

'ENDEAVOURS' CLAUSES: WHEN THEY WORK AND WHAT THEY MEAN

Ross Fentem, Guildhall Chambers

'Endeavours' clauses: why analyse them at all?

1. The title of this paper may be thought somewhat ambitious. 'Endeavours' clauses, which oblige a party to a contract to use his 'best', 'reasonable' or 'all reasonable' endeavours to bring about a particular result, generate a large volume of litigation, of notoriously uncertain result. They are encountered across the full range of commercial contracts from share sale / purchases, through distributorship agreements and franchises, to development contracts and options. Business people seem to like them, perhaps because they allow a flexibility about predicting the outcome of future events which is not allowed by an 'absolute' obligation.
2. Therefore, the types of litigation, and so of judicial experience, in which such clauses fall to be considered are as various as commercial endeavour itself. Pronouncements on what is meant by, for instance, 'best endeavours' in a franchising dispute will, in the right context, be relevant to a contract concerning a land option. It is, however, a counsel of prudence to bear in mind that any contract must be construed against the specific, admissible factual background in which it came to be concluded. Except (generally) in the context of printed standard terms, it cannot be assumed that the words in one contract bear the same meaning as the identical words in another. At first instance in *Jet2.Com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm), HHJ Mackie QC expressed this caution as follows:

'The meaning of the expression remains a question of construction not of extrapolation from other cases ... the expression will not always mean the same thing.'¹

3. Despite that caution, I remain wedded to my title, and am supported in this respect by the recent decision of the Singapore Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16,² in which VK Rajah JA sensibly concluded that:

'decisions on the meanings and effect of certain commonly-used phrases provide authoritative guidance on the *prima facie* meaning of similar phrases when they are used in documents that are intended to have legal effect. This is especially so because the contracting parties would have taken into account the general law in reaching their agreement. Furthermore, attributing *prima facie* meanings to similar phrases ... promotes commercial certainty.'

4. I will address first the issue of whether an 'endeavours' clause is enforceable at all, before turning to recent authority on the ambit of the obligation imposed by the usual 'endeavours' clauses.

'Endeavours' clauses: when are they enforceable?

5. Shortly stated, the issue is this: when is an obligation to use endeavours to obtain a result enforceable?
6. In the very recent case of *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB), Andrews J was concerned with a settlement agreement in a dispute about works on a luxury car, which contained an obligation to 'use ... reasonable endeavours to fulfil the Condition Precedent'. The 'Condition Precedent' meant 'entering into an agreement with [a named third party] on or before 30 May 2012 to carry out the Works' to the car, which were more or less defined. The claimant said the clause was an uncertain 'agreement to agree'. The judge agreed. Her rationale was founded on a series of cases, concluding with *Jet2.Com* in the Court of Appeal³ which it is useful to consider.

¹ See also the decision of the High Court of Australia in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

² Although of course not binding on English courts, this decision provides the best recent survey of the field of 'endeavours' clauses. Anyone facing a problem of interpretation of these clauses could do little better than read paras [42] to [95].

³ [2012] EWCA Civ 417.

7. It is not unusual for an 'endeavours' clause to impose an obligation to enter into some form of legal relationship with a third party; for instance common clauses in option and development contracts requiring an option-holder or developer to enter into an enforceable s.106 agreement with the relevant local planning authority or to agree a price with a vendor of land.
8. The well-known case of ***Yewbelle Ltd v London Green Developments Ltd*** [2008] 1 P&CR 17 concerned an obligation to use 'all reasonable endeavours' to conclude a s.106 agreement.⁴ It was never in doubt that the clause was enforceable. In ***Dany Lions***, the judge was satisfied that this was correct, because there is no difference in kind between that obligation and an obligation to use endeavours to obtain planning permission 'which would plainly be enforceable'.⁵
9. In ***Jet2.Com*** in the Court of Appeal, Moore-Bick LJ (who was in the majority) said that 'in general, an obligation to use best endeavours, or all reasonable endeavours, is not in itself regarded as too uncertain, provided that the object of the endeavours can be ascertained with sufficient certainty.' He distinguished between:
 - (a) A clause whose content is so uncertain that it is incapable of creating a binding obligation; and
 - (b) A clause which gives rise to a binding obligation, the precise limits of which are difficult to define in advance, but which can nonetheless be given practical content.
10. The other former Commercial Court judge on the panel, Longmore LJ, agreed with Moore-Bick LJ and suggested that an 'endeavours' clause should usually be held to be enforceable,⁶ unless:
 - (a) The object intended to be procured is too vague or elusive to be a matter of legal obligation; or
 - (b) The parties have provided no criteria on the basis of which it is possible to assess whether the endeavours have been carried out.
11. On that basis, the courts are unwilling to give binding force to an obligation use 'reasonable endeavours to agree': ***Phillips Petroleum Co UK v Enron Europe Ltd*** [1997] CLC 329 at 343. For a judge to intervene in a dispute about whether such endeavours have been carried out would require him to police a territory in which the parties may 'legitimately have differing views or interests, but have not provided for any [objective] criteria on the basis of which a [judge] can assess or adjudicate the matter in the event of a dispute.' In the most extreme case, the problem is both as to the object intended to be procured (how clear are the terms of the future agreement?) and as to the objective yardstick (how can the court determine, particularly as between the two contracting parties themselves, the reasonableness of the endeavours of either in deciding whether to make a new contract?).
12. In the Scottish case of ***R&D Construction Group Ltd v Hallam Land Management Ltd*** [2010] CSIH 96, the defendant had agreed to sell land at an agreed price to the claimant, but the land was first to be purchased by the defendant from a third party at a price that was 'wholly acceptable' to the defendant. The defendant was obliged to use 'all reasonable endeavours' to conclude that purchase. Although the Court of Session held the clause to be effective, the Court of Appeal in ***Jet2.Com*** was clearly uncomfortable with this conclusion. With delicious judicial understatement, Moore-Bick LJ said he had 'some reservations' about it, because there were no objective criteria against which to judge the defendant's satisfaction as to the price; it was an agreement to agree terms with the third party if and howsoever he wished. Lewison LJ (dissenting as to the result in ***Jet2.Com***) shared those reservations. I would suggest that the reservations were properly held; in the English courts, an agreement

⁴ I.e. an agreement with the relevant local planning authority under s.106 of the Town and Country Planning Act 1990.

⁵ The reason there is no difference is because in many cases, the s.106 agreement will be a condition of obtaining permission, and the parties must be assumed to know this.

⁶ It remains to be seen whether this will be treated as giving rise to a specific presumption, or whether it will be treated as merely a specific example of the general presumption that parties intended their contractual words to have legal effect.

to use reasonable endeavours to purchase land from a third party at a price which is in the obligor's whim is not, without more, justiciable.⁷

13. Thus the questions for the court considering an 'endeavours' clause challenged as to enforceability are these: (1) is the object of the endeavour sufficiently certain to allow the court to know what it is that the obligor must try to achieve?, and (2) are those objects capable of evaluation by reference to a sufficient, objective criterion? If so, the clause can be enforced.

14. Returning to **Dany Lions**, Andrews J had this to say:

'Those two essential requirements of certainty of object and a yardstick by which to measure the endeavours are applicable across the board, whatever the object may be. They will not be satisfied in a case in which the object is a future agreement with the other contracting party, because even if the first requirement is satisfied (e.g. there is a draft contract on the table) the second will not be... They may be satisfied if the object is a future agreement with a third party, but such cases are likely to be exceptional. If the essential terms of the prospective agreement with the third party are identified in advance, there may be both the requisite certainty of object and sufficient criteria by which to judge the endeavours. If those terms are left open for negotiation, satisfying the second requirement is just as problematic as it would be in a case where the prospective agreement is with the other contracting party, and for precisely the same reasons.'

15. The consensus as to why an obligation to use endeavours to obtain planning permission, or to conclude a s.106 agreement as in **Yewbelle**, is generally considered to be enforceable is because there are objective criteria governing the circumstances in which planning permission may be granted, and a local planning authority's decision is made against those criteria. It is not the same as an 'arms' length' negotiation between two private contracting parties.

16. However, the general judicial consensus set out in the above paragraph may be vulnerable when it comes to agreements to use endeavours to conclude s.106 agreements. In **Yewbelle**, the contract contained a draft form of a s.106 agreement, such that the obligor knew what it was that he should use endeavours to obtain. It is therefore easy to see how this chimes with Andrews J's views as to enforceability in **Dany Lions**. What if there were no draft? Andrews J would take the view that it would still generally be enforceable, but on one view an agreement to conclude a future s.106 agreement whose terms are not known and whose terms may be subject to quasi-commercial negotiation with the local planning authority is not especially different in substance from an agreement to conclude a future commercial agreement of any other sort. Perhaps the principled answer is that the criteria on which the authority will seek to determine the s.106 obligations are subject to the principles of public law (and indeed are published), so that the parties to the 'endeavours' clause know objectively what they are up against.

'Endeavours' clauses: what do they mean?

17. The obvious starting point is to note that an 'endeavours' clause of any sort does not impose an absolute obligation to achieve a result. Even a 'best endeavours' clause is not to be treated as the next best thing to a guarantee of performance: **Midland Land Reclamation Ltd v Warren Energy** [1997] EWHC 375 (TCC).

18. In a dispute about an 'endeavours' clause, it inevitably follows that the result will not have been achieved. The question is whether the obligor did what was expected of him by the clause. Although the three main genera of 'endeavours' clauses have spawned various

⁷ A fortiori where the future agreement is with the other contracting party. See **Little v Courage Ltd** [1995] CLC 164, concerning a lease-renewal condition that the tenant should enter into a business agreement with the landlord. Millett LJ refused to imply a term that the landlord should use its best endeavours to do so, as that would create an unenforceable agreement to agree. Contrast an agreement to use endeavours to become a party to an existing agreement. The terms of the agreement are known; the negotiation if any only concerns 'getting in'.

species and subspecies (e.g. 'all reasonable and commercially justifiable endeavours'), this paper is only concerned with the usual triumvirate.

19. Most laymen would probably assume that there is a hierarchy of obligations, leading from 'reasonable endeavours' (the lowest of the three), through 'all reasonable endeavours', to (at the highest end) 'best endeavours'. This was the view of Rougier J in the relatively early case of **UBH (Mechanical Services) Ltd v Standard Life Assurance Co** Times, 13 November 1986: 'all reasonable endeavours', he thought, meant 'something more than reasonable endeavours but less than best endeavours'. As the caselaw has developed, and the meaning of the phrases has been explored in more depth, this assumption has turned out to be wrong. Although the logician may think there to be a difference between 'all reasonable endeavours' and 'best endeavours', on the state of the authorities the practical lawyer would find it hard to fit a page of Chitty between them.
20. **Reasonable Endeavours:** Nevertheless, a 'reasonable endeavours' clause is agreed to impose the lowest burden. In **Rhodia International Holdings Ltd v Hunstman International LLC** [2007] 2 Lloyd's Rep 325, it was suggested that in a case where a number of reasonable courses could be taken in a given situation to achieve the particular object, the obligor need only take one of them. He is entitled to put all relevant commercial considerations into the scales, and to weigh up the likelihood of succeeding in the endeavour before taking any particular course. He is in particular entitled to look first and foremost, if not only, to his own interests in determining whether any particular action should be taken.
21. **Best Endeavours:** Obviously, an obligation to use 'best endeavours' imposes a heavier burden. In the very early case of **Sheffield District Railway Co v Great Central Railway Co** (1911) 27 TLR 451, it was said that the obligor must 'broadly speaking, leave no stone unturned' in his endeavours to achieve the objective. The metaphor was given more specific content in **IBM United Kingdom Ltd v Rockware Glass Ltd** [1980] FSR 335, in which the Court of Appeal suggested that it mirrored the standard of all those reasonable steps which would have been taken by a prudent and determined man, acting in the obligee's own interests and anxious to achieve the object (in that case, the obtaining of planning permission). In **Rhodia International**, Julian Flaux QC held that, in contrast to a 'reasonable endeavours' clause, a 'best endeavours' clause requires the obligor to take all of the reasonable courses of action open to him.
22. Firstly, then, 'best endeavours' requires the obligor to act in the obligee's interests, and not merely in the interests of someone under a contractual obligation. So, in **IBM**, if planning permission were first refused, the obligor would have then to consider the prospects of appeal to the Secretary of State and, if prospects were reasonable, to seek to appeal. It is therefore obvious that a 'best endeavours' clause will or may require expenditure by the obligor.
23. Secondly, however, the obligation is qualified by reasonableness. Although the obligor must take all the reasonable courses open to him, he is not required (in the absence of any other indication in the contract) to drive himself to certain commercial ruin: **Terrell v Mabie Todd & Co Ltd** [1952] RPC 234.
24. **All Reasonable Endeavours:** There has been some suggestion in the cases that 'all reasonable endeavours' imposes an obligation somewhere between the two extremes: see **UBH** and **Jolley v Carmel Ltd** [2000] 2 EGLR 153. But that approach, based at least in linguistic logic, does not sit well with the meaning that has been attributed to 'best endeavours'. Logically, an 'all reasonable endeavours' obligation would suggest that where there are a number of reasonable courses open to achieve the end, the obligor must take all of them; which is more or less exactly what is required by a 'best endeavours' clause.
25. So, in **Yewbelle**, the Court of Appeal decided (as did Lewison J at first instance) that although the obligor did not have to sacrifice his commercial interests, he did have to keep on using his reasonable endeavours until he reached the point where there were no more reasonable endeavours left to try. Account should be taken of events as they unfolded, which may therefore increase or reduce the number of reasonable courses existing from time to time, but

if there proved to be an insuperable obstacle to success, endeavours could properly cease. Similarly, in **Jet2.Com**, Moore-Bick LJ said that in using its 'best endeavours', the obligor had to do 'all that it reasonably could'.

26. Interestingly, he may be required to keep the other party informed of difficulties as they are encountered in order to find out whether there is a solution: **EDI Central Ltd v National Car Parks Ltd** [2011] SLT 75. Commercial suicide is not required, but substantial expenditure may well be: **CPC Group Ltd v Qatari Diar Real Estate Investment Co** [2010] NPC 74.⁸
27. That approach is so similar to the approach to a 'best endeavours' clause as to admit of no real distinction. In the Scottish case of **EDI Central Ltd**, Lord Glennie suggested that 'any difference [between the two obligations] is likely to be metaphysical rather than practical'. The following, from **KS Energy** in the Singapore Court of Appeal, is a justified conclusion:

'Perhaps lawyers may occasionally perceive an apparent spectral difference between these two types of 'endeavours' obligations due to the difference in their wording. However, without the parties specifying how these two types of 'endeavours' obligations differ and what steps are required to fulfil each type of 'endeavours' obligation, any difference between them would merely be a pointless hair-splitting exercise.'

28. Given that each contract falls to be construed on its own terms and against its own background 'matrix of fact', it follows that 'all reasonable endeavours' cannot mean the same as 'best endeavours' in every case; not least because 'best endeavours' logically cannot itself mean the same thing in every case – but that is a different, and probably more 'metaphysical', point. In the vacuum of the *prima facie* meaning given to commonly-used phrases, the two types of 'endeavours' clause are now to be treated as identical. Hence, in **Jet2.Com**, it was simply agreed by the parties that they were the same, even when used in the same clause to qualify different obligations.
29. **Guidelines on Best and All Reasonable Endeavours:** The following guidelines as to the standards expected in these clauses are adapted from **KS Energy**:
- (a) The obligor must go on using his reasonable endeavours until the avenues available are exhausted, but need only do what has a significant or real prospect of successfully achieving the end in any case.
 - (b) An insuperable obstacle to success will entitle the obligor to cease taking steps to overcome other problems which stood in the way of procuring the outcome, as there would be no utility to doing so. It would be unwise to cease action, even in reliance on professional advice, without engaging with the obligee about the issue.
 - (c) The obligor cannot sit back and say that he could do no more where, if he had engaged with the obligee, he would have been told about another course open to him to achieve the end.
 - (d) The obligor need not sacrifice his own commercial interests and drive himself to financial ruin, unless the contract expressly or impliedly so provides.
 - (e) It appears that, once the obligee establishes that there were certain reasonable steps which, if taken, could (or perhaps *probably would*) have achieved the contractual object, the burden⁹ shifts to the obligor to show that it did take those steps, that those steps would not have achieved the object.

⁸ In that case, Vos J said that the obligation does not 'always' require the obligor to sacrifice his commercial interests. It is doubtful that the adverb added anything to the reasoning.

⁹ Query whether the Singapore court meant the legal or the evidential burden. The latter would be considerably less objectionable as a matter of practice.

Conclusion

30. The conclusion must be that, at present, nothing is finally concluded. There remains no authoritative pronouncement that 'all reasonable endeavours' means the same as 'best endeavours'. Given judicial caution about codifying contractual interpretation, and the reasons for that caution, it is unlikely that any 'final' pronouncement could ever be given. Pragmatically, though, clients would be well-advised to leave 'all reasonable endeavours' clauses well alone. Notwithstanding the advice that will often if not always be taken in large-scale development and option agreements, business people may well think they mean something different from 'best endeavours'.
31. Those lawyers faced with the task of drafting such clauses would themselves be well-advised to try to persuade their clients to fix the ambit of the obligation more specifically, by reference to discrete and specified steps,¹⁰ ambit of expenditure, duties to keep the obligee informed, rights vesting in the obligee to insist on steps being taken and time-limits. Much though developer clients may wish to avoid further technicality and specificity in their contracts, 'endeavours' clauses give rise to uncertain litigation when the object is not achieved; it is obviously far better to try to pin down the nature of the endeavours in advance.

¹⁰ I accept that this is bound to result in clauses saying 'including but not limited to....', but at least then a court has a yardstick to look to.