

**Commercial**

**In it for the long haul?**

Caroline Kehoe & Joanne Keillor examine the consequences of an endeavours obligation on a long term contract

**“P**arties should approach an endeavours obligation contained within a long-term contract with particular caution.”

What are the implications of an endeavours obligation in a long-term contract? What happens if the commercial circumstances change, such that it is no longer desirable for a party to continue to perform a contract in the same way it has been performed initially? Can the party limit or abandon its performance because it would otherwise incur a loss?

These issues arose in the case of *Jet2.com Limited v Blackpool Airport Limited* [2012] EWCA Civ 417, [2012] All ER (D) 24 (Apr) where the Court of Appeal found, by a majority, that Blackpool’s obligation to use best endeavours to promote Jet2’s low-cost services gave rise to an enforceable obligation to operate outside normal opening hours, as this was essential to Jet2’s business model. Blackpool could not escape this obligation on the basis that to comply would be unprofitable.

**Background**

In September 2005 Jet2 and Blackpool entered into an agreement setting out the terms on which Jet2 would operate from Blackpool’s airport over a 15-year period. Clause 1 stated that Jet2 and Blackpool would “co-operate together and use their best endeavours to provide [Jet2’s] low cost services” from the airport, and Blackpool would “use all reasonable endeavours to provide a cost base that will facilitate [Jet2’s] low cost pricing.”

The agreement was silent about the hours during which Blackpool would accept aircraft movements. Blackpool’s normal opening hours were 7am to 9pm. However, for over four years, Jet2 operated regular departures and arrivals outside the normal opening hours, inevitably causing Blackpool to incur additional costs in providing support services. Following a change of ownership, in October 2010, Blackpool gave Jet2 seven days’ notice that it would not accept flights scheduled outside normal hours.

Jet2 sought damages for breach of contract and a declaration (having obtained an interim injunction pending the outcome of the claim) that Blackpool was obliged to accept aircraft movements outside normal hours. Blackpool argued that it was entitled to take into account its own commercial interests when considering what steps to take in considering its “best endeavours”, such that if the additional revenue it obtained from handling aircraft movements outside normal opening hours did not cover its costs then it was not obliged to do so.

The trial judge held that Blackpool was in breach of contract in refusing to handle flights outside normal hours, but refused the declaration sought. Blackpool appealed, raising a further argument that cl 1 was too uncertain to give rise to an enforceable obligation.

The court had more difficulty identifying the content of the second obligation in cl 1, i.e. to use all reasonable endeavours to provide a cost base to facilitate low-cost pricing. While Jet2 argued that the obligation required Blackpool to help it keep its prices down, Moore-Bick LJ described these words as “too opaque” to enable him to give them a meaning with any confidence. However, it was unnecessary to do so in light of the court’s findings on the first part of the clause.

**Consideration of own commercial interests**

The majority found that whether, and to what extent, a party was required to sacrifice its own commercial interests in complying with a “best endeavours” obligation depended on the nature and terms of the obligation in question.

Moore-Bick LJ’s judgment suggests that where a particular matter is fundamental to the agreement (such as, on the judge’s findings, the ability to operate outside normal hours), it will be difficult to argue that the relevant obligation is subject to consideration of the performing party’s own commercial interests. Moore-Bick LJ said he “approached with some caution”
the submission that Blackpool was entitled to refuse to operate outside normal hours if that caused it to incur a loss, because on the judge’s findings the ability to operate outside normal hours was essential to Jet2’s business and therefore fundamental to the agreement. One would therefore not expect the parties to have contemplated that Blackpool could restrict operations to normal hours simply because it would otherwise incur a loss.

This only went so far, however. The court could “see force” in the argument that if it became clear that Jet2 could never expect to operate low cost services from the airport profitably, Blackpool would not have to incur further losses in seeking to effectively “prop up” a failing business. This is consistent with the approach in Terrell v Mahie Todd and Co. Limited [1952] 69 RPC 234, where it was found that a “best endeavours” obligation does not give rise to an obligation to take action resulting in “the certain ruin of the company or… the utter disregard for the interests of shareholders”. Given the uncertainty about future events, and whether under other circumstances Blackpool might (on proper notice) be entitled to refuse to handle aircraft movements outside normal hours, the judge was right to refuse a declaration that would “rigidly define the scope of [Blackpool’s] obligation for the ensuing ten years”.

**Lewison LJ’s dissenting judgment**

Lewison LJ concluded that cl 1 of the agreement was too vague to give rise to a binding obligation and therefore Blackpool was not in breach of contract. In his view, the clause was too open-ended to allow a court to define or recognise the limits of the obligation and this lack of certainty in the object made the clause unenforceable. Since the agreement was silent about opening hours, that issue simply was not covered by the contract, even if the parties had appeared to understand and implement this objective for four years. Lewison LJ concluded that the judge’s approach was “construction of the contract” not in the sense of interpreting it, but rather in the sense of making the contract the parties had not themselves made. He stated: “If a contract says nothing about a particular topic, then even if that topic is demonstrated by the admissible background to be an important one, the default position must surely be that the topic in question is simply not covered by the contract”.

“Best”, “reasonable” or “all reasonable” endeavours

The Court of Appeal’s judgment does not shed light on the differences between obligations to use “best”, “reasonable” or “all reasonable” endeavours. It was common ground between Jet2 and Blackpool that, for the purposes of their contract, there was no difference between the obligation to use “best” or “all reasonable” endeavours. While nothing turned on that in this case, there may well be a distinction between these terms in other contexts. The traditional view, as stated obiter in UBH (Mechanical Services) Ltd v Standard Life Assurance Company, The Times, 13 November 1986 is that “all reasonable endeavours” is “probably” a middle position somewhere between “best endeavours” and “reasonable endeavours”.

In the case of “reasonable endeavours”, a party is not required to sacrifice its own financial interests (Phillips Petroleum Company United Kingdom Ltd v Enron Europe [1997] CILC 329), save where the contract specifies certain steps which must be taken in relation to the performance of the obligation, when those steps must be taken regardless: obiter Rhodia International Holdings Limited & anor v Huntsman International LLC [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577. In the case of an “all reasonable endeavours” obligation, a party may be required to sacrifice its own commercial interests, although that is not always the case. Yewbelle v London Green Developments [2007] EWCA Civ 475, [2007] All ER (D) 379 (May) suggests that the more control a party has over the result, the more difficult it is to argue that the obligation is limited by consideration of its own commercial interests; this approach was applied by the trial judge in the Jet2 case, who placed emphasis on the fact that Blackpool’s duties related to matters within its own control.

**Practical implications**

The precise meaning of clauses requiring the use of “best”, “reasonable” or “all reasonable endeavours” to achieve some objective does, despite the weight of case law, remain open to a great deal of debate and precedent can be of limited value: “the meaning of the expression remains a question of construction not of extrapolation from other cases…the expression will not always mean the same thing” (per Mackie J, at first instance).

However, this case suggests that endeavours clauses will, if possible, be upheld, in particular in a contract that is already being performed. Where a clause is broadly drafted, it may be difficult to predict in advance not only what is required to fulfill the obligation, but whether it is sufficiently certain to be enforceable. The uncertainty inherent in reliance on such a clause should encourage parties to set out as clearly and precisely as possible what steps a party is required to take (or not take) in order to comply with the obligation and the objective that is sought to be achieved, or at least to set some criteria by which a party’s endeavours can be assessed. These may include the period for which the obligor should pursue a particular objective; the level of any expenditure it must incur (perhaps subject to a minimum spend or monetary cap); and the extent to which a party is entitled to protect its own interests or is required to act in the interests of the other party.

Parties should also give careful consideration to how they perform an agreement in practice. Longmore LJ’s judgment contains the suggestion that the criteria by which a party’s endeavours can be assessed may be affected by how the agreement is in fact performed; in his view, Blackpool’s change of stance after operating out-of-hours flights for four years needed a justifiable explanation. He stated: “Any question of best endeavours was most unlikely to arise before the agreement started to be performed. Once performance has begun, the party who proposed to change the status quo should have to justify that stance.” However, as Lewison LJ remarked, how the parties had in fact operated should not be relevant, since that would come “close to using the parties’ subsequent conduct in order to interpret the contract”.

Parties should approach an endeavours obligation contained within a long-term contract with particular caution. For Jet2 and Blackpool, this litigation has failed to resolve the underlying commercial problem for the remaining term of the contract. As the trial judge remarked “this case may prove to be little more than a practice run for the next one”.

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