

Article Information

Authors: Andrew MacGillivray, Denise Burloff, Ted Williams
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Reasonable endeavours versus best endeavours

As we all know, the terms “reasonable endeavours” and “best endeavours” are commonly used terms in construction contracting, and are also used as an alternative to “must” or “shall”, which requires a party’s mandatory compliance. It is also common place for a party to use the terms “to use reasonable or best endeavours” to limit strict compliance with the Contract.

In reality, the real difference in the standard imposed by these terms may be surprising to parties whom believe that merely attempting to satisfy the obligation is sufficient.

Reasonable endeavours

Although parties consider the obligation to use “reasonable endeavours” as imposing a lesser standard than the obligation to use “best endeavours”, Bathurst CJ in *Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd* [2011] NSWCA 173 considered that the Courts regarded the terms to impose similar obligations.

In the decision of *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd* [2009] NSWCA 341, the Court also provided guidance on how best to interpret the term “reasonable endeavours”. The Court provided that reasonable endeavours may require the party under the obligation to take a step even where success was not guaranteed and or the chance of succeeding was equal to or less than 50%. This doesn’t seem very ‘reasonable’ does it?

Best endeavours

Contrary to many assumptions, to use “best endeavours” still creates a strict and onerous obligation on the party who owes the obligation.

In *Joseph Street Pty Ltd v Tan* (2012) 38 VR 241 the Court (unanimously) considered that to use “best endeavours” requires a party to do all they reasonably can in the circumstances to achieve the purpose of the obligation. The Court (at 256) further considered a number of authorities and interpreted “best endeavours” as requiring a party to:

1. do all it can reasonably do to act in the same manner as a reasonable and prudent party would act if it was acting in its own interests to achieve a certain object;
2. do the acts required to achieve the object with the same vigour expected of a party attempting to secure its own interests until the party reasonably considers that further attempts to achieve the object of the obligation would have a remote chance of succeeding; and
3. within reason, act in a manner so as to leave no stone unturned to achieve the object.

Owen J in the unreported Supreme Court of Western Australia case of *Jetcity Pty Ltd v Yenald Nominees* concluded that at the very least, parties under a “best endeavours” obligation must act honestly, but in some circumstances, it would be expected that parties act in good faith.

Mason J in *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 (approved by Dawson J in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41) stated that the obligation to use best endeavours is measured by what is reasonable in the circumstances, and in consideration of the nature, capacity, qualifications and responsibilities of the person who owes the obligation, in the context of the relevant contract.

It is these considerations of capacity and ability that *Rein AJ in Waters Lane Pty Ltd v Sweeney* [2006] NSWSC 222 regarded as distinguishing the obligation to use best endeavours and reasonable endeavours.

Take note

Parties should be aware of the high standard expected of them when they agree to use reasonable or best endeavours in the overall context of their relevant contract.

Whilst certain alternatives are less onerous than the words “must” or “shall”, there is still a real risk that failure to comply with the obligation could still constitute a breach of contract if the required level of effort is not used to satisfy the reasonable or best endeavours standard.

As such, parties should always take sufficient steps to demonstrate that reasonable or best endeavours are used, and that the party has not merely made an attempt to comply with the obligation (or has done so in bad faith).