OBLIGATIONS TO USE REASONABLE ENDEAVOURS

by Thomas Jefferies
Landmark Chambers
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1. Development agreements, conditional contracts and options frequently provide for one party or the other to take steps to achieve something whose outcome cannot be guaranteed. In such cases, the agreement usually obliges the part or parties to use reasonable endeavours, act in good faith and co-operate with each other. This paper is concerned with obligations to use reasonable and best endeavours.

2. There are some principles applicable to all such obligations. However, specific issues arise in relation to obligations to negotiate and enter agreements.

Different degrees of endeavours.

3. An obligation to use best endeavours requires the promisor to take all those steps in its power which are capable of producing the desired result, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take. See *IBM UK v Rockware Glass Ltd* [1980] FSR 335, 348 CA at 343. The promisor must do his best, not his second best. *Sheffield District Railway v Great Central Railway Co* (1911) 27 TLR 451 at 452.

4. An obligation to use all reasonable endeavours means the same as best endeavours. See *Overseas Buyers v Granadex* [1980] 2 Lloyd's Rep 608 at 613; *Rhodia International v Huntsman International* [2007] EWHC 292.

5. It is not necessary to carry on endeavours if further steps would have had no real/worthwhile/substantial/significant chance of achieving the desired result. See *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475 at [32] If there is one insuperable obstacle, there is no need to seek to overcome other obtsacles. See Yewbelle at [103].

6. An obligation to use reasonable endeavours requires the promisor to do what is reasonable in the circumstances. What is reasonable will be determined by reference to the facts and expert evidence if necessary.

7. The difference between best and reasonable endeavours was explained as follows in *Rhodia International v Huntsman International* [2007] EWHC 292 at 33

> "This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. 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."

8. An obligation to use reasonable endeavours to obtain planning permission will normally include an obligation to appeal if appropriate. See *IBM UK v Rockware Glass Ltd* [1980] FSR 335, 348 CA. It may be reasonable to decide not to appeal if, for example, the prospects are uncertain, or if it would result in substantial delay which would not be reasonable in the circumstances. See *Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455.

9. It appears that the burden is on the party obliged to use reasonable endeavours to prove that he has done so. See *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475 at 104.

Can the promisor take his own interests into account?

10. In *Brauer v James Clark* [1952] 2 All ER 497, CA, there was a contract for the sale of goods subject to the UK seller obtaining an export licence to enable him to import the goods

from Brazil. The seller had to take reasonable steps to obtain the export licence. He could obtain a licence, but only on terms that he imported the goods at a price which would make the contract unprofitable. It was held that this was not a good reason for not obtaining a licence, because the seller had agreed to sell at a fixed price, and had agreed to accept the risk of an increase in the cost to him. The position would only be different if the licence had only been available on terms outside the contemplation of the parties.

11. A different approach was taken in *UBS (Mechanical Services) Ltd v Standard Life Assurance Co*, 13.11.1986 unreported, where Rougier J had to consider an obligation by a landlord to use reasonable endeavours to procure that all its tenants on an industrial estate should take all their heating requirements from the Claimant. The judge reviewed the authorities and concluded that

> "..r*easonable endeavours" first of all must mean something appreciably less than "best endeavours"... It really comes down to a balancing act whereby, in the present case, Standard Life were obliged to put in one scale the weight of their contractual obligation to UBH, and in the other they were entitled to place all relevant commercial considerations, including the question of their relationship with their tenants, their local reputation as landlords; the ease or otherwise with which new tenants might be procured; the cost and uncertainties of any proposed litigation, and the expense to them occasioned by the continued operation of the tenants' covenant to take UBH heating and none other. In relation to any proposed course of action, the chances of achieving the desired result would also be of prime importance*."

This was based on a review of *Agroexport State Enterprises v Compagine Europeene de Cereales* [1974] 1 Ll R 499; *Terrell v Mabie Todd & Co* 69 RPC 234; *Sheffield Diostrict Railway v The Great Central Railway* (1911) 27 TLR 451; *James Finlay & Co v NV Kwik Hoo Tong* [1929] 1 KB 400. *Brauer v James Clark* was not referred to.

12. In *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475 the Court of Appeal approved (at 29) the judge's (Lewison J) interpretation of the obligation to use reasonable endeavours

> "122…In using reasonable endeavours towards that end, I do not consider that Yewbelle was

required to sacrifice its own commercial interests.

13. The issue arose most recently in *Jet2.com Limited v Blackpool Airport Limited* [2011] EWHC 1529. The airport's standard published opening hours were between 7am and 9pm, and it was under no obligation to operate outside those hours. However, in practice it operated outside these hours for low cost airlines, who need to operate early and late to maximise use of their planes. The parties to this claim agreed

    "to co-operate together and use their best endeavours to promote Jet2.com's low cost services from [the airport] and BAL will use all reasonable endeavours to provide a cost base that will facilitate Jet2.com's low cost pricing"

14. When the service proved unprofitable to the airport's new owners, it withdrew out of hours services without warning. Jet2 contended that the airport was in breach of the above provision. The airport claimed that it was not obliged to sacrifice its own commercial interests. The Judge cited the above principles, and held that the airport was in breach of its obligations. The focus was on what risks the parties had contemplated and assumed under the contract, and this is probably the best way of reconciling the cases.

Obligation to use reasonable endeavours to enter an agreement

15. An agreement to execute an agreement containing specified terms is enforceable. See *Morton v Morton* [1942] 1 All ER 273. So for example, and agreement to execute a s106 agreement in the terms of an attached draft.

16. Likewise, an obligation to enter a s106 obligation if reasonably required is enforceable. This, like an obligation on an assignee to give a direct covenant to a landlord if reasonably required, imposes a stricter obligation. Such steps will have to be taken, even if that could on one view be said to involve the sacrificing of a party's commercial interests. See *Rhodia International v Huntsman International* [2007] EWHC 292 at 35.

17. What about obligations to use reasonable endeavours to reach agreement with the other party, or a third party? It is well understood that an agreement between two parties to reach an

agreement with each other is not an agreement at all. The authority cited for that proposition is *May and Butcher v The King* [1934] 2 KB 17. However, the courts have been increasingly willing to enforce agreements to agree contained in a long term, otherwise enforceable agreement. The law on this issue was reviewed in *Marmidoil-Jetoil Greek Petroleum Company SA* [2001] EWCA Civ 406, and the following principles set out at paragraph 69:

i. "Each case must be decided on its own facts and on the construction of its own agreement. Subject to that,

ii. Where no contract exists, the use of an expression such as "to be agreed" in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that "you cannot agree to agree".

iii. Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.

iv. However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

v. Where a contract has once come into existence, even the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence.

vi. Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum reddi potest*.

vii. This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.

viii. For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable.

ix. Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in section 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in section 15(1) of the Supply of Goods and Services Act 1982).

x. The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute."

18. These principles were applied in *Scammel v Dicker* [2005] EWCA Civ 405, where the court emphasized that it is only in the absence of agreement as to essential terms that a contract is in danger of failing for uncertainty because further agreement is required.

19. Draftsman sometimes seek to circumvent the difficulties of enforcing an agreement to agree by providing that the parties should negotiate in good faith. There is at present high authority to the effect that English Law does not recognise or enforce a duty to negotiate in good faith. See *Walford v Miles* [1992] 2 AC 128, HL; *Little v Courage Ltd* (1994) 70 P&CR 469, CA. However, *Walford v Miles* was a case in which there was no agreement at all. There is a tantalising suggestion in *Petromec Inc v Petroleo Brasileiro SA Petrobas* (No 3) [2005] EWCA Civ 891; [2006] 1 Lloyds Rep 121, CA that the position may be different where an obligation to negotiate on some issue in good faith is found in a binding agreement:

> 115. This brings me to the question whether an express obligation to negotiate in good faith is enforceable or not. Anything I say on this topic is not essential to the disposition of the appeal but in deference to the arguments presented, I would like to say a few words.
> 116. The traditional objections to enforcing an obligation to negotiate in good faith are (1) that the obligation is an agreement to agree and thus too uncertain to enforce, (2) that it is difficult, if not impossible, to say whether, if negotiations are brought to an end, the termination is brought about in good or in bad faith, and (3) that, since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would have been reached, it is impossible to assess any loss caused by breach of the obligation. I doubt, however, if any of these objectives would be good reasons for saying that the obligation to negotiate in good faith contained in clause 12.4 is unenforceable in this particular case.
> 117. The first objection, that the obligation is an agreement to agree, carries little weight in the present case. It is contained in the Supervision Agreement which is itself legally enforceable. (No one suggested that, if the obligation to negotiate the cost of the upgrade is unenforceable, that affects the rest of the agreement.) The obligation only relates to the cost to Petromec of the Roncador upgrade over and above the South Marlim upgrade and the cost of any variation orders. The "cost to Petromec" is comparatively easy to ascertain (especially if no element for profit is to be included). If agreement is not reached, the court will itself have to ascertain what the reasonable cost of such upgrade should be. If there are any ascertainable losses which arise from a failure to negotiate in good faith, they will likewise to ascertainable with comparative ease.
> 118. These reasons also apply to the third objection, the difficulty of ascertaining loss. If the court is able to conduct the exercise of finding the reasonable cost to Petromec of the

upgrade, there should be no difficulty in deciding what the result of good faith negotiations is likely to have been. Unless there are special factors present, it is likely to be the same as the reasonable cost. No doubt there could be argument in the present case as to whether, if negotiations did not proceed (but should have proceeded) in good faith, they would have embraced an uplift and whether, in that event, the uplift would have been in any particular amount, but it is not uncommon for courts to have to assess, by way of calculating damages, whether a claim against a third party was good or not and for how much it might have been settled. Any exercise in relation to uplift would raise similar (but not insurmountable) problems. To this extent, therefore, I would not share the concerns which the judge expressed in paragraph 170 of his judgment.

119. It is the second objection that is likely to give rise to the greatest problem viz that the concept of bringing negotiations to an end in bad faith is somewhat elusive. But the difficulty of a problem should not be an excuse for the court to withhold relevant assistance from the parties by declaring a blanket unenforceability of the obligation. Once the fraud amendment has been permitted, the court is going to have to consider the reasons why the negotiations were terminated in any event. If fraudulent representations as to the intention to continue negotiations were made, the obligation to negotiate in good faith is likely to fall away as a separate obligation; if there was no fraudulent representation, it is perhaps less likely that there will have been bad faith in terminating negotiations but it will not be particularly difficult to tell whether there was or not.

120. The authority chiefly relied on by Mr Hancock in support of blanket unenforceability was the decision of the House of Lords in *Walford v Miles*, which (of course) binds us for what it decides. The main distinction between that case and this was that in that case there was no concluded agreement at all since everything was "subject to contract"; there was, moreover, no express agreement to negotiate in good faith. There were negotiations for the sale of a business in the course of which the defendant prospective vendor agreed not to negotiate with any third party and to negotiate only with the claimant prospective purchaser. All the negotiations were subject to contract and the House of Lords held that the "lock-out agreement" was unenforceable because there was no provision saying how long it was to last. The claimants sought to resolve this difficulty by asserting that it was an implied term of the agreement that, while the defendant wanted to sell the business, they would negotiate in good faith with the claimants. The House of Lords held that it was impossible to imply such a term since it was unworkable in practice and inherently inconsistent with the position of a party negotiating "subject to contract". The lock-out agreement was therefore too uncertain to be enforceable. As Lord Ackner (with whom the rest of their Lordships agreed) said at page 138G:-

> ". . . . while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content."

121. That shows the difference from the present case. Clause 12.3 of the Supervision Agreement is not a bare agreement to negotiate. It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors and issued under the imprint of Linklater & Paines (as Linklaters were then known). It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has "no legal content" to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men, to adapt slightly the title of Lord Steyn's Sultan Azlan Shah lecture delivered in Kuala Lumpur on 24th October 1996 (113 LQR 433 (1977)). At page 439 Lord Steyn hoped that the House of Lords might reconsider *Walford v Miles* with the benefit of fuller argument. That is not an option open to this court. I would only say that I do not consider that

> *Walford v Miles* binds us to hold that the express obligation to negotiate as contained in clause 12.4 of the Supervision Agreement is completely without legal substance.

20. In *Walford v Miles* Lord Ackner drew a distinction [at p138] between an agreement to negotiate, which was unenforceable, and an agreement to use best endeavours, which was not. However, the Courts have been reluctant to enforce an agreement to use reasonable endeavours to reach an agreement, either with each other or a third party, unless there are identifiable objective criteria by which to judge their endeavours, or a mechanism for resolving any dispute.

21. The issue was considered in *P.&O. Property Holdings Limited v Norwich Union* (1994) 68 P&CR 261, HL, concerning a shopping centre development. The landowner, the London Borough of Sutton, entered an agreement with the developer, P&O, to grant a headlease of 200 years to P&O or its funder (Norwich Union) in consideration for the construction of a shopping centre and a profit rent. P&O covenanted with Sutton ("the Council") to "*use their reasonable endeavours to effect sub-letting of all units...having regard to the principles of good estate management*...". The headlease was eventually granted to the funder, Norwich Union, which covenanted "*..to use its reasonable endeavours to underlet or procure the underletting of the [units] at the Open Market Rent at all times in accordance with the principles of good estate management and to the mutual advantage of the parties hereto*..". The case turned on the meaning of a provision in the funding agreement between P&O and Norwich Union, by which "*the Developer and the Society shall use their reasonable endeavours to obtain a letting of each [unit] in accordance with the remainder of this clause and as soon as reasonably possible after the terms of the said letting have been agreed between the Society the Developers the tenant and the Council (which shall include agreement as to the payment of any premium) the Developers shall grant an agreement ...whereby ..the Society will grant to the underlessee an underlease substantially in the form signed*...". The question was whether P&O were bound to agree to the payment of a reverse premium to a tenant if a hypothetical reasonable landlord would agree to pay it. Under the funding agreement any such payment would have to be borne by P&O. The Judge had granted a declaration that any reverse premium was to be taken into account as part of the Development Costs if it would reasonably be agreed by a landlord in order to achieve a

letting having regard only to his own interest as such landlord and to principles of god estate management but otherwise unconstrained by the terms and effect of the said agreement.

22. It was argued by Norwich Union that the concept of reasonable endeavours connotes some objective standard because otherwise the obligation would be pointless, given that the parties had differing interests. The test should be what a hypothetical reasonable landlord would agree.

23. It was held by the House of Lords that

    a. the agreement could not be construed as obliging the parties to grant leases on reasonable terms. The word "reasonable" qualified "endeavours", not the terms of the letting;

    b. there could be no obligation to grant a lease or pay a reverse premium unless and until agreement had actually been reached;

    c. alternatively, there was nothing in the agreement to justify the declaration as to what factors the landlord was required to take into account;

    d. it would be impossible to determine what a reasonable landlord would do without having regard to his nature, means and management.

24. In the *P&O* case the House of Lords drew attention to the difficulty of ascertaining what agreement a reasonable landlord would be willing to reach with a prospective tenant, since it depends on his nature, means and management aims. A similar issue arose in *Phillips Petroleum Co UK Ltd v Enron Europe Limited* [1997] CLC 329, CA. The parties had entered a gas supply agreement, under which they agreed to build the necessary facilities and then "*to use reasonable endeavours to agree..the date on which the Seller..will commence deliveries ..to the Buyer (the Commissioning Date)... If the Buyer and Seller are unable to agree...the Commissioning Date shall be 25.9.1996*". The plant was built by February 1996, and there was no technical or operational reason for not agreeing the Commissioning Date. Nonetheless the Buyer refused to agree the Commissioning Date because it perceived it to be in its own financial interest to do so. The seller argued that each party was under a duty to use its reasonable endeavours to agree the date having regard only to criteria of technical and

operational practicability. That argument was rejected. The Court held that the Buyer was entitled to take into account his own financial interests. The obligation to use reasonable endeavours to agree was unenforceable, as no more than an agreement to agree. It was conceded that no term needed to be implied to give business efficacy to the agreement, as there was a long stop date.

25. In one subsequent case, *RAE Lambert v HTV (Wales) Ltd* [1998] FSR 874, CA at 880-1, it was held that an obligation to use reasonable endeavours to enter an agreement with a third party was enforceable. However, neither *P&O* nor *Phillips* was cited. Furthermore, since no attempt at all had been made to enter the required agreement, it was not necessary for the court to address the issue of how the reasonableness of the endeavours should be judged where there is a conflict between the interests of the parties to the agreement.

26. The difficulty in both *P&O* and *Phillips* was that there were no objective criteria by which to judge their endeavours to reach an agreement. If such criteria were specified or implied, it may be that an obligation to use reasonable endeavours to enter an agreement would be enforceable. Thus, for example, in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, an option to purchase land at price to be agreed between two valuers was construed as an agreement to purchase at a fair and reasonable price, which was enforceable. In "*The Didymi*" [1988] 2 LLR 108, CA, an agreement in a charterparty to an equitable decrease in the hire by an amount to be agreed was held to be enforceable because there were ascertainable objective criteria for the amount of the decrease.

27. In *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475, the contract for sale of "one of the ugliest buildings in London" included a provision that

> "The Seller will use all reasonable endeavours by completion to obtain the completed S.106 Agreement and the Buyer will not be bound to complete until the S.106 Agreement has been obtained by the Seller subject to the Buyer hereby indemnifying the Seller against all obligations contained in the S.106 Agreement and the buyer paying the legal costs of the London Borough of Merton in connection therewith"

28. "Section 106 Agreement" was defined as

> "the proposed Agreement to be entered into between the Seller (1) the Seller's mortgagee (if any) (2) and the Mayor and Burgesses of the London Borough of Merton (3) substantially in the form of the draft attached to this Agreement".

29. The draft 106 prevented occupation of the B1 units until a library had been constructed to shell and core. The Council confirmed that the s106 was in an approved form, but after the Agreement was entered, increased its demand. It wanted a lease back of the library at a peppercorn rent, and the library built to a later stage of construction. Furthermore, the parties then discovered that part of the land required for the s106 obligations, to provide a library, was owned by a third party which would want a ransom payment. The seller put forward a revised s106 agreement reducing the footprint of the development to omit the third party land, but the Council, Merton, would not agree to it. The seller asked the buyer to waive the requirement for a s106 agreement, but it would not, leaving the seller in a position where it could not complete.

30. The judge and CA accepted that a term should be implied that the seller could rescind the contract if (i) it complied with its obligation to use reasonable endeavours for a reasonable time (ii) the seller then gave the buyer an opportunity to complete without the s106 (iii) the buyer chose not to complete.

31. It was held that the seller had done all it could. It was accepted that the seller was not required to spend its own money buying off the third party or purchasing its land (104 and 127). There was little discussion of this, since the point was conceded. The most likely explanation is that payment to a third party was outside the contemplation of the parties. The case is thus distinguishable from *Brauer v James Clark.* Furthermore, reaching agreement with a third party raises the issues seen in *P.&O. Property Holdings Limited v Norwich Union.* There were no objective criteria by which to judge on what terms agreement ought reasonably to be reached.

32. Without agreement of the third party, the planning permission would have had to be amended, but that would have had the effect that the s106 agreement would then not be in accordance with the contract. It was held that the seller had not used all reasonable

endeavours to resolve the library issue, but that would have been pointless, as the third party land issue could not have been resolved. The seller thus succeeded on appeal.

33. This illustrates the difficulties in framing an obligation to use reasonable endeavours: if it is framed too widely, and involves reaching agreement with a third party, there is a risk that the obligation will fail to be enforceable for want of objective criteria; if the obligations are too specific, there may be insufficient scope for requiring a party to meet the changing demands of local authorities and others.