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GOOD INTENTIONS CAN BE DIFFICULT TO INTERPRET

By Alison Barker and Richard Craven

The road to hell is said to be paved with good intentions. The road to the courts may similarly be paved with virtuous, but imprecise, aspirations. For instance, the opening sentiments of NEC3, invoking a spirit of mutual trust and co-operation, or an obligation to co-operate in good faith may sound fine at the honeymoon stage of a contract but, if it all ends in tears, what exactly do these phrases mean? They might look reassuringly familiar in construction contract wording but how, exactly, do they work? Two recent cases may shed a little light for the industry.

A catering company's contract with an NHS Trust included an obligation to co-operate in good faith and provided for deductions from payments where there were "service failure points" but the Trust made "absurd" calculations of the points which resulted, for example, in deductions of £46,320 for out of date ketchup found in a cupboard and of £84,450 for a one day old chocolate mousse. The court ruled that the calculations, and the Trust's failure to respond positively to the company's attempts to resolve the dispute, were breaches of the good faith obligation.

The precise scope of the duty to co-operate, said the court, depends on the circumstances and nature of the contract. In a long-term contract of the sort it was considering, the duty necessarily required the parties to work together constantly, at all levels of the relationship, including working together to resolve the problems that would almost certainly occur from time to time. It also necessarily required the parties not to take unreasonable actions that might damage their working relationship.

And how about "best endeavours", or its sibling, "all reasonable endeavours"; handy phrases to resolve construction contract negotiation issues but a real challenge to interpret? Take, for instance, that clause buried in the JCT extension of time machinery, that says that the contractor shall constantly use its "best endeavours" to prevent delay. What, or how much, might that mean?

In another recent case, a budget airline had a 15-year contract with an airport that required both parties to use "best endeavours" to promote the airline's low cost services from the airport. For years the airline, with the airport's support, operated regular flights outside the airport's normal operating hours, even though this cost the airport money, but, after a change of ownership, the airport said it would no longer accept flights outside normal operating hours. Was this a breach of the best endeavours clause?

By 2-1, the Court of Appeal said that it was. It said that, in general, a "best endeavours", or "all reasonable endeavours" obligation is not in itself regarded as too uncertain to be enforceable, provided the object of the endeavours can be ascertained with sufficient certainty. Whether, and to what extent, a person who has undertaken to use best endeavours can have regard to their own financial interests will depend very much on the nature and terms of the contract in question.

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In the end, it's the same old story. There is no one, all-purpose, answer so be careful to check and understand, and, if necessary, clarify what you might be agreeing to do. A "best endeavours" obligation might avoid a contractual deal-breaker but, depending on the wording, it could mean having to disregard your own financial interests. And should duties of good faith and co-operation feature in a dispute, an adjudicator, court or arbitrator may be needed to explain how they work in the circumstances of your particular contract. Which means spending time and money to find an answer that might not be good news.

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