

Best
Endeavours

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BEST ENDEAVOURS

Introduction

The terms “best endeavours”, “reasonable endeavours” and “all reasonable endeavours” are commonly used by solicitors in the drafting of agreements and contracts. When making use of these terms, it is key to have an understanding of their precise meaning and to also be aware of the obligations their inclusion place on clients.¹

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.”²

This very onerous obligation has been lessened somewhat over the years to allow for the concept of standards of reasonableness to be introduced into its meaning. What is now required is that a person must do “all that a reasonable person reasonably could do in the circumstances.”³

In other words, a party must take all steps in their power which “are capable of producing the desired result...”, they must take all the steps a reasonable person “acting in their own interest and desiring to achieve that result would take.”⁴

An obligation to use best endeavours probably requires a party to take all the reasonable courses he/she can. They must act honestly, reasonably and make a positive effort to perform the relevant obligation.

In the instance 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

¹ Due to the absence of Irish case law this article has considered the position under English law only.

² Sheffield District Railway Co. –v- Great Central Railway Co. (1911) 27 TLR 451

³ Pips (Leisure Production) Ltd. –v- Walton (1980) 43 P&CT 415

⁴ IBM UK Limited –v- Rockware Glass Ltd [1980] FSR 335 (CA)

to their contractual obligations.”⁵ In other words a company must do all that is reasonable in the circumstances.

This obligation does not extend to a situation where a company should put itself at risk of financial ruin to fulfil its obligation.⁶ It does seem clear however that it should carry out such actions that are commercially practicable and incur any reasonable associated cost in order to fulfil its responsibilities.

What amounts to best endeavours must be considered at the time of performance or breach of the undertaking and not at the time of the creation of the contract.⁷

Reasonable Endeavours

The obligations imposed by the term reasonable endeavours are “appreciably less than (those imposed by) best endeavours”⁸ 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 ensure that criteria are included in the contract clearly stating what the parties must do in order to meet their reasonable endeavours obligations.⁹ Without such 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. No criteria are in place to enable a third party to determine whether or not the behaviour of the relevant party amounts to reasonable endeavours in the circumstances.¹⁰

⁵ Terrell –v- Mable Todd & Co. Ltd (1952) 69 RPC 234

⁶ Terrell –v- Mable Todd & Co. Ltd (1952) 69 RPC 234

⁷ Midland Land Reclamation Ltd and Leicestershire County Council –v- Warren Energy limited 1995 ORB No. 254

⁸ UBH (Mechanical Services) Ltd. –v- Standard Life Assurance Co. The Times 13th November 1986

⁹ RAE Lambert –v- HTV Cymru (Wales) Ltd 1998 Court of Appeal

¹⁰ Phillips Petroleum Co UK Ltd –v- Enron Europe Ltd [1997] CLC 329

In an important new development the English High Court¹¹ has recently held that where a clause in a contract requires a party to use reasonable endeavours and the clause specifies certain steps to be taken in order to fulfil an obligation to utilise reasonable endeavours, those steps would need to be taken even if it involves that party sacrificing their own commercial interests. This development clearly increases the onus placed on parties who undertake an obligation to utilise reasonable endeavours.

The Court reiterated 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 probably requires a party to take all the reasonable courses he can.

All Reasonable Endeavours

All reasonable endeavours has been described as “something more than reasonable endeavours but less than best endeavours.”¹²

Clearly while it does not impose as onerous an obligation as best endeavours, an obligation of all reasonable endeavours requires the party in question to expend more than merely minimal efforts in an attempt to fulfil its responsibility, but the obligor is not required to take all those steps in its 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”¹³ it is still considered an onerous obligation requiring a party to do all that is prudent and reasonable in the circumstances.

¹¹ Rhodia International Holdings Ltd –v- Huntsman International LLC [2007] EWHC 292

¹² UBH –v- Standard Life

¹³ Midland Land Reclamation Ltd –v- Warren Energy Ltd (20 January 1997 QB)

Reasonable endeavours undertakings create a lower level obligation with only minimal effort required, however in the absence of clear criteria these undertakings may 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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