ENDEAVOURS OBLIGATIONS
WHAT'S "BEST" OR "REASONABLE"?

1. Introduction

In negotiating a contract, a point frequently facing lawyers is whether their client ought to use or accept "best" or "reasonable" endeavours in respect of the discharge or compliance of contractual obligations. Typically the issue arises in cases where one party cannot accept an unqualified obligation. For example, where a party must rely on the co-operation of a third party outside the contract in order to discharge or comply with an obligation. In such cases it would be unwise for the party giving the undertaking to accept an unqualified obligation and they should instead agree only to use their "best" or "reasonable" endeavours to comply.

Defining what is meant by "best" or "reasonable" endeavours has been the subject of ongoing debate. It is apparent that lawyers negotiating contracts tend to apply widely differing views of the meaning of "best" and "reasonable" endeavours and often these do not accord with the current judicial interpretation.

For example, this firm recently encountered an argument from a lawyer that "best endeavours" would require his client to spend any amount of money to secure a limited financial benefit. The lawyer believed that an obligation to use "best endeavours" meant that every possible avenue had to be explored, at any cost, to the exclusion of considerations of reasonableness. As will be clear from this Note, this, while a popular view amongst lawyers, is inconsistent with case authority on the meaning of "best endeavours".

This Note reviews the case authority on the meaning of "best endeavours" and "reasonable endeavours", draws conclusions as to the difference between the two and offers some practical guidance for lawyers negotiating levels of "endeavours" obligations. It should be borne in mind from the outset that there is a very meaningful distinction to be drawn between the obligations of "best" and "reasonable" endeavours.

2. Best Endeavours

Over the years there have been a number of cases on the meaning of "best endeavours". The cases illustrate that the use of "best endeavours" imposes an obligation to do all that which can reasonably be done in the circumstances (Terrell v. Mabie Todd & Coy Ltd [1952] 69 RPC 234). Whilst perhaps seen as somewhat onerous, it is important to realise that "best endeavours" does not mean going beyond the bounds of reason. So what does this mean in practice?

It is suggested that a party which has given a "best endeavours" undertaking must:

   a) take action which, having regard to costs and degree of difficulty, is commercially practicable. However, performance of such an undertaking would not require the party to take action which could lead to its financial ruin, or which would undermine its commercial standing or goodwill;

   b) incur such expenditure which is reasonable in taking such action; and

   c) continue to act in its own interests.

Each element of the duty must be performed by reference to the facts available at the time of performance, rather than at the time of entry into the contract.
The following cases set out various points which lawyers should note in advising their client on using "best endeavours" in discharging a particular obligation (or indeed, in advising a client to whom the obligation is due).

(i) Sheffield District Railway Co v Great Central Railway Co (1911) 27 TLR 451

This is one of the earliest cases of the meaning of "best endeavours" and is cited frequently as the general authority for the meaning of the term. The Court considered an agreement which required the Great Central Railway Company to use their "best endeavours" to develop the through and local traffic of the Sheffield Railway, which, it was alleged, they had failed to do. The Court said:

"... "best endeavours" means what the words say; they do not mean second-best endeavours... the words mean that the [obligor] must, broadly speaking, leave no stone unturned..."

However, the Court also said in relation to the discharge of the obligation that it did not mean "... that the limits of reason must be overstepped...". Therefore while positive steps have to be taken to comply with the obligation to use "best endeavours", this case found that the extent of those steps is limited by the bounds of reasonableness.

(ii) Markland v Jack Barclay [1951] 1 All ER 714

A further example of the limitations of the obligation to use “best endeavours”, and one commonly found in sale of goods contracts, is the case of Markland v. Jack Barclay. In this instance, the Court of Appeal examined the following contractual term:

"the sellers will use their best endeavours to secure delivery of the goods on the estimated delivery date from time to time furnished, but they do not guarantee time of delivery nor shall they be liable for any damages or claim of any kind in respect of delay of delivery."

The Court said about the clause:

"It obviously binds the sellers to do something - in fact, to use their "best endeavours" to secure delivery - to secure delivery presumably from the manufacturers, so that they themselves can make delivery to the customer. To secure delivery by the manufacturers when? ... on the estimated delivery date from time to time furnished".

The Court was not presented with conclusive evidence as to whether an estimated date had been agreed and it concluded that even where one had not been agreed, the obligation would be for the party to deliver within a reasonable time. The Court in deciding what was meant by a reasonable time said it "means a time reasonable in all the circumstances".

(iii) Terrell v Mabie Todd & Co [1952] 2 TLR 574

In this case, the defendant undertook to use its "best endeavours" to promote sales of fountain pens and ink bottles incorporating the plaintiff's inventions. The Court
cited Sheffield District Railway Co and agreed that "best endeavours" does not mean "second-best endeavours".

The Court in setting out the defendant company's obligations said:

"... their obligation was to do what they could reasonably do in the circumstances. The standard of reasonableness 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 case clearly illustrates the concept of reasonableness as an intrinsic part of the obligation to use "best endeavours".

(iv) Northern Counties Securities v Jackson & Steeple [1974] 2 All ER 65

In this case, the Court considered the following undertaking on a company to:

"forthwith at their expense apply for and to use their best endeavours to obtain quotation for and permission to deal on the London Stock Exchange in the shares".

The Court held that this required the company to use its best endeavours to see that the shareholders passed the resolution for the issue of shares to the plaintiff. The Court added that if for any reason a quotation for such shares could not in fact be obtained, this did not allow the company to escape from its obligations to issue the shares. As the undertaking given by the company was part of a Court Order, the company would be required to go back to the Court to request a change.

(v) IBM United Kingdom Limited v Rockware Glass Limited [1980] FSR 335

The Court considered a dispute as to the proper interpretation and effect of a contract whereby the defendant agreed to sell certain land to the plaintiff. A proposed planning application was attached to the agreement and a clause of the agreement contained provisions to the following effect:

a. that the purchaser make application for the planning permission;

b. that the purchaser would use its best endeavours to obtain the planning permission; and

c. that the purchaser would not withdraw the said application without the vendor's written consent.

Planning permission was sought and refused. Thereafter, the purchaser did not pursue the application by way of appeal and two questions arose for determination. First, what was it that the purchaser was obliged to use its "best endeavours" to do? The second question was, what was the extent of the purchaser's undertaking to use its "best endeavours"?

The Court held that by not appealing, the purchaser had not used its "best endeavours" to obtain planning permission and further, the test of using "best endeavours" is what an owner of the property in such a case who was anxious to obtain planning permission should do to achieve that end.
The Judge further said that "... the Purchaser is to do all he reasonably can to ensure that the planning permission is granted if it were refused by the Local Planning Authority, and if an appeal to the Secretary of State would have a reasonable chance of success, it could not, in my opinion, be said that he had 'used his best endeavours' to obtain the planning permission if he failed to appeal".


The Court, in considering the contract by the parties to "use best endeavours" to complete a purchase by a given date said:

""best endeavours" are something less than efforts which go beyond the bounds of reason, but are considerably more than casual and intermittent activity. There must at least be the doing of all that reasonable persons reasonably could do in the circumstances".

The Court held that the vendors’ delay amounted to a substantial breach of their obligation to use their "best endeavours" to complete by the given date. The Court felt that if there had been problem in completing by a given date, the obligation to use "best endeavours" included an obligation to seek agreement to have that time extended at an early stage.

(vii) Rackham and anor v. Peek Foods Ltd [1990] BCLC 895

A share purchase contract included a "best endeavours" obligation on the buyer and its merchant bank to procure shareholder approval for the proposed transaction. Following the exchange of contracts, but prior to the buyer's extraordinary general meeting, an announcement of proposed legislation meant that the purchase would not be in the interests of the buyer. As a result, the buyer and its merchant bank took appropriate action to ensure that shareholder approval was not obtained. It was held that the "best endeavours" undertaking did not oblige the defendants to take any action which was not in the interests of the buyer, such as the giving of bad advice, and so there was no breach of the undertaking:

"On its true construction the best endeavours covenant did not oblige the directors to give advice which they genuinely believed to be bad advice"

"If, after the date of the conditional agreement, the directors consider that the bargain has become unacceptable from the point of view of the shareholders, it is the duty of the directors so to advise the shareholders and that advice by the directors does not constitute a breach of the best endeavours covenant by the company."

3. Reasonable Endeavours

While there is considerable less case law on the meaning of "reasonable endeavours" what is clear is that it is less burdensome than "best endeavours".

(i) UBH (Mechanical Services) Limited v Standard Life Insurance Co [The Times November 13 1986]

The plaintiff’s claim concerned a covenant contained in an agreement made between the predecessors in title of Standard Life, who were, for all intents and purposes, UBH. The covenant required the defendant to use its "reasonable endeavours" to procure that tenants on the estate took all their heating requirements from UBH and nobody else. The plaintiff alleged against the defendant, Standard Life, that they
were in breach of this covenant. Inter alia, the Court attempted to set out what is meant by "reasonable endeavours".

The decision of the Court of the first instance specifically held that a covenant to use "reasonable endeavours" was less onerous than to use "best endeavours" and said:

"A lessee required to use "reasonable endeavours" was entitled to perform a balancing act, placing on one side of the scales the weight of his obligations to the lessor and on the other commercial considerations, including his relationship with his sub-tenants, his reputation as a landlord, and the other uncertainties of litigation ... In relation to any proposed course of action, the chances of achieving the desired result would also be of prime importance".

Interestingly, although the Court did not have to distinguish between "all reasonable endeavours" and "best endeavours", the Judge said that he believed "that the phrase "all reasonable endeavours" probably lies somewhere between the two, implying something more than "reasonable" but less than "best" endeavours.

In sum, the defendant was entitled to balance the duty to use "reasonable endeavours" against all relevant commercial considerations including the costs of, and the uncertainties and practicalities relating to, compliance with the undertaking. The defendant was also entitled to consider the likelihood of success of performing its reasonable endeavours to be of "prime importance".

"I do not think that reasonable endeavours on the part of the [Defendant] requires them to institute legal proceedings of a doubtful outcome."

This suggests that, if use of reasonable endeavours would result in a financial or other commercial disadvantage to the obligor, no action may need to be taken. This view is supported by the following case, P&O Property Holdings Limited, the effect of which is to minimise the actions which are required in order to implement a reasonable endeavours obligation.


The sellers entered into a contract to sell their entitlement to natural gas which contained provisions regarding the progress of works leading up to the commencement of delivery. One of these provisions was that the parties should use "reasonable endeavours" to agree a commissioning date. In default of agreement a date was specified. The buyers refused to reach an agreement due to a sharp decline in the market price of gas contending that they were entitled to do so because the agreement was an agreement to agree and created no enforceable obligation, or that in any event they were entitled to take account of their own financial position. The sellers contended that the buyers could only take account of technical and operational practicalities in refusing or failing to agree.

It was held that, read in their context, the obligation to use "reasonable endeavours" did not prevent the buyers from refusing or failing to agree for financial reasons or any other reason other than one based on a technical or operational practicality. There was no reason for imposing on the buyers a contractual obligation to disregard the financial effect upon them, as argued by the seller.
4. Conclusion

The conclusion which can be drawn from these cases is that an obligation to use "reasonable endeavours" means an obligation to take action but only to the extent that such action does not disadvantage the obligor. In practice it is therefore likely that this means only a minimal effort is required.

On this basis, when acting for the party to whom an obligation is due, lawyers should be more resistant than perhaps they are to conceding the weakening of a "best endeavours" obligation to one of "reasonable endeavours". The argument, which falls clearly out of the cases referred to in Section 2 above, is that "best endeavours" is restricted by the concept of reasonableness and the bounds of reason in any event.

On the other hand, when acting for the obligor, it clearly remains preferable to be subject to an obligation of "reasonable endeavours" rather than "best endeavours". It will continue to be possible to exploit the custom, in commercial contracts at least, that "reasonable endeavours" obligations will generally be acceptable in place of "best endeavours". Perhaps that custom is in part derived from the mistaken view that "best endeavours" is a more onerous obligation than the case authorities clearly show; it does not require the incurring of any cost however great to achieve the discharging of the obligation if that would be more than a reasonable person would do in the circumstances.

Of course, where possible and when a party will accept clear and unambiguous statements of his obligation, it remains best to try and spell out the specific obligations and the steps required by that party to discharge the obligations in the contract itself. For example, in a situation requiring a party to use "best endeavours" to obtain planning permission, if that party does not wish to appeal an adverse decision in the first instance it would be advisable to set this out clearly in the document rather than to have to argue, at a later stage, the meaning of using "best endeavours" or "reasonable endeavours" in the context concerned.

Finally, as a word of caution it should be noted that it appears that the Courts will treat the term "all reasonable endeavours" as stronger than "reasonable endeavours" but weaker than "best endeavours". Quite where that leaves an obligor is uncertain but common sense suggest that more active steps and possibly greater expenditure will be required in order to comply with the obligation created.

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