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Most parties who have been involved in any sort of commercial negotiations leading to written contracts will be reasonably familiar with the terms "best endeavours" and "reasonable endeavours", used in circumstances where it is not possible to give an absolute contractual commitment. To the non-lawyer there may be very little difference between these phrases but the onus assumed can vary significantly in practical terms depending on the precise wording used.

In short, "reasonable endeavours" requires less effort than "all reasonable endeavours" which in itself is a lesser standard of effort than "best endeavours" but the judgment in a recent case in Scotland has provided some guidance as to the level of obligation implied by the use of the phrase "all reasonable endeavours".

The facts of *MacTaggart & Mickel Homes Limited v Charles and Sandra Hunter* (16 September 2010) [2010 CSOH 130] were that the plaintiff, MacTaggart & Mickel contracted to purchase a site from the Hunters for development. The contract was in effect conditional upon MacTaggart & Mickel obtaining a planning consent satisfactory to them. MacTaggart & Mickel were obliged in the contract to use "reasonable endeavours" to obtain such a planning consent. The Hunters alleged that MacTaggart & Mickel had not used reasonable endeavours because they had not engaged the local authority in pre-application discussions as regards the acceptability of their proposed planning application nor had they taken due account in their planning application of the fact that the proposed site was a conservation area. The court held:

- that the onus was on MacTaggart & Mickel to show it had used reasonable endeavours;
- "reasonable endeavours" only requires a party to take one reasonable course of action, not all reasonable courses of action available;
- the question to be asked of MacTaggart & Mickel's action was what a reasonable and prudent board of directors acting properly in the interests of their company and applying their minds to its contractual obligations would have done to try to obtain the planning permission;
- whether a course of action is "reasonable" is linked to whether that course of action is likely to be successful or not. The fact that MacTaggart & Mickel did not engage in pre-application discussions with the local authority or design units that were traditional to take account of the conservation status of the area was unlikely to actually change the outcome of any planning application; and
- each case is to be decided upon the merits of the relevant facts.

A more recent case of *EDI Centra Limited v National Car Parks Limited* (27 October 2010) affirmed the principles set out in *MacTaggart & Mickel's* case in general including that a person is not obliged to disregard its own commercial interests when using "reasonable endeavours".

While the above cases (both of which were Scottish cases so it remains to be seen if they are followed in Ireland) are helpful in interpreting the meaning of the phrase "reasonable endeavours", they also highlight just how ambiguous this particular phrase can be. While it is often used as a matter of necessity, if specific steps are required (or not required, as the case may be) of a party, then best practice must be to spell that out in the agreement.

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When negotiating agreements the appropriate language needs to be carefully selected and, if possible, thought should be given to spelling out in the agreement which steps should be taken rather than relying entirely on a "reasonable endeavours" obligation, albeit in most cases a fully prescriptive approach may be impossible or risky as it may exclude obligations that are appropriate. Similarly, the person with the obligation to perform under the agreement might wish to exclude specifically steps which will not be required of it.

The obligation to use "best endeavours" is regarded as the most onerous of the various formulations but still falls short of an absolute obligation. There is an argument based on recent case law that "best endeavours" might be understood to relate to the full range of courses available to a party to achieve fulfilment of the obligation, including the incurring of expense as required by the relevant party, as distinct from an obligation to comply with an obligation to do what the party itself might regard as reasonable having regard to its own interests. As a corollary, it could be that so long as that party takes all reasonable steps to comply with an obligation to use best endeavours it would appear that no liability will attach should the objective not be realised. However, until the question of "reasonable" is addressed in the context of "best endeavours", it is not possible to be definitive on this matter.

The formulation of "all reasonable endeavours" would appear to be the least clear and is commonly understood to sit somewhere between "best endeavours" and "reasonable endeavours". As against this In Rhodia International Holdings Ltd v Huntsman, [2007] EWHC 292 (Comm) it was noted that an obligation to use "all reasonable endeavours" might equate with using "best endeavours". More recent case law suggests that the courts seem to view "all reasonable endeavours" as something below "best endeavours". For instance in CPC Group Limited v Qatari Diar Real Estate Investment Co. [2010] EWHC 1535, the court suggested that an obligation to use "all reasonable but commercially prudent endeavours" did not equate to a "best endeavours" obligation. In addition it was stated that an obligation to use "all reasonable endeavours" does not always require a person to sacrifice his/her own commercial interests. Accordingly in this case "all reasonable endeavours" was viewed to be a lesser standard than "best endeavours". The CPC decision shows that the test for deciding whether a party has discharged its obligation to use "all reasonable endeavours" need not require a comparison with a "best" or "reasonable" endeavours obligation and suggests that previous cases have confused the scope of "all reasonable endeavours" by trying to locate it somewhere on the spectrum rather than focusing on what it means in practice. In addition a "best endeavours" obligation will not override a board's fiduciary duties as illustrated in Rackam and Another v Peek Foods Ltd and Others [1990] BCLC 895.

The obligation to use "reasonable endeavours" is another commonly used formulation although the case law is not consistent in the interpretation of this phrase. In a leading Irish authority, Drocarn Ltd v Seamus Murphy Properties and Developments Ltd, [2008] IEHC 99, Finlay Geoghegan J. accepted the submission that an obligation to use "reasonable endeavours" was at least one step down from an obligation to use "best endeavours". In the Rhodia case mentioned above the court commented that there might be a number of reasonable courses that could be followed in a given situation to achieve a particular aim, and an obligation to use "reasonable endeavours" to achieve the aim probably only required a party to take one reasonable course, not all of them, whereas an obligation to use "best endeavours" probably required a party to take all reasonable courses available to it. It also seems that the difference between "best endeavours" and "reasonable endeavours" relates not only to the number of courses of action that may need to be pursued but also to the standard of performance required.

In fulfilling a "reasonable endeavours" obligation, limited expenditure may be required but a party will be permitted to consider its own commercial interests and 'the chances of achieving the desired result' (UBH (Mechanical Services) v Standard Life Assurance [1986] TLR, 13 November). For "best endeavours" the party may be required to expend a significant amount of money (though not so much to result in insolvency) and undertake litigation provided it has a reasonable chance of success. Following the CEP case, a party subject to an "all reasonable endeavours" obligation will need to do everything that can reasonably be expected of it but will be able to apply some discretion in deciding how to achieve its aims.



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In summary, there is a hierarchy in terms of the various formulations of "endeavour", with "reasonable" at the lower end of the spectrum and "best" at the upper end, with "all reasonable endeavours" sitting somewhere in between but closer to the "best" threshold. But what the case law establishes beyond doubt is that parties when agreeing commercial contracts need to take care to ensure that they understand the obligations that they may be establishing by using any of the various "endeavours" formulations. The consequences of not doing so may result in the resulting rights and obligations being somewhat different from those contemplated or intended by one or more of the parties.

For more information please contact



Gerard Halpenny

T +353 1 637 1546
E ghalpenny@lkshields.ie



Jennifer McGuire

T +353 1 638 5851
E jmcguire@lkshields.ie

About LK Shields Solicitors

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LK SHIELDS SOLICITORS

39/40 Upper Mount Street, Dublin 2, Ireland

T +353 1 661 0866 | F +353 1 661 0883 | E info@lkshields.ie | W www.lkshields.ie