



Legal Developments - Built Environment

Mr. John Coghlan – Principal C&E Legal
Solutions

Introduction

John Coghlan

- Principal – C&E Legal Solutions
- Boutique Law Firm
 - Construction and Engineering Law only
 - Over 30 years' experience in the Construction and Engineering Industry – subcontractor/lawyer
- Objective
 - Provide Clients in the Construction and Engineering Industry with practical bespoke and cost effective legal solutions to overcome the challenges they encounter when delivering their projects across the globe
- Approach
 - Technology: Leading Cloud based legal technology
 - Modern Day Work Practices: Agile Working
 - Global Reach = **Genuine Added Value!**

Structure

- Update on Common Terms in Construction and Engineering Contracts
 - “Reasonable Endeavours”
 - Gaia Ventures Limited and Abbeygate Helical (Leisure Plaza) Limited [2019] EWCA Civ 823
 - Court of Appeal Decision in England
 - “Fit for Purpose”
 - Global Switch (Property) Singapore Ltd v Arup Singapore Pte Ltd [2019] SGHC 122
 - Not implied
- Dispute Resolution: Construction and Engineering Contracts
 - Q&A

Common Terms – Reasonable Endeavours (1)

- Parties use “Reasonable Endeavours” or “Best Endeavours” clauses to qualifying an obligation
 - latter seen as more stringent
- Case - Rhodia International – good commentary indicating the difference:

“...There may be many reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours... requires a party to take all reasonable courses he can...” (Rhodia International Holdings Ltd v Huntsman [2007] EWHC 292)

Common Terms – Reasonable Endeavours (2)

- Recent Development
 - Gaia Ventures Limited and Abbeygate Helical (Leisure Plaza) Limited [2019]
 - Abbeygate (developer) was under an obligation to use its “reasonable endeavours” to obtain several property interest which triggered an obligation to pay an overage payment (fee) of GBP 1.4 m – property transfer included a “Longstop date” of 10 years
 - “Longstop date” passed and Gaia sued for damages GBP 1.4 m - High Court determined Abbeygate had breached its obligation
 - Abbeygate appealed claiming, *inter alia*, it had used its “reasonable endeavours” to obtain the property interests and the funding for a development and that it would be “commercially reckless” to agree to be obliged to pay the overage before it obtained the funding
 - C of A dismissed the appeal - Abbeygate’s actions (and inactions) had ensured that it did not obtain the property interests or the funding until after the “Longstop date”
 - Abbeygate had restricted its own access to funding and it could not rely on the same to show that it had used “reasonable endeavours” to attempt to obtain the property interests within the 10 year period
 - **Note:** Interpretation “*heavily dependant on the particular wording used*” – understand your obligations!

Common Terms – Fit for Purpose (1)

- Design Consultant – Contract with Employer to complete “design” of the Works
 - General Standard of Care: Reasonable Skill & Care (absence any express terms to the contrary)
 - Consultant required to complete the “design” of the Works using “*reasonable skill & care*”
 - Emanates from s 13 of Supply and Goods and Services Act 1982 and Professional Negligence
 - If the Consultant has provided the service “...*exercising the ordinary skill of an ordinary competent man exercising that particular art...*” (**Bolam Test**) then the Consultant has not breached its duty
 - In other words: Not required to achieve a particular result
 - Higher Standard of Care: Fit for Purpose
 - Consultant is required to “design” the Works to achieve a particular result i.e. works are “*fit for their intended purpose*”
 - Either expressly or implicitly – Courts may imply the higher standard in “*special circumstances*”
 - Consultant holds itself out as having specific skills/expertise
 - Employer informs the Consultant what is required and relies on the Consultant’s skills/expertise

Common Terms – Fit for Purpose (2)

- *Court of Appeal: Greaves & Co v Baynham Meikle* – Greaves agreed to provide a warehouse in which the first floor would accommodate the use of “stacker trucks”
 - Engaged Baynham as “expert” engineers and informed Baynham of the “purpose” of the first floor in the warehouse - floor failed Greaves sued Baynham for breach of implied term/warranty i.e. Fit for Purpose
 - CoA: Baynham liable in damages as designed a floor which failed i.e. breach of implied term/warranty

*“...It is not open to this Court, except where there are special facts and circumstances, to extend the responsibilities of a professional man beyond the duty to exercise all **reasonable skill and care**...”*
 - Singapore High Court: *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019]
 - GSS claimed \$23 m damages claiming that Arup had breached an implied obligation to design a data centre “fit for purpose” – in other words failed to meet GSS’s exact requirements
 - SHC: Dismissed the claim – threshold to imply a term that the Arup’s design was “*fit for purpose*” was high (see Greaves). GSS had not met that threshold. General Standard of Care applied “*reasonable skill & care*”
 - **Note:** SHC raised queries regarding GSS’ contentions re “Fit for what purpose?” and “Fit to what standard?” – beware set out both the “Purpose” of the Works and “Standard” for Completion in your construction and engineering contracts!!!

Thank You

John Coghlan

Principal



E: johncoghlan@cels.global

UK +44 (0) 7938 948 131

Qatar: 00974 5559 3797

www.cels.global