 The court at first instance reached the conclusion that there was a contract between the parties on the basis that it was unrealistic to argue that there was no intention to enter into legal relations between the parties where (as in this case) the scope of the work and the price for the work had been agreed and the natural inference was there was a contract between the parties, even though this contract could not be spelt out by a classic analysis of offer and acceptance.

4.32 The court at first instance reached the conclusion that MF/1 conditions did not apply because (1) the letter of intent stated that the final contract terms were not to be contractually agreed until signature; (2) the contract was designed to operate as a composite whole consisting of all the terms and conditions of MF/1 and its schedules (although many of the schedules had been finalised, several had not been agreed); (3) the parties had not proceeded on the basis of the MF/1 conditions; and (4) clause 48 of the MF/1 conditions provided that the contract would not become effective until each party had executed a counterpart and exchanged it with the other (which had not occurred).

4.33 Having (unsuccessfully) argued before the court at first instance that there was a contract between the parties on the terms of the contractor's own terms and conditions, the contractor changed its stance and argued that there was no contract in existence between the parties (the result being that the contractor was entitled to payment on the basis of quantum meruit and its maximum potential liability to the employer was the return of the money it had received for the works (by way of abatement for defects)).

4.34 The Court of Appeal accepted the contractor's argument that the court's findings at first instance resulted in the “extraordinary result” that, by taking steps to perform, the contractor assumed unlimited liability for its contractual performance, which it would not have assumed under any contract and therefore found that there was no contract in existence between the parties after
expiry of the letter of intent. The Court of Appeal considered that clause 48 of MF/1 provided a "complete answer" in that it prevented any contract from coming into existence between the parties.

4.35 As a result of the Court of Appeal's finding: (1) the contractor was not liable in contract to the employer after expiry of the letter of intent; (2) the contractor was entitled to be paid on the basis of quantum meruit; and (3) in the event of any defects in the works, the employer's rights against the contractor were limited to recovering the contract price (by way of an abatement). The Court of Appeal admitted that its finding that there was no contract was unsatisfactory, but considered that the judge at first instance's finding was also unsatisfactory since it achieved a bargain that neither side had intended.

4.36 The fact that the Court of Appeal itself was not entirely happy with its own findings demonstrates the difficulties inherent in dealing with disputes under letters of intent.

4.37 It is hard to disagree with the Court of Appeal's conclusion that both its and the court at first instance's decisions were unsatisfactory. The court at first instance's decision resulted in the contractor's potential liability to the employer being far greater than it was prepared to undertake during negotiations between the parties. This was an "extraordinary result" (which highlighted the dangers to a contractor of proceeding under an expired LoI). The Court of Appeal's decision resulted in the contractor undertaking no contractual liability whatsoever to the employer - arguably, also an "extraordinary result" (which highlights the dangers to an employer of proceeding under an expired LoI). This case demonstrates that the risks involved to employers in proceeding under an expired LoI cannot be overstated.

Diamond Build Limited v Clapham Park Homes Limited [2008] EWHC 1439 (TCC)

4.38 In this case it was in the employer's interests to rely on the absence of a formal contract, and it was the contractor who found itself significantly prejudiced as a result of such absence.

4.39 The contractor tendered for a development whereby preliminaries required the contract between the parties (to be on a JCT Intermediate Form of Contract, 2005 Edition with further amendments) to be executed as a deed. The employer and the contractor reached agreement on all the essential contractual terms. In June 2007 the employer sent the contractor a letter of intent, which stated:

"We confirm that it is our intention to enter into a Contract with you on the basis of a JCT Intermediate Form of Contract, 2005 Edition with further amendments as specified in the Specification …

The Contract Sum will be [£X]

Should it not be possible for us to execute a formal Contact with you in place of this letter, we undertake to reimburse your reasonable costs up to and including the date on which you are notified that the Contract will not proceed provided that the … total costs will not exceed £250,000 …"

4.40 At the time the letter of intent was signed, the parties had reached agreement on all essential matters. It appears that neither of the parties envisaged that any delay would occur between signature of the letter of intent and execution of the formal contract. The parties' intention to enter into a formal contract without delay was apparent from the fact that the £250,000 cap on costs which the contractor could recover in the absence of a formal contract would be reached within a relatively short time. The employer was responsible for issuing contract documents to the contractor (the task to be undertaken by its quantity surveyor).

4.41 During the first few months after the letter of intent was issued, the works commenced on site. The contractor placed orders with suppliers and sub-contractors to a total value of £1.5 million. Meetings were held during which it was recorded in the minutes (as an action point for the employer) that contract documents were to be issued to the contractor. The employer delayed sending out the contract documents because its quantity surveyor had other more pressing
things to do. The employer’s quantity surveyor eventually sent out the contract documents in October 2007. The contractor did not promptly return the contract documents duly signed and executed because it did not think it was essential for it to do so, and it also had more pressing things to do. Eventually, the employer became disenchantment with the contractor on the grounds of its allegedly late/defective performance.

4.42 In November 2007 (when the contractor had still not returned the signed contract documents to the employer), the employer sent the contractor a letter giving notice, in accordance with the letter of intent, that no further work was to be carried out under the letter of intent. The contractor vigorously opposed the employer’s right to do so, on the basis that there was a contract between the parties upon the terms of the JCT 2005 form of contract, and any termination by the employer therefore had to be in accordance with the JCT provisions. The difficulty with the contractor’s position was that there was still no formal contract in place between the parties on the JCT terms. Furthermore, the letter of intent did not state that, pending execution of the formal contract, the JCT provisions would apply.

4.43 The court held that the letter of intent constituted a contract between the parties, but not on the JCT terms. Its rationale was that (1) the parties must have been aware of the requirement in the preliminaries that there was to be a formal contract under seal; (2) the only purpose of the letter of intent in this case was to cover the period between the letter of intent and the execution of the formal contract; (3) by accepting the letter of intent, the parties accepted that the terms of the letter (which set out the basis upon which the employer would compensate the contractor if no formal contract was entered into) should govern the rights and obligations of the parties until the formal contract was signed.

4.44 As a result of the court’s findings, the contractor was in a position in which the employer could terminate the letter of intent without being bound by the JCT termination provisions at a time when (with the knowledge of the employer) the contractor had committed itself to substantial costs, well in excess of the £250,000 cap stipulated in the letter of intent.

4.45 The contractor raised an estoppel argument, contending that the parties had proceeded as if the full JCT contract, and not the letter of intent, regulated their relationship and that the employer was therefore estopped (either by representation or by convention) from denying this. The court rejected this argument on the grounds that several minutes of meetings had clearly referred to the fact that the contract documents were to be issued by the employer’s quantity surveyor. There was no evidence that either the employer or the contractor had ever said that the letter of intent was being abandoned or that a formal contract did not have to be executed.

4.46 The contractor also argued that it would be unfair if the letter of intent governed the relationship between the parties. The court disagreed on the basis that (1) the contractor could have committed itself to sub-contractors and suppliers in a similar way to that set out in the letter of intent; and (2) the contractor could have approached the employer (at the point at which the cap was being approached) to ask for an increase in the cap.

4.47 The court mentioned (without elaborating) other potential rights of recourse for the contractor. These were not argued before the court, so the court did not make any findings. They are however helpful for contractors in a similar situation to take into account in the future. These included:

(a) The right to an equitable claim for additional payment. This would arise if the only reason why the formal contract had not been executed had been the employer’s withholding of its signature and if the employer had (at the same time) insisted upon the contractor proceeding beyond the cap. The contractor had itself delayed returning the contract documents to the employer so it would have been difficult to argue that the above position applied. Presumably what the court had in mind was a claim for “monies had and received” or unjust enrichment.

(b) The possibility of a cause of action arising as a result of a delay by the employer’s quantity surveyor in sending the contract documents to the contractor (though the court did not elaborate on what such a cause of action would be).
(c) A claim in quantum meruit for any work instructed by the employer which was additional
to or different from the work which was the subject of the letter of intent (since the letter
of intent only related to work which was the subject of the contractor's tender).

4.48 The contractor found itself in a most unfortunate position because (having entered into a letter
of intent which did not envisage that there would be any delay in executing the formal contract),
neither party considered executing the formal contract to be important: both parties had “more
pressing things to do”. The case vividly illustrates how misguided this position was.

4.49 This is no doubt precisely the sort of case the judge had in mind when making his scathing
comments in Cunningham v Collett.

Entering into the construction contract itself

4.50 It follows from everything that has been said above that, having entered into a letter of intent, the
parties should continue with contract negotiations and enter into the main construction contract
as soon as possible.

4.51 When entering into the construction contract, the letter of intent should be terminated. This
should be done on terms whereby work performed and payments made under the letter of intent
become work performed and payments made under the main contract. This is in the interests of
both parties. In effect, the letter of intent simply “folds into” the main contract.

4.52 If this folding process is not gone through, difficulties can arise (especially if the terms of the main
contract were not applicable during the letter of intent period). For instance:

(a) What will govern the standard of works performed under the letter of intent and in
particular alleged defects?

(b) Would the works have been adequately insured during that period?

5 Concluding comments

5.1 Used in their place and following careful consideration, letters of intent undoubtedly serve a
purpose. On the other hand, a poorly considered and hastily drafted letter of intent is likely to
cause more problems than it solves.

5.2 Despite the pitfalls, their use in the industry is commonplace and the more constructive approach
is to embrace them and negotiate/draft them carefully when they are required.

5.3 All industry players would do well to think carefully about when and how to use letters of intent
and to learn the lessons from their own and others’ prior mistakes. In particular, anyone
unfortunate enough to into a letter of intent governed by English law in the wrong circumstances
without heeding the cautionary words of Mr Justice Coulson in the Cunningham case, and then to
have a dispute, is likely to incur the wrath of the adjudicator/judge/arbitrator.