



Best or Reasonable? A look at the law on Best and Reasonable Endeavours in Property Transactions

BRIEFING

Introduction

Property transactions will often call for one or both parties to promise to fulfil future obligations, which are incapable of being achieved when the deal is struck. This usually arises where there is a contractual requirement to obtain planning permission or grant funding, to release charges or to satisfy Section 106 obligations. This is accomplished by one or both parties agreeing to use either 'best' or 'reasonable' endeavours to undertake their contractual obligations.

In other words, they are promises to make efforts to fulfil the contractual bargain reached. Generally, an obligation to use reasonable endeavours is recognised to be less onerous than best endeavours. In practice, is there really a difference between the two and how much effort is enough?

What does Best Endeavours Mean?

The courts have often been asked to consider what best endeavours actually means, but lawyers and contracting parties alike recognise this to be a high standard and really, it is to do one's very best. It has been defined as 'leaving no stone unturned'ⁱ as long ago as 1911. This has always been tempered with the need to balance the costs involved in performing the obligationⁱⁱ but

otherwise to use all efforts that can sensibly be undertaken.

Confusingly, as the law has developed the courts have recognised that the duty to use best endeavours is limited to doing all that can reasonably be expected to be done in the circumstances,ⁱⁱⁱ judged by the standards that the company directors or officers acting in the company's best interest would apply. It is not necessary for a party to make efforts to comply with an obligation if the cost or difficulty of compliance is not justifiable or reasonable. There will be no breach where a party refuses to take any action which is not in its interest^{iv} and likewise where the action required would cause reputational issues or loss of goodwill for that party.

In a leading 1980 case^v, the duty was defined further as being 'an obligation to take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to achieve the desired objective, would have taken'. It is a high standard or level of commitment to achieve a promised action but not 'the next best thing to an absolute obligation or a guarantee'^{vi}.



How is this different from Reasonable Endeavours?

Reasonable endeavours are a lower standard than 'best', or 'appreciably less than best'^{vii}. It is easy to be confused about the difference given that 'best' endeavours must also be reasonable. Perhaps the easiest distinction is that a party required to use reasonable endeavours is free to make a full commercial assessment of the impact of so doing. Factors that can be taken into account include the weight of the obligation in the covenant, other commercial considerations and practicalities, the party's relationship with sub-tenants or third parties and the lack of certainty with litigation. It is also legitimate to consider the likely success of performing its reasonable endeavours.

There is a string of case law that supports this lower standard and gives greater liberty to a party subject to this requirement to consider whether it can and will comply with the obligation. Perhaps it is most usefully considered as an obligation to take action but only to the extent that such action does not financially or commercially disadvantage the person that party.

Practicalities for Property Contracts

The standards are very different and what is reasonable or best can be very subjective to each party to the transaction. Worse, the parties' views and the court's views may also be different. This can lead to uncertainty and the risk of dispute. Consequently, specific obligations which are important to one party should be clearly defined in

an agreement to minimise the risk of a disagreement arising between the parties.

As a word of caution, if the parties do define the precise steps that need to be taken by way of reasonable endeavours, then those steps must be strictly adhered to^{viii}. This is the case even if compliance would involve the sacrificing of a party's commercial interests. There may be scope to argue in the current economic climate that the courts should take such an aggressive stance against a defaulting party. Sufficient consideration must be given to the consequences of complying with any specific obligations before accepting them.

If there is some doubt as to what reasonable or best endeavours might (or might not) entail, time or financial limits on the obligations can be imposed together with long stop or other termination provisions. The obligations can be very clearly and precisely defined. Care should be taken when drafting such precise obligations because if they are too difficult to achieve then transactions will fail, with resulting abortive costs. Properly considering and obtaining advice on the element of risk that a transaction entails and evaluating whether this is acceptable is a more practical way forward. All contracts, property transactions included, involve a degree of good faith and belief that the other party will observe its obligations together with a degree of risk.



Summary

The market and the courts recognise the need to give parties the freedom to back away from an obligation that is obviously harmful to reputation or business or uneconomic, but generally do act to preserve the need to adopt quite high standards to fulfil best or reasonable endeavours. The present market is unlikely to change that.

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ⁱ Sheffield District Railway v Great Central Railway 1911 27 TLR 451

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ⁱⁱⁱ Terrell v. Mable Todd and Co (1952) 69 RPC 234, confirmed in Rackham and Another v. Peek Foods Limited (1990) BCLC 895

^{iv} Rackham and Another v. Peek Foods Limited (1990) BCLC 895

^v IBM UK v. Rockware Glass 1980 FSR 335

^{vi} Midland Land Reclamation Ltd and Leicestershire County Council v. Warren Energy Ltd, 1997

^{vii} UBH (Mechanical Services) Ltd v. Standard Life Assurance Company, The Times, 13 November 1986

^{viii} Rhodia International Holdings Ltd v Huntsman International LLC