

Sale and Development Agreements: Obligations to Use Endeavours

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Introduction

At the time of writing, the UK remains subject to stringent and extensive measures which have been enacted by Parliament in response to the Covid19 pandemic. Although there has been some relaxation since the “lockdown” was first introduced in mid-March 2020, large parts of the economy remain on hold. This has had and will continue, for some time, to have an effect on the ability and desire of parties to contracts for the sale and/or development of land to perform their obligations. It will also affect the extent to which transactions of this sort continue to be entered into and the terms of sale and development agreements may well need to adapt to the changing landscape.

An obvious and immediate effect of the pandemic and the lockdown measures on basic sale and purchase agreements will be an inability to adhere to completion dates. However, this article considers another class of obligations commonly found in more complex agreements for the sale and development of land, which are those obligations which arise before the time for completing the sale and purchase. Often completion is made conditional on one party or the other obtaining planning permission for a particular development and/or carrying out building works. This article considers the type of obligation which requires a contracting party to use certain endeavours to achieve such an outcome.

The Nature of an Endeavours Obligation

Some contractual obligations require the contracting party to achieve a result or a target. For example, “The seller agrees that the works will be carried out and completed by a certain date”. If that target or outcome is not achieved, the seller will be in breach of contract and can be required to compensate the buyer for loss if loss is caused by the delay or the failure to achieve the target. In addition, many sale and development agreements contain a right to terminate if the target is not met or the outcome not achieved.

For that reason, the parties often settle upon a less onerous obligation to use endeavours to achieve that outcome. Providing sufficient endeavours are employed, if, notwithstanding those endeavours, the outcome is not achieved, there will be no breach of contract. The endeavours obligation might sit alongside a right for the other party to terminate the agreement if the outcome is not achieved. For example, if the seller has used reasonable endeavours to carry out and complete a building project by a certain date, the seller will not be liable in damages if it is delayed notwithstanding those endeavours but the buyer might nevertheless have a right to terminate the agreement in that situation. However, if the seller has not used reasonable endeavours, the buyer can terminate and sue for any losses suffered.

Types of Endeavours Obligation: Some Distinctions

Of the numerous types of endeavours obligation, there are two broad categories which are relevant to some of the issues which the courts have to decide. First, there are obligations to use endeavours to agree something with a third-party (“Category 1”), such as a section 106 agreement with the local planning authority or an agreement with a neighbouring owner or authority relating to the proposed use of the land which is the subject of the agreement. Secondly, there are obligations to use endeavours to achieve an objectively identifiable target which does not depend (directly, at least) on

an agreement with a third party (“Category 2”), such as obtaining planning permission for development or carrying out building works (whether or not there is a target date).

Another distinction which is relevant to endeavours obligations relates to the extent of the endeavours which the contracting party must employ in order to comply with the obligation. At first instance in *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), Julian Flaux QC (as a Deputy Judge of the Commercial Court) described an important tripartite distinction which has since been approved by the Court of Appeal (in *Sidhu v Sandhu* [2010] EWCA Civ 531 at [16]). At one end of the scale, the obligation to use reasonable endeavours requires some effort towards achieving the result and the effort must be a reasonable one. It does not require the contracting party to do everything that could reasonably be done to that end. At the other end of the scale, “best endeavours” properly does require the contracting party to go that far. It requires a sort of “no stone unturned” approach and is easier to challenge than a reasonable endeavours obligation. An obligation to use “all reasonable endeavours” is more like best endeavours than just some reasonable endeavours.

Nevertheless, it is very difficult to extract any general principles as to where the dividing lines are between these different forms of obligation. This is principally because of the elasticity of the word “reasonable”. Efforts that are reasonable in the circumstances of one particular case may well not be reasonable in another.

Economic and Financial Considerations

An issue which is likely to raise its head in disputes about obligations to use endeavours to achieve a particular result in the current climate and as a result of the economic difficulties which are likely to remain for some time as a result of the current restrictions is the extent to which the contracting party’s commercial or financial position and the wider economic context should be taken into account. Imagine that A contracted to use reasonable endeavours to build something by 31 December 2020 and was making good progress, but in April 2020, as a result of the pandemic, A’s funding dried up and despite strenuous efforts on A’s part, A could not source the funding to meet the target of the end of the year. Does that mean that A’s endeavours have not been sufficient? Or does using reasonable endeavours entitle A to delay to ensure that his commercial interests are not compromised?

The approach of the courts to this question has differed in relation to Category 1 cases (where the object of the endeavours is reaching agreement with a third party) and Category 2 cases (where the object is something which does not depend directly on the agreement of the third party). In *Yewbelle Ltd v London Green Developments* [2006] EWHC 3166 (Ch), the claimant was subject to an obligation to use reasonable endeavours to secure a section 106 agreement with the local planning authority. Lewison J said (at [122]):

“... the essence of the obligation required Yewbelle to use reasonable endeavours to reach an agreement not with the other party to the contract, but with a third party. ... In using reasonable endeavours towards that end, I do not consider the Yewbelle was required to sacrifice its own commercial interests.”

On the other hand, in *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch), this question was answered differently. The case concerned an agreement for the lease of a site in Greenwich for a large mixed-use development. The seller, Telford Homes, agreed to build out the commercial phases of the development to shell and core at which point Ampurius would take a 999-year lease of the commercial parts, leaving Telford to complete the residential phases of the

development. Before the lease was to be completed, Telford was required to use reasonable endeavours to complete the commercial parts to a particular state by a target date. All was going well until the recession took hold in 2008 and Telford's funding dried up. Given the dire circumstances for anyone seeking finance during this period, Telford actually did quite well in managing to ultimately find a new means of funding the development but by then, it had had to put the construction site on hold. Once it started up again, it was clear that it was going to be several months late.

There was no express right for Ampurius to terminate if the target date was missed, so Ampurius sought to terminate for repudiatory breach of the agreements to use reasonable endeavours (and also a similar obligation to use due diligence to achieve the target date). At trial, the court upheld Ampurius's claim. This was subsequently reversed by the Court of Appeal on the ground that the delay did not amount to a repudiatory breach of these obligations and therefore did not entitle Ampurius to terminate the agreement. However, of interest for present purposes is the decision at first instance, which was not challenged on appeal, that the failure to meet the target date amounted to a breach of the obligation to use reasonable endeavours. It was argued, partially in reliance on *Yewbelle*, that the unexpected economic background meant that stopping work and securing alternative funding was a reasonable course to take. This was rejected by Roth J:

"I do not think that a 'reasonable endeavours' clause as regards the time of completion in what is, in this respect, a construction contract can extend to endeavours to have sufficient money to perform the contract. Although the language could literally bear that meaning, in my judgment, on an objective reading 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."

Roth J distinguished *Yewbelle* on the basis that the obligation to use endeavours to secure an agreement with a third party (a section 106 agreement) is different. Although he did not explain why, it is suggested that reaching agreement with a third party, even the local planning authority under section 106, is something which is inherently bound up with the contracting party's commercial interests and financial clout. The "efforts" that are required involve a commercial negotiation and the commercial interests of that party cannot be left out of account in assessing the reasonableness of those efforts. That, therefore, suggests a different approach for a Category 1 case where the endeavours are to reach agreement with a third party than in a Category 2 case where the obligation is to use efforts to build something or achieve some other outcome not dependent on a third party's co-operation. In the case of an obligation to build, either the building is constructed or it is not. As the Judge said in *Ampurius*, it is more extraneous matters which will be relevant to the reasonableness question such as shortage of materials or the weather. The inability of the construction workers to proceed apace because of social distancing regulations would, therefore, be relevant but the fact that the contracting party's balance sheet has changed as a result of the sudden recession would not.

All of this was considered more recently in *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm), [2018] EWCA Civ 2407, a case about the purchase of the Rio Tinto copper mine in Andalusia in Spain. The claimants contracted to sell their interest in the mine to the defendants. The agreement provided for payment of deferred consideration (of over €40 million) but only on satisfaction of two conditions. First that the buyers secure a "senior debt facility" to fund the mining of the site and secondly obtaining a permit to start mining operations.

In fact, mining started with the benefit of a permit but the buyers were able to fund the project via an equity release scheme and therefore did not require a senior debt facility. The Buyers therefore declined to pay the deferred consideration. The sellers argued that the condition was unenforceable for various reasons, including the fact that it had become futile because the object of the agreement, namely the opening of the copper mine, had been achieved with funding obtained in some other way. The court rejected these arguments and held that the sellers' entitlement to the deferred consideration had not arisen.

In addition, the buyers had agreed to use all reasonable endeavours to obtain the senior debt facility and therefore the sellers argued that the defendants were in breach of that obligation and should be liable in damages for the €40 million which did not become payable by way of deferred consideration as a result. It was accepted by Leggatt J that using all reasonable endeavours did not require the buyers to acquire a senior debt facility at any cost. Financial considerations were not, therefore, irrelevant. He said that it could not reasonably have been contemplated that the buyers should have to enter into a senior debt facility if that would make the project commercially unviable. This would also defeat the contractual purpose because if it became insolvent, it would not be able to pay the deferred consideration. On the facts, it was demonstrated that the buyer could not have obtained the senior debt facility if all reasonable endeavours had been used.

That is not to say that the buyers could pursue any form of finance rather than senior debt funding if they chose to reopen the mine just because to do so they would be better off. That would defeat the contractual purpose of the condition. So, there was a balance to be struck. But the important point for present purposes is that the obligation to use all reasonable endeavours did not require the buyers to achieve the object of securing senior senior debt funding without any regard at all to their financial interests.

The analysis of Leggatt J in this case fits with that of Roth J in *Ampurius* and Lewison J in *Yewbelle*. This was a failure to use endeavours to enter into a particular type of debt finance with a third party. It was a Category 1 obligation as in *Yewbelle* rather than a Category 2 obligation as in *Ampurius*. The cost to the contracting party of acquiring a senior debt facility was therefore relevant to the reasonableness of the endeavours it used. The commercial sensibilities of the party need not be abandoned in pursuing the required outcome in this context.

This distinction between Category 1 cases and Category 2 cases also fits with the approach taken by the Court of Appeal in *Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd* [2019] EWCA Civ 823 in which the court was concerned with an agreement for the sale and purchase of a lease of a leisure complex in Milton Keynes for the purpose of a development. There was a dispute about whether the buyer had complied with an obligation to use reasonable endeavours to negotiate a variation of a head lease to permit the proposed development. It was argued that the buyer was not entitled to have regard to its commercial interests or the profitability of the proposed development in the efforts it employed to procure those variations. Taken to its logical conclusion, that could require the buyer to pay any level of premium to the superior landlord. However, the Court of Appeal did not accept the argument that in this type of case, the contracting party had no right to have regard to its commercial interests.

The seller had relied on the decision of the Court of Appeal in *Alghussein v Eton College* (The Times, 16 February 1987)¹ in which the main issue concerned an obligation to use best endeavours to proceed with a development. Dillon LJ said that the contracting party could take account of extraneous matters such as engineering or construction difficulties or the absence of a required consent or permission but not profitability in determining what endeavours were required to complete the development in order to comply with the obligation. This is a Category 2 case and the reasoning of Dillon LJ in the Court of Appeal is consistent with the distinction between Category 2 and Category 1 cases.

In *Gaia Ventures* and Patten LJ declined to adopt the same approach as Dillon LJ to the relevance of the commercial position of the promising party. It was accepted that the obligation to use reasonable endeavours to agree a variation of the head lease entitled the buyer to have regard to its commercial interests to some extent. The Court of Appeal distinguished the reasoning in *Alghussein* on the basis that the obligation was to use best endeavours rather than reasonable endeavours. However, a more principled and consistent distinction between the two cases lies in the difference between Category 1 cases and Category 2 cases. *Gaia Ventures* was a Category 1 case whereas *Alghussein* concerned a Category 2 case where there was an objectively identifiable project which the contracting party agreed to use endeavours to complete.

In summary, whilst not all cases make this distinction between Category 1 cases and Category 2 cases, it is a useful barometer to apply when considering the extent to which a contracting party who has agreed to use endeavours to achieve a particular object or target is entitled to take into account his own commercial interests or wider economic factors.

Certainty

There is another issue which has been raised in the authorities in which the distinction between Category 1 cases and Category 2 cases has been applied. This came to the fore in the *Astor Management* case. It stemmed from a decision of Andrews J in *Dany Lions Ltd v Bristol Cars Ltd* [2014] 2 All ER (Comm) 403, which concerned an agreement compromising a dispute about a rare motor car in which one party agreed to use reasonable endeavours to enter an agreement with a particular specialist for the restoration of the car. Andrews J concluded that it is only in an exceptional case that an agreement to use endeavours to agree something with a third party would be enforceable. She said that the requirements of certainty of object and a yardstick by which to measure the endeavours will not be satisfied unless the essential terms of the third party agreement are specified in advance.

The suggestion that most Category 1 endeavours obligations are likely to be void for uncertainty was rejected resoundingly by Leggatt J in *Astor Management*. It was argued that the obligation in that case to use best endeavours to secure a senior debt funding agreement was void because of these principles. Leggatt J. declined to follow the earlier decision of Andrews J. He said:

“The role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy. To hold that a clause is too uncertain to be enforceable is a last resort or, as Lord Denning MR once put it, ‘a counsel of despair’ see *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 1 QB 933.”

¹ Not be confused with the decision of the House of Lords (reported at [1988] 1 WLR 587) which turned on the application of the principle that a contracting party cannot rely on his own breach of contract to invoke a contractual right.

He went on to say that it should almost always be possible to give sensible content to an undertaking to use reasonable endeavours or all reasonable endeavours or best endeavours to enter into an agreement with a third party. So far as certainty of object is concerned there will never be any problem because there can be no difficulty in telling whether an agreement with a third party has been made. Whether sufficient endeavours have been employed will be a question of fact which the court can decide. Whilst it may sometimes be hard to prove an absence of endeavours, the difficulty of proving a breach is “an everyday occurrence and not a reason to hold that there is no obligation”. He concluded that “where the parties have adopted a test of reasonableness, ... they are deliberately inviting the court to make a value judgement which sets a limit to their freedom of action”.

Accordingly, it is unlikely that a court would strike down a Category 1 endeavours obligation to reach agreement with a third party on the ground of uncertainty.

Conclusions

Both Category 1 cases and Category 2 cases will be affected by the consequences of the current pandemic. Although the Government is now trying to get builders back to work, social distancing requirements will mean that work on large-scale sites will be pared back for some time. This will affect timing and target dates. Similarly, endeavours to strike bargains with third parties will be affected by the commercial position of the contracting parties as a result of the economic downturn. Although in cases where endeavours are required to secure an agreement with a third party, wider economic forces may be taken into account, it is likely that where obligations to use endeavours to achieve a particular object cannot be complied with because of wider economic concerns, those economic factors are less likely to affect the extent of the endeavours which the contracting party is required to employ.

Accordingly, whilst obligations to use endeavours to secure a result or an outcome are less strict than an obligation to achieve the target or outcome, contracting parties who find themselves bound by an endeavours obligation and are unable to achieve the required outcome because of unforeseen circumstances which now arise because of the pandemic might find that there is not much wriggle room within the four corners of the contract.