

REASONABLE AND BEST ENDEAVOURS THE POTTED GUIDE



ENDEAVOURS OBLIGATIONS

In this month's potted guide, Jonathan Seidler QC guides practitioners through the basics relating to the use of reasonable, all reasonable and best endeavours

REASONABLE AND BEST ENDEAVOURS CHECKLIST

- ▶ In what situations do endeavours obligations arise?
- ▶ Do endeavours obligations mean the same in different situations?
- ▶ What are 'reasonable endeavours'?
- ▶ To what extent can persons subject to a reasonable endeavours obligation take into account their own financial interests?
- ▶ Is the imperative to fund a reasonable endeavours obligation itself subject to the flexibility of 'reasonable endeavours'?
- ▶ What are 'all reasonable endeavours'?
- ▶ What are best endeavours?
- ▶ What limits are there on 'best endeavours'?
- ▶ For how long does the party subject to reasonable endeavours obligations have to use those reasonable endeavours?

In what situations do endeavours obligations arise?

Endeavours obligations allow parties to provide for one or both of them to "try" to bring about a specified outcome or event. They arise most commonly in long-term contracts and specifically where the efforts being envisaged are so far off that the parties cannot sensibly warrant that any particular outcome, although desired, will be obtained, because factors that will determine the viability of such outcome cannot be predicted with precision.

Endeavours clauses therefore build in commercial flexibility for the future. Property lawyers commonly see endeavours obligations in conditional contracts for the purchase of development land, where the purchaser has the responsibility to use 'reasonable endeavours' or 'all reasonable endeavours' or 'best endeavours' to obtain the satisfactory planning permission that constitutes one of the conditions.

Do endeavours obligations mean the same in different situations?

No. There will always be a level of uncertainty about the scope of an endeavours clause because its meaning in a particular context will always depend on the precise terms of the obligation, the other terms of the contract and the commercial context in

which the contract was originally made. In *Jet2.Com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm) it was said: "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." Everything else written on this topic is a footnote to that proposition.

What are 'reasonable endeavours'?

It is commonly thought that 'reasonable endeavours' imports an objective criterion – that of a reasonable person seeking the specified outcome in the situation in which the person subject to the reasonable endeavours obligation finds itself.

This is true, to a point. Although there will be a purely objective standard where the contract expressly spells it out (such as where the requirement is to procure "with all reasonable endeavours as would be expected of a normal prudent commercial developer experienced in developments of that nature" – as per *EDI Central Ltd v National Car Parks Ltd* [2010] CSOH 141), the objective test was rejected by the House of Lords in *P&O Property Holdings Ltd and others v Norwich Union Life Insurance Society* [1993] EGCS69.

The true position is that the person subject to the reasonable endeavours obligation must be judged against the

standard of a reasonable person, in that situation, desiring that outcome, but also balancing factors personal (ie subjective) to it. In the words of Roush J in *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* [The Times, 13 November 1986]: "In the present case... [the persons subject to the reasonable endeavours obligation] were obliged to put in one scale the weight of their contractual obligation... and in the other they were entitled to place all relevant commercial considerations... In relation to any proposed course of action, the chances of achieving the desired result would also be of prime importance."

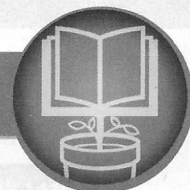
To what extent can persons subject to a reasonable endeavours obligation take into account their own financial interests?

A person subject to a reasonable endeavours obligation can take into account the financial effect on itself of securing the outcome that it is obligated to use reasonable endeavours to bring about: see *Phillips Petroleum Co UK Ltd v Enron Europe Limited* [1997] CLC 329. In *P&O Property Holdings* Kennedy LJ said that he found it "impossible to say that [the contract terms] impose on the buyer a contractual obligation to disregard the financial effect on him... when deciding how to discharge his obligation to use reasonable endeavours."

The party can take into account not only a direct detriment that arises from effecting that outcome but also more speculative potential downsides, such as:

- the effect on existing relationships with third parties;
- its own reputation in the relevant market; and
- the cost and uncertainty of any litigation with third parties that might arise out of seeking such outcome.

However, where the contract actually specifies certain steps have to be taken as part of the exercise of reasonable endeavours, those steps will have to be taken, even if that would otherwise involve the sacrificing of that party's own financial interests: see *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292



(Comm). In *Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd* [2016] EWCA Civ 160, the Court of Appeal held that an "all reasonable endeavours" obligation had to yield to an express provision concerning the circumstances in which a specific act of endeavour had to be taken.

Is the imperative to fund a reasonable endeavours obligation itself subject to the flexibility of 'reasonable endeavours'?

No. In *Ampurius NU Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch), a party was obligated to use its reasonable endeavours to procure completion of certain works, by a certain date or as soon as reasonably possible thereafter. Roth J said: "The qualification of 'reasonable endeavours', as opposed to an absolute obligation to complete, is designed to cover matters that directly relate to the physical conduct of the works, thereby providing an excuse for delay in such circumstances as inclement weather or a shortage of materials for which the defendant was not responsible. The clause does not, in my view, extend to matters antecedent or extraneous to the carrying out of the work, such as having the financial resources to do the work at all."

Accordingly, the lack of funding did not in itself excuse the defendant's failure to perform. See also *Arsenal Football Club Plc v Reed* [2014] EWHC 781 (Ch).

What are 'all reasonable endeavours'?

It is often said that a covenant to use reasonable endeavours is less onerous than one to use all reasonable endeavours. The use of the word "all" suggests that the party subject to the all reasonable endeavours obligation must try multiple approaches to achieve the contractual objective, rather than just exhaust one such approach and then leave it at that: see *Dany Lions Ltd v*

Bristol Cars Ltd [2014] EWHC 817 (QB).

However, there are also important similarities between the relevant tests. By analogy with *Phillips Petroleum* but also basing himself on *P&O Property Holdings*, Lewison J (as he then was) ruled in *Yewbelle Ltd v London Green Developments Ltd* [2007] 1 EGLR 137 that a party subject to an obligation to use all reasonable endeavours was not "required to sacrifice its own commercial interests". This approach was mentioned in the Court of Appeal ([2007] 2 EGLR 152) without demur and the proposition that Lewison J had applied the wrong legal test in judging whether the appellant had used all reasonable endeavours, was rejected. However, dicta to the contrary exist in *Jet2.com*.

A lively debate exists about whether all reasonable endeavours is half way (or at some point) between reasonable endeavours and best endeavours or whether it means the same as best endeavours. The short but unworldly answer is that all reasonable endeavours and best endeavours mean much the same thing as regards the extent to which a party can take into account its own financial interests (it can, in both – see *Yewbelle*) but they mean different things as regards the number of alternative courses of action a party needs to take – see *Rhodia*.

For practical purposes, therefore, there is a spectrum: best endeavours is the most onerous type of endeavours obligation; all reasonable endeavours is somewhere in the moderate centre; reasonable endeavours is the least onerous: see *Jolley v Carmel Ltd* [2000] 3 EGLR 68.

What are 'best endeavours'?

Best endeavours are distinguishable from reasonable endeavours and all reasonable endeavours in that they do require a party, in some circumstances, to act against its own commercial

interests. Certainly best endeavours can be contrasted with second-best or "half-hearted endeavours", which will amount to a breach of the obligation: see *Sheffield District Railway Co v Great Central Railway Co* [1911] 27 TLR 451.

In *Jet2.com* in the Court of Appeal ([2012] EWCA Civ 417), in which it was held that an airport operator was obligated to open outside its normal operating hours to comply with a best endeavours obligation, notwithstanding that the airport would incur a loss from taking that step, Longmore LJ said: "... the fact that [a party] has agreed to use his best endeavours pre-supposes that he may well be put to some financial cost, so financial cost cannot be a trump card to enable him to extricate himself from what would otherwise be his obligation".

What limits are there on 'best endeavours'?

Best endeavours requires the party subject to such an obligation to try all available means to achieve the contractual objective but it does not require anything which might imperil that party's solvency, for that would be likely also to imperil that objective too: see *Terrell v Mabie Todd and Co Ltd* [1952] 69 RPC 234.

For how long does the party subject to endeavours obligations have to use those reasonable endeavours?

Until the endeavours are producing a return that is disproportionately small compared to the efforts put in. Nobody subject to an endeavours obligation of whatever type is going to be expected to apply endeavours when they are more likely than not to come to nought (or very little): see *Rhodia* and *Dany Lions*.

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David Payton, Dentons
Robin Springthorpe, Norton Rose
Fulbright
Edward Starling, Wedlake Bell

LEADING AUTHORITIES AND STATUTORY PROVISIONS

UBH (Mechanical Services) Ltd v Standard Life Assurance Co [The Times, 13 November 1986]
Rhodia International Holdings Ltd v Huntsman International LLC [2007] EWHC 292 (Comm)
Yewbelle Ltd v London Green Developments Ltd [2007] 1 EGLR 137
Jet2.Com Ltd v Blackpool Airport Ltd [2011] EWHC 1529 (Comm)
Dany Lions Ltd v Bristol Cars Ltd [2014] EWHC 817 (QB)
Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd [2016] EWCA Civ 160