Woolly words in public sector contracts

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Two recent cases illustrate the danger in public sector contracts of using "woolly words" which do not spell out the scope of the commitment being undertaken.

In negotiating some commercial contracts, a degree of vagueness may sometimes seem to be an attractive strategy. However, it is not always a satisfactory alternative to agreeing a more precise allocation of risk, particularly where the circumstances in question are foreseeable or quantifiable, or where they are known to be important to the parties and within their control.

Perhaps the best known example of "woolly words" is the use of "best endeavours" obligations in commercial contracts. Their use is still widespread, although it is recognised that they can impose a high level of commitment and may require significant expenditure by the party concerned and actions contrary to its own commercial interests'.

An obligation to use "reasonable endeavours" is lower down the risk scale, with an "all reasonable endeavours" commitment somewhere in between, although it has been recognised that the latter may, depending on the circumstances, impose a level of obligation similar to that of a "best endeavours" commitment.

The trading of these verbal vaguenesses is with the aim of trying to narrow – or widen – the wiggle room for the party concerned to limit its exposure if commercial risks occur. However the danger is that the scope of the commitment is very much dependent on the particular circumstances.

This danger is illustrated by the recent case of *Jet2.com Ltd v Blackpool Airport Ltd [2012]* in which a 'best endeavours' commitment to promote Jet2's low cost airline service was held to impose an obligation on Blackpool Airport to accept flights outside of its normal operating hours (incurring significant cost on the part of the airport). The result may have been different if the need to operate outside normal operating hours had not been both important and profitable for the airline.

A second example of "woolly words", this time in a purchasing context, involves the use of "good faith" commitments in purchasers' dealings with their suppliers.

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An illustration is provided by the recent case of *Compass Group v Mid Essex Hospital Trust [2012*] in which a hospital trust entered into a long term catering contract with a well known supplier on terms that any failure to meet service levels permitted the purchaser to deduct service credits and accumulate service points, but also included an obligation on the parties to co-operate "in good faith" to enable the purchaser to derive the full benefit of the contract.

The purchaser noted a number of supply failures and calculated the service credits in question at a very optimistic rate.

The court took into account the long term nature of the contract and the need for mutual co-operation. It held that the purpose of the service credits was to encourage and not to penalise performance and that the arbitrary and inconsistent way in which they had been applied by the purchaser constituted a breach of its "good faith" commitment. However, the court, perhaps unsurprisingly did not attempt to define a general standard of behaviour implied by "good faith" obligation.

The moral in both the above cases is that the use of "woolly words" to deal with situations where risk is foreseeable or quantifiable can sometimes prove to be an expensive hostage to fortune.

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