

## Construction Law Update

### What Amounts to 'Reasonable Endeavours'?

In contrast to a 'best endeavours' obligation, a contractual obligation to use 'reasonable endeavours' will generally only require a party to take one of a number of reasonable courses of action in order to discharge the obligation. In addition, a 'reasonable endeavours' obligation will usually not require a party to act in a manner inconsistent with its own commercial interests. In the recent case of *Gaia Ventures Limited ("Gaia") v Abbeygate Helical (Leisure Plaza) Limited ("Abbeygate")*, the Court of Appeal has provided further guidance on an obligation to use 'reasonable endeavours' to meet a condition 'as soon as reasonably practicable'.

#### Background

In 2003, Gaia and Abbeygate entered into an agreement for the re-development of a leisure plaza in Milton Keynes. Abbeygate paid a sum of £1.5m to Gaia and entered into an overage covenant to pay a further £1.4m once the planning permission and other conditions required for the re-development of the site had been granted, subject to a 10 year longstop date. The agreement required Abbeygate to use reasonable endeavours to trigger the conditions for the overage payment as soon as reasonably practicable.

Abbeygate only satisfied the triggers conditions to the overage payment four days after the expiration of the long stop date, meaning that no payment was due to Gaia. Consequently, Gaia brought legal proceedings against Abbeygate claiming that it had failed to fulfil its obligation to use reasonable endeavours.

#### Had Abbeygate used reasonable endeavours?

The court of first instance found in favour of Gaia stating that the key consideration was "*whether the relevant step was feasible, and then whether in all the circumstances, it was reasonable to take it (or unreasonable not to take it), balancing the risk of adverse consequences against the obligation to perform the promise.*" Specifically, the court held that Abbeygate had "*dragged its feet*" and intentionally

delayed satisfaction of the trigger conditions in order to avoid making the overage payment.

Abbeygate appealed to the Court of Appeal on the basis that it was entitled to take into account, and even give precedence to, its own commercial interests when deciding how to satisfy the trigger conditions. On the other hand, Gaia countered that the fact that an agreement specifies that certain steps must be taken as part of an obligation to use reasonable endeavours means that the party with the burden of such obligation must take such steps – even if doing so sacrifices its own commercial interests.

The Court of Appeal dismissed the appeal finding that although 'reasonable endeavours' clauses are not so burdensome as to require a party to dismiss their commercial interests, Abbeygate had actively manipulated the situation to avoid triggering the overage payment. Gaia was awarded the overage payment of £1.4m.

#### Analysis

This decision demonstrates that an obligation to use reasonable endeavours includes an obligation to act positively and not in a way to avoid the relevant outcome. Parties entering into contracts which include reasonable endeavours clauses should make provision in the contract so that liability cannot be avoided by the 'dragging of feet' by including an obligation to satisfy the conditions 'as soon as reasonably practicable'. Parties should also be aware that courts will not look favourably upon a party which has deliberately delayed achieving a condition.

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