Non-Absolute Obligations: Their Interpretation and Effect in Business Contracts

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Abstract

Business contracts impose absolute obligations to perform. However, the ability of the party obliged may be dependent on third party performance or events beyond his control or he may simply be unwilling to undertake an absolute obligation. Endeavours clauses are therefore used to create non-absolute obligations while requiring some real endeavours to achieve the desired contractual outcome. The precise meaning and scope of endeavours obligations and the exact standards of performance lack clarity. Without sufficient clarity, these obligations may fail for want of certainty. Decisions from common law jurisdictions provide pointers but do not all speak with one voice. This legal uncertainty makes non-absolute obligations unpredictable, giving rise to potential risks and increased business costs. Any difference in interpretation is particularly relevant in cross-border transactions involving the laws of different jurisdictions. This paper demonstrates how this lack of clarity affects the obliged party's efforts in discharging endeavours obligations.

I. Introduction

Parties to a wide variety of contracts ranging from landlord and tenant to planning and construction contracts may only be willing to undertake non-absolute obligations framed in terms of "best endeavours", "all reasonable endeavours" or "reasonable endeavours". These endeavours clauses are used to suggest different levels of effort, but there is no consensus on their meaning. The party obliged to use “best endeavours” is required to meet the most onerous standard. "All reasonable endeavours" falls in between. [1] Its scope is not clear and there is judicial opinion that it is equivalent if not as close to the meaning of “best endeavours”. "Reasonable endeavours" is the least stringent and requires the party obliged to take a reasonable course of action but without harming his own commercial interests. Another kind of qualifier may direct the contracting parties to "endeavour to agree in good faith". These endeavours obligations will be discussed below.

2. “Best Endeavours”

The party obliged has a very onerous burden to “broadly speaking, leave no stone unturned.”[2] English law has, however, been tempered with the introduction of standards of reasonableness, requiring the party obliged to do all that a reasonable person could do in the circumstances. [3] This requires taking steps which a prudent, determined and reasonable person, acting in his own interests would take to achieve the desired outcome, [4] even at the expense of his own commercial interests. These steps may require the party obliged to spend money, if necessary, but not to his certain ruin [5] or even to litigate, unless the action was doomed to failure. [6]

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[1] See UBH (Mechanical Services) Ltd v Standard Life Assurance Co Ltd The Times, 13 November 1986; Jolley v Carmel Ltd [2000] 2 EGLR 154.
[2] Sheffield District Railway Co. v Great Central Railway Co. (1911) 27 TLR 451.
[3] Pips (Leisure Production) Ltd. v Walton (1980) 43 P&CT 415.
[4] IBM United Kingdom Ltd v Rockware Glass Ltd [1980] FSR 335 where Buckley LJ clarified at 349 that “acting in his own interests” meant acting in the obligee’s interests and not the interests of the obligor.
[5] Terrell v Mabie Todd and Co [1952] 69 RPC 234.
[6] Malik Co v Central European Trading Agency Ltd [1974] 2 Lloyd's Rep 279.

However, it will not require actions that are financially detrimental to a company or which would undermine its commercial standing or goodwill.[7] As "best endeavours" must also be reasonable, it appears to blur the line between "best" and "reasonable endeavours". That said, English law still lacks clarity as to the meaning of endeavours obligations.

Similarly, under Australian law, "best endeavours" is measured by what is reasonable in the circumstances, having regard to the nature, capacity, qualifications and responsibilities of the obligor viewed in the light of the particular contract. [8] Thus the obligor is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more.

The qualification of reasonableness associated with a "best efforts" promise is aimed at resolving the conflict between the obligation to use "best efforts" and the independent business interests of the party obliged. Thus, in some cases, the interests of the obligor would prevail. [9] Although the meaning of "best efforts" has been considered in a number of cases, the High Court of Australia observed that its meaning in a particular contract must be determined in the context of the contract as a whole and the circumstances in which it was made, and that decisions on the effect of the same words in a different context must be viewed with caution.[10]

In Canada, "best efforts" is regarded as equivalent to "best endeavours" and means to "leave no stone unturned".[11] It was considered at length by the British Columbia Supreme Court in *Atmospheric Diving Systems Inc v International Hard Suits Inc.* [12] After surveying English and Canadian jurisprudence, Madam Justice Dorgan distilled the following principles on "best efforts":

(a) "Best efforts" imposes a higher obligation than a "reasonable effort".
(b) "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.
(c) "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
(d) The meaning of "best efforts" is not boundless. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
(e) While "best efforts" of the obligor must be subject to overriding obligations of honesty and fair dealing, it is not necessary for the obligee to prove that the obligor acted in bad faith.
(f) The onus to show that failure was inevitable regardless of whether it made "best efforts" is on the obligor. Evidence of inevitable failure is relevant to causation but not to liability.
(g) Evidence that the obligor could have satisfied the "best efforts" test had it acted diligently is relevant evidence that the obligor did not use its "best efforts".

Justice Dorgan also decided that the standard of "best efforts" was more onerous than "reasonable efforts". This is exemplified by the phrase "no stone unturned", *albeit* within the context and purpose of the contract itself. This approach has been endorsed by a number of Canadian decisions.[13] Thus "best efforts" imposes an onerous burden which requires the obligor to take all reasonable steps and to "leave no stone unturned" to discharge its duty. It requires first-class as opposed to second-class efforts. However, that duty does not require the party to sacrifice itself totally to the economic interests of the party to whom the duty is owed, although the interests of the other party must predominate. [14]

In Ontario, "best efforts" are said to be analogous to good faith. In *Bruce v. Waterloo Swim Club*,[15] Lane J. defined "best efforts" to mean "taking, in good faith, all reasonable steps to achieve the objective, carrying the

[7] Rackham v Peek Foods Ltd. (1990) BCLC 895.
[8] Transfield Pty Ltd v Arlo International Ltd (1980) 144 CLR 83, High Court of Australia.
[9] Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, High Court of Australia.
[10] Ibid. at 64.
[11] CAE Industries Ltd. and CAE Aircraft Ltd. v. The Queen [1983] 2 F.C. 616 (T.D.).
[12] (1994) 89 BCLR (2d) 356.
[13] Leacock v Whalen, Beliveau & Associates Inc [1996] BCJ No 2085 (SC); Wentworth Development Inc v Calgary (City) (1998) 218 AR 1 (QB); GC Parking Ltd v New West Ventures Ltd 2004 BCSC 706.
[14] CAE Industries Ltd v R. [1983] 2 F.C. 616 (T.D.) at p 639 per Collier J. Campobello Fisheries Ltd v Jackson Bros Ltd 1992 Carswell NB102(N.B. Q.B.) at [95] per Jones J.
[15] (1990), 1990 CarswellOnt 779 (Ont. H.C.).

process to its logical conclusion and leaving 'no stone unturned'". There is also support for the view that "best efforts" is an objective and not a subjective standard in *BEM Enterprises Ltd. v. Campeau Corp.*[16] and *Eastwalsh Homes Ltd v Anatal Development Ltd.* [17]

It appears that Canadian courts have introduced good faith into the meaning of "best efforts" or "best endeavours". This may lead to further uncertainty. While the doctrine of good faith has received some support it has yet been firmly endorsed in common law jurisdictions, except the United States.

Endeavours clauses are infrequently considered by Singapore Courts. In the first case of its kind, [18] "best endeavours" was construed in a manner somewhat similar to the English, Australian and Canadian approaches. There, the Court of Appeal laid down important guidelines (referred to as the "*Travista* test") derived from the English Court of Appeal decision of *IBM United Kingdom Ltd v Rockware Glass Ltd.*[19] Under those guidelines, the obligor has a duty to take all those reasonable steps which a prudent and determined man, acting in the obligee's interests and anxious to obtain the desired result within the available time, would have taken. It is not a warranty to produce the desired results requiring the obligor to drop everything and attend to the matter at once. The duty is to use the "best endeavours" by doing everything reasonable in good faith, not everything conceivable, to obtain the required result within the agreed time. It is surprising that the Court of Appeal should introduce the concept of good faith in interpreting "best endeavours" when the doctrine of good faith is not recognised in Singapore law. In determining whether "best endeavours" is satisfied, the court used an objective test but went on to state, somewhat confusingly, that it is also a composite test in that the party obliged may also take into account his own interests. However, it agreed that whether the test is satisfied is a question of fact in each case.

3. "Best"/"All Reasonable Endeavours"

The interpretation of these endeavours clauses will be considered together as there is some suggestion of overlap between the two kinds of endeavours.

The interpretation of "all reasonable endeavours" was considered in *AP Stephen v Scottish Boatowners Mutual Insurance Association (The "Talisman").*[20] The House of Lords unanimously held that the question of whether the efforts taken would constitute a reasonable endeavour is essentially one to be determined by the court, based on an evaluation of all the evidence, including expert evidence in appropriate cases. "The test is an objective one, directed to ascertaining what an ordinarily competent [fishing boat skipper] might reasonably be expected to do in the same circumstances".[21]

The party obliged will find "all reasonable endeavours" the least clear of the endeavours obligations. It has been stated that the applicable standard is somewhere between "best" and "reasonable endeavours", something more than "reasonable endeavours" but less than "best endeavours".[22] The requisite standard is controversial. Some English cases [23] suggest that "best" and "all reasonable endeavours" do not impose the same standard of conduct. Other cases suggest that there is no meaningful difference between "all reasonable endeavours" and "best endeavours".

The English High Court in *Rhodia International Holdings v Huntsman International* [24] reasoned that since "reasonable endeavours" probably requires the obligor to take only one reasonable course, not all of them,

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16 (1980), 24 B.C.L.R. 244 (S.C.).

17 1990 Carswell Ont 532 (Ont HC) at para 42-45.

18 Travista Development Pte Ltd v Tan Kim Swee Augustine and Others [2008] 2 SLR(R) 474, Court of Appeal.

19 [1980] FSR 335.

20 [1989] 1 Lloyd's Rep 535.

21 Ibid. at 539 per Lord Keith of Kinkel.

22 UBH (Mechanical Services) Ltd v Standard Life Assurance Co. The Times, 13 November 1986.

23 Such as UBH (Mechanical Services) Ltd v Standard Life Assurance Co. The Times 13 November 1986, Jolley v Carmel Ltd [2000] EGLR 154, CPC Group v Qatar Diar Real Estate Ltd [2010] All ER (D) 222; [2010] EWHC 1535.

24 [2007] 2 ALL ER (Comm) 577.

whereas "best endeavours" requires the obligor to take all the reasonable courses he can, it may well be that an obligation to use "all reasonable endeavours" equates with using "best endeavours". [25]

In *Jet2.com Ltd v Blackpool Airport Ltd,* [26] both parties accepted that "best endeavours" and "all reasonable endeavours" carry the same standard. Jet2.com was a low-cost airline which operated *inter alia* out of Blackpool Airport Ltd (BAL). The parties entered into a 15 year agreement. It provided that the parties would co-operate together to use their "best endeavours" to promote Jet2.com's low cost services and BAL would use "all reasonable endeavours" to provide a cost base that would facilitate Jet2.com's low cost pricing. For the first four years, BAL allowed Jet2.com to operate outside the standard hours of operation but subsequently restricted Jet2.com's arrival and departure times when BAL found that it was running at a loss and could no longer accommodate Jet2.com. The latter sued BAL for breach of contract. The High Court held that BAL's obligation to use its "best endeavours" to promote Jet2.com's low cost services included BAL opening the airport outside of its standard hours (being entirely within its control to do so) even if this was against BAL's own commercial interests. BAL appealed, arguing that the clauses were too uncertain to be enforceable. Alternatively, the inclusion of the clauses meant that BAL was not required to act against its own commercial interests by opening the airport outside of its standard hours. The majority of the Court of Appeal held that BAL's obligation to promote Jet2.com's services was not too uncertain as to be incapable of giving rise to a legally binding obligation. On the other hand, the obligation to provide a low-cost base was too oblique to be enforceable. Addressing BAL's second argument, the Court of Appeal agreed with the High Court that the promise to use "best endeavours" extended to keeping the airport open after standard hours even if it was against BAL's own commercial interests. In particular, the parties had clearly understood that in a low-cost airline industry, the ability to operate outside standard hours was essential in order for Jet2.com's business to prosper (even if BAL may well be put to some financial cost).

The High Court took a different view in *CPC Group v Qatari Diar Real Estate Ltd.*[27] It held that the obligation to use "all reasonable endeavours" did not always require the obligor to sacrifice its own commercial interests and this obligation was not equivalent to a "best endeavours" clause. In that case, Qatari was obliged to use "all reasonable but commercially prudent endeavours" to achieve certain financial thresholds for the site, mainly dependent on progress made in the planning application. The application was eventually withdrawn and CPC sued Qatari for breach of contract. Vos J held that Qatari was in breach of its other obligations, but not the "all reasonable endeavours" obligation. Such an obligation did not always require the obligor to sacrifice his own commercial interests, particularly because of the use of the words "but commercially prudent". This meant that Qatari was only obliged to take all reasonable measures to procure planning permission as long as these were commercially prudent.

Similarly, the Court of Appeal decided in *Yewbelle Limited v London Green Developments Limited, Knightsbridge Green Limited,* [28] that in undertaking "all reasonable endeavours", the obligor was not required to sacrifice his own commercial interests. Comparing the two decisions, the Singapore Court of Appeal stated in *BR Energy (M) Sdn Bhd v KS Energy Services Ltd* [29] that it preferred Vos J's approach in *CPC Group*. It explained that although an obligor is entitled to take into account its own interests, including its financial interests in performing its obligations, there is no particular reason why it should, as a rule, never have to sacrifice its commercial interests.

It is still uncertain whether "all reasonable endeavours" imposes the same standard of conduct as "best endeavours". It is also unclear whether or not, and if so to what extent, an obligor who has undertaken to use his "best endeavours" must sacrifice its own commercial interests. In this regard, the observations made by Moore-Bick LJ and Longmore LJ [30] in *Jet2.com* are significant.

They stated that whether an obligor must sacrifice its financial interests in fulfilling his obligations depends on whether the nature and terms of the contract in question indicate that it is in the parties' contemplation that the obligor would have to sacrifice his financial interests, and if so, to what extent. Given the lack of clarity, the

[25] Apparently also in Oversea Buyers Ltd v Granadex SA [1980] 2 Lloyd's Rep 608.
[26] [2012] 2 ALL ER (Comm) 1053.
[27] [2010] All ER (D) 222; [2010] EWHC 1535.
[28] [2007] 2 EGLR 152 at [29].
[29] [2014] SGCA 16.
[30] [2012] 2 ALL ER (Comm) 1053 at [31], [32] per Moore-Bick LJ and [70] per Longmore LJ.

meaning and scope of an endeavours clause is best determined by a fact-sensitive inquiry, bearing in mind the objective of the clause, the contractual context and other relevant terms. However, if the contract stipulates specific steps to be taken to discharge the obligation, then those steps must be taken, even at the risk of involving the sacrifice of a party's commercial interests.[31]

"All reasonable endeavours" was first considered in Singapore in *BR Energy (M) Sdn Bhd v KS Energy Services Ltd.* [32] The Court of Appeal explained that endeavours clauses address the *lacuna* arising from the non-recognition of the implied duty of good faith in Singapore contract law. It is for this reason that express endeavours clauses are often introduced to regulate the parties' obligations. However, there remains a degree of uncertainty as to what legal responsibilities they might entail. The facts of the case concerned the construction and delivery of an oil rig known as a workover pulling unit (WPU). KS Energy was not obliged to build and deliver the WPU but only to "use all reasonable endeavours" to ensure its construction and delivery by Ordeco, a third party, with whom KS Energy had contracted. No completed WPU was ever delivered and BR Energy sued KS Energy for breach of contract. The court found, on the facts of the case, that KS Energy was not in breach of the "all reasonable endeavours" clause. It re-affirmed the *Travista* test and held that it should ordinarily apply to both "best endeavours" and "all reasonable endeavours". The court could find little or no practicable difference between the standards in each obligation nor was it useful to distinguish between them. Without the parties stipulating a different standard for each type of obligation, any attempt to distinguish between them would merely be "a pointless hair-splitting exercise", with any differences likely to be "more metaphysical than practical". The court also pointed out that the *Travista* test should ordinarily apply even where the parties use a variation of the phrase "best endeavours" or "all reasonable endeavours", as the case may be. However, it does not apply to "reasonable endeavours" for reasons that will be discussed below. On the other hand, the test may not be entirely applicable where the parties have stipulated the steps to be taken by the obligor to meet the obligation. The question would then be whether the stipulated steps have been taken and whether the obligation has been discharged. This can only be ascertained through a fact-intensive inquiry which will be applicable to both "best endeavours" and "all reasonable endeavours".

In re-affirming the *Travista* test, the Court of Appeal endorsed the following guidelines in relation to the extent and operation of "best endeavours" and "all reasonable endeavours" obligations.

(a) Such clauses require the obligor to go on using endeavours until all reasonable endeavours have been exhausted or to do all that it reasonably could.
(b) The obligor need only do that which has a significant or real prospect of success in achieving the contractual object.
(c) If there is an insuperable obstacle to achieving the contractual object, the obligor need not do more to overcome other problems which also impede achieving that contractual object but which might have been resolved.
(d) The obligor is not always required to sacrifice his own commercial interests in satisfaction of his obligations but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice.
(e) An obligor cannot just sit back and say he could not reasonably have done more to achieve the contractual object in cases where if he had asked the obligee, he could have discovered other steps which could reasonably have been taken.
(f) Once the obligee points to certain steps which the obligor could have taken to achieve the contractual object, the burden ordinarily shifts to the obligor to show that he took those steps, or that those steps were not reasonably required or that they were bound to fail.

The Court of Appeal also decided that in the Singapore context, "all reasonable endeavours" is ordinarily as onerous as "best endeavours". In its view, this approach is sensible.

In a situation where an obligor has to achieve a contractual object through the efforts of a third party, it will not be viable to impose an absolute obligation on him. At the same time, the obligee's interests need to be protected. The best solution is to align the interests of both parties by contract. The *Travista* approach, using the standard of a prudent and determined man, acting in the obligee's interests and anxious to procure the contractually stipulated

[31] *Rhoda International Holdings v Huntsman International* [2007] 2 ALL ER (Comm) 577.
[32] [2014] SGCA 16.

outcome within the time allowed, as a benchmark, pragmatically addresses this issue and adequately protects unsophisticated parties. Where an obligor does not wish to be held to such a high standard, he should stipulate the specific steps required to discharge the "all reasonable endeavours" or "best endeavours" obligation. In the situation where both types of clauses are provided in the same contract, but without different standards being imposed for each type of endeavour, this will not be sufficient to indicate an intention to depart from the *Travista* approach. With regard to the test for "best endeavours", the court re-affirmed that it is an objective test and that the obligor is to be held to an objective standard.[33]

4. "Reasonable Endeavours"

Although the standard expressed in English law is lower than "best endeavours", it is unclear how much lower it is. It may involve the obliged party balancing the "weight of the contractual obligation" to the other party against "all relevant commercial considerations" with "the chances of achieving the desired result [being] of prime importance".[34] However, the obligor is not required to sacrifice his commercial interests.[35] As Flaux QC suggested *in obiter* in *Rhodia International Holdings*, [36] this obligation requires the obligor to take one reasonable course of action and not all of them, in contrast to "best endeavours" which requires the obligor to pursue all reasonable courses of action until they are exhausted. Thus, the distinction between "best endeavours" and "reasonable endeavours" appears to be based on the number of courses of action the obligor would be required to attempt.

The High Court of Australia made three general observations on "reasonable endeavours" in *Electricity Generation Corporation v Woodside Energy Ltd.* [37] It stated that first, it is not an absolute or unconditional obligation; second, the nature and extent of such an obligation is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances which affect the obligee's interests. Third, some contracts containing such an endeavour include their own internal standard of what is reasonable by some express reference relevant to the business interests of the obligee.

The traditionally American term "reasonable efforts" was considered by Canadian courts which held that “reasonable efforts” are not “best efforts” and include “all reasonable and measured steps” to fulfill the obligation. [38] They stated that the standard of “reasonable efforts” is interpreted in the context and purpose of the particular contract. It is synonymous with “logical”, “sensible” and “fair” but does not require the obligor to go to whimsical or unwarranted lengths.[39] Neither does it require no stone to be left unturned. It does not mean all efforts, efforts to the point of undue hardship or every effort. What it means is efforts that are reasonable in the circumstances. This will obviously depend on the facts of the particular case.[40]

The Singapore Court of Appeal similarly accepted in *BR Energy* that "reasonable endeavours" is ordinarily less onerous than "all reasonable endeavours". The former requires the obligor to take only one reasonable course of action and not all of them and is not subject to the standard laid down in the *Travista* test requiring all those reasonable steps which a prudent and determined man would have taken. The obligor merely has to act reasonably to achieve the contractual object, beyond which the court did not find it helpful to define the applicable standard. “Reasonable endeavours” thus imposes a limited obligation and is not an onerous obligation.

5. "Commercially Reasonable Endeavours" and "All Commercial Endeavours"

There is little judicial consideration of these phrases. From the above discussion, it appears that commercial considerations are already included in "endeavours" clauses so that commercial reasonableness is implied. However, two questions arise: (a) what is the meaning of commercially reasonable? Is it only restricted to steps

[33] [2014] SGCA 16 at [74].
[34] UBH (Mechanical Services) Ltd v Standard Life Assurance Co The Times, 13 November 1986.
[35] P&O Property Holdings Ltd v Norwich Union Life Insurance Society [1993] EGCS 69.
[36] [2007] 2 ALL ER (Comm) 577.
[37] [2014] HCA 7.
[38] Logic 2000 Inc v CNC Global Ltd 2003 WL 22048651 (Ont CA).
[39] Dobb v Insurance Corp of BC (1991) BCWLD 1987 (SC).
[40] Ontario (Ministry of Transportation) v OPSEU (1997) 4 LAC (4th) 38 (Ont Arb Bd).

which are commercially reasonable, having regard to matters such as fair market value and commercial feasibility? (b) is a higher or lower standard from "reasonable endeavours" expected? As for "all commercial endeavours", is reasonableness implied or must the obligor take all commercial measures to fulfill the endeavour? The inclusion of "commercial" in such phrases is ambiguous and should be specifically defined in the contract in which it appears.

The addition of the phrase "commercially prudent" to an "all reasonable endeavours" clause in the English case of *CPC Group* appears to restrict the measures taken to those which are commercially prudent. Thus, as long as the obligor takes all reasonable measures that are commercially prudent, these may be sufficient to meet the obligation.

What is "commercially reasonable" was considered in *Barclays Bank plc v UniCredit Bank AG*[41] in the context of early termination by parties to financial instruments, two of which required Barclay's prior consent, "such consent to be determined… in a commercially reasonable manner." Can Barclays take account of its own interest in preference to the interest of Unicredit? In the opinion of Longmore LJ, the answer is that it can, because any commercial man entrusted with the determination of a course of action would think it commercially reasonable to have primary regard to his own commercial interests. He did not see how the requirement to have regard to the interests of the counterparty could work in practice, as it would be difficult to assess what those interests were, let alone weigh those interests in comparison to its own interests. Although it is not easy to express a test for commercial reasonableness for the purpose of this or any other contract, Longmore LJ tentatively suggested that it would not be acting in a commercially reasonable manner to demand a price way above any return which a party could reasonably expect from the contract. On the other hand, parties to contracts such as these can look after their own interests and contract on different terms if they wish to do so. Accordingly, the Court of Appeal concluded that the price Barclays demanded as the price of its consent was not out of line with the reasonable return it could have expected had the contract run its expected course. It was entitled to have regard to its own commercial interest and had made its determination in what was a commercially reasonable manner.

6. "Endeavour to Agree in Good Faith"

This clause gives rise to uncertainty: first, what standard of endeavour is imposed; second, what good faith entails. It arose in the context of an existing contract in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd.* [42] The parties had agreed on a three-stage rent review mechanism, the first stage of which obliged the parties to "in good faith endeavor to agree on the prevailing market rental value of the premises concerned". In arguing against the effectiveness of this clause, the respondent relied on *Walford v Miles*[43] which held that agreements to negotiate in good faith are unworkable in practice and unenforceable for uncertainty. The Singapore Court of Appeal distinguished the facts of *Walford v Miles*[44] which concerned an agreement to negotiate in good faith to enter into a contract from the present case which required the parties to endeavour to agree in good faith in the context of an existing contractual framework. The Singapore Court took the view that parties who are already contractually bound need not negotiate in an adversarial or hostile manner and it was probably useful for them to negotiate in good faith since they could not "simply walk away from the negotiating table for no rhyme or reason".[45] Furthermore, such a clause is not contrary to public policy as it is in the public interest to "promote the consensual disposition of any potential disputes".[46] Even if one party fails to negotiate in good faith, there will be contractual remedies available and this avoids the issue of uncertainty.

It is unclear what standard of endeavour is required.

With regard to good faith, the court stated that it includes the subjective requirement of acting honestly as well as the objective requirement of observing commercial standards of fair dealing. These entail a duty to act fairly, not to profit from the known ignorance of the other party and to cooperate fully to facilitate the ascertainment of the new rent. This necessitates the disclosure of all material information which could have an impact on the

[41] [2014] EWCA Civ 302.
[42] [2012] 2 SLR 311.
[43] [1992] 2 AC 128.
[44] [1992] 2 AC 128; [1992] 2 WLR 174.
[45] [2012] 2 SLR 311 at [36].
[46] Ibid. at [40].

negotiations and determination of the new rent. As with all good faith issues, the answer would depend on the facts of the particular case.

7. Uncertainties Surrounding the Interpretation of Non-Absolute Obligations and the Effect on their Discharge

Although endeavours clauses place no absolute obligations, they should not be seen as non-obligations. Some real endeavours are required but it is not entirely clear what standards and legal responsibilities are sufficient to meet the obligation in question. Any alleged non-performance of endeavours is bound to raise the issue of whether what has been done is sufficient to discharge the obligation.

The general consensus is that the meaning and scope of endeavours clauses is to be ascertained through a fact-intensive inquiry, in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in the language. The party obliged will be held to an objective standard, although Singapore law also regards it as a composite test as the obligor may also take into account his own interests. It is not entirely clear how this works.

With regard to the standard of endeavour, there is general consensus that "best endeavours" requires the most stringent standard as compared to "reasonable endeavours". Decisions on "best endeavours" from common law jurisdictions place a high standard requiring the obligor to do all that he reasonably can in the circumstances to achieve the contractual objective.

There is also some suggestion that "best endeavours" involves good faith. Singapore courts suggest that "best endeavours" requires the obligor to do everything reasonable in good faith to achieve the desired outcome. What this entails is uncertain. Some indication of what good faith includes was set out in *HSBC Institutional Trust Services* in the context of an "endeavour to agree in good faith". Since an implied duty of good faith is not recognised in Singapore contract law, it is surprising that "endeavours" clauses are said to address this *lacunae* and are introduced to regulate the parties' obligations. Canadian decisions also suggest that "best efforts" are analogous to good faith and involves obligations of honesty and fair dealing in taking all reasonable steps to achieve the contractual objective. This makes the standards required for meeting "best endeavours" even more ambiguous.

There is no less uncertainty with regard to "all reasonable endeavours" and whether it carries the same standard of conduct as "best endeavours". This is not settled in England and creates uncertainty where English law is the applicable law. On the other hand, Singapore courts do not find any real distinction between "best endeavours" and "all reasonable endeavours". The standard of endeavour is ordinarily just as onerous for both types of obligations. Thus, in contracts governed by Singapore law, both endeavours require the most stringent standards. Furthermore, where both "best" and "all reasonable" endeavours appear in the same contract, without differentiating between the applicable standards, this is insufficient to indicate an intention to impose different levels of endeavour, in the view of Singapore courts.

"Reasonable endeavours" is regarded as less onerous than "all reasonable endeavours". However, it is unclear how much lower the standard is and the courts have not ventured to define the applicable standard.

It is also uncertain whether "best", "all reasonable" and "reasonable" endeavours require the sacrifice of the obligor's own commercial interests. This calls for balancing contractual requirements with commercial interests, given that each party has his own commercial interests to look after. The lack of consensus in the common law jurisdictions is apparent. English decisions are not consistent. In Canada, "best endeavours" does not require the party obliged to sacrifice himself totally to the economic interests of the obligee, although the interests of the other party must predominate. In Australia, "best endeavours" involves a recognition that the interests of the obligee could not be paramount in every case and that in some cases, the interests of the obligor would prevail. Singapore courts take the position that the obligor can take into account his own interests in undertaking "best" and "all reasonable" endeavours.

He is not always required to sacrifice his own commercial interests in satisfaction of his obligations unless the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice. This exception is consistent with the views of Moore-Bick LJ and Longmore LJ [47] in *Jet2.com.* In this

[47] [2012] 2 ALL ER (Comm) 1053 at [31], [32] per Moore-Bick LJ and [70] per Longmore LJ.

regard, the discussion on "commercial interests" in *Barclays Bank plc* is helpful, *albeit* in the context of that case. With regard to "reasonable endeavours", there is some support for the view that the party obliged is not required to sacrifice his own interests. It remains an open question in Singapore. The uncertainty of whether the obligor is required to sacrifice his own commercial interests can be resolved by looking at the words of the contract in determining whether or not such sacrifice is contemplated. Where a particular course of action is set out as part of the obligation, that course of action must be taken, even at the risk of involving the sacrifice of the obligor's commercial interests.

8. Conclusion

None of the endeavours clauses, without further definition, has any particular meaning ascribed to it. The distinction between each of these non-absolute obligations is a fine line and their precise meaning and extent remain unclear. In an attempt to resolve this uncertainty, courts and practitioners have suggested setting out clearly and in detail the underlying objective of the endeavour, the extent of the obligations, the degree of effort to be deployed and the steps to be taken for achieving the desired contractual objective. If criteria is set out, then strict compliance is necessary. In the absence of clear criteria, it will be difficult to determine the intended meaning and scope of the endeavour clause in the context of the individual contract.

The meaning and scope of non-absolute obligations is determined by a fact-intensive inquiry involving a contextual approach. The party obliged will do well to bear in mind that the same endeavours formulation used in a particular context may not necessarily have the same or similar meaning in a different context and that decisions arrived at in a different context must be viewed with caution.