

BEWARE “ALL REASONABLE ENDEAVOURS”

The High Court has found that a duty to provide “all reasonable endeavours” required a party to act against its own commercial interests.

In *Jet2.com Limited v Blackpool Airport Limited* [2011] EWHC 1529 (Comm), the Court decided that Blackpool Airport’s obligation towards a low cost airline was within its control and that it was obliged to perform its duties even though the contract had become commercially unviable.

The Court noted that the term “all reasonable endeavours” is closer to “best endeavours” than to “reasonable endeavours”, which remains the least stringent of the three. The ruling has also made it clear that there is no all-encompassing definition available that can be applied to every case. As such, endeavour clauses will need to be considered in the context of the commercial background and the entirety of the contract.

Background

In September 2005, Jet2 entered into a 15 year letter of agreement with Blackpool Airport. Clause 1 of the agreement provided that:

*“Jet2.com and BAL will co-operate together and use their **best endeavours** to promote Jet2.com’s low cost service from BA (ie Blackpool Airport) and BAL will use **all reasonable endeavours** to provide a cost base that will facilitate Jet2.com’s low cost pricing.”*

The agreement did not contain any restrictions in relation to operating hours nor did it deal with operations outside the airport’s normal opening hours. The airport’s published opening hours were 6am to 8pm in summer and 7am to 9pm in winter. It was understood by both parties that the Jet2 operations would not be restricted to the published opening hours, given that its business model required a degree of flexibility. In fact, Jet2 operated a number of flights outside of these hours for about four years.

Blackpool Airport was making substantial operating losses and the management sought to cut its losses by only allowing flights to take off or land within the airport’s opening hours. On 22 October 2010, the airport informed Jet2 that from 12pm on 29 October 2010 (giving Jet2 a week’s notice to change its schedule) it would not accept any departures or arrivals outside of normal opening hours. This culminated in two of Jet2’s flights diverting to Manchester exposing Jet2 to additional expenses.

On 4 November 2010, Jet2 applied for an injunction against the airport. The injunction was subsequently renewed until the trial in March 2011.

At the trial, Jet2’s main argument was that on a proper construction of the agreement, Blackpool airport were under an obligation to accommodate Jet2’s flight movements between 6am and 12pm, and outside those times, to do its best to accommodate such movements. Blackpool Airport contended that the commitment to use “all reasonable endeavours” meant no more than a commitment to act in a way consistent with its commercial interests. The agreement did not expressly require Blackpool Airport to operate outside normal hours. Clause 1 permitted the airport to choose whether it operated outside normal hours.

Decision

His Honourable Judge Mackie QC found in Jet2’s favour and held that Blackpool Airport were in breach of the agreement by refusing to enable Jet2 to operate its flights outside of the airport’s opening hours.

The Judge distinguished this case from others concerning the construction of “all reasonable endeavours”. One of these contained an agreement “*to use all reasonable endeavours to agree the date on which deliveries were to begin. . .*” There was a fall-back position that would kick in if no agreement was reached. Here the court found it “*impossible to say that they [ie the contractual terms] impose on the buyer a contractual obligation to disregard the financial effect on him*” and “*if the obligation were to be strait-jacketed in that way . . . [it] would have been expressly stated*”. In another case, a “*party buying land was obliged to use all reasonable endeavours to secure a completed section 106 Agreement and the other was under no obligation to complete in the absence of such an Agreement*”. Here, the issue was “*whether nothing more could have been done*” to obtain it. The Court held that on the facts the party was not required to go against its commercial interests.

Significance and way forward

This case deals with the important issue of the construction of “endeavour clauses”, which are of particular relevance to those drafting commercial agreements.

In effect, what a particular contract means is “*what a reasonable person with all the relevant background knowledge of the parties at the time when the contract was made would have understood those parties to mean by the language they have used*”. The Judge made it clear that “*the meaning of words is shaped by their context*”. The court will also consider the facts of the individual case to ascertain “*whether or not all reasonable or best endeavours have been made*”.

Each case depends on the overall construction of the agreement as a whole, together with the facts of the case, and such construction may also depend on whether the obligation is within the power of the party or on an act of a third party (e.g. the grant of a planning permission).

The three main types of “endeavour clauses” can be summarised as follows:

- “Reasonable endeavours” – the least stringent of the three. Whilst a party under an obligation to do X may be required to incur limited expenditure, it is unlikely that it will be required to go against its own commercial interests. The courts will consider the party’s circumstances and interest.
- “All reasonable endeavours” – a compromise between “reasonable endeavours” and “best endeavours”, but the courts have found that it is closer to “best endeavours”. Meeting an “all reasonable endeavours” obligation may involve expenditure which obliges the party to go against its commercial interests. It will depend on the facts of the case and will boil down to the issue of construction. Where an obligation is within a party’s control then it may be required to go against its commercial interests.
- “Best endeavours” – the most stringent of the three. As a general rule, the courts will consider the obligor’s obligation from the obligee’s perspective. The obligor may have to act against its own commercial interest to fulfil its part of the contract.

When drafting, or agreeing the drafting of, a claim that includes an “endeavours” obligation, consider carefully how strict an obligation you require, or are prepared to undertake. Anything more than just “reasonable endeavours” may, in the light of this case, be a stricter and more costly obligation than you expected.

If you would like advice on the use of “endeavours” clauses and their potential consequences, please contact James Hutchinson on 020 7420 8653 on at j.hutchinson@beale-law.com.