

First Corporate Manslaughter Conviction

On 15 February 2011, Gloucestershire company Cotswold Geotechnical Holdings (CGH) became the first UK company to be convicted of the new offence of corporate manslaughter. CGH was convicted under the Corporate Manslaughter and Corporate Homicide Act 2007 and ordered to pay a fine of £385,000. The conviction followed the death of one of CGH's staff on 5th September 2008, when geologists Alex Wright died whilst investigating soil conditions in a deep trench on one of CGH's sites (which collapsed and killed him). This case is a timely warning for companies that may have downscaled their safety departments and reduced their investment on training during the economic crisis.

It should be noted that CGH was a small company (at the time of the offence, CGH only had 8 employees) and yet the fine imposed on CGH represents 115% of the company's turnover in the year of the incident. The full force of the Corporate Manslaughter Act will only be seen when a large company is prosecuted; the offence under the Act may be penalised by an unlimited fine. Whilst individuals cannot be prosecuted under the Act, senior managers of the offending companies may still be charged with gross negligence manslaughter as well as other health and safety offences. For example, Peter Eaton, a director of CGH, had originally been charged with manslaughter by gross negligence in addition to a separate health and safety offence but these charges were subsequently dropped because of his poor health.

The advice to company managers is: do not take risks when it comes to safety at the workplace and people's lives. Ensure sufficient resources are employed to tighten up workplace safety or risk contravening the Corporate Manslaughter Act.

Exclusion of Consequential/Indirect Losses: McCain Foods (GB) Limited v Eco-Tec (Europe) Limited (2011)

It is a common misconception that a party would be able to avoid substantial liability by including an exclusion clause in respect of its liability for the other party's "indirect" or "consequential" losses. There is a myth that by excluding liability for indirect and consequential losses a party would escape liability for loss of profit and economic loss. Loss of profits and economic losses are not restricted to being "indirect" or "consequential" losses. Loss of profits and economic losses are also capable of being recovered by a party as "direct" losses if such losses were the natural consequence of the breach. There is therefore no certainty that exclusion of "indirect" or "consequential" loss will lead to exclusion of liability for loss of profit and economic loss. On the contrary, exclusion of liability for indirect or consequential loss will not exclude liability for lost profit etc, if it is found on the facts of the case that these losses arose directly in the natural course of events.

In this case, the court decided that all of the losses claimed by the claimant were direct losses arising naturally from the breach (which included significant lost profits and various economic losses). The exclusion clause in the contract, excluding the respondent's liability for "indirect" losses, did not reduce the claimant's claim at all; since the court decided that the amounts claimed were all direct losses.

It is dangerous to assume that a clause excluding liability for indirect/consequential losses will protect a party against large financial losses. Exclusion clauses need to be carefully drafted and tailored in line with the particular circumstances of the agreement, and

where the "indirect and consequential loss" formula is used, clear provisions should be included to exclude any further or additional types of loss.

Endeavours Obligations: "Best" "Reasonable" "All Reasonable"

Most construction related agreements impose reasonable endeavours, best endeavours and/or all reasonable endeavours obligations on one or both parties. The problem with using these types of phrases is that they are not usually defined in the agreements. Consequently, in the event of a dispute, the courts are left with the task of deciding what a particular party must do to discharge their obligations in the particular circumstances of that case.

Helpful clarification on the meaning of these phrases was given in the case of Rhodia International Holdings v Huntsman International (2007). Whilst an obligation to use "reasonable endeavours" permits a party to take a reasonable course of action without sacrificing its commercial interests, "best endeavours" (whilst not an absolute obligation) requires a party to take all reasonable courses of action that it can, which indeed may involve sacrificing its commercial interests.

The court in Rhodia also indicated that an obligation to use all reasonable endeavours was not very different from an obligation to use best endeavours. However, in the recent case of CPC Group Limited v Qatari Diar Real Estate Investment Co (2010), the court said that 'all reasonable endeavours' was a middle ground between 'reasonable endeavours' and 'best endeavours'.

It is always prudent for parties to minimise uncertainty in their contracts by incorporating wording to clarify what is required by any "endeavours" clauses in

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the agreement. For example, this could include specifying the particular acts the obligor is required to perform, as well as specifying financial limits to satisfy the obligation (or a minimum spend threshold). The contract could also expressly say for how long the obligor should pursue a certain course of action to satisfy its endeavours obligation.

Quantity Surveyor's Duty of Care: Dhamija v Sunningdale Joineries Limited (2010)

A recent court ruling has confirmed the position adopted in *Sutcliffe v Chippendale & Edmondson (1971)* in relation to the scope of a quantity surveyor's duty of care; their duty of care is limited to issues of quantity and not quality. In *Dhamija*, the claimant alleged that the quantity surveyor had a duty to only value works that were "properly executed" and "not obviously defective" and that the quantity surveyor had a positive duty to bring defective work to the attention of the architect. The court disagreed, holding that the quantity surveyor's duty of care did not extend to issues of quality. The court refused to infer a positive obligation on a quantity surveyor not to value work that was obviously defective. The court stated that the architect had the responsibility for the quality of the works and the responsibility

for notifying the quantity surveyor of any defects that may affect his valuation of the works.

Drafting of Performance Bonds and Guarantees

The case of *Vossloh Aktiengesellschaft v Alfa Trains (UK) Limited (2010)* highlights the importance of ensuring that performance bonds are properly drafted. The court held that it would not determine a document to be a performance bond just by the label given to it; the court will construe the document in its factual and contractual context having regard to its commercial purpose. In this case the court held that the document in question was not a performance bond; it was a guarantee supported by indemnities. Where you, as a beneficiary, are seeking to create a performance bond - with a primary obligation payable on demand (irrespective of whether the primary obligor is liable or not) - it is important that you ensure that you use a document correctly drafted to create an on demand bond.

The case of *Fairstate Limited v General Enterprise & Management Limited (2010)* is yet another reminder of the pitfalls of bad drafting. In that case the court

refused to rectify the drafting in a guarantee, holding that the guarantee was so flawed and unsuitable for the transaction that it could not be sufficiently cured either by construction or rectification. You should ensure that any guarantees you enter into are drafted properly: do not rely on the court to proofread and rectify your drafting mistakes.

Amendments to The Construction Act 1996

The Department for Business, Innovation and Skills has stated that it is working to introduce the amendments to Part II of the Housing Grant, Construction and Regeneration Act 1996 in October 2011. We will keep you updated on developments in this regard and provide a summary of the core changes and consequences, nearer the time.

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