

Are your endeavours reasonable?

In the recent high profile case concerning the redevelopment of the Chelsea Barracks site, the High Court was asked to consider the meaning of a clause which required the use of 'all reasonable but commercially prudent endeavours'.

Commercial contracts often contain an obligation on a party to achieve, or to procure the achievement of, a particular objective. Such an obligation could be an absolute one, with a party agreeing that it 'shall' do something, or it may be a qualified obligation, requiring the party only to use its 'best' or 'reasonable' endeavours to attain the desired result. Whilst the terms 'best' and 'reasonable' endeavours are widely used, there is still some uncertainty as to what efforts each term actually requires in practice.

Best endeavours

A 'best endeavours' obligation is often considered to be the next best thing to an absolute obligation but the case law suggests that such an obligation is less onerous than first thought. Surprisingly, it is accepted that there is an element of reasonableness in a best endeavours obligation. In the 1980 case of *IBM United Kingdom Ltd v Rockware Glass Ltd*, it was held that an obligation to use best endeavours meant that the contracting party must do 'all it reasonably can' to obtain the desired result.

In practice, a company which has given a 'best endeavours' undertaking must:

- Take action which, having regard to costs and degree of difficulty, is commercially practicable although the performance of such an undertaking would not require the company to take action which could lead to its financial ruin or which would undermine its commercial standing or goodwill;
- Incur such expenditure as is reasonable in taking such action; and
- Act in the best interests of the company.

Reasonable endeavours

The common understanding is that a 'reasonable endeavours' obligation is less arduous than one requiring 'best endeavours' and this view is supported by the relevant case law. In *UBH (Mechanical Services) Ltd v Standard Life Assurance Co [1986]*, the court confirmed that reasonable endeavours was 'appreciably less than best endeavours': a person subject to a reasonable endeavours obligation is entitled to balance its duty to use reasonable endeavours against all relevant commercial considerations including the costs of, and the uncertainties and practicalities relating to, compliance with the undertaking.

That person was also entitled to give prime importance to the likelihood of success of performing its reasonable endeavours, suggesting that if use of reasonable endeavours would result in financial or other commercial disadvantage to that person, then no action need be taken. The more recent case of *Yewbelle v London Green Development [2006]* confirmed that a reasonable endeavours obligation does not require a party to do anything that would involve sacrificing its own commercial interests.

Although what constitutes 'reasonable endeavours' will vary depending on the circumstances of each case, it seems clear that it would not include doing anything that would disadvantage the person subject to the undertaking and therefore, in practice, only minimal effort is likely to be required to comply with such an undertaking.

It should also be noted that if a contract sets out the specific steps which must be taken to comply with a general obligation to use 'reasonable endeavours', the 2007 case of *Rhodia International Holdings Limited and Anor v Huntsman International LLC* confirmed that those specific steps must be taken, even where such steps would lead to the sacrificing of the commercial interests of the relevant party. It would therefore appear that for a party seeking to rely on a qualified obligation in a contract, it is worth specifically stating in the contract the steps it



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considers necessary to comply with a 'reasonable endeavours' obligation. In practice, a company which has given a 'reasonable endeavours' undertaking must:

- Take reasonable steps to achieve the desired objective whilst balancing this against all relevant commercial considerations;
- Incur limited expenditure but without sacrificing its own commercial interests; and
- Give prime importance to the chance of achieving the desired result when deciding what steps to take.

All reasonable endeavours

A compromise is often reached between best and reasonable endeavours by stating that a party must use 'all reasonable endeavours'. However, the meaning of such an obligation has not been considered in depth by the courts, with the majority of comments on it being either made at first instance or in obiter remarks.

Nonetheless, it seems clear that this concept occupies a middle ground implying 'something more than reasonable endeavours but less than best endeavours' (*UBH v Standard Life*), which reflects the natural meaning of the words used. In the *Rhodia* case, the judge seemed to go further, suggesting that an obligation to use all reasonable endeavours may equate to using best endeavours.

The Chelsea Barracks case - a fourth way?

In the recent case concerning the redevelopment of the Chelsea Barracks, a subsidiary of the Qatar Investment Authority had given an obligation to CPC Group Limited that it would use 'all reasonable but commercially prudent endeavours' to procure planning permission for the site.

Following the intervention by the Prince of Wales, the planning application was withdrawn and CPC claimed this constituted a breach of the relevant contractual obligation. CPC argued, in line with comments made in the *Rhodia* case, that a party subject to an 'all reasonable endeavours' obligation was required to subordinate its own financial interests to obtaining the required objective.

The judge, however, stated that a requirement to use all reasonable endeavours did not always require the relevant party to sacrifice its own commercial interests.

This was effectively stated in the agreement in this case by the express use of the words 'commercially prudent' which made it clear that the Qatar Investment Authority was able to take into account its own commercial interests alongside those of CPC when considering how to respond to the intervention by the Prince of Wales.

It seems likely that the judge, who followed the line of reasoning from the *Yewbelle* case, would have reached the same decision even if the words 'commercially prudent' had not been set out in the agreement. By expressly including those words, however, the parties helped to clarify exactly what was required by the 'all reasonable endeavours' obligation and, in particular, the extent to which the obligor's own commercial considerations can be an influencing factor. It remains to be seen whether this becomes the standard approach in future in order to minimise uncertainty.

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