Judgment

Mr Justice Akenhead:

Introduction

1. This is yet another case which relates to a Letter of Intent on a construction project. The issues in this case revolve around whether the Letter of Intent had been superseded by a contract incorporating the JCT Intermediate Form of Building Contract, 2005 edition. There is an estoppel said to have arisen. The case illustrates the dangers posed by letters of intent which are not followed up promptly by the parties’ processing of the formal contract anticipated by them at the letter of intent stage. The Claimant seeks a declaration that by the time its relationship with the Defendant was terminated the Letter of Intent had been replaced by the standard form contract.

The history

2. Clapham Park Homes Ltd (“CPH”), the Defendant, wished in early 2007 to have refurbishment and regeneration works carried out to a number of houses and flats on the Clapham Park Estate in South London. To that end, through its Quantity
Surveyors, Ian Sayer & Co, and in particular their Mr Cutts, CPH invited the
Claimant Diamond Build plc (“DB”), a contractor, to tender for these works. The
invitation to tender letter dated 2 March 2007 enclosed a Specification, Tender
Drawings and a Form of Tender.

3. The Specification contained various Particulars of the Project. Having described the
works and who the relevant parties were likely to be, such as the Quantity Surveyor,
there then followed a description of what the Contract and Form of Agreement was to be:

“The Articles of Agreement of Conditions of Contract will be
the JCT Intermediate Building Contract 2005, with
Contractor’s Design. A schedule of the amendments is set out
in Appendix A to this document …

The Contractor is to note that the Articles of Agreement of
Contract Particulars within the Form of Contract as ultimately
executed will be reproduced as separate documents
incorporating all relevant contract details and amendments
scheduled hereafter …

Articles of Agreement

The agreement will be executed as a deed …”

It was indicated at Paragraph 120 that the Contract Drawings would be the same as
the tender drawings. The invitation to tender was amended by a further letter dated 28
March 2007 from Mr Cutts to DB.

4. By letter dated 2 April 2007 to CPH, DB enclosed its tender in the sum of £2,489,302
for the works as described in the Specification. DB then stated:

“We have endeavoured to interpret your requirements in
accordance with the Specification and site visits. Should our
tender prove of interest there are a number of points we would
welcome further discussion on.”

5. The Form of Tender accompanying this letter was in a relatively standard form:

“Dear Sirs

We the undersigned do hereby tender and undertake to execute
the various works in accordance with the Conditions of
Contract Specification and to the satisfaction of the Contract
Administrator for the sum of:

TENDER - £2,489,302.00 …

This is a fixed price tender and is not subject to any variation in
the costs of labour and materials and will hold for acceptance
for a period of three months from the date fixed for the
submission or lodgement of tenders …
I/We undertake to commence the works within four weeks of acceptance of my/our tender and to complete the works within 36 working weeks of being given possession of the site …”

A summary breakdown of the tender was provided which showed that, amongst other things, there was an additional adjustment to overheads and profit with an addition of £200,000 within the tendered price.

6. Mr Cutts emailed DB on 23 April 2007 referring to the letter accompanying the tender and asking DB to advise him what the points referred to were which DB wanted to discuss. The response by email on 24 April 2007 by CPH was that DB had no further points for discussion.

7. On 5 June 2007, CPH sent to DB the Letter of Intent which has given rise to the major part of the issue between the parties. It was in the following terms (with my numbering of the paragraphs in square brackets):

“Refurbishment Works to 16 NR Houses and 51 NR Flats – Clapham Park Estate London, SW4.

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 upon which your tender of 2nd April 2007 was based on. [1]

Clapham Park Homes Ltd wish that you now commit the appropriate resources to permit you to take possession by no later than 28 calendar days from the date of this letter and to regularly and diligently proceed with the refurbishment works to achieve an overall completion with 36 working weeks from the date of possession. [2]

The Contract Sum will be £2,489,302.00 as set out in your tender. [3]

Should it not be possible for us to execute a formal Contract 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 Supervising Officer is satisfied that those costs are appropriate and that, in any event, total costs will not exceed the sum of £250,000 … [4]

Clapham Park Homes Ltd do not undertake to reimburse any anticipated profits for the works as a whole, nor actual costs or actual or theoretically incurred general or specific overheads arising after the date of notification that no further work is to be carried out. [5]
You are to comply with the Construction (Design and Management) Regulations 2007 ("the CDM Regulations") and be the "Principal Contractor" for the Project as defined in the CDM Regulations and fulfil in relation to the Project all the obligations of the Principal Contractor as set out in the CDM Regulations … [6]

You are also to effect all insurances stipulated in the Form of Contract and Specification referred to above and relevant to the work undertaken pursuant to this letter. [7]

It is hereby confirmed that the undertakings given in this letter will be wholly extinguished upon the execution of the formal Contract. [8]

Please confirm receipt of this letter and indicate acceptance of its terms by signing and returning the enclosed copy where shown.” [9]

8. The first version of this letter which was sent, although addressed to DB, left room for a signature by another company, Hilife Construction. At a Preliminary Meeting on 6 June 2007 attended by representatives of DB, CPH and the Contract Administrator (Estia Building Consultants – “Estia”) there was some discussion about the Letter of Intent; it was agreed that it would be reissued with the name of the Contractor corrected. This duly happened and the Letter of Intent with room for signature by DB was received by DB on 7 June 2007. I was told by Counsel for DB, and I accept, that it was signed by DB shortly thereafter.

9. There is a minor issue of fact between the parties as to whether or not on 6 June 2007 there was agreement reached as to the date for commencement. I am satisfied that agreement was reached, although it is clear from a letter dated 18 June 2007 to which I will return that there was undoubtedly discussion about the topic. I am sure that if there was disagreement at the meeting it would have been recorded in the minutes. It was not and I am satisfied that agreement on commencement date was reached at that meeting. The fact that, after the meeting, the Letter of Intent was signed without demur supports this view; it is corroborated by Estia’s unchallenged letter of 13 June 2007 (see below).

10. By letter dated 11 June 2007, DB wrote to CPH thanking CPH and confirming receipt of the Letter of Intent. It was indicated that a “contract management team had been assigned to this project”. It was hinted however, extremely obliquely, that DB might not wish to commence within 28 days of the Letter of Intent.

11. Estia responded to DB on 13 June 2007:

“We have concerns by the wording of your final paragraph with reference to an anticipated start date.

As you will be aware the contract documents stipulate a four week lead-in period and at our meeting on 6 June a contract
start date was agreed on 9 July 2007, some 4.5 weeks after the Letter of Intent.

We therefore confirm that the contract start date will be 9 July and that this is the date from which the contract completion date will be calculated …”

12. DB responded on 18 June 2007 to Estia’s letter:

“…we should advise you that we are unhappy with the start date that was discussed at the initial meeting and it is unlikely that we will have covered all of the processes that are required under our quality control system to meet the proposed date.

There are various issues that the contract team will have to clear with you besides placing orders with approximately 30 major items of supply and subcontractors that need to be in place on this contract and we do not see this being completed to enable us to start within the four week period stated in the documents …”

13. I was told, and I accept, that, over the first two to three months of this project after the Letter of Intent, DB placed orders with suppliers and subcontractors to a total value of about £1.5m.

14. At a meeting, said to be the “Pre-Contract Meeting”, held on 4 July 2007 attended by representatives of CPH, Estia, DB, Mr Cutts and others, substantial agreement was confirmed on what the Contract Details would be. Minute 3.0 records this:

“3.0 Contract Details.

3.1 Date for possession: 23 July 2007.

3.2 Contract Period: 36 weeks.

3.3 Insurances: Insurance details received.

3.4 Warranties: Design Warranties required for M & E works.

3.5 Performance Bond: Not required.

3.6 Parent Company Guarantee: Not required.

3.7 Contract Documents: To follow.”

15. At minute 5 of the minutes of this meeting, it was agreed that the valuation procedure would be as the Preliminaries in the Specification whilst valuation dates were to be the first Monday of every month. There was reference at minute 7.1 to involvement as a subcontractor to DB of Everest who were to provide glazing of some sort for the Works. The Action List attached to the minutes contained these two references:
‘13. Letter of Intent to be reissued with name of contractor corrected [the date was “ASAP” and action was by CPH]

19. Contract Docs to be issued [action by Mr Cutts].”

The reference to the Letter of Intent was immaterial because it had already been reissued in the previous month.

16. On 13 July 2007, DB sent to Mr Cutts its cashflow forecast. That indicated that by week 7 (week commencing 10 September 2007) £279,480.73 was forecast to represent the accumulated value of works.

17. On or about 19 July 2007, DB sent its Order to Everest with regard to glazing work.

18. At the Site Progress Meeting held on 6 August 2007, it was recorded again in the Action List that the Contract documents were to be issued by Mr Cutts. On 24 August 2007, Estia issued its first Contract Instruction No. 1. This concerned a number of items of possible additional work and omission.

19. The works had been proceeding on site since the last week in July 2007. At the next Site Progress Meeting on 3 September 2007, there was a discussion about progress and programmes. The Action List contained the same reference to Contract Documents to be issued.

20. On 3 September 2007, Mr Cutts issued his first Valuation No. 1 in the sum of £138,700. In fact he had valued the works at £146,000 but this was to be reduced by 5% to represent retention.

21. On 6 September 2007, Estia issued its first certificate of Interim Payment. This was on a standard JCT form of certificate. It identified the Contract Sum of £2,489,302 and endorsed Mr Cutts’ valuation. There is a reference to the Contract (“Contract dated:”) but there is no indication of any dated contract.

22. On 6 September 2007, Mr Gibbons of DB referred to a quotation in respect of a door entrance system and asked Mr Cutts if this was acceptable. He asked for an allowance of 15% to cover Main Contractor Overheads and Profit. Mr Cutts replied on the same day:

“On the subject of the 15% overheads and profits, I have considered this further. Having checked through the price specification, I can see no justification for the 15%. Firstly I would point out that the provisional sums stated that profit and overheads are included for elsewhere within the price document, and the adjustment made on the summary page is the only profit and overhead related cost within the price specification. Secondly, the pricing of the Everest windows within the specification are based solely on the Everest quotation with no additional profits or overheads added so again the only profit and overhead adjustment that would be made is for the sum on the summary page. I therefore propose
to adjust any costs using the sum included on the summary page as the basis for adjustment.”

23. By the date when a special meeting was called on 25 September between the parties, a number of problems had arisen. One package subcontractor had been suspended by DB and CPH was concerned about various “performance issues” as perceived by it. Asbestos had been discovered and steps were in hand to address that problem.

24. At a further meeting on 8 October 2007, which was a Site Progress Meeting, there were further discussions about what was said to be “lack of progress and poor workmanship”. The clients reported that it was “continually having to field complaints and queries from tenants”. It was acknowledged that the programme had begun to slip. It is not necessary for me to decide whether DB was to blame for any of this. However, the Action List attached to the minutes stated:

“7. CPH to issue signed contract documents [action was to be by CPH].”

This differed somewhat from the earlier references, where Mr Cutts was to issue the documents. I was told, and I accept, that it was CPH’s normal procedure for formal contracts which were to be signed to be sent out first to the contractor for signature and then returned.

25. Meanwhile, there had been problems between DB and Everest in entering into a subcontract. The argument to a large extent revolved around whether DB’s standard terms should be incorporated or some version of a standard form of subcontract. Mr Gray, the chairman of DB, became involved in negotiating and discussing matters with Everest and on several of the emails which he exchanged with Everest Mr Cutts was copied in. Mr Gray was quite willing for a standard form of subcontract to be used and he had researched this by reference to the RIBA forms. In an email dated 9 October 2007 to Everest, copied to Mr Cutts, he said:

“Our contract with the client is on a JCT IFC 2005 form with contractor’s design for the mechanical and electrical services amended to suit the clients requirements. The corresponding domestic subcontract form that goes with this contract is either the SBC Sub/C&A or the SBC Sub/D/C&A all with similar client’s amendments.

The website for you to view this information is as follows: …

I trust that you would be happy to enter into a contract using one of these standard forms. I am not sure what your original agreement is with our mutual client and although we do not have a design responsibility for the windows; you may have a responsibility to the client. Therefore I should be pleased if the Client’s Quantity Surveyor Derek Cutts would guide us in this matter.”

26. Mr Cutts emailed Mr Gray on 10 October 2007 in the following terms:
Judgment Approved by the court for handing down
(subject to editorial corrections)

“Although it is not usual for me to have an input to your contracts with suppliers/subcontractors, it would make sense to use a sub-contractor associated with the main contract, bearing this in mind and as Everest are designing the windows as well as manufacturing and installing the IC Sub/D/A, if available would be the one to use. This is the subcontract with subcontractor’s design. If this has yet to be issued, then would suggest SBC Sub/D/C be used.

I look forward to hearing that all has been agreed.”

27. Thereafter and taking on board what Everest and Mr Cutts had said, DB on 16 October 2007 confirmed to Everest, in effect, that they had reached agreement with Everest on the basis of one of the standard forms of subcontract which had been referred to.

28. On 12 October 2007, Mr Cutts wrote to DB enclosing the contract for signature:

“Please find enclosed the Contract for the Refurbishment Works on the Clapham Park Estate. Would you please arrange for the Contract to be signed and sealed where indicated and for the drawing schedules and specifications to be signed, again where indicated.

The signed documents are to be returned to our offices, we will then pass them on to the employer.”


30. On 29 October 2007, DB gave notice “in accordance with clause 2.19 of the Conditions of Contract” of delay to progress; in effect a claim for extension of time was notified to Estia.

31. On 3 November 2007, DB put in its application No. 3 for payment. It indicated a “grand total” of £326,630.85.

32. Site Progress Meeting No. 4 took place on 5 November 2007. There was a discussion about progress with DB reporting that some of the dwellings were nine weeks behind and others seven weeks behind programme. In the Action List to the minutes it was indicated that:

“5. DB to sign and return contract documents.”

33. By 7 November 2007, CPH was becoming disenchanted with DB. It had a meeting internally, attended by Estia and CPH representatives, on 7 November 2007 and considered the potential consequences of terminating or not terminating. There was a concern noted that CPH would be “in breach of contract” if units were not released under the contract to DB. Consideration was given to issuing a default letter, but it
was resolved that CPH’s solicitors, Trowers & Hamlin, would be contacted to be consulted on the strength of the case.

34. Notwithstanding this, on 7 November 2007, Estia issued their Instruction No. 4.

35. By this stage, Mr Gray had become involved and was taking steps to put right matters which were being complained of by CPH, in effect without prejudice as to whether there was a problem which was attributable to DB. In that regard by email to Estia on 12 November 2007, Mr Gray, for instance, indicated that he was introducing a contracts manager “to take the contract forward” and had brought in a design co-ordinator as well.

36. On 12 November 2007, Mr Cutts issued his Valuation No. 3 in the gross sum of £205,225. Also on that date, Estia issued Instruction No. 5 containing a number of confirmed instructions as well as additions.

37. Following an internal meeting on 15 November 2007, CPH resolved to send a letter, presumably drafted by its solicitors, about a week before, to DB that day. That letter, dated 15 November 2007, was delivered to DB on site just after 4pm on Friday 16 November 2007 and was in the following terms:

“We hereby give you notice in accordance with paragraph 4 of our letter of intent dated 5 June 2007, that no further work is to be carried out under that letter.

Although the letter of intent does not require us to demonstrate any breach in order to terminate, we note the following

- The works have been ongoing for 16 weeks, over 40% of the anticipated contract period.

- Internal works to 11 units out of 68 total are in progress. No internal works to units have been completed. Some units have been continuously open for 15 weeks.

- Attendance by workman is unreliable.

- These concerns were raised formally at a meeting on 25 September with a director of Diamond Build. Detailed revised programmes were issued. These have not been met.

- Although these 11 units are nearing handover, there is no evidence that works are progressing at an acceptable rate or that attendance is more reliable.

- External works to one block out of 10 is in progress with scaffolding erected to a second block.”
38. Estia issued its certificate No. 3 on 16 November 2007 in the gross sum of £205,225.00. Mr Cutts produced all his valuations by reference to the tender rates and prices.

39. Mr Gray of DB responded, relatively vigorously, to CPH’s letter of 15 November:

“We were shocked and disappointed to receive your letter of 15th November 07 which was sent to our offices by courier at 16.20 hours on Friday 16th November 2007. We are concerned that you have used inaccurate and misleading statements in your letter to substantiate your reasons for writing the letter.

Firstly we should point out that the date of the letter of intent was dated 5th June 2007 and that matters in relation to this contract have moved on.

Your letter of 5th June 2007 does not limit your liability to us to the sum of £250,000. You have issued instructions on this contract far in excess of that and you have advised us upon contract matters in relation to the issue of sub-contract documents to your named specialist window contractor Messrs Everest Windows. You were aware and complicit in us entering into a sub-contract agreement with them.

You have issued the contract documents for signature after we raised the issue of being unable to place orders with sub-contracts as a result of the non-issue of the main contract documents. The issuing of these documents proved that you were able and it was possible for you to enter into a contract with us for the works.

Consequently, we are in fact, in contract with you based upon the terms and conditions of the JCT Intermediate Form of Contract 2005 Edition with further amendments as specified in the specification upon which our tender of 2nd April 2007 was based.

If it is your intention to terminate this contract you are bound to follow the rules laid down in the 2005 form of contract. To do otherwise would be a repudiation of the contract that exists between us …”

40. Mr Cutts accepted in oral evidence that the primary reason why he did not prepare the contract documentation sooner was that he had more pressing things to do. It was accepted by DB’s witnesses that DB did not return the signed and executed contract because they had more pressing things to do and did not think that it was essential in any event.

The Law
41. Primarily, the issue which arises in this case is a question of construction of the Letter of Intent. There has been a substantial amount of authority about letters of intent, particularly in the context of construction contracts. Mr Justice Robert Goff (as he then was) had to consider such a case in *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd* (1981) 24 BLR 94. He said this:

‘Now the question whether in a case such as the present any contract has come into existence must depend on the true construction of the relevant communications which have passed between the parties and the effect (if any) of their action pursuant to those communications. There can be no hard and fast answer to the question whether a letter of intent will give rise to a binding agreement; everything must depend on the circumstances of the particular case. In most cases where work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence; because if the party who has acted on the request is simply claiming payment, his claim will usually be based upon a quantum meruit, and it will make no difference whether the claim is contractual or quasi-contractual. Of course, a quantum meruit claim (like the old actions for money not received and for money paid) straddles the boundaries of what we now call contract and restitution; so the mere framing of a claim as a quantum meruit claim, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi-contractual. But where, as here, one party is seeking to claim damages for breach of contract, the question whether any contract came into existence is of crucial importance.

As a matter of analysis the contract (if any) which may come into existence following a letter of intent may take one of two forms – either there may be an ordinary executory contract, under which each party assumes reciprocal obligations to the other; or there may be what is sometimes called an “if” contract, ie a contract under which A requests B to carry out a certain performance and promises B that, if he does so, he will receive a certain performance in return [and pay] usual remuneration for his performance. The latter transaction is really no more than a standing offer which, if acted upon before it lapses or is lawfully withdrawn, will result in a binding contract.’ (Page 119-120).

42. In *Jarvis Interiors Ltd v Galliard Homes Ltd* [2000] BLR 33, the preliminaries in the tender bills of quantities indicated that the “contract will be executed as a deed under seal”. In the letter of intent, Galliard wrote that it was its intention to enter into a contract with Jarvis and that:

“in the event that we do not enter into a formal contract with you through no fault of Jarvis … you will be reimbursed all fair and reasonable costs incurred and these will be assessed on a quantum meruit basis.”
43. Over the following months, Jarvis carried out a substantial amount of work, but the parties were unable to agree upon terms. In the Court of Appeal, Lindsay J said this at page 37:

‘On the appeal no one has argued that there was as yet any contract between the parties [at the date of the issue of the letter of intent]. Moreover, I see the reference to “a formal contract” as only adding force to a view, to which I shall return, that, absent express agreement or necessary implication otherwise, there was to be no contract on the basis of the Preliminaries unless and until there was a “formal contract”, namely one, in the context of those Preliminaries, under seal. This last paragraph of the Letter of Intent, further, may also go some way to have put in the parties’ minds that a relatively leisurely approach could, if necessary, be endured, at any rate by Jarvis, in the completion of a formal contract, notwithstanding that the work by Jarvis had actually begun on the show flats. So long as no fault could fairly be attributed to Jarvis they could always fall back on the not uncomfortable basis of a quantum meruit. The presence of the paragraph also in my view denies the usual force to be attributed to the dictum of Steyn L.J. in Trentham (G Percy) Ltd -v- Archital Luxfer [1993] 1 Lloyd’s RP 25 at 27 that the fact that a transaction is performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations, at all events if the dictum is used to support the existence of some contract other than on a quantum meruit.’

Evans LJ at paragraph 8 said this:

‘The correct analysis of the legal situation, in my judgment, is that a contract came into existence on the terms of the Letter of Intent, either when it was acknowledged by Jarvis (24 March), or when Jarvis began work, or, at latest, when Jarvis entered onto the site at Galliard’s request (cf. Steyn L.J.’s reference to the reasonable expectations of sensible businessmen, Trentham (G Percy) Ltd v. Archital Luxfer …

44. Of course, in the current case there was no material disagreement between the parties as to the terms of the contract, at the date of the revised Letter of Intent. Also, given the cap of £250,000 in the Letter of Intent, any formalisation of the contract would have to be achieved within a relatively short time period.

45. The case of G Percy Trentham plc v Archital Luxfer was a case about “offer” and “acceptance”. It was not about a letter of intent as such. Notwithstanding that there was not a concluded signed contract in that case, the work was substantially completed. Lord Justice Steyn (as he then was) stated at page 29:

“But ultimately the only issue is whether there is sufficient evidence to support the Judge’s central finding of fact that a binding contract on phase 1 came into existence …
In a case where the transaction was fully performed, the argument that there was no evidence upon which the Judge could find that a contract was proved is implausible. A contract can be concluded by conduct. Thus in *Brogden v Metropolitan Railway*... decided in 1877, the House of Lords concluded in a case where the parties had acted in accordance with an unsigned draft agreement for the delivery of consignments of coal that there was a contract on the basis of the draft. That inference was drawn from the performance in question with the terms of the draft agreement...The argument that there was insufficient evidence to support a finding that a contract was concluded is wrong. But, in deference to Counsel’s submissions, I would go further.

One must not lose sight of the commercial character of the transaction. It involved the carrying out of work on one side in return for payment by the other side, the performance by both sides being subject to agreed qualifying stipulations. In the negotiations and during the performance of phase 1 of the work all obstacles to the formation of a contract were removed. It is not a case where there was a continuing stipulation that a contract would only come into existence if a written agreement was concluded. Plainly the parties intended to enter into binding contractual relations. The only question is whether they succeeded in doing so. The contemporary exchanges, and the carrying out of what was agreed in those exchanges, support the view that there was a course of dealing which on Trentham’s side created a right to performance of the work by Archital, and on Archital’s side it created a right to be paid on an agreed basis. What the parties did in respect of phase 1 is only explicable on the basis of what they had agreed in respect of phase 1. The Judge analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance. And it does not matter that a contract came into existence after part of the work had been carried out and paid for. The conclusion must be that when the contract came into existence it impliedly governed pre-contractual performance. I would therefore hold that a binding was concluded in respect of phase 1.”

46. I do not consider that the *G Percy Trentham* case is authority for much beyond a consideration of the particular facts and relationships in that case. It is of little use in the current case because the *G Percy Trentham* case, Steyn LJ observed (see above), was not a case where there was “a continuing stipulation that a contract would only come into existence if a written agreement was concluded”. Of course, the Courts will seek to give effect to the reasonable expectations of commercial parties. It is sometimes said that courts will strain to find a contract. That is not a particular
difficulty in the current case in the circumstances at the very least of a letter of intent which was not only signed but also acted upon by both parties.

47. In Stent Foundations Ltd v Carrillion Construction (Contracts) Ltd (CA) 13 July 2000 the terms of a letter of intent were agreed on 8 September 1998 as between Stent and Carrillion. It was envisaged that the contracts would be signed under seal but several matters about the contract remained to be agreed. By January 1989, agreement had been reached on all the terms following the signing of a main contract between the defendant’s next employer. The parties however never got round to issuing let alone signing the formal contract. Dyson J (as he then was) at first instance decided that all essential terms had been agreed and concluded that the execution of formal subcontract documentation was not a condition precedent to the existence of a binding contract. In the Court of Appeal, Hale LJ (as she then was) stated this in reference to the Jarvis case:

‘But the facts and circumstances in the Jarvis case were very different from these. The pre-contractual arrangements were made between the same parties. The letter of intent in that case promised payment upon a quantum meruit basis “in the event that we do not enter into a formal contract with you”. All sorts of matters remained in active dispute and variation as the work proceeded. Crucially these included whether there was a fixed price contract at all, as Galliard wished it to be, or whether, as the contractor contended, a contract for payment on a quantum meruit basis …’ (Paragraph 45)

She continued at Paragraph 46:

“If anything, in this case the history of the letter of intent supports rather than undermines the claimant’s case. It clearly contemplates a works contract being made; it promises reimbursement of costs but not loss of profit if no such contract is made. That was no longer acceptable to Stent once they started work. They were then paid by WCM according to the agreed tender sums and not in accordance with the letter of intent. Everything else that happened after then was in accordance with a contract between WCM and Stent. This includes the procurement by WCM for Wiggins of the bond and warranty, which would not have been necessary, or at least as necessary, if, as [Counsel] contends, the letter of intent had been a contract between Wiggins and Stent which was still in existence.”

48. It is of course necessary in all cases involving letters of intent to construe the letter of intent to see whether it falls within one of several categories. There can be letters of intent which do not give rise to a contract at all. There are others which do give rise to a simple contract in themselves and are applicable pending the execution of a formal contract. There are others which are a contract so far as they go, but not subject to the entering into of a formal contract.
49. In this context, reliance is also placed on various dicta of Rimer J sitting in the Court of Appeal in *Bryen & Langley Ltd v Martin Boston* [2005] BLR 508. The following extracts from his judgment are of some assistance:

‘36. There remains the point that particularly impressed the judge, namely that the 12 June letter envisaged a formal contract being signed in the future, being a formal contract that would incorporate the JCT Form, and so it was inconsistent to regard the contract created by the letter and its acceptance as itself incorporating that Form. That is a view with which it is perhaps quite easy to have instinctive sympathy, but it is one with which, on the facts of the present case, I respectfully disagree. The mere fact that two parties propose that their agreement should be contained in a formal contract to be drawn and signed in the future does not preclude the conclusion that they have already informally contractually committed themselves on exactly the same terms. Of course, if they negotiate on a “subject to contract” basis such a conclusion will be precluded. But otherwise it will not, or at least may not. This court in *Harvey* was not applying any novel principle of law. In *Rossiter v. Miller* (1878) 3 App. Cas. 1124, at 1151, Lord Blackburn said:

“So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.”

37. Parker J made a statement to similar effect in *Von Hatzfeldt–Wildenburg v. Alexander* [1912] 1 Ch. 284, at 288, 289:

“It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will
in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal contract can be ignored.”

50. Again, this authority is one which is decided on its own particular facts, but the general principle, particularly that adumbrated by Parker J is of assistance in the current case.

The decision

51. I now turn to the construction of the Letter of Intent. The first question to consider is whether from its terms and its acknowledgment and acceptance by DB the Letter of Intent give rise to a contract in itself. I have no doubt that it did give rise to a (relatively) simple form of contract. My reasons are as follows:

(a) Whilst the first paragraph merely confirms an intention to enter into a contract, the second paragraph effectively asks DB to proceed with the work.

(b) There is an undertaking in effect pending the execution of a formal contract to pay for DB’s reasonable costs, albeit up to a specific sum.

(c) The fact in the penultimate paragraph that the undertakings given in the letter are to be “wholly extinguished” upon the execution of the formal contract point very strongly to those undertakings having legal and enforceable effect until the execution of the formal contract.

(d) The fact that the Specification referred to in the Letter required a contract under seal demonstrates that the parties were operating with that in mind.

(e) The very fact that DB was asked to (and did) sign in effect by way of acceptance the Letter of Intent points clearly to the creation of a contract based on the terms of the Letter of Intent itself.

52. Although this is a simple contractual arrangement, it has sufficient certainty: there is a commencement date, requirement to proceed regularly and diligently, a completion date, an overall contract sum and an undertaking to pay reasonable costs in the interim.

53. It is suggested by DB that all that this was doing was requiring DB to mobilise or “pre-mobilise” rather than do any substantive work. I do not consider that that is how the second paragraph of the letter should be read. The request clearly is in effect to take possession and to proceed at a sufficient pace to achieve a specific completion period. The reference to the CDM Regulations suggests that the whole work on site is being contemplated and not just pre-start mobilisation.

54. The next question to consider is, broadly, how this Letter of Intent agreement works. In effect, DB argues that once one gets to the stage that it is “possible” for the parties “to execute a formal contract”, that is when the Letter of Intent contract, such as it is, lapses and the new contract comes into being (which for DB has the advantage of
having no cap). I do not consider that this Letter of Intent contract can be read in that way:

(a) Once the Letter of Intent was in effect accepted (which it was once DB signed and returned the Letter of Intent itself), the only essential matter which remained to be done was the execution of the formal contract. The terms of the Letter of Intent require DB to take possession within 28 days. That was effectively confirmed at the meeting of the parties on 6 June 2007, albeit that later (on 4 July 2007) the parties in effect agreed a change to the start date. The parties must be taken to have known by about 6th or 7th June 2007 that all material terms were in fact agreed.

(b) Thus, the only purpose of the Letter of Intent was to cover and legislate for the period between the Letter of Intent and the execution of the formal contract.

(c) That then explains the penultimate paragraph which, construed properly, means that the undertakings given in the letter (including critically the obligation to reimburse reasonable costs (albeit up to a cap) in the fourth paragraph) were to continue until the formal contract was executed.

(d) The parties must be taken to have been aware of the requirement in the Preliminaries that there was to be a formal contract under seal. It is, in effect, for the parties to decide when and how a contract is to come into being. By accepting the Letter of Intent, the parties were accepting that the terms of that Letter should dictate the rights and obligations of the parties until the formal contract was signed.

55. There is an additional argument which is made by DB which is that the entitlement which DB had for “reasonable costs” did not include for profit and overheads. I disagree because the fifth paragraph makes it clear that it is only in respect of the period after the date of notification that no further work is to be carried out that profit or overheads are to be disallowed. If one reads the fourth and fifth paragraphs together in a sensible and commercial way, what the parties were agreeing was that DB was in effect entitled to be paid the sum due by reference to the Contract Sum referred in the third paragraph including such profit and overheads as were applicable thereto.

56. It is argued by DB that the cap produces an unfair position for DB because it was foreseeable that the cap could be reached within a relatively short time. I reject that argument for a number of reasons:

(a) It was always open to DB to commit itself to its subcontractors and suppliers in a similar way to that predicated by the Letter of Intent.

(b) If the cap was being approached it would have been open to DB to approach CPH for an increase of the cap.

(c) If the sole reason why the formal Contract was not being executed was the withholding of signing by CPH, the insistence by CPH that DB proceed beyond the cap would lead to at the very least an equitable claim for additional payment.

(d) It was necessarily envisaged that, given that agreement was reached by the time that the revised Letter of Intent was sent out and then signed, the formal
contract would be effected in a short period. What the parties did not legislate for was the delay which actually happened. Whether the delay by Mr Cutts in producing the contract for signature gives rise to a cause of action was not canvassed before me and I do not decide that matter.

(e) The Letter of Intent, and the cap, relate to the work which was the subject matter of the tender. If additional or different work was ordered by or on behalf of CPH to be done by DB, that would attract payment in addition to and above the cap on a quantum meruit basis; that could be by way of a mini or implied contract or in restitution. Similarly, any breach of express or implied terms of the Letter of Intent agreement would attract damages which would not be caught by or subject to the cap.

57. I now turn to the issue of estoppel raised by DB. In broad terms, it is argued that either by way of representation or by way of convention the parties proceeded on the basis that the Letter of Intent had been abandoned and as if the full JCT IFC contract was regulating the relationship between the parties. It is clear that, as witnesses on both sides said in evidence, both parties believed that there was a contract in place. What they did not say and indeed were not asked, was what that contract was. There clearly was in any event a contract in place, namely that created by the Letter of Intent. This evidence does not take the matter further.

58. I have formed the view that estoppel of whatever type does not arise here for the following reasons:

(a) The constant references in the Action Lists attached to the circulated meeting minutes to “Contract Docs to be issued” demonstrate that the parties were still expecting the formal contract to be executed.

(b) It was never said by either party that the Letter of Intent was being abandoned or that they were proceeding on the basis that a formal contract did not have to be executed.

(c) The fact that valuations were done on the basis of the tender rates and prices is not inconsistent with the Letter of Intent which allowed overheads and profit on work done and materials and plant provided.

(d) The fact that valuations were done on the basis of the tender rates and prices and that instructions were issued by Estia is not inconsistent with the parties’ hope and belief that sooner or later a formal contract would be executed which would necessarily be retrospective in effect back to June or July 2007.

(e) The involvement of Mr Cutts in the placing of the sub-contract between DB and Everest does not give rise to an estoppel to the effect claimed by DB here. It might very arguably give rise to an estoppel to the effect that the cap was not intended to apply to the Everest works, although I do not have to decide this.

Broadly, I am not satisfied on a balance of probabilities that any representations were made by CPH that in some way there was no need for the contract to be executed or
that CPH altered its position with regard to that need; similarly I am not satisfied that there was any convention as between the parties to similar effect.

**Decision**

59. For the above reasons, DB’s claim is dismissed.