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Contract Law Update

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Overview

- Introduction
- Agreement to Agree
- Endeavours Obligations/Due Diligence
- Withholding of Consent
- Subject to Contract
- Good Faith
- Execution in Counterpart

Agreement to Agree

Case: Barbudev v Eurocom Cable Management Bulgaria EOOD

Facts

- B was offered an investment opportunity
- Parties entered into side letter to acknowledge agreement to negotiate an investment & shareholders' agreement (ISA)
- ISA was never drawn up and a dispute arose as to whether side letter was enforceable

Agreement to Agree

Case: Barbudev v Eurocom

Facts

Side letter stated:

*“In consideration for you agreeing to enter into the Proposed Transaction ...as soon as reasonably practicable after the signing of the [Share Purchase] Agreement...we shall offer you the opportunity to invest ...**on the terms to be agreed** ...which shall be set out in the [ISA] and we **agree to negotiate the [ISA] in good faith with you.**”*

Agreement to Agree

Case: Barbudev v Eurocom

Held

- Terms of investment were still to be negotiated and agreed
- Side letter was not a legally enforceable contract – its terms were too uncertain, so it was merely an agreement to agree

Agreement to Agree

Case: Barbudev v Eurocom

Held

However, even though the contract was unenforceable, the parties had intended to create legal relations:

- drafted by lawyers
- boilerplate clauses
- language of legal relations
- binding confidentiality obligations

Endeavours Obligations

Case: Jet2.com Ltd v Blackpool Airport Ltd

Facts

- Both parties' obligation: Use “best endeavours” to promote Jet2’s low cost services
- BAL obligation: Use “all reasonable endeavours” to provide a low-cost base to facilitate Jet2’s low-cost pricing
- After operating at a loss, BAL changed policy - no departures/ arrivals outside opening hours
- Jet2 sued for breach of contract - new policy contravened endeavours obligations

Endeavours Obligations

Case: Jet2.com v Blackpool Airport

Held

- “Best” and “all reasonable” interchangeable
- BAL failed to use best or all reasonable endeavours to promote low cost service
- Even though operating outside normal service hours was costly, it was within scope of obligation
- Whilst BAL could have regard to its own commercial interests, cost was not a decisive factor

Endeavours Obligations: Summary

Best	All reasonable	Reasonable
<ul style="list-style-type: none"> • All prudent steps a prudent, determined and reasonable person, acting in his own interests, would take • Not an absolute obligation • May require significant expenditure but not ruinous (some regard for own commercial interests) • May be overridden by other duties 	<ul style="list-style-type: none"> • Has been equated to both best and reasonable • Interpretation depends on the context • Does not require party to (i) continue implementing all reasonable efforts to overcome all obstacles once it is clear that one of them was impossible; or (ii) take commercially imprudent decisions • Does not always require a party to sacrifice its commercial interests 	<ul style="list-style-type: none"> • Less tangible but not toothless • Involves balancing the contractual obligation against all relevant commercial considerations • No requirement to sacrifice own commercial interests • No obligation to take legal action where outcome doubtful

Endeavours Obligations: Practical Tips

- Ranked in strength from reasonable - all reasonable - best
- To be enforceable, must refer to clear, definite objective, which can be assessed against objective standards
- Expressly set out specific steps obligant must take/ is *not* required to take

“Reasonable Endeavours” and “Diligence”

Case: Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd

Facts

- Separate obligations:
 - carry out works “*with due diligence*”
 - “*use reasonable endeavours to procure completion ...by the Target Date or as soon as reasonably practicable thereafter*”
- Contractor ceased work due to lack of funding, delaying completion

“Reasonable Endeavours” and “Diligence”

Case: Telford v Ampurius

Held: Breach of both obligations

- Specified completion date was delayed by deliberate decision to stop works
- “Due diligence”: familiar principle in construction contracts, carries notions of “assiduity/ expedition”
- “Reasonable endeavours” as regards **timing** of completion does not extend to having sufficient funding to complete – funding not directly related to physical conduct of works

“Reasonable Endeavours” and “Diligence”

Case: Morris Homes (West Midlands) Ltd v Keay & Another

Facts

- Separate obligations:
 - *“carry out works diligently”*
 - *“use all reasonable endeavours to ensure the works are completed as soon as reasonably practicable, unless delayed or prevented by some cause or circumstance not within [its] reasonable control...”*
- Contractor suspended work in order to avoid “commercial suicide”

“Reasonable Endeavours” and “Diligence”

Case: *Morris Homes v Keay*

Held: Breach of diligence obligation only

- Diligence obligation:
 - manner_in which works are carried out (materials/workmanship)
 - time/ order of carrying out (“assiduity/expedition”, programming, sequence of works)
- Endeavours obligation to complete: May involve taking steps to ensure sufficient capital available

“Reasonable Endeavours” and “Diligence”: Summary

- Although often linked, concepts are separate and distinct
- Can be in breach of one obligation whilst still complying with the other
- Consider qualifying - “unless prevented by event outside reasonable control”

Withholding Consent

Case: Barclays Bank plc v UniCredit Bank AG

Facts

- Parties entered into a guarantee allowing one party to terminate if a regulatory change occurred, provided consent obtained
- Consent to be determined by Barclays in a commercially reasonable manner
- Barclays' understanding it would receive a minimum of five years' fees on early termination
- Entire agreement clauses

Withholding Consent

Case: Barclays v UniCredit

Held

- B's refusal to give consent without 5 years' fees = commercially reasonable
- Reasonable and legitimate expectation at the time it entered into the guarantees

Withholding Consent - Comments

Case: Barclays v UniCredit

- First reported case which deals with reasonableness of consent in context of finance transactions
- Discretion to consent to a request by another party in a reasonable manner is common in finance transactions
- Objective standard of reasonableness was applicable
- Parties should consider the use of a term which sets out that consent will be given if certain conditions are met

Subject to Contract

Case: Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd

Facts

- Guarantee negotiated through series of e-mails
- Parties anticipated full and complete signed agreement would be drawn up
- “Final” email confirmed conclusion of agreed terms - but full formal document never created
- Dispute: Was enforceable guarantee created through email exchange?

Subject to Contract

Case: Golden Ocean v Salgaocar

Held

- Parties intended to be bound by terms agreed in e-mail exchange
- Emails created enforceable guarantee even though full formal agreement never executed
- No statutory requirement for agreement to be contained in one single document (and no express requirement in email correspondence)
- Distinguished - negotiations *expressly* subject to *contract being executed*

Subject to Contract: Summary & Drafting Tips

- Creates strong presumption that parties do not wish to be bound until contract executed
- Question of fact whether this will be enough to deny intention to create legal relations
- Courts assess parties' words/ conduct on the facts
- Parties may “waive” requirement for formal executed document by their conduct

Subject to Contract: Drafting Tips

- Clear, express and prominent statement - particularly when negotiating by email:
“Subject to contract. No legal rights shall be created unless and until a full written agreement containing all the necessary terms is fully negotiated and executed between us.”
- Avoid relying on email disclaimers, which may be hidden and overlooked by one party

Good Faith

Case: Compass Group UK & Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust

Facts

- Public sector hospital catering contract - customer (Trust) & contractor (Medirest)
- Detailed provisions – performance levels and penalties
- Sums payable to Medirest liable to deduction for poor service
- Termination provisions for service level failures
- Contract obliged parties to co-operate in good faith

Good Faith

Case: Compass Group UK (Medirest) v Mid Essex NHS Trust

Held – First Instance

- Implied term found by judge was non-existent
- English law - no general doctrine of good faith
- Good faith implied by law – certain categories of contract
- Good faith (contractual duty) limited to defined purposes

Good Faith: Practical Tips

- Nothing wrong with being tough and exercising your contractual rights
- Good faith – express provision in contract
- Meaning of good faith – honest endeavours/not to act in an arbitrary, capricious or irrational manner

Execution in Counterpart

- Can an agreement be validly executed in counterpart under current Scots law?
- Ancient case law in Scotland on counterparts – *Smith v Duke of Gordon*
- Execution in Counterpart (Scotland) Bill
- Mercury Tax Group case
- Scottish Law Commission Discussion Paper 154

Key Messages to Take Away

- To ensure a contract is legally enforceable, terms must be sufficiently certain
- Endeavours obligations should refer to a clear, definite objective, and ideally set out steps an obligant must take/ is *not* required to take
- Where consent may be required, consider setting out any relevant conditions/ factors to be considered
- If parties do not intend to be legally bound until formal contract is drawn up, state this expressly and clearly
- Contractual duty of good faith should be expressly linked to the obligation it is intended to relate to

Resources

- *Barbudev v Eurocom Cable Management Bulgaria EOOD and others* [2012] EWCA Civ 548
- *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417
- *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577
- *Morris Homes (West Midlands) Ltd v Keay & Another* [2013] EWHC 932
- *Barclays Bank plc v UniCredit Bank AG and another* [2012] EWHC 3655 (Comm)
- *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd and another* [2012] EWCA Civ 265
- *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200
- *Execution in Counterpart (Scotland) Bill*
- *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721
- *Scottish Law Commission Discussion Paper 154*

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