

## **GUIDANCE ON OBLIGATIONS THAT ARE LESS THAN ABSOLUTE**

Commercial agreements often include an obligation on a person or company to use their 'best endeavours' or to use 'reasonable endeavours' to achieve a particular outcome. Neither term creates an absolute obligation and case law indicates considerable latitude as to the threshold of effort imposed by such obligations. However three recent overseas cases from 2007 suggest that the relative meaning of 'endeavours' obligations is becoming more settled.

In the UK case of *Rhodia International v Huntsman*, Rhodia agreed to sell its chemical business to a subsidiary of Huntsman. The sale contract required Rhodia and Huntsman to use 'reasonable endeavours' to obtain the necessary consents for the transfer of all the third party contracts. Huntsman was also obliged, if reasonably required by a third party, to provide a parent company guarantee. The subsidiary was making significant losses. Huntsman declined to guarantee the obligations of its subsidiary to an energy supply company which then refused to allow Rhodia to assign a key energy supply contract. Rhodia issued proceedings against Huntsman for failing to exercise 'reasonable endeavours' to secure consent to the transfer.

The High Court of England and Wales held "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." The Court held that "it may well be that an obligation to use 'all reasonable endeavours' equates with using 'best endeavours'." The Court confirmed that an obligation to use 'reasonable endeavours' does not require a party to sacrifice its own commercial interests, with the exception that where the contract specifies certain steps which have to be taken as part of the exercise of 'reasonable endeavours' (e.g. the giving of a guarantee), those steps would have to be taken, even if that could be regarded as sacrificing a party's commercial interests. Consequently Rhodia's claim succeeded.

In the UK case of *Yewbelle v London Green Developments*, the seller under a conditional property sale agreement gave a commitment to use 'all reasonable endeavours' to obtain a development agreement with the planning authority to allow development of the site. Subsequent to the sale agreement, the planning authority introduced more stringent planning requirements and the seller discovered an encroachment on the site which it would have had to buy, at significant cost, to obtain planning consent. The seller told the buyer that because the planning agreement could not be obtained, the sale agreement was at an end. The buyer wanted to go through with the purchase and argued that the seller had not exhausted 'all reasonable endeavours' to obtain a planning agreement.

The Court of Appeal of England and Wales confirmed that an obligation to use 'all reasonable endeavours' did not require the seller to sacrifice its own commercial interests, however it did require the seller to go on using endeavours until the point was reached when all reasonable endeavours have been exhausted, subject to the qualification that account must be taken of events as they unfold, including extraordinary events. Under the circumstances the Court held that the seller had used 'all reasonable endeavours' to meet its obligations and the buyer's claim failed.

In the Australian case of *Waters Lane v Sweeney*, a property developer had given a commitment to a property owner under a heads of agreement to use 'all reasonable endeavours' to obtain, before a sunset date, Council consent to development of the property. The Court held that Waters Lane had taken a 'softly softly' approach with the Council and while this may have been reasonable in other circumstances, it was insufficient to constitute the use of 'all reasonable endeavours'.

The New South Wales Court of Appeal held that "an obligation to use 'best endeavours' does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object,

but no more.” The Court said “if this means that there is no relevant difference between the standard constituted by the expression 'all reasonable endeavours' and that constituted by the expression 'best endeavours' then so be it.”

While an obligation to use 'reasonable endeavours' is likely to be less stringent than an obligation to use 'best endeavours' the recent English and Australian cases indicate that there may be little or no difference between the obligation to use 'best endeavours' and 'all reasonable endeavours'. These statements on the extent of 'endeavours' obligations should be considered by contracting parties at the outset in deciding how far they are prepared to go to achieve the required result.

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