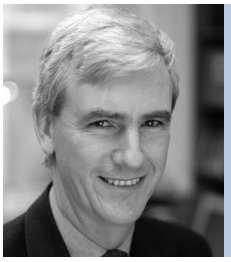
Endeavouring to avoid dispute



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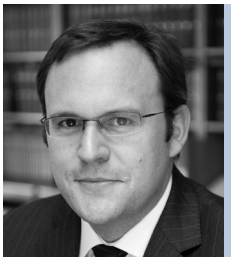

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COMMERCIAL PARTIES REGULARLY CONTRACT to use 'reasonable', 'all reasonable', or 'best' endeavours to achieve an outcome. Are they wise to do so? What better language could they use?

Frequently, agreements for the development of land, licensing or distribution of goods, or the provision of services or facilities, impose obligations on either or both parties to use 'all', or their 'reasonable' or 'best' endeavours or efforts to bring about a specified outcome. These can range from endeavours to agree the terms of an entire contract or the terms of a further phase of scheduled works, to seeking a necessary consent or agreement of a third party, maximise sales or promote a business.

Endeavours clauses are employed where a party is unwilling to accept an absolute obligation to achieve an outcome. Breach of such obligations may justify the innocent party seeking damages or claiming that the contract has been discharged. As recent cases demonstrate, the true meaning and effect of such clauses can be difficult to determine. In particular, the scope of any endeavours obligation will depend on the commercial context.

In negotiating and drafting endeavours clauses, two practical problems are regularly encountered:

- how to describe the object which is to be achieved; and
- how to describe the methods or efforts to be employed to achieve that object.

OBJECTS

Clarity over the objective of the obligation is essential, since without it such clauses can be void. Uncertainty over steps to be taken will not be fatal, but uncertainty over the object to be achieved will be. The distinction between the means to be employed by the obliged party and the ends to be achieved was clearly drawn in *Little v Courage* [1995], by Millett LJ:

> 'An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced: an undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable obligation.'

Clauses that amount to little more than an agreement to agree are void. A finding that a clause is void on that basis can be disastrous. In the litigation surrounding Wembley Stadium (*Multiplex Constructions UK v Cleveland Bridge UK* [2006]), it led to a contractual term requiring the parties to it to use reasonable endeavours to agree a 'reprogramming' of sub-contracted works being struck down. A clause under a preliminary agreement where the parties undertook to use reasonable endeavours to agree the terms of a joint venture was too uncertain to be capable of enforcement in *London and Regional Investments v TBI* [2002]. A clause requiring the parties to reach agreement on a new rent as a condition precedent to the renewal of the lease was also void (*BJ Aviation v Pool Aviation* [2002]).

Different issues arise where the object of an endeavours clause is to secure some form of permission from a third party, such as a planning permission, or to negotiate an agreement with a third party. These clauses are enforceable in principle, but they appear to give the most trouble in practice.

In *Yewbelle v London Green Developments* [2007], the Court of Appeal held that an agreement to use 'all reasonable endeavours' to obtain a section 106 planning agreement was perfectly enforceable.

It seems from these cases that an agreement to agree with a third party will not be as readily struck down as an agreement to agree with the other contracting party. Thus, an agreement to use reasonable endeavours to obtain a further agreement with a third party may well be perfectly valid. This is evident from *P & O Property Holdings v Norwich Union Life Insurance Society* [1994]. There, the owner of a 200-year lease argued that an obligation on a developer to use reasonable endeavours to obtain a letting of each part of the development did not require

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the developer to pay reverse premiums to incoming tenants. The House of Lords was prepared to look into what amounted to reasonable conduct under the clause, rather than simply striking it down. There is therefore no absolute rule that agreements to agree are necessarily void, at least so far as agreements relating to third parties are concerned.

THE EFFORTS TO BE EMPLOYED

Assuming that an endeavours clause applies, what is required of the party bound by it? This depends on the language employed and the commercial context. The distinctions between the various clauses form a spectrum, with an obligation to use 'best' endeavours falling at one extreme, a commitment to use 'all reasonable' endeavours lying in the middle, followed by 'reasonable' endeavours at the lowest end of the spectrum.

Quite what the distinction is between different degrees of effort is very fact specific. In *Rhodia International Holdings v Huntsman International LLC* [2007], the judge accepted that there was a distinction between 'best' and 'reasonable' endeavours:

> 'An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours...'

Complete inaction under such a clause, as in *Rhodia*, is likely to result in the obligor being in breach of the obligation. Where the obligation requires a complex activity to be undertaken, such as the assembly of a development site or the promotion and sale of a product, a series of small acts or omissions, none of them in itself sufficiently serious to amount to a breach of contract, may collectively be a breach of a reasonable endeavours obligation, as occurred in *CEP Holdings v Steni AS* [2009].

An obligation to use reasonable endeavours does not generally require steps to be taken that would be harmful to the commercial interests of the obliged party. In *Phillips Petroleum Company United Kingdom v Enron Europe* [1997], it was found acceptable for a party obliged to agree a date for the commencement of an energy supply to delay agreement to take advantage of a falling market. Similarly, in *P & O Property*, the House of Lords thought that an obligation to use reasonable endeavours to secure lettings did not extend to requiring the obliged party to pay reverse premiums. In *Yewbelle* the judge considered that such a clause did not require the party obliged to sacrifice its own commercial interests. The same view has recently been expressed in *CPC Group v Qatari Diar Real Estate Investment Company* [2010], the 'Chelsea Barracks' case. Whether or not a party had to sacrifice its own commercial interest was treated as a question of construction. The terms of the contract (imposing a 'reasonable', but 'commercially prudent' endeavours obligation) in that case did not create such an obligation. The clause did, however, require the party under the obligation to subordinate other interests of a non-commercial nature.

An exception to this general rule is where the contract specifies steps which are to be taken as part of the fulfilment of the reasonable endeavours obligation. In that type of case the agreed steps must be taken, whether they result in unanticipated loss for the relevant party or not. That party's freedom to decide how best to perform the contract in its own interests is curtailed to the extent of the specific steps that the contract requires it to take.

A 'best' endeavours obligation is more stringent. If there is a choice of methods to achieve the intended result, the obligor is entitled to select the course that is least costly. If there is only one means of securing the objective, or if all possible means will cause loss to the obligor, it will nonetheless be required to adopt those means and to subordinate its own financial interests in order to achieve the contractual objective. A recent illustration is the decision of the Court of Appeal in *Jet2.com v Blackpool Airports* [2012]. An airport operator contracted to use its best endeavours to 'promote' low-cost services by a budget airline. A question arose as to whether this required the airport to allow the airline to operate outside the normal opening hours of the airport, which caused the airport to make a loss on those services.

The Court of Appeal interpreted the 'promotion' of the airline's business as requiring the airport to do all it reasonably could to enable that business to succeed. The limits of that obligation were very difficult to define, but it could be done with sufficient certainty to make the obligation enforceable. The Court then considered that the extent to which a party could have regard to its own commercial interests in performing an endeavours obligation depended on the nature and terms of the contract. In this case the ability for the airline to operate outside the airport's normal business hours was essential to its business model and was therefore fundamental to the achievement of the objects of the agreement. The Court refused to define the extent of the airport's obligations since these would depend on circumstances over the life of the 15-year agreement. If it became impossible for the airline to operate low-cost services at a profit, the airport would not be required to make losses of its own that conferred no benefit on either party.

Parties often resort to incorporating endeavours clauses into their contracts precisely because it is difficult to foresee the steps that it may be necessary to take to achieve their objective. The project may be inherently complex or may depend on the decisions or actions of third parties which cannot be predicted. In such situations different techniques may be employed to take some of the inevitable

uncertainty out of the contract, for example by referring specifically to an objective standard of performance. In *EDI Central v National Car Parks* [2010], a reasonable endeavours obligation relating to the development of land was qualified by reference to the methods that 'a normal prudent commercial developer experienced in development of that nature' would choose to employ.

An alternative means of reducing room for argument is to place limits around the steps that are to be taken by stipulating the maximum financial outlay the obligor must commit, the number of applications for a consent that must be made, or the minimum or maximum duration of the obligation. As a minimum, the contract should make clear what is to happen if the endeavours obligation has been performed, yet the objective has not been achieved. Exactly that sort of ambiguity landed the parties in *Yewbelle* in the Court of Appeal.

BJ Aviation v Pool Aviation [2002] EWCA Civ 163

CEP Holdings v Steni AS [2009] EWHC 2449

CPC Group v Qatari Diar Real Estate Investment Company [2010] EWHC 1535 (Ch)

EDI Central v National Car Parks [2010] CSOH 141

Jet2.com v Blackpool Airports [2012] EWCA Civ 417

Little v Courage [1995] 70 P & CR 469

London and Regional Investments v TBI [2002] EWCA Civ 355

Multiplex Constructions UK v Cleveland Bridge UK [2006] EWHC 1341 (TCC)

P & O Property Holdings v Norwich Union Life Insurance Society [1994] 68 P & CR 261

Phillips Petroleum Company United Kingdom v Enron Europe [1997] CLC 329

Rhodia International Holdings v Huntsman International LLC [2007] All ER (Comm) 577

Yewbelle v London Green Developments [2007] 2 EGLR 152

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PRACTICAL CONSEQUENCES

Jet2.com resulted in a split decision in the Court of Appeal, with one Lord Justice holding that the agreement was too vague to be enforceable. This illustrates the inherent uncertainty of all types of endeavours obligation, which should not be resorted to as an easy fix. There are important practical lessons to be drawn from these cases by draftsmen and negotiators of commercial contracts of all types, particularly property development agreements where endeavours clauses are very common.

One size does not fit all, but we offer some dos and don'ts:

- Don't use imprecise language to describe the objectives to which the endeavours are to be directed (a term requiring reasonable endeavours 'to provide a cost base to facilitate low-cost pricing' baffled the Court of Appeal in *Jet2.com* and was held to be unenforceable).
- Don't use phrases suggesting different levels of effort (best/reasonable/all reasonable) in the same contract unless you intend to impose different levels of obligation.
- Don't leave room for doubt about whether expense is to be incurred, litigation is to be engaged in, or a loss-making activity is to be carried on.
- Don't leave room for doubt about what is to happen if the object of the endeavours obligation cannot be achieved.
- Do consider carefully the practical steps that will be required to bring about the desired outcome; the more carefully they can be defined, and responsibility for achieving them allocated by the contract, the less room there will be for future dispute.
- Do list any specific steps which it is agreed one or other party must take as a minimum performance of the obligation (eg 'A agrees to use reasonable endeavours to obtain all third-party consents required to implement the development including, but not limited to, x, y and z').
- Do specify whether legal action is required in order to achieve the objective, eg an appeal against a refusal of planning permission, or consent for the assignment of a lease.
- Do, where possible, identify an objective standard of behaviour or performance, which can be used as a yardstick by which to measure the performance of the obligation.

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