

The potential burden of all "reasonable endeavours"

April 2022



By Katherine
Garner

Endeavours obligations are common in finance documents and are often used where a borrower is required to procure something from a third party which is not entirely within its control. While common, they are not always uncontentious as there is a balance to be struck on the part of a funder between admitting that a borrower may not be able to accept an absolute obligation to procure something outside its control while ensuring the obligation retains some "teeth". In striking that balance there may well be a debate on the nature of an endeavours obligations and the parties may settle on an "all reasonable endeavours" obligation. So just how hard does the obligor have to try? The recent case of *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* ("*PPL*") has provided some helpful colour.

By way of a reminder, there are three main types of endeavour clauses, which are as follows:

- reasonable endeavours;
- all reasonable endeavours; and
- best endeavours.

In summary, a reasonable endeavours clause, the least burdensome of the three, can be discharged by taking one reasonable course of action. A best endeavours clause requires a party to do everything within their power to produce the desired result - this can, for example, include the subordination of their commercial interest. "All reasonable endeavours" clauses have typically been viewed as a middle ground - *Brooke Homes* suggests that this view should be reassessed.

The case of *Brooke Homes* was brought by a developer who entered into an agreement for a sale of land with PPL who, in turn, had various options over land near Bicester, which they had acquired with the view to developing eco-towns. A claim was brought for specific performance and damages in lieu of an order for specific performance for alleged breaches of contract. The claim for specific performance failed as the contracts entered into "*fell short of...an enforceable contract for sale*". However, damages of £13.4m were awarded to the developer for breach of contract, namely a failure to "*use all reasonable endeavors to enter into a final binding Agreement*" and to "*act in good faith*".

An example of the breach of the endeavours obligation identified in this case was the failure of the Defendants to provide a *"red line plan"* which provisionally identified the parcel of land to be transferred. The Court reasoned that there was no *"adequate explanation"* as to why a plan was not produced and that a plan was reasonably necessary to progress the negotiations *"into a final binding Agreement"*. The Court therefore assessed if the all reasonable endeavours clause had been discharged by examining whether the taking of a *"particular path...would have had a significant or substantial chance of achieving the desired results"*. The Court's decision was also informed by the fact the parties also had to *"act in good faith"*. It may have suited PPL to *"keep the identification of the parcels of land somewhat vague"*, but it was held that they did not act with transparency.

The Court noted that its view of the all reasonable endeavours clause was informed by the overall contract, and identified specifically the following provision, which was to structure the transaction *"in a manner which will most effectively achieve the desired commercial and financial outcome for both parties"*. The Court reasoned that a red line plan would have *"been to the mutual benefit of the parties"*. Finally, the Court also found that an all reasonable endeavours clause raises a positive obligation, and that *"passivity or inactivity [are] likely to be construed as a potential breach"*. Contrast the failure to provide a red line plan with the failure to include one of the relevant title numbers. The Court reasoned that the missing title number did not amount to a breach because the Defendants took proactive steps to correct the mistake by a later supplemental agreement.

This provides clarification that the interpretation of "all reasonable endeavours" clauses will be coloured by the other clauses in a contract. In this particular case the bar for discharging the obligation to use all reasonable endeavours was raised to that of best endeavours (including the sacrifice of one of the parties' commercial interests), as it was read in conjunction with the obligation to *"act in good faith"* and to the *"mutual benefit of the parties"*.