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A “reasonable endeavours” undertaking, and its variants, are common features of commercial contracts. These clauses might be inserted into agreements to balance the interests of the parties where the achievement of the contractual object involves conditions beyond the obligor’s control, for example, the procurement of a third party’s performance. Equally common is the insertion of these clauses into contracts to resolve a negotiation stalemate where one party refuses to promise the absolute achievement of the contractual objective.

Notwithstanding their common usage, the general principles regarding the interpretation and scope of non-absolute obligation clauses remain mired in some uncertainty. In decisions delivered just a week apart, both the Singapore Court of Appeal and the High Court of Australia established general guidelines on the approach to be taken in respect of such clauses. Each case presented different aspects of the uncertainties surrounding non-absolute obligation clauses. In *KS Energy Services Ltd v BR Energy (M) Sdn Bhd*,¹ the Singapore Court of Appeal pronounced on the general approach to a simple “all reasonable endeavours” clause, as well as its relationship with “best endeavours” and “reasonable endeavours” clauses. In *Electricity Generation Corporation T/AS Verve Energy v Woodside Energy Ltd*,² the High Court of Australia considered a “reasonable endeavours” clause that was qualified by an explicit provision on how the obligor’s interests are to be balanced against the oblige’s interests. Both cases go some way towards resolving the confusion surrounding non-absolute obligation clauses.

**KS Energy: Singapore Court of Appeal**

In *KS Energy*, BR Energy had been awarded a contract to charter an oil rig to Petronas. The oil rig was to be delivered to Petronas by 21 March 2006. As it turned out, however, BR Energy’s original partners for the project had to pull out. BR Energy therefore approached KS Energy, which was in the business of chartering capital equipment in the oil and gas industry, to deliver the oil rig. KS Energy found a third-party contractor, Oderco, to construct the oil rig. It also formed a joint venture company with BR Energy to procure the oil rig and then charter it out, in fulfilment of BR Energy’s original contract with Petronas. The joint venture agreement stipulated that KS Energy was to:

“use all reasonable endeavours to procure the [oil rig] is constructed and ready for delivery in Abu Dhabi or other location specified by [KS Energy] within six months after the Charter Agreement is executed”.

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However, Oderco was unable to meet the timelines. The construction of the oil rig was not completed even well past the original deadline for delivery. After multiple fruitless chasers and extensions of time to BR Energy, Petronas terminated the contract with BR Energy. Although the oil rig was useless to BR Energy by this time, KS Energy took over its construction from Oderco. In the end, BR Energy’s relationship with KS Energy soured, which led BR Energy to write to KS Energy to terminate the joint venture agreement for breach of a fundamental term. BR Energy’s primary contention was that KS Energy had failed to “use all reasonable endeavours to procure the [oil rig] is constructed and ready for delivery on time”.

The trial judge found on these facts that KS Energy had failed to use all reasonable endeavours to procure the construction and delivery of the oil rig within a certain time frame. This holding was reversed on appeal. The Singapore Court of Appeal held that, as a starting point, KS Energy was required to be a prudent and determined company acting in the interests of BR Energy, and anxious to procure the contractual outcome within the stipulated timeframe. In so far as the timelines were concerned, the Court of Appeal thought that those stipulated in the joint venture agreement constituted the upper limit of KS Energy’s obligations; it had to use all reasonable endeavours to ensure that this timeline was not breached, but it did not have to bring about an earlier delivery of the oil rig.

Importantly, the Court of Appeal distinguished between an obligation to use all reasonable endeavours to procure a third party’s performance and an obligation to use all reasonable endeavours to perform the same oneself. KS Energy concerned the former situation. In any event, KS Energy’s employees had been persistent in pushing Oderco to perform: they deployed staff at Oderco’s yard, assisted in the procurement of critical equipment, and even paid out money to help with Oderco’s cash flow problems. In this regard, the Court of Appeal rejected BR Energy’s argument that KS Energy should have deployed permanent on-site personnel to supervise Oderco’s construction of the oil rig: the court did not regard it reasonable to expect that KS Energy could have secured such an intrusive right vis-à-vis a third-party builder. The Court of Appeal further rejected BR Energy’s argument that KS Energy should have been more forceful in its dealings with Oderco, as the reasonableness and correctness of KS Energy’s endeavours were not to be judged with the benefit of hindsight. On the whole, the Court of Appeal was satisfied that KS Energy had exercised all reasonable endeavours, being a prudent and determined company acting in the interests of BR Energy to have a third party construct the oil rig.

More generally, in the interest of promoting commercial certainty, the Court of Appeal enunciated a set of guidelines on the prima facie interpretations and scope of non-absolute obligation clauses. First, there is little or no relevant difference between the standard imposed by an “all reasonable endeavours” clause and a “best endeavours” clause.

5. Ibid, [137].
6. Ibid, [150].
7. Ibid, [62] and [93].
According to the Court of Appeal, *prima facie*, both require the obligor to exhaust all reasonable endeavours, but reasonable endeavours are confined to those which have a significant or real prospect of success. However, the obligor would not be faulted for choosing a reasonable course of action that turned out to be ineffective. In that respect, there is not much difference between the two types of clause. By contrast, a simple "reasonable endeavours" undertaking merely requires the obligor to act reasonably to procure the contractual outcome. Second, the obligor is not always required to sacrifice its own commercial interests in satisfaction of its undertaking, but this would not be the case if the parties had contemplated that the obligor should do so. Third, the obligor would not have exhausted all reasonable endeavours if the obligor might have discovered other reasonable steps that could have been taken had it consulted the obligee. Finally, as a matter of proof, once the obligee points to certain steps which the obligor could have taken to achieve the contractual outcome, the burden ordinarily shifts to the obligor to show that these steps were either not reasonably required or that they would have no prospect of success.

**Woodside: Australian High Court**

*Woodside* concerned a long-term gas supply agreement between Verve and various gas suppliers in Western Australia, including Woodside. Verve is a major supplier of electricity to a large area in Western Australia. There were separate contracts with each gas supplier under the gas supply agreement. Under the contract between Verve and Woodside, which was identical to the contracts with all other suppliers, Woodside was to supply Verve a maximum daily quantity of gas. Woodside was also obliged to use "reasonable endeavours" to supply a supplemental daily quantity of gas to Verve if Verve’s daily nomination exceeded the maximum daily quantity. Crucially, the "reasonable endeavours" clause further stipulated that:

"In determining whether [the suppliers] are able to supply [the supplemental quantity of gas] on a Day, [the suppliers] may take into account all relevant commercial, economic and operational matters . . .".

As it turned out, a gas plant explosion temporarily affected the gas supply. As a result of Woodside’s refusal to supply the supplemental quantity of gas under the original contract, Verve entered into a new contract under protest with them for the supply of gas at the prevailing market rate. The dispute centred on whether Woodside breached the "reasonable endeavours" clause, which in turn had a bearing on Verve’s claims for rescission of the new contract on the basis of economic duress as well as for restitution. Neither party disputed that Woodside had the capacity to supply the supplemental quantity of gas during this period. The Supreme Court of Western Australia found that Woodside was not in breach of the clause. The Court of Appeal of Western Australia, however, reversed this holding.

9. *Ibid*, [63].
On appeal before the High Court of Australia, the majority (French CJ, Hayne, Crennan and Kiefel JJ) overturned the Court of Appeal’s ruling, and held that the clause, construed within the wider contract and in a businesslike manner, did not oblige Woodside to supply the supplemental quantity of gas to Verve in conflict with their own commercial interests. The word “able” was not to be interpreted as Woodside’s objective capacity to supply gas. What constitutes a “reasonable” endeavour is in part qualified by constraints imposed by commercial and economic considerations as stipulated in the clause. Thus, Woodside could decide not to supply the supplemental quantity owing to price considerations, even though it objectively maintained the ability to do so. More generally, the majority also made three observations regarding a “reasonable endeavours” clause. First, it is a non-absolute obligation. Second, the nature and extent of the obligation are qualified by reasonableness. The undertaking does not require the obligor to achieve the contractual object to the disregard of its own business interests. Finally, some non-absolute obligation clauses may set out their own standard of reasonableness, for example, by reference to conditions relevant to the obligor’s business interests.

Dissenting, Gageler J construed the undertaking to mean that Woodside could take into account all relevant commercial, economic and operational matters in determining their objective capacity to supply supplemental quantity of gas to Verve. Thus, such matters did not extend to conferring the discretion to Woodside not to supply the supplemental quantity based on commercial considerations (such as the ability to obtain a higher price) if Woodside was still objectively “able” to supply gas. Gageler J said that the converse interpretation, as put forward by the suppliers, would be a result that would render the undertaking “elusive”, if not “illusory”.

**Differentiating the different obligations**

Notwithstanding that non-absolute binding obligations are commonplace clauses in commercial contracts, the English authorities are unclear as to the precise nature of these obligations, and how they are to be distinguished. It was thought at one time that there is no real difference between “best endeavours” and “reasonable endeavours” clauses. Some later English cases, however, suggested a difference not only between these clauses, but also “all reasonable endeavours” clauses. Thus, in *Jolley v Carmel Ltd*, Kim Lewison QC stated that the phrases “reasonable efforts”, “all reasonable efforts” and “best endeavours” denoted a spectrum of obligations, with “reasonable efforts” being at “the lowest end of the spectrum”. A few other cases have since raised some doubts regarding these distinctions. For example, in *Rhodia International Holdings Ltd v Huntsman International LLC*, Flaux QC held that a “best endeavours” clause and

13. *Ibid*, [41].
16. Cf an agreement to use one’s best endeavours to agree is not sufficiently certain to amount to a binding obligation: see *Little v Courage Ltd* (1994) 70 P & CR 469 (CA), 476 (Millett J).
an “all reasonable endeavours” clause meant the same thing, whereas a mere “reasonable endeavours” clause meant a lower standard of obligation, since it obliges a party to take only one reasonable course of action, and not all of them. While it is not doubted that the content of the obligation is an issue of construction in each case, the lack of consensus in the English authorities is also partly attributable to the fact that the content of the obligation was not determinative of the dispute in some cases; and, even in cases where the issue was germane to the litigation, the judge did not have all previous cases before him for consideration.

The Australian position remains unclear as well. In the earlier case of Transfield Pty Ltd v Arlo International Ltd, the High Court held that a “best endeavours” clause required the obligor to “do what [it] could reasonably do in the circumstances”. Recent Australian cases, however, may have read down the distinctions between the different clauses somewhat. For example, Centennial Coal Co Ltd v Xstrata Coal Pty Ltd (a case concerning “all reasonable endeavours”) is notable for the equation of the “all reasonable endeavours” obligation with the “best endeavours” obligation. More recently, in Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd, the Court of Appeal of New South Wales commented that Australian courts have considered both “best endeavours” and “reasonable endeavours” undertakings as imposing similar obligations. However, in Foster v Hall, the Court of Appeal of New South Wales clarified that a “best reasonable endeavours” obligation, by virtue of the word “best”, imposes a “somewhat higher” obligation than a simple “reasonable endeavours” obligation. It equated a “best reasonable endeavours” undertaking with a “best endeavours” undertaking, at least for purposes of the dispute before it. In Woodside, the majority (citing Cypjayne) noted that the argument before the court proceeded on the basis that the types of clause impose “substantially similar obligations”, without explicitly affirming the correctness of this basis. Nor did the majority explain what “similar obligations” entailed or, importantly, what the distinctions between them are.

It is therefore laudable that the Singapore Court of Appeal has laid down clear, pragmatic guidelines in KS Energy regarding the prima facie interpretations of the various expressions. Notably, in rejecting Lewison QC’s view in Jolley, the court rightly pointed out that it would be a “pointless hair-splitting exercise” to distinguish between “best endeavours” and “all reasonable endeavours” clauses. The eradication of this fine distinction will indirectly encourage parties to spell out more precisely the exact obligations

26. [2012] NSWCA 122, [33].
27. Ibid, [33].
28. [2014] HCA 7, [40].
29. Cf Lewison LJ’s extrajudicial view that the obligation to use “all reasonable endeavours” equates with the obligation to use best endeavours: Sir K Lewison, The Interpretation of Contracts, 5th edn (Sweet & Maxwell, London, 2011), [16.07].
expected of the obligor. Both expressions entail the same obligation: to take all those reasonable steps which a prudent and determined man, acting in his own interests, would have taken. Under Singapore law, a distinction is instead drawn between an obligation to use all reasonable endeavours and an obligation to use reasonable endeavours; the latter only requiring the obligor to act reasonably to procure the contractual outcome. This is a distinction that is meaningful and sufficiently certain in practice. The situation would of course be different if the parties expressly stipulated the steps to be taken by the obligor to discharge its “best endeavours” or “all reasonable endeavours” obligation; the enquiry is then directed at whether those steps had been taken.

For Singaporean lawyers, and perhaps a more general audience, a point of contract drafting is this: it is meaningless to fight over nuanced differences in expressions, even if, intuitively, the phrase “best endeavours” appears to import a higher degree of obligation than “all reasonable endeavours”, which in turn suggests that the obligor might be required to act against its commercial interests for the former obligation. Rather than risk the uncertainty inherent in a thin distinction between “best endeavours” and “all reasonable endeavours”, parties should specify the obligations required, even if non-exhaustively so as to cater for completely unforeseen circumstances. For example, parties should set out in the contract expenditure limits, time frame and other matters that might materially affect the obligor’s solvency. Short of express stipulation, it seems unreasonable (and unrealistic) to treat commercial men as having agreed to act contrary to their own commercial interests to the extent of jeopardising their own business. After all, avoidance of insolvency might well be the reason the obligor had not agreed to achieving the contractual outcome absolutely.

As such, KS Energy offers some pragmatic points of reflection for English and Australian courts on the interpretation of non-absolute obligation undertakings. The convergence of interpretation across the various jurisdictions on a pragmatic basis would greatly promote certainty for transnational trade. In truth, whether in a commercial context or not, it is difficult to determine what is the “best” thing to do in the circumstances. The oft-cited fiduciary duty to act in the best interests of a principal aptly illustrates the point. Its existence, content and enforceability have been repeatedly questioned. From whose perspective are the principal’s best interests adjudged; what is the standard required? Fiduciary duties, no matter that they are onerous, must be kept within realistic and certain bounds. A fortiori, contractual duties should be similarly confined.

30. The same will thus also apply for variants of these expressions, such as “reasonable best efforts” and “commercially reasonable best efforts”.

31. [2014] SGCA 16, [62]. This is in line with the English position: Rhodia International Holdings Ltd v Huntsman International LLC [2007] 2 All ER (Comm) 577.

32. Cf M Conalgen, Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties (Hart, 2011), 54–58. Conalgen argues that the “best interests” duty is not a fiduciary duty, that is, it is not a duty peculiar to fiduciaries. In his view, it had been used variously by the courts to mean different things, including a restatement of the fiduciary’s duty of care.

33. GW Thomas, “The duty of trustees to act in the ‘best interests’ of their beneficiaries” (2008) 2 J Eq 177, 177–178. Thomas argues that the “best interests” duty serves as a shorthand for some of the core functions of trustees. It is, in other words, a foundational concept underpinning these core functions.

34. It is noteworthy that the English Court of Appeal had upheld a duty of disclosure based on the “fiduciary duty” to act in the best interests of the principal in Item Software (UK) Ltd v Fassihi [2004] EWCA Civ 1244; [2005] 2 BCLC 91, seemingly suggesting that the duty exists and is enforceable. However, the case had been subject to trenchant criticisms. Later English cases have also generally confined the ratio of Item Software to the context of a director’s duties: see, eg, GHLM Trading Ltd v Maroo [2012] EWHC 61 (Ch), [192–195].
Sacrifice of the obligor’s commercial interests?

Another uncertain aspect of the non-absolute obligation concerns whether the obligation requires the obligor to act against its commercial interests and, if so, to what extent? Prior to *KS Energy* and *Woodside*, some older English cases appeared to suggest that the obligor is in a quasi-fiduciary relationship in relation to the obligee, such that the obligor must thus align its interests entirely with the obligee’s interests. Yet, in other cases, there was no explicit attempt by the English courts to discuss the relevance of the obligor’s own interests.

In *KS Energy*, the Singapore Court of Appeal suggested that a distinction ought to be made between an obligation to use all reasonable endeavours to procure a *third party’s* performance and an obligation to use all reasonable endeavours to perform the same oneself. As *KS Energy* concerned the former situation, it was not necessary for the court to articulate what would be required in the latter scenario. It is likely that, given that the achievement of a contractual outcome in the former scenario is beyond the obligor’s control, the Singapore courts would construe “all reasonable endeavours” in light of this factor, and thus a slightly higher obligation might be *prima facie* required in a scenario where one is to use “all reasonable endeavours” to achieve the outcome on *one’s own*. This higher obligation might require the obligor to sacrifice its own commercial interests in fulfilling its promise. The distinction appears sensible as a *prima facie* guideline. However, each case must still be determined on its own facts, as we shall see when we apply the distinction to a case such as *Woodside* below. Moreover, the two scenarios may not always be so different as to justify a difference in treatment. For instance, even in a case of procurement of a third party’s performance, the obligor may face difficulties in achieving that because the third party has made demands (extorting a higher price, etc) which may jeopardise the obligor’s solvency. This is quite different from a situation of the obligor’s having to obtain a licence from a regulatory authority, a matter that is quite out of the obligor’s hands once it has duly completed the steps of application.

This distinction could also be inferred from two English cases: *Yewbelle v London Green Developments* and *Jet2.com Ltd v Blackpool Airport Ltd*. In *Yewbelle*, the English High Court held that the obligor is not required to sacrifice its own commercial interests in meeting a non-absolute obligation to procure a third party’s performance. A contrasting case can be seen in *Jet2.com*, where an airport and an airline entered into an agreement pursuant to which it was agreed, *inter alia*, that both would use their “best endeavours” to promote the airline’s low cost services. The airport was found by the English Court of Appeal to be in breach of this obligation in refusing to accept arrivals or allow departures from that airline outside of the airport’s normal operation hours, even though the airport might suffer some loss. It could thus be surmised that where a third party is involved in the obligor’s

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35. Sheffield District Railway Co v Great Central Railway Co (1911) 27 TLR 451, 452; IBM United Kingdom Ltd v Rockware Glass Ltd [1980] FSR 335 (CA).
37. [2007] EWCA Civ 475.
38. [2011] 2 All ER (Comm) 988, [46]. Also, see “What are all reasonable endeavours?” (2011) 32 PLB 33.
39. Ibid, [32] (Moore-Bick LJ) and [70] (Longmore LJ). Cf [53] (Lewison LJ), who came to the opposite conclusion.
discharge of its non-absolute obligation, a lower standard might be applied in contrast to a situation which is more within the obligor’s control. Even so, the question remains to what extent is the obligor required to act contrary to its own commercial interests? Of course, the answer varies from case to case, depending on the contractual objectives, language and surrounding circumstances. In light of the potential uncertainty, it is thus recommended that contracting parties spell out the obligations expected of the obligor.

Woodside presents a slightly different situation. The contract had stipulated a qualification to the “reasonable endeavours” clause, but there were two interpretations of the clause. A chief problem with the drafting of the qualification clause is the use of the word “able”, which lends itself to be interpreted as referring to the objective ability to supply gas, and sits uncomfortably with the provision that the obligor may take into account “all relevant commercial, economic and operational matters”, which on its own suggests that the obligor would not be required to perform the obligation to the extent of sacrificing its own commercial interests. As such, although Gageler J had held that the obligor could take its own interests into account, this only went towards assessing its ability or capacity to perform the contract, not so much as affording a discretion to perform based on commercial considerations. Gageler J’s construction is, in essence, a literal interpretation of the clause; to read the two parts of the clause coherently, based on the common understanding of the English words. The majority’s construction, by contrast, reveals a more purposive (or contextual) interpretation of the clause. As the majority had stressed, the clause must be interpreted in a “business-like” manner. Perhaps, a cautionary note from Gageler J’s dissenting judgment in Woodside is that commercial parties should give greater consideration to the choice of words, so as to minimise the possibility of conflicting constructions.

Further, in Woodside, neither the majority nor Gageler J discussed drawing a distinction between cases involving a third party’s performance and those that do not in determining whether the obligor should sacrifice its commercial interests. This does not mean that the distinction is therefore irrelevant to Australian law. The same analysis can be re-packaged/approached as a matter of construing the contract in light of all relevant circumstances and in this connection the fact that the operation of a non-absolute obligation clause involves a third party is surely a relevant factor, and one that qualifies the reasonable efforts that the obligor is required to make in a particular case.

In any event, even if the majority in Woodside had taken this factor/distinction into account, they might not have come to the same result as Gageler J, even though the case concerned the obligor performing the act on its own. Third-party performance (or absence of) is merely one of the factors, albeit an important one. There are other relevant factors supporting the majority’s construction; a qualification to the non-absolute obligation based on financial, commercial and economic matters; it was a simple “reasonable endeavours” clause; the case concerned a long-term contract; it related to additional supply beyond the


41. In Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, 64, Gibbs CJ said that the “meaning of particular words in a contract must be determined in the light of the context provided by the contract as a whole and the circumstances in which it was made”.

daily quantity. Cumulatively, read in its context, the endeavours clause operated in effect akin to a quasi force majeure to enable the supplier to be discharged from its obligation to supply supplemental quantity if it would become too onerous to do so. In fact, we would also suggest that the third-party factor operates with greater force as a prima facie guideline in cases where parties merely inserted a plain endeavours clause without prescribing within the contract the standard of reasonableness required.

Conclusion

The uncertainty generated by non-absolute obligation clauses comes about from the adherence to fine distinctions between the types of clause, as well as the vague premise that such clauses must be interpreted in light of the overall context. However, as the differing interpretations in Woodside demonstrate, it may be cold comfort to parties relying on the courts to interpret such clauses contextually, when it is unclear what the relevant context is. Based on the two cases discussed, there are two solutions for consideration. First, the vague distinctions between the different types of non-absolute obligation should be discarded in favour of a more explicit approach which in turn encourages parties to spell out the extent of their obligations more clearly. Secondly, default standards should apply where the parties have not expressly spelt out such obligations. Such default standards include the relevant factors to be taken into account in interpreting such non-absolute obligations clauses. For example, if the clause concerns a third party’s performance, then the prima facie interpretation is that the obligor should not be expected to sacrifice its commercial interests.

Man Yip*
Yihan Goh**

AVIATION ACCIDENT REPORTS ADMISSIBLE IN CIVIL PROCEEDINGS IN THE UK

Hoyle v Rogers

In Hoyle v Rogers,† Mr Rogers was a passenger in a vintage Tiger Moth propeller bi-plane; Mr Hoyle was the pilot. In 2011, in the course of the flight, the aircraft crashed to the ground. Mr Rogers was killed; Mr Hoyle was seriously injured but survived. The UK Air Accident Investigation Branch (“AAIB”) investigated the accident and produced a report. The issue for the Court of Appeal was whether the report was admissible in evidence and whether, if admissible at all, the court should exclude it as a matter of discretion.

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The authors are grateful for an anonymous reviewer’s comments. All errors are, however, the authors’ own.

1. Hoyle v Rogers (Secretary of State for Transport and IATA intervening) [2014] EWCA Civ 257.