

Best and Reasonable Endeavours Clauses

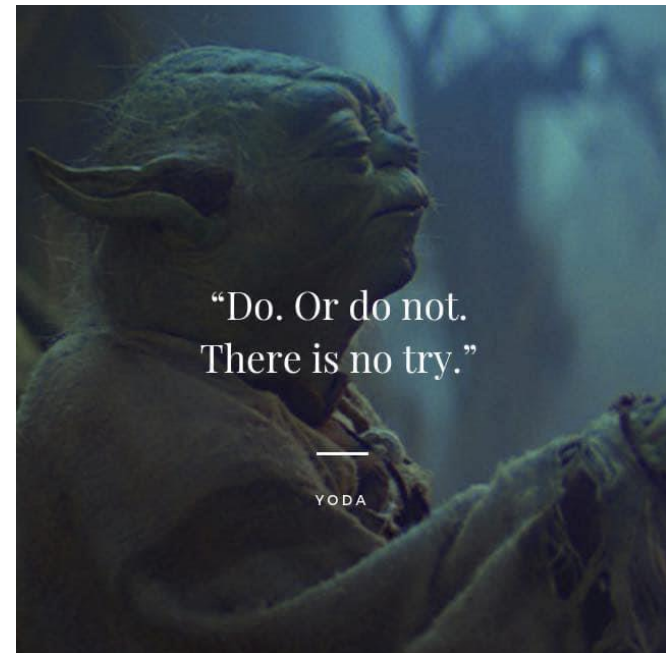
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Best / reasonable endeavours

- What are we talking about?
- A promise to try...
... really hard?



Scope

- A summary of relevant cases & key principles
- Consideration of the following questions:
 1. Is there a difference between 'best' and 'reasonable' endeavours?
 2. Can the cases be distinguished where there is a fiduciary or ongoing relationship?
 3. Can a contractual liability to use best endeavours be delegated?
 4. Can it be implied as a term of a commercial contract?
 5. Ultimately, what is the threshold conduct required?

General principles

- Ultimately turns on the facts of the case and the particular wording of the clause.
- **Best endeavours:** A “party must do all that he [or she] can in the circumstances to achieve the contractual object, but no more”

Hospital Products Ltd v United States Surgical Corporation (1984)
156 CLR 41, 64

- **Reasonable endeavours:** an obligation to “take steps that a reasonable person in the circumstances would take to achieve that end”

(Altis Propco 2 Pty Ltd v Majors Bay Development Pty Ltd [2022]
NSWSC 403 at [72]-[72]).

The Victorian position

***Joseph Street Pty Ltd v Tan* (2012) 38 VR 241; [2012] VSCA 113**

‘The words ‘best endeavours’ mean what they say – best endeavours, not second-best endeavours; and so, within reasonable limits, they require the obligor, broadly speaking, to leave no stone unturned to achieve the object in view’ (at [157])

See also:

- *Bisognin v Hera Project Ptd Ltd* [2018] VSCA 93
- *Joseph Finance and Investment Pty Ltd v Eastwood Retirement Pty Ltd* [2023] VSC 731
- *Re Iceland Storage Australia Pty Ltd* [2023] VSC 206

Examples

- **Obligation to distribute and promote:** *Sheffield Railway; Hospital Products; Transfield; Weatherbeeta Limited v Hammersmith Nominees Pty Ltd* [2019] VSC 559
- **Obligation to obtain building or planning permits:** *Hawkins; Joseph Street; Paltara Pty Ltd v Dempster* (1991) 6 WAR 85
- **Obligation to subdivide property:** *Foster v Hall; Hera Projects;*
- **Obligation to satisfy condition precedent:** *Stepping Stones Child Care Centre Pty Ltd v Early Learning Services Ltd* [2013] ATSC 173 (landlord consent); *Re Iceland Cold Storage Australia* (refinance)
- **Subject to finance:** *Atlis PropCo*

Sheffield District Railway Co v Great Central Railway Co

(1911) 27 TLR 451

- Sheffield District Railway operated a short railway line with two stations providing access to Sheffield.
- Central Railway owed an obligation to “use their best endeavours” to increase traffic on the Sheffield stations. Central Railway had assumed a quasi-fiduciary position towards Sheffield District Railway.
- Central Railway continued to route goods through its own stations, rather than Sheffield’s.
- **Held:** Central Railway breached its best endeavours obligations
- **Test:** Central Railway was required to, broadly speaking “*leave no stone unturned to develop traffic on the Sheffield District line.*”

Transfield Pty Ltd v Arlo International Ltd

(1980) 144 CLR 83

- Arlo granted Transfield exclusive license to make, use, exercise and vend the Arlo pole.
- Transfield tendered for a government contract to build a railway, but did not specify the use of the Arlo pole.
- Government expressed doubts as to suitability of Arlo pole.
- Subsequently, Transfield developed its own pole which was distributed pursuant to the tender and subsequently destroyed the potential market for the Arlo pole.
- **Held:** breached obligation to use best endeavours.

Transfield Pty Ltd v Arlo International Ltd

- **Clause:** *“The licensee covenants during the period of Power Transmission Line Licence at all times to use its best endeavours towards the design fabrication, installation and selling of [the Arlo pole] throughout the licensed territory and to energetically promote and develop the greatest possible market for [the Arlo pole].*
- **Mason J:** *“A ‘best endeavours’ clause thus prescribes a standard of endeavour 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”.*

Hospital Products Ltd v United States Surgical Corporation

(1984) 156 CLR 41

- Parties entered into a distribution agreement to distribute surgical stapling products in Australia. Unbeknownst to the manufacturer, the distributor had commenced reverse engineering its products to manufacture them in Australia.
- **Clause:** *“That the distributor would devote its best efforts to distributing USSC surgical stapling products, and building up the market for those products, in Australia, to the common benefit of USSC and itself.”*
- **Held:** breach of best endeavour obligations. However, the best endeavours clause did not prevent the distributor from selling a competitor’s product.

Hospital Products Ltd v United States Surgical Corporation

Per Mason J at 91-93:

- A best efforts clause is a common feature of a distribution agreement. The provision that such efforts be for the common benefit of both parties is unusual.
- The extent of the obligation thereby imposed is governed by what is reasonable in the circumstances (citing *Transfield*).
- The clause recognises that the interests of USSC could not be paramount in every case and in some circumstances, the interests of the distributor will prevail.
- A distributor is entitled to make decisions in its own interests, subject to such restrictions on its powers as imposed by the contract.

Hospital Products Ltd v United States Surgical Corporation

Per Gibbs CJ (in dissent) at 64-65.

- *“An obligation to use “best endeavours” does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more.”*
- *“An undertaking to use best endeavours or best efforts to promote the sale of one product does not necessarily impose an obligation not to sell a competing product...although it may do so in some circumstances...”*
- *“However, a person who had given such an undertaking could not successfully assert that he had fulfilled it if he prepared a product of his own and promoted the sale of that product with the deliberate intention of appropriating for himself the market which he had in effect promised to do all he reasonably could to secure for the person to whom he had given the undertaking”*

Electricity Generation Corporation v Woodside Energy Limited

(2014) 251 CLR 640

- Verve entered into a long-term agreement to supply gas across WA with gas sellers, which included Woodside.
- Verve purchased gas from these sellers under terms that required the sellers to supply certain quantities to Verve each day and use “reasonable endeavours” to make available a minimum quantity of gas and, in certain circumstances, must use “reasonable endeavours” to make available an additional quantity of gas.
- A gas explosion at a plant operated by a third party reduced the supply of gas to WA. The sellers refused to supply the additional gas at the price stipulated in the agreement.
- **Held:** not a breach of the reasonable endeavours clause.
- The best endeavours clause in the supply agreement was qualified by the gas seller’s entitlement to take into account their own commercial economic and operational interest in relation to the supply of gas.

Electricity Generation Corporation v Woodside Energy Limited

Per French CJ, Hayne, Crennan and Kiefell JJ (citations omitted):

Three general observations can be made about obligations to use reasonable endeavours to achieve a contractual object. First, an obligation thus expressed is not absolute or unconditional.

*Secondly, the nature and extent of an obligation imposed in such terms is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect an obligor's business.... As Sellers J observed of a corporate obligor in *Terrell v Mabie Todd & Co Ltd*, an obligation to use reasonable endeavours would not oblige the achievement of a contractual object "to the certain ruin of the Company or to the utter disregard of the interests of the shareholders". An obligor's freedom to act in its own business interests, in matters to which the agreement relates, is not necessarily foreclosed, or to be sacrificed, by an obligation to use reasonable endeavours to achieve a contractual object.*

Thirdly, some contracts containing an obligation to use or make reasonable endeavours to achieve a contractual object contain their own internal standard of what is reasonable, by some express reference relevant to the business interests of an obligee.

Foster v Hall

[2012] NSWCA 122 (McFarlan, Meagher JJA and Tobias AJA)

- Contract for sale of part of Vendor's land, subject to registration of a plan of subdivision within 12 months.
- Vendor must use 'best reasonable endeavours'.
- Development consent issued by local council required construction of an accessway suitable for fire appliances.
- Vendor did not seek amendment of this requirement despite indications from Council that it would consider an amendment.
- Subdivision plan not registered within the required timeframe.
- Purchaser alleges breach.

Foster v Hall

- The addition of the word “best” to the expression “reasonable endeavours” raises the required standard to a level somewhat higher than that imposed by a simple “reasonable endeavours”.
- However: do not consider that there is any significant difference, at least for present purposes, between the content of an obligation to use "best reasonable endeavours" and one to use "best endeavours".
- A party subject to the obligation is bound to take "steps which a prudent, determined and reasonable [party], acting in his own interests and desiring to achieve [the results specified in the contract] would take" (citing *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 151 quoting Buckley LJ in *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 at 343).

Joseph Street Pty Ltd v Tan

(2012) 38 VR 241; [2012] VSCA 113 (Warren CJ, Nettle JA and Cavanough AJA)

- Purchasers of residential unit “off the plan”.
- Contract of Sale subject to registration of proposed subdivision.
- ‘The Vendor at its own expense and with all reasonable expedition will use its best endeavours to procure that the Plan of Subdivision is approved by the Registrar of Titles within 6 months from the Day of Sale’.
- Stipulated time passed, Vendors purported to rescind.
- Purchasers allege Vendor should have entered into s.173 agreement with Council to facilitate timely registration of the Plan.

Joseph Street Pty Ltd v Tan

- A discrete obligation.
- *‘The words ‘best endeavours’ mean what they say – best endeavours, not second-best endeavours; and so, within reasonable limits, they require the obligor, broadly speaking, to leave no stone unturned to achieve the object in view’*
- Party wishing to rescind cannot take advantage of its own ineffective or inefficient measures to comply with its contractual obligations.
- Where a vendor’s default has deprived the purchaser of a “substantial chance” that the condition would have been fulfilled, the vendor cannot exercise the right of rescission.

Bisognin v Hera Project Ptd Ltd

[2018] VSCA 93 (Tate, Kyrou and Coghlan JJA)

- Contract of sale for land on an unregistered plan of subdivision.
- Subject to 'sunset clause' allowing termination if the plan was not registered by a specified date.
- Purchaser paid deposit and incurred expenses in pursuing registration of the plan.
- Vendors subject to best endeavours obligation to cooperate.
- Vendors misled the Purchaser about obtaining finance to pay fees required for registration, separately contracted to sell the land to another party if they could terminate the first contract.

Bisognin v Hera Project Ptd Ltd

Relevant Clauses:

- “The Purchaser shall at its own cost and expense prepare a Plan of Subdivision in respect of the land comprised in the Parcel in or to the like effect of the Plan of Subdivision annexed hereto and submit the same to the City of Casey for sealing in accordance with the provisions of Part 1 of the Act and shall use its **best endeavours and do all things reasonably required to expedite and procure the registration of the said Plan** pursuant to the provisions of Part II of the Act.”
- “The Vendor will use their **best endeavours to co-operate** with the Purchaser, sign all documents, do all acts and things necessary to give effect to the approval of the Plan of Subdivision and to give effect to the UDF, making the duplicate title available at the Land Titles Office for the purpose of registration of the Plan of Subdivision, and will make any Growth Areas Infrastructure Contribution (GAIC) payment promptly if required by the relevant authorities.”

Joseph Finance and Investment Pty Ltd v Eastwood Retirement Pty Ltd

[2023] VSC 731 (Croft J)

- In assessing reasonableness, the endeavours of a party are not to be judged with the benefit of hindsight.
- Cf. *'everything reasonably necessary'* clauses.
- It is an entirely mistaken approach to treat such a formulation as something akin to a term of art at general law or as some 'quasi-legislative' term carrying a fixed meaning devoid of any context.
- In the present context, 'reasonable endeavours' required the Defendant to do everything reasonable to achieve the 'contractual object' of the Option Deed, short of going beyond the bounds of reason such as imperilling its own financial solvency or survival.

Joseph Finance and Investment Pty Ltd v Eastwood Retirement Pty Ltd

- Parties entered into an option deed which granted the Plaintiff an option to purchase the Defendant's retirement village business.
- The option deed required the Defendant to use reasonable endeavours to complete the proposed development of the retirement village before the expiry date.
- The Defendant did not instruct its builder to complete construction of the remaining villas before the expiry date, despite having the financial capacity to do so.
- Plaintiff sought to exercise the option, but the Defendant denied it.

Back to the questions...

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Questions

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