

LEGAL IMPLICATIONS OF GREEN BUILDING, PART I: THE US LITIGATION AND CLAIMS EXPERIENCE

Prepared by
Karen Martin, Partner

Fraser Milner Casgrain LLP

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FRASER MILNER CASGRAIN LLP

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LEGAL IMPLICATIONS OF GREEN BUILDING, PART I: **THE US LITIGATION AND CLAIMS EXPERIENCE**

The construction industry will be transformed over the next few years by the green building movement. There is an increased demand in North America for buildings and construction procedures with a reduced impact on the environment. In particular, it is becoming relatively common for public and private owners to require that their buildings achieve a particular level of LEED™ certification (Leader in Energy and Environmental Design).

The practical and legal implications for owners, design consultants, contractors, and suppliers or manufacturers of construction products of committing to design and build a LEED™ project are not yet fully understood, but past experience with new developments in construction would suggest that a careful consideration of the legal risks and appropriate mitigation measures is warranted at this time.

In Part I of this article, we focus on the experience with green building in the United States, from which lessons can be learned. In a future newsletter, we will identify the legal risks associated with green building as well as specific steps that can be taken in drafting and administering construction contracts in order to minimize the risks.

A commonly cited American case in relation to green building is *Southern Builders v. Shaw Development* No. 19-C-07-11405, (Somerset Co. Cir. Ct., filed Feb 7, 2007). Although the case settled before trial, thus depriving us of judicial reasoning on the issues, it does provide insight into some of the potential risks on LEED™ projects.

The project which was the subject of the litigation was the Captain's Galley, a \$7.5 million condominium project located on the Chesapeake Bay in Crisfield, Maryland. It was intended to achieve a Silver LEED™ rating, which under the laws of Maryland, would have resulted in tax credits for the owner. However, there were significant delays during construction, and the contractual completion date was not achieved. As a result, the Captain's Galley failed to achieve the LEED™ certification within the time limit specified in the tax credit application, and the credits were denied.

The contractor, Southern Builders, commenced an action to enforce a lien of approximately \$50,000, based on amounts claimed to be owing under the construction contract. Shaw Development counterclaimed, seeking damages in the amount of \$1.3 million from Southern Builders, of which \$635,000 related to the building's failure to achieve the tax credits. The relevant claim made by Shaw Development was that Southern Builders had breached the construction contract and been negligent in failing "to construct an environmentally sound 'green building' in conformance with the LEED™ rating system".

The only reference in the contract to the project's LEED™ requirements was in the Specifications, which stated simply that the project was "designed to comply with a Silver Certification Level according to the USGBC's LEED™ Rating System, as specified in Division

1.” The contract was a standard American Institute of Architects (AIA) A101-1997 Owner/Contractor Agreement. While it required Southern Builders to build the project in conformance with the contract design, it did not obligate the contractor to achieve any particular LEED™ certification, nor did it specify the contractor’s responsibilities in relation to achieving the certification, or address the fact that the certification had to be achieved within a specific time frame.

More will be said on the topic of the need for specific contract language dealing with roles and responsibilities relating to LEED™ certification in the next edition of this newsletter.

It should be noted that while there are very few reported judicial cases on green building issues, there are many reports in the United States of claims made under liability insurance policies and otherwise on green projects, arising from failures, unexpected consequences and unfulfilled expectations. These include:

- failure to achieve the represented LEED™ level of certification
- delay claims
- claims for breach of warranties or representations made in the LEED™ certification documents
- claims arising from inexperience with new products
- claims of overstated experience
- water damage, mould and air contaminants
- failure to meet changing regulatory requirements
- claims by occupants of failure to meet their expectations (“greenwashing”)
- operational failures
- increased maintenance costs.

In our next newsletter, we will offer tips on risk mitigation steps that can be taken in the contract drafting and administration phases of a green project in order to assist in avoiding such claims.