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Best Endeavours

The terms “best endeavours”, “reasonable endeavours” and “all reasonable endeavours” are commonly used by solicitors in the drafting of agreements and contracts. Clearly, when making use of these terms it is important to have a clear understanding of their precise meaning and to be aware of the obligations their inclusion place on clients.

Best Endeavours

The inclusion of the term best endeavours in a clause originally placed an onus on the obliged party to, “broadly speaking, leave no stone unturned.”

This very onerous obligation has been lessened somewhat over the years to allow for the concept of standards of reasonableness to be introduced. Whilst the obligation no longer requires someone to go as far as above, what is required is that a person must do “all that a reasonable person reasonably could do in the circumstances.”

In other words, a party must take all steps in their power which “are capable of producing the desired result...” and they must take all the steps a reasonable person “acting in their own interest and desiring to achieve that result would take.”

An obligation to use best endeavours probably requires a party to act honestly and reasonably and to make a positive effort to perform the relevant obligation.

In the case of a company the required standard is that of a “reasonable and prudent board of directors, acting properly in the interest of their company and applying their minds to their contractual obligations.”

This obligation does not extend to a situation where a company

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should put itself at risk of financial ruin to fulfil its obligation.

It does seem clear however, from the recent decision of *Jet2.com Ltd v Blackpool Airport Ltd* that a company should carry out such actions that are commercially practicable and incur any reasonable associated cost in order to fulfil its responsibilities.

In this case, the parties had entered into a 15 year contract which included an obligation on both parties to cooperate and to use “their best endeavours to promote jet2.com’s low cost services from Blackpool Airport.”

The Court was tasked with deciding whether Blackpool Airport was under an implied obligation to accept flights from Jet2.com outside the airport’s standard operating hours, when there was no express term requiring this, as it would damage the airport’s commercial interests if they had to do so.

The Court found that the inclusion of the best endeavours wording was seen as Blackpool Airport accepting a risk that there could be some resulting financial cost or loss from the agreement.

The English Court of Appeal held that Blackpool Airport was in “breach of an obligation to use best endeavours in relation to promoting Jet2’s business” and that “such an obligation may well require a party to act to its own commercial detriment.”

Reasonable Endeavours

The obligations imposed by the term reasonable endeavours are “appreciably less than (those imposed by) best endeavours” and can be satisfied by an “honest try” by the obliged party.

If a company can show any practical, financial or other commercial disadvantage in proceeding with the obligation this could justify their failure to take positive action, as could the likelihood or lack thereof of being successful. Any disadvantage to the obligor seems to justify a failure to take positive action.

In order to ensure the enforceability of a reasonable endeavour clause parties should include criteria in the contract clearly stating what the parties must do to meet their reasonable endeavours obligations.

Without these objective criteria the clause may be unenforceable due to uncertainty, as it can be difficult to decide what is reasonable and unreasonable in an area where the parties may have differing views and no criteria are in place for a third party to assess in the circumstances, what amounts to reasonable endeavours.

In an important development the English High Court has held that where a clause in a contract required a party to use reasonable endeavours and specified certain steps that had to be taken to fulfil their reasonable endeavours obligations, those steps would have to be taken even if it involved that party sacrificing their own commercial interests. This development clearly increases the onus placed on parties when using the term reasonable endeavours.

The Court did reiterate the position that reasonable endeavours only requires a party to take one reasonable course, not all of them, whereas the obligation to use best endeavours imposes a significantly higher onus on parties.

All Reasonable Endeavours:

All reasonable endeavours has been described as “something more than reasonable endeavours but less than best endeavours.”

Clearly while it does not impose as onerous an obligation as best endeavours it does require that the party in question expend more than merely minimal effort in an attempt to fulfil their responsibility, but the obligor is not required to take all those steps in their power to reach the desired result.

Conclusion:

In the drafting process, the above terms should be used with caution and with emphasis on ensuring that all parties are aware of the extent of the obligations imposed on them by their inclusion.

Clearly “endeavour” clauses do not amount to an absolute obligation as imposed by terms such as “must” or “shall”. Nevertheless, whilst “best endeavours” does not impose an “absolute obligation” it is still an onerous obligation requiring a party to do all that is prudent and reasonable in the circumstances.

Reasonable endeavours undertakings create a lower level obligation with only minimal effort required, however in the absence of clear criteria these clauses can be considered unenforceable.

Importantly, where criteria have been included in a contract minimal effort will not be considered sufficient to have fulfilled a party’s obligations. If certain steps are set out then those steps must now be carried out even though they may be detrimental to the party’s commercial interests.

All reasonable endeavours is accepted as imposing an obligation midway between reasonable and best endeavours.

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