

## Construction Law Update

### The Problems with Entering into an Oral Contract

When the Housing Grants, Construction and Regeneration Act 1996 was amended in October 2011, one of the key changes was that disputes arising under oral contracts could be referred to adjudication. Whilst the vast majority of businesses would probably dismiss the suggestion that they might ever enter into an oral contract, this can and does happen. Disputes about oral contracts are inevitably difficult to resolve due to the lack of substantive evidence. The recent case of *Dacy Building Services Limited v IDM Properties LLP* (2018) highlights the difficulties that can arise in relation to an oral contract.

#### Background

In 2014 HOC (UK) Ltd ('HOC') was engaged as main contractor under a JCT Design and Build Contract 2011 to construct a mixed residential and retail development in London. IDM Properties LLP ('IDM Properties') was named as the Employer's Agent under the contract. IDM Properties was part of a group of companies, all with 'IDM' in their title. The Employer also had a connection with the IDM group.

By November 2015, HOC was in financial difficulty and work on site had stopped. HOC had stopped paying its sub-contractors. HOC approached Dacy Building Services Ltd ('Dacy'), who had not been involved in the project previously, to come on board and complete the works. HOC had engaged Dacy on a number of projects previously, but owed Dacy £170,000 relating to one of the previous projects.

Despite the substantial sums owed by HOC on another project, Dacy agreed to become involved in the project, although it was Dacy's case that it had contracted with IDM Properties, rather than with HOC. Dacy submitted a number of invoices which were not paid, so Dacy commenced an adjudication against IDM Properties. Dacy was successful and was awarded £247,250 by the adjudicator. IDM Properties refused to pay and defended the adjudication enforcement proceedings on the basis that there was no contract between the

parties. At the enforcement proceedings, the court ordered a full trial to determine whether there was a contract between Dacy and IDM Properties.

#### Was there a contract?

The dispute centred around a meeting that had taken place between Mr Keran of Dacy, Mr Cutmore of HOC and Mr Mcloughlin of IDM Properties in a bus shelter opposite the site on 3 December 2015. Dacy contended that the purpose of the meeting was for Mr Keran to meet Mr Mcloughlin so that he knew who he would be entering into a contract with. IDM Properties argued that the meeting was essentially a coincidence and Mr Mcloughlin, who was at the site for another reason, had simply bumped into Mr Keran and Mr Cutmore when he went to get a coffee.

The court considered all the evidence (much of which was witness evidence, given the lack of documentation) and found that there was a contract between Dacy and IDM Properties. The following factors were relevant to the court's decision:

- Dacy had supplied plant, materials and labour to the project. The courts are reluctant to decide there is no contract when the subject matter of the alleged contract has been performed.
- Mr Mcloughlin had given Mr Keran his business card at the meeting.
- In circumstances where HOC was unable to pay its existing sub-contractors and work on site had stalled, it made business and common sense for Dacy to have contracted with IDM Properties. It was a "*fanciful notion*" that any sub-contractor would have been content to be engaged by HOC. Further, it would have been "*commercially suicidal*" for Dacy to do so, bearing in mind that HOC already owed Dacy £170,000. There was "*no sensible prospect*" of Dacy having entered into another contract with HOC.
- IDM Properties' quantity surveyor had asked Dacy for evidence of HMRC certification and insurance documents. He had also sought

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confirmation internally that Dacy's rates were acceptable. There would have been no need to do this if the two companies were not in contract.

- The court found Mr Keran and Mr Cutmore to be more convincing and accurate witnesses, commenting that Mr Mcloughlin was *"very capable of glossing over contractual precision when it suits him"*.

The court concluded *"In the context of the state of the Project as at 3 December 2015, the stalling of the works, and the fact that HOC was in a dire financial situation and had stopped paying their sub-contractors, the suggestion that the meeting with Dacy (who had only just arrived on site that very day) was entirely coincidental is difficult to take seriously and I reject it... The meeting was not impromptu or a chance encounter as I have found. Its location is unusual but the circumstances were unusual, and the date is highly relevant. It is directly in the period that discussions, in which Mr Mcloughlin was centrally involved, were taking place with HOC about direct contracting between an IDM company and sub-contractors. Further, the duration of the meeting reflected the limited, though important, number of points that had to be discussed and agreed. These were the engagement of Dacy; the fact that the work would be directed by HOC; and that the contract was to be direct with IDM Properties."*

The court also decided that Mr Mcloughlin had been acting on behalf of IDM Properties at the meeting on 3 December 2015, rather than any of the other IDM companies. The judge commented *"I also find that the number of companies with very similar names, all with IDM in their title, with the consequence that Mr McLoughlin can almost seamlessly and interchangeably attribute acts or relations to whichever IDM company suits him at any particular time, to be an unsatisfactory feature of his business arrangements"*.

The court therefore upheld the adjudicator's decision that Dacy was entitled to be paid the outstanding sums.

### Analysis

This case is an important reminder of two points. The first is that it is possible to enter into a legally binding contract in a relatively informal setting. Anyone involved in commercial negotiations should therefore be mindful of what they are agreeing and make it clear to the other parties if there is no intention to be contractually bound.

The second is that it is very important to ensure that any agreement which is intended to be legally binding is recorded in writing. This dispute, which would ordinarily have been a fairly straightforward claim for unpaid sums, became much more expensive and time consuming for the parties to resolve because of their failure to record their agreement in writing.

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