

Cerno

Distinguish; determine; resolve.

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Welcome

Welcome to this newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. In this issue the subject matter considers the use of Letters of Intent to procure work; the duties owed by a Project Manager to its Client; and the effectiveness of limitation of liability clauses.

LOIs; skill & care; and limiting liability

The recent case of the **Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Limited** [2012] EWHC 2137 (TCC) will be of interest to those involved in procuring projects through the services of a professional Project Manager, and for those involved in project management. The case provides a reminder of the responsibilities and standard of care owed by a Project Manager to its client, and of the inherent uncertainty in the use of Letters of Intent. Further, the case examined the extent of reliance that can be made against limitation of liability clauses.

Turner & Townsend Project Management Limited was engaged as Project Manager (PM) to Ampleforth (as Client), to perform a range of project management duties including facilitating, assisting and being involved in the procurement of the building contractor and the building contract. Ultimately, however, the works were procured under a series of Letters of Intent; a formal contract never being finalised between Ampleforth and the contractor.

Project Managers should advise their clients on risks and take resolute action!

When Ampleforth found itself having to meet the claims of the contractor with no right of counter-claim in respect of the delayed completion of the project, it took action against the PM.

The Judge in the case found that the PM failed to advise of the limited protection offered by Letters of Intent and of the increasing risk of repeated issue of Letters of Intent. Further, the PM had not done enough to take resolute action to procure the execution of the contract and protect Ampleforth.

A PM has a duty to exercise care and skill. At common law, following the test set down in the negligence case of **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582, the standard of care required is that of an ordinary skilled man exercising and professing to have that particular skill. The Judge held that Turner & Townsend had failed to provide proper advice on the risks of using Letters of Intent; and it was no excuse that they claimed to have misunderstood the effect of the letters of intent. Whilst the Judge considered that, of itself, a failure to procure the formal contract for the project did not dictate a conclusion that the PM was negligent, he considered that the PM had failed to take steps reasonably required of a competent PM for the purpose of finalizing the contract and was therefore negligent.

In its defence against Ampleforth's claims, Turner & Townsend relied upon a limitation of liability clause within its standard terms of business. In short, its defence failed. Under the laws of England & Wales clauses, in contracts, which purport to limit a Party's liability are governed by Statute law and must satisfy a test of reasonableness. Turner & Townsend's clause failed that test.

When relying upon his written standard terms a party cannot exclude or restrict liability in respect of a breach he commits, except to the extent that the term relied upon is reasonable.

A party cannot exclude or restrict his liability for negligence except to the extent that the term relied upon satisfies the requirement of reasonableness. Further when relying upon his own written standard terms of business a party cannot exclude or restrict any liability in respect of a breach he commits, except to the extent that the term relied upon satisfies the requirement of reasonableness.

Factors which are to be taken into account in establishing reasonableness are those observed in the case of **James Moores v Yakeley Associates** [1998] EWHC Technology 288. A relevant term has to have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made. Where the limit of liability is a specified sum of money regard will also be had to the resources available to the party relying upon the limitation and how far it was reasonable for him to take insurance cover.

It should be taken from this case that the execution of a formal contract for work is not merely an aspirational goal; it should be a fundamental. Letters of Intent are notoriously uncertain and should be avoided where possible and ought never to be used to procure the entirety of a project. Where it is necessary to utilise more than a single Letter of Intent for the purpose of commencing a project, it falls within the duty of care owed by a project manager to its client to advise on the risks being assumed and the measures desirable to conclude a formal agreement. Furthermore, when a contract contains a limitation of liability clause it is important that the party that would rely upon the clause brings it to the attention of the other party, and that it is discussed and agreed.

CIArb News

*News for members of
the Chartered Institute
of Arbitrators in Trinidad
& Tobago*

The Trinidad & Tobago branch of the Chartered Institute of Arbitrators (CIArb) is a branch of the regional, Caribbean Chapter and is looking to host regular meetings for its members; however it needs one or more venues.

If anyone can provide a suitable meeting place preferably with light refreshment facilities, to accommodate up to 50 persons, please contact Cerno.

Anyone interested in joining the CIArb can obtain information directly from the Institute (www.ciarb.org) or by writing to info@cerno.org.

Upcoming Events

It is intended that Cerno's newsletters will include details of local happenings and events of interest. Anyone wishing to have details of an event considered for inclusion here should write to info@cerno.org and provide relevant details.

22-23 & 26-27 November 2012: Hyatt Regency, Trinidad: "The Practical Use of the 1999 FIDIC Conditions of Contract for EPC Turnkey Projects & Comparison with the Plant & Design Build Contract " & "The Practical Use of the 2008 Conditions of Contract for Design Build and Operate Projects." For details and registration e-mail to jccfidic2@gmail.com.

Contact Information

Cerno can be contacted by e-mail to info@cerno.org.

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