Best Endeavours Clauses – No Longer a Bridge too Far

Dr Josh Wilson QC[1]

Abstract

On 5 March 2014 the High Court of Australia held that the nature and extent of a best endeavours clause in a commercial agreement was necessarily conditioned by what is reasonable in the circumstances and that an obligor's freedom to act in its own best 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 the contractual object. This holding substantially waters down over a century of learning to the effect that 'best endeavours' meant leaving no stone unturned to achieve the contractual object. Scope now exists for the obligor under a best endeavours clause to keep an eye to the protection of its own interests and still be compliant with the obligation.

Introduction

As long ago as 1911, Lawrence J in *Sheffield District Railway Company v Great Central Railway Company*[2] held that a best endeavours clause required the obligor, broadly speaking, to 'leave no stone unturned to achieve the object in view'.[3] Subsequent UK and Australian authorities focused on an examination of what the obligor actually did when assessing whether the obligor did all that he or she could reasonably have done to achieve the contractual object. So far as Australian authority was concerned, the obligation to leave no stone unturned was said to emanate from the reasons of Gibbs CJ in *Hospital Products Ltd v United States Surgical Corporation*.[4] What the obligor could reasonably have done was determined by placing the obligor in the shoes of the obligee. Then, one asked whether the acts of the obligor were the same as the acts that the obligee would have done if 'conscientiously applying itself to the task'[5] of doing the act required by the clause. The focus was on what the obligee would have done to secure its own interests. If the acts actually performed by the obligor did not correspond, then the obligor was said to have failed to comply with the best endeavours clause.

Since the March 2014 High Court decision in *Electricity Generation Corporation v Woodside Energy Ltd* ('Woodside'),[6] the focus has shifted. Now, while reasonableness remains the touchstone in assessing

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2 (1911) 27 TLR 451, 452.

3 The words in quotations are not mine nor are they those used by Lawrence J but rather they are of the Court of Appeal (Warren CJ, Nettle JA and Cavanough AJA) in *Joseph Street Pty Ltd v Tan* [2012] VSCA 113 at [41].

4 (1984) 156 CLR 41, 64 to 65.

5 This formulation emerged from the decision of the Full Court of the Supreme Court of Queensland in *Hawkins v Pender Brothers Pty Ltd* [1990] 1 Qd R 135, 150.

6 [2014] HCA 7.

compliance with the clause, courts and arbitrators are entitled to assess compliance with the clause against things that affect the obligor's own business interests. One would be forgiven for thinking that is a very long way from leaving no stone unturned. So, an obligor is not now required to achieve the contractual object if in the process the obligor causes its own ruination.[7]

Tracing the learning

In *Woodside*, the High Court said[8] that best endeavours clauses are not uncommon in distribution agreements,[9] intellectual property licences,[10] mining and resources agreements[11] and planning and construction agreements.[12] While the pronouncement by Lawrence J that no stone be left unturned was made in the regency era of 1911, the more important authorities that pre-dated the decision in *Woodside* were decided in the new millennium, as the survey below records.

Curiously, the seed was planted in 1952 that compliance with a reasonable endeavours clause did not require the obligor to act to its own ruination. The decision of Sellers J in *Terrell v Mabie Todd & Co* stood for the proposition that 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. Sellers J held that an obligor's freedom to act in its own business interests, in matters to which the agreement related, was not necessarily foreclosed or sacrificed by an obligation to use reasonable endeavours to achieve a contractual object. So, 40 years after Lawrence J spoke of leaving no stone unturned, the ground began yielding in 1952 when Sellers J qualified the best endeavours clause in the way his Lordship did.

Little judicial attention was devoted to best endeavours clauses between 1952 and 1980. But in the 1980 decision of Buckley LJ in *IBM United Kingdom Ltd v Rockware Glass Ltd*,[13] the situation changed. That was a planning case, the facts of which are unimportant except insofar as they involved a covenant to use best endeavours to obtain planning permission. Buckley LJ described the obligation as requiring a vendor to do what an owner would do who was anxious to obtain a planning permit. His Lordship put the position in these terms:

> *What would an owner of the property with which we are concerned in this case, who is anxious to obtain planning permission, do to achieve that end. The formula which has been suggested and which would command itself to me is that the plaintiffs as covenantors are bound to take all those steps in their power which are capable of producing the desired results, namely, the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take.*

7 The High Court in *Woodside* cited with approval comments to that effect in the 1950s observations of Sellars J in *Terrell v Mabie Todd & Co* (1952) 69 RPC 234, 236.

8 [2014] HCA 7 at [40].

9 Citing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

10 Citing *Terrell v Mabie Todd & Co* (1952) 69 RPC 234.

11 Citing *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd* [2009] 76 NSWLR 29.

12 Citing *CPG Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch).

13 (1980) FSR 335, 343.

Taking all steps in their power which are capable of producing the desired result resonates with leaving no stone unturned.

In 1980 the High Court of Australia addressed a best endeavours clause in relation to the design, fabrication and installation of plant and equipment in *Transfield Pty Ltd v Arlo International Ltd*.[14] Following *Terrell v Mabie Todd & Co Ltd*, Mason J held that a best endeavours clause prescribed a standard of endeavour which was measured by what was reasonable in the circumstances, having regard to the nature, capacity, qualifications and responsibilities of the licensee viewed in the light of the particular contract.

Then came the decision of the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation*.[15] The court took different views about the content of the obligation under a best endeavours clause. In one camp was Gibbs CJ and in another was Mason J. Subsequently, the Court of Appeal of the Supreme Court of Victoria in *Joseph Street* preferred the views of Gibbs CJ whereas the High Court in Woodside preferred the views of Mason J. Under the theory espoused by Gibbs CJ,[16] an obligation to use best endeavours to achieve a contractual object required the obligor to do all he or she could reasonably do in the circumstances to achieve the contractual object. The essence was the obligor doing '*all* he or she could reasonably do'. Conversely, Mason J did not place emphasis on the obligor doing all that could reasonably be done. Mason J put the matter differently as follows:[17]

> *The qualification [of reasonableness] itself is aimed as situations in which there would be conflict between the obligation to use best efforts and the independent business interests of the distributor and has the object of resolving those conflict by the standard of reasonableness…It therefore involves a recognition that the interests of [the manufacturer] could not be paramount in every case and that in some cases the interests of the distributor would prevail.*

So, by 1984 the High Court pronounced upon the requirement of a best endeavours clause in a seemingly contradictory manner. Gibbs CJ put it somewhat immutably that the obligor was to do 'all he or she could reasonably do' whereas Mason J held that there was no predetermined formula in which the obligee's interests always prevailed.

Six years later, in 1990, the issue arose for the consideration of the Full Court of the Supreme Court of Queensland in *Hawkins v Pender Bros Pty Ltd*.[18] That case involved a covenant to use best endeavours to obtain a building permit and town planning approvals. The Full Court held that the clause required the obligor conscientiously to apply itself to the task of securing approval with the vigour to be expected of it if it were prudently attempting to secure its own interests, and to continue to do so until it should reasonably judge in the circumstances that further efforts would have such remote prospects of success as to be likely wasted. On that formulation, the test called for conscientious application to the task, with

14 (1980) 144 CLR 84 at [17].
15 (1984) 156 CLR 41.
16 (1984) 156 CLR 41 at [64] – [65].
17 (1984) 156 CLR 41 at 92.
18 (1990) 1 Qd R 135.

vigour, as if the obligor were undertaking the task for itself, and to not stop in the task until all hopes for getting what the obligor was required to get were reasonably exhausted. According to the view espoused six years earlier by Mason J in *Hospital Products*, the Full Court's formulation went far beyond his prescription.

One year after *Hawkins*, the Full Court of the Supreme Court of Western Australia in *Paltara Pty Ltd v Dempster* [19] expressed the test differently again. Malcolm CJ and Pidgeon J held that an obligation to use best endeavours to obtain sub-divisional approval under a sale of land contract required the obligor to do what reasonably could be done in the circumstances, and what could reasonably be done was whatever a reasonable and prudent board of directors acting properly in the interests of the company would do in the circumstances. Under this formulation, the only relevant enquiry was 'what would a reasonable and prudent board do in the circumstances'. Immediately it must be acknowledged Malcolm CJ and Pidgeon J seemed not to have considered how natural persons were to comply with a best endeavours clause as the Full Court's test was aimed only at a board of directors. That said, there was no mention of 'doing the best the board could do', nor of 'leaving no stone unturned', nor of 'achieving the contractual object'. In one sense the Full Court's prescription imposed a regime on the obligor that was tolerably relaxed.

In the United Kingdom, in 2006 Mr. Justice Lewison considered the duration that a reasonable endeavours clause bound the obligor in *Yewbelle Ltd v London Green Developments Ltd*.[20] His Lordship addressed the issue in the following manner:

> *I come back to the question: for how long must the seller continue to use reasonable endeavours to achieve the desired result? In his opening address, Mr. Morgan said that the obligation to use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters again. I am prepared to accept this formulation, subject to the qualification that account must be taken of events as they unfold, including extraordinary events.*

That formulation had a similar air about it to the *Hawkins* distillation.

Martin CJ of the Supreme Court of Western Australia followed *Paltara* in *O'Rourke v P & B Corp Ltd*.[21] Martin CJ's analysis was at a single judge level, however.

The Court of Appeal of the Supreme Court of New South Wales had occasion to consider a best endeavours clause (there described as a reasonable endeavours clause) in 2009 in *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd*.[22] That case concerned an agreement for the sale of a coal mining project. The issue to hand was whether reasonable endevaours included taking steps to implement pre-

19 (1991) 6 WAR 85,89.
20 [2006] EWHC 3166 at [123].
21 (2008) 6 WAR 85, 89.
22 (2009) 79 NSWLR 129 .

emption provisions. The court[23] drew together the various pronouncements by Australian and English courts and said this:[24]

> *While the content of a 'best endeavours' clause depends upon the particular obligation and the circumstances in which it was undertaken, it posits an objective standard to be addressed by reference to what was done or not done in the circumstances that existed; it requires the doing of what can reasonably be done in the circumstances to achieve the contractual object [Hospital Products Ltd v United State Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 at 64–65, 91–92 and 118]. It necessarily includes an obligation not to hinder or prevent achievement of the contractual object [Hospital Products, 64–65 (Gibbs CJ), 95 (Mason J)]. The obligation continues until the obligor "should reasonably judge in the circumstances that further efforts would have such remote prospects of success that they are simply likely to be wasted" [Hawkins v Pender Bros Pty Ltd [1990] 1 Qd R 135 at 150–151 and 152]; however, one must allow for events, including extraordinary events, as they unfold, as Lewison J said in Yewbelle Ltd v London Green Developments Ltd [2006] EWHC 3166 (Ch) (at [123]); affirmed [2007] EWCACiv 475 [29], [33], [122], [124]]*

That statement might be condensed into a few propositions. First, the obligation involves an objective standard. Second, the obligor must do what can reasonably be done to achieve the contractual object. Third, the obligation continues until further efforts will be wasteful. But those propositions remained silent about the obligor being entitled to prefer his, her or its own interests and whether the obligor might not do everything in the circumstances if by doing so its own ruination might result.

In the UK, Mr. Justice Vos in *CPG Group Ltd v Qatari Diar Real Estate*[25] followed the observations of Mr. Justice Lewison in *Yewbelle*, adding nothing to those observations. Thus, the position in England was by then well entrenched by Lewison J.

Next chronologically came *Rehins Pty Ltd v Debin Nominees Pty Ltd (No. 2)* in 2011.[26] There, Murray J was concerned with a subdivision best endeavours case. In surveying the applicable legal principles, his Honour cited the decisions in *O'Rourke v P & B Corporation Pty Ltd*, *Hospital Products, IBM, Hawkins* and *Paltara* but not *Yewbelle, Centennial or Qatari*. No new test was formulated.

Two decisions from the Court of Appeal of the Supreme Court of New South Wales followed, one in 2011 and the other in 2012. The earlier was *Cypjayne Pty Ltd v Babcock & Brown International*.[27] There, the Court of Appeal[28] did no more than apply the 1980 High Court decision of *Transfield Pty Ltd v Arlo International Ltd*, that in turn followed *Terrell v Mabie Todd & Co Ltd*. One might think that case threw up a curious state of affairs by addressing no other authority beyond Mabie, in view of the burgeoning jurisprudence then developing in the field. Perhaps the explanation for the exclusive focus on *Mabie*

23 Hodgson, Tobias and Campbell JJA.
24 (2009) 79 NSWLR 129 at [29].
25 [2010] EWHC 1535 at [250].
26 [2011] WASC 168.
27 [2011] NSWCA 173 at [67].
28 Bathurst CJ, Macfarlan and Young JJA.

was that *Cypjayne*, an intellectual property case, invoked authorities applicable to intellectual property rather than land subdivision cases.

The second decision of the New South Wales Court of Appeal was *Foster v Hall* [29] in which the court addressed a clause that required compliance with 'best reasonable endeavours'. Macfarlan JA,[30] a member of the Court of Appeal in *Cypjane*, applied *Hospital Products, Hawkins*, and *IBM* but none of the other decisions extracted above. The court held that 'whether a failure to seek amendment (of a development consent) represents a breach of the obligation to use "best endeavours" will depend on the circumstances of the case'. That form of language seems reminiscent of the words of Mason J in *Hospital Products* but not of the notion of leaving no stone unturned.

The Victorian position

In *Joseph Street*,[31] the Court of Appeal of the Supreme Court of Victoria made its contribution to the jurisprudence in the field. The facts of the case bear close examination. Mr. and Mrs. Tan sold land to Jonathan O'Dwyer pursuant to a contract that included a provision that the balance of the purchase price was to be paid 'at the expiration of 14 days after the registration of the plan of subdivision or issue of the certificate of occupancy, whichever shall be later'. The contract also included a term to the effect that the vendors would 'at its (sic) own expense and with all reasonable expedition…use its best endeavours to procure that the plan of subdivision is approved by the Registrar of Titles within six month from the day of sale'. A further term of the contract provided that either party could rescind if the plan of subdivision was not registered in a certain time. The period of 15 months from the date of sale expired without a planning permit having been registered on 18 December 2006. It was ultimately registered on 1 April 2008. The vendors purported to rescind the contract in September 2007. The purchasers asserted that if the vendors had been true to their obligation to use best endeavours, the vendors could have (but failed to) utilise a procedure by which the plan of subdivision obtained the necessary registration under s 173 of the *Planning and Environment Act*. Had they done that, so the purchasers contended, the local council would have provided a statement of compliance under the *Subdivisions Act* thereby expediting registration of the plan of subdivision. The purchasers argued that the vendors made no attempt at all to enter into the s. 173 agreement.

The vendors contended that by early 2007 the builder, Gumleaf, was in dire financial straits and that the building works had slowed to a snails pace ultimately leading to the appointment of an administrator then to the appointment of external administration by the court.[32] The vendors contended at trial that it was impossible to register the plan of subdivision in view of the insolvency of the builder, Gumleaf.

At trial the vendors succeeded, successfully dispelling the notion that they had in any way breached their obligation to comply with the best endeavours clause.

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29 [2012] NSWCA 122.
30 Meagher and Tobias JJA agreed.
31 [2012] VSCA 113 (judgment in which was handed down on 7 June 2012).
32 The learned trial judge accepted evidence called by the vendors to that effect Joseph Street Pty Ltd v Tan [2010] VSC 586 at [159] (J Forrest J).

On appeal, the Court of Appeal disagreed, holding that the vendors had breached their best endeavours obligation. This was the reasoning.

Citing the decision of Gibbs CJ in *Hospital Products* (curiously, not the decision of Mason J in the same case) the court held that an obligation to use best endeavours to achieve a contractual object required the obligor to do all he or she reasonably could do in the circumstances to achieve that contractual object. The court held that the words 'best endeavours' meant what they said – best endeavours, not second-best endeavours; and so, within reasonable limits, they required the obligor, broadly speaking, to leave no stone unturned to achieve the object in view.[33] The court then cited *IBM, Paltara, Hawkins, Foster v Hall* and *O'Rourke*, giving a one page six-paragraph analysis to the learning. The court held that it was plain that by failing to pursue a s. 173 agreement with the council the vendors did not use their best endeavours to obtain registration of the plan of subdivision during the relevant period.[34] So far as the protection of the vendors own interests was concerned, the court referred to the submission that the vendors adopted a commercial strategy of terminating the contract in order to obtain a higher price on resale and held that 'this illustrates the vendors' focus on their own commercial interests in a way quite inconsistent with the requirement to use best endeavours as explained by Martin CJ in O'Rourke (being) an obligation to take steps which a prudent and reasonable owner acting in his or her own interests and determined to proceed would take'.

The court addressed the vendors argument concerning there being no need to enter into the s 173 agreement and said the following:

> *The vendors submit that to enter into a s 173 agreement just for the sake of obtaining individual title where settlement could not be effected because the building works were not completed does not make sense in business terms, especially in the circumstances of this case where the builder, Gumleaf, was slow in its building works and apparently in difficulties. However, once again, that is to look at the matter from the point of view of the vendors' interests only…*

The case was a disaster for the vendors. Faced with a builder that became insolvent and a purchaser seeking to procure an event the utility of which had long passed, the vendors were held to have breached their obligations to the purchaser to use reasonable endeavours to procure the registration of the plan of subdivision.

That was 2012. Now, fast forward to 2014.

Woodside

In 2014, the question of the balancing of the interests of the obligor against those of the obligee in a best endeavours clause attracted the attention of the High Court in *Woodside*. The facts are a little involved. Western Australia's Electricity Generation Corporation (trading as Verve Energy) entered into long-term agreements for the supply of gas across Western Australia with gas sellers, one of which was Woodside.

33 [2012] VSCA 113 at [41].
34 [2012] VSCA 113 at [48].

Verve purchased gas from those sellers under terms that required the sellers to supply a certain quantity of gas to Verve each day but also to use 'reasonable endeavours' to make available to Verve a supplemental maximum quantity of gas. The agreement provided that in certain eventualities, the sellers 'must use reasonable endeavours to make available for delivery up to an additional (quantity) of gas in addition to the supplemental maximum daily quantity' and that in determining whether the sellers were able to supply the supplemental maximum daily quantity, they were entitled to 'take into account all relevant commercial, economic and operational matters…'

On 3 June 2008 an explosion occurred at the plant operated by a third party causing a reduction in the supply of gas in and to Western Australia. The sellers refused to supply supplementary gas at the price stipulated under the agreement for an indefinite period and instead offered Verve gas at prices that exceeded those under the original gas supply agreement. The sellers then invited tenders for the purchase of gas between 4 June and the end of September 2008. Verve contended that the sellers, including Woodside, breached the gas supply agreement that required Woodside to use reasonable endeavours to supply gas to Verve at the rate applicable for supplementary maximum daily quantity from the date of the explosion to the date of the new tender period, September 2008.

The trial judge[35] held that upon a proper construction of the gas supply agreement, the sellers were not obliged to use reasonable endeavours to make the supplementary quantity of gas available. The trial judge held that the agreement expressly provided that the sellers were entitled to take into account commercial matters including the sale of gas to their customers and the profitability of such sales in determining whether the sellers were 'able to supply' the gas. The trial judge held that the sellers did not breach the agreement by failing to supply the supplemental maximum daily quantity of gas to Verve from the date of the explosion to the end of September.

The Court of Appeal[36] reversed the trial judge holding that Woodside did not in fact use reasonable endeavours to make available the supplementary maximum daily quantity of gas. The Court of Appeal held that the agreement set out the factors that the sellers *could* take into account but nothing gave the sellers the right to decide whether or not to supply the supplementary maximum daily quantity of gas at all.

The sellers, including Woodside, appealed to the High Court of Australia.

The High Court referred to Woodside's argument in these terms. Read as a whole, clause 3.3 of the gas supply agreement imposed an obligation to use reasonable endeavours to supply the supplementary maximum daily quantity of gas but that obligation was qualified or conditioned by the seller's entitlement to take into account their own commercial economic and operational interests in relation to that supply of gas. The explosion and the consequential business conditions in the market were matters the sellers were entitled to take into account in determining whether they were 'able' to supply the supplemental quantities of gas.

35 Le Miere J.

36 The court was made up of McLure P, Newnes and Murphy JJA.

The majority of the High Court[37] agreed, although Gageler J did not. The majority held that three general observations could be made about obligations to use best endeavours to achieve a contractual object. First, citing Dawson J in *Hospital Products* and the New South Wales Court of Appeal in *Cypjane*, the majority of the High Court held that an obligation thus expressed is not an absolute or unconditional obligation. Second, citing Mason J in *Hospital Products*, the High Court held that the nature and extent of an obligation imposed in such terms was necessarily conditioned by what was reasonable in the circumstances and that can include circumstances that affect the obligor's business. The court held that an obligation to use reasonable endeavours would not oblige the achievement of a contractual object to the certain ruin of the obligor. Third, the High Court held that some contracts importing an obligation to use reasonable endeavours contain their own internal standard of what is reasonable by some express reference to the business interests of the oblige.

Gageler J held that he was unable to see that the gas supply agreement gave the sellers a discretion not to make gas available for delivery up to the maximum merely because market circumstances presented an opportunity for the sellers to demand a substantially higher price.

Matters that emerge from the Woodside decision

It seems to me several matters arise from the High Court decision. First, no longer can it be sensibly contended that a best endeavours clause requires the obligor to leave no stone unturned so as to give the obligee the benefit of the contractual object. That thinking vanished some time ago. Next, and more importantly, in assessing what the obligor is to do and the lengths to which he, she or it must travel to comply with a best endeavours clause, the obligor is entitled to have regard to its own interest. That is not merely because such regard is part of the matrix that makes up what is reasonable. But it is because the High Court has now stated that the observations of Mason J in *Hospital Products* are part of the three general observations on this subject. Thus, the obligor is not required to go to such lengths in order to comply with such a clause as would lead to the ruination of the obligor.

Interestingly, the High Court said nothing about the duration that the best endeavours obligation lasts. One can infer that the earlier pronouncements in cases such as *Yewbelle and Hawkins* still apply, namely that the obligation endures until such time as further efforts would be wasted. In the case of a company that is bound by the obligation, the statement of the High Court seems to have eclipsed earlier comments in such cases as *Paltara* and *Rehins* to the effect that the obligor is bound to do as a reasonable board of directors would have done. Nowadays there seems to be no differentiation between the corporate and non-corporate obligor.

One wonders whether the result in *Joseph Street* would be different had it been decided post-Woodside. Would the vendors, faced with an insolvent builder and expensive completion costs, nevertheless have been required to enter into a s. 173 agreement, in order to comply with their best endeavours obligations? Or would those vendors, faced with those commercially unattractive exigencies, have been permitted to place their own interests ahead of 'leaving no stone unturned'. In the current state of jurisprudence, after Woodside, one would be forgiven for thinking the latter.

37 French CJ, Hayne, Crennan and Kiefel JJ.