

# Starting off on the right foot

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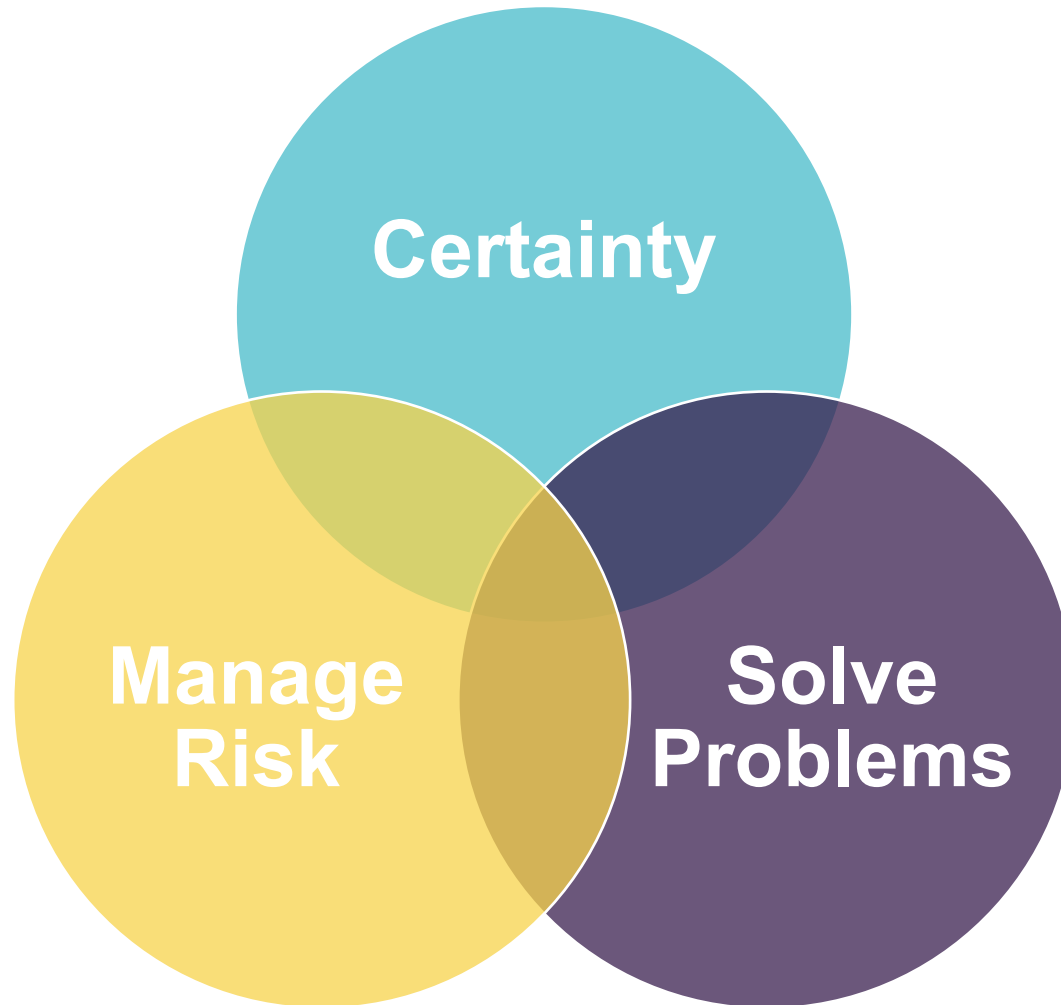
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Why does this matter?



# Why have a contract?

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# Why do you need to get it right?

## *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH* [2010] UKSC 14

- Letter of intent case
- 3 courts, 9 Judges, 3 different decisions



## *Balfour Beatty Regional Construction Ltd v Van Elle Ltd* [2021] EWHC 794 (TCC)

- Sub-contract concluded, superseding an LOI, but still a fight
- Preliminary issue before the defective piling can be addressed
- Effort to rely on limitation of liability

# Contract formation



# Contract formation – the basics

## 1. Offer / Counter-Offer

Silence, query/request for information, rejection, counter-offer

## 2. Acceptance

Communicated and unequivocal

## 3. Consideration

The deal; e.g. cash for services

## 4. Intent

Assumed in commercial transactions

“Subject to contract” *Joanne Properties Limited v Moneything Capital Limited and another* [2020] EWCA Civ 1541

# Battle of the Forms

## Competition to decide whose T&C apply

- Exchange of standard terms

## How do you win?

- Fire the last shot!



## Caution

- Cases are rarely clear cut
- There is lots of law and it always depends on the facts

# Battle of the Forms – Key Cases



## ***Tekdata v Amphenol [2009] EWCA Civ 1209***

- Traditional analysis of offer / acceptance
- “Where A makes an offer on its Ts&Cs and B accepts that offer on its Ts&Cs and, without more, performance follows, the correct analysis, assuming that each party’s Ts&Cs have been reasonably drawn to the attention of the other, is that there is a contract on B’s Ts&Cs”.



## ***Transformers v Needs [2015] EWHC 269 (TCC)***

- Follows Tekdata
- Neither party’s T&C applied



## ***Trebor Bassett and Cadbury v ADT Fire and Security [2011] EWHC 1936 (TCC)***

- Follows Tekdata
- Cadburys’ (Purchaser) T&C’s applied
- Issue not appealed



# Also note...

## 1. Course of dealing vs traditional approach

- Could get around a traditional analysis if a course of dealings suggests an intention to contract on other terms, but the course of dealing must be “*consistent and unequivocal*”.
- It does not have to be extensive; 3 or 4 times in a short time may be enough.
- *Tekdata* and *Transformers*.

## 2. More than one contract?

- Battle of the forms might also be relevant.
- Look at what is really going on.
- *Ex Novo Limited v MPS Housing Limited* [2020] EWHC 3804 (TCC)

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# Letters of Intent



# Letters of Intent – Less Well Known Trip Hazards

- You all know the main things to look out for – scope, payment, end dates etc. Easy boxes to tick on a quick read through.
- Assume the whole project may be built under it. Ideally, needs the same degree of scrutiny as the full contract.
- Most LOIs are bespoke (but a lot of copy and pasting goes on!)
- The whole contract applying to the work

*“Although the Contract has not yet been entered into, all the terms and conditions of the Contract will apply to any work carried out by you pursuant to the instructions contained in this letter”*

- What’s the problem?

# Letters of Intent – Less Well Known Trip Hazards

- OD Developments v Oak Dry Lining (2020)
- *“We confirm that it is our intention to enter into a formal contract [...] based on the JCT Design and Build”* Sound familiar?
- Parties followed some of the JCT (eg payment) but it was never formally signed.
- Adjudicator decided that JCT applied and was incorporated because there was nothing left to agree, despite fact that Contract Particulars were not completed
- *“It is one thing to agree what documents you will have if you execute a JCT contract; it is quite another to say that you have, therefore, incorporated all those JCT terms and conditions at the outset and at the same time”*
- JCT not incorporated.
- Lessons?

# Letters of Intent – Less Well Known Trip Hazards

- The insurance regime

*“We will put in place insurance in respect of existing structures together with the contents of the structures owned by us or for which we are responsible for, for the full cost and reinstatement, repair or replacement of loss or damage due to any Specified Perils”.*

- What’s the problem?
- Terms that are more onerous than contract

*“You shall indemnify us against all losses, damages, expenses, liabilities, claims, costs or proceedings which we may suffer or incur by reason of your negligence or failure to perform any of your duties and/or obligations arising under or in connection with this letter of intent or shall commit any breach of any provision or fail to fulfil any warranty or indemnity set out in this letter of intent”*

- What’s the problem?

# Third Party Agreements



# Third Party Agreements

## Typical clause dealing with Third Party Agreements

*“2.1.6. The Contractor shall take account of the Third Party Agreements. The Contractor shall in the performance of the Contractor's obligations under this Contract, not cause or contribute to the Employer being in breach of and/or liable under any Third Party Agreements. The Contractor acknowledges that any breach of the Contractor's obligations under this Contract may result in the Employer being in breach of and/or liable under any Third Party Agreement. Such liability of the Employer is agreed as being in the contemplation of the Parties as at the date of this Contract as being the probable result of any such breach by the Contractor. Should the Employer subsequently provide to the Contractor or subsequently enter into any subsequent Third Party Agreements after the date of this contract, the Contractor shall take account of such subsequent Third Party Agreements, but where the provisions of such subsequent Third Party Agreements explicitly require a Change to the Works, the Employer shall instruct such a Change.”*

# Third Party Agreements

- Why is it done?
- What's lurking in the small print?
- Risk of the conflicts could well sit at the contractor's doorstep.
- Common conflicts include scope, timing and quality of work, access/noise/sequencing restrictions, requirements of funders etc. All these issues are covered in the main contract as well. So which trumps?
- What about agreements issued post-contract? May be treated as a variation, but you've got to spot the problem!
- Variation clauses usually give the employer all they need (can change access, hours, sequence, scope etc).
- All these problems from just one clause?



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Thank you.  
Questions?

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