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Contractors' and sub-contractors' constant best endeavours to prevent delay

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**Const. L.J. 293* Introduction

THIS article considers the obligations imposed by the often-used terminology requiring contractors and sub-contractors to use constant "**best endeavours**" to prevent delay. For example, the provisos to clause 25 of the JCT standard form of building contract 1980 (local authority and private editions) and clause 11.2.4 of NSC/4, applicable to main contractors and nominated sub-contractors respectively. (Reference below will only be made to the JCT 80 main contract terms although the principle applies equally to nominated sub-contractors and indeed domestic sub-contractors under DOM/1).

The proviso and the obligation

Readers will be aware that the foregoing clauses deal with the procedure to be followed and the timing and content of notices which a main contractor and nominated sub-contractor(s) are required to submit, prior to the architect considering whether to grant the extension of time applied for, or any extension at all, in order to fix a later date as the date for the completion of the works.

Clause 25.3.4 casts an important qualification on a main contractor's entitlement to an extension of time as it governs the whole of clause 25. Clause 25.3.4 provides as follows:

".4 Provided always

.4.1 the Contractor shall use constantly his **best endeavours** to prevent delay in the progress of the Works, howsoever caused and prevent the completion of the Works being delayed or further delayed beyond the Completion Date;

.4.2 the Contractor shall do all that may be reasonably required to the satisfaction of the Architect to proceed with the Works."

The obligation imposed by clause 25.3.4 recognises that not all obligations can be undertaken in absolute and unqualified terms. However, no case law exists to cast light on the meaning of "constant **best endeavours**" and there is an absence of case law pertinent to contracts entered into in the construction industry. **Const. L.J.*

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a contracting organisation desirous of passing the “constant **best endeavours**” test, case law as to the meaning of “**best endeavours**” is instructive.

Case law

In *Terrel v. Mabie Todd and Company*,¹ Sellers J. held that an obligation to use “**best endeavours**” to promote the sales of a product, meant a duty to do what could reasonably be done in the circumstances; the standard of reasonableness being that of a “reasonable board of directors acting properly in the interests of their company and applying their minds to their contractual obligations to exploit the inventions”.

The obligations to use “**best endeavours**” was raised by the Court of Appeal in *IBM (UK) Limited v. Rockware Glass Limited*,² a case which solicitors and chartered surveyors involved in certain sales of land will be familiar. In this case, the defendant agreed to sell land to IBM for £6 million. The agreement provided that “the purchaser will make an application for planning permission and use its **best endeavours** to obtain the same”. Although planning permission was sought, it was refused. Moreover, IBM did not appeal to the Secretary of State against the refusal of the planning authority.

Allowing the defendant's appeal, Buckley, Lane and Goff L.JJ. declared that IBM: “are bound to take all those steps in their power which are capable of producing the desired result, 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.*”

(emphasis added)

Buckley L.J. said that the obligation to use **best endeavours** was not to be measured by reference to someone who is under a contractual obligation but someone who is acting in his own interest. Geoffrey Lane L.J. stated:

“These words (**best endeavours**) oblige the purchaser to take all those reasonable steps which a *prudent and determined man, acting in his own interests and anxious to obtain planning permission, would have taken.*”

(emphasis added)

The court unanimously agreed that, if an appeal to the government minister had a reasonable prospect of success, IBM were obliged to appeal.

However, in *Overseas Buyers Limited v. Grandex*³ Mustill J., then in the High Court, doubted whether the test established in *IBM* differed from “doing all that can reasonably be expected”. Accordingly, case law, on Court of Appeal authority at least, suggests that the standard of endeavour required by a party obliged to use his “**best endeavours**” is

a high one. It is submitted that their Lordships in *IBM* have reached a decision which is consistent with the ordinary meaning of the words before them.

Some commentators, however, have suggested that the increased level of the duty to use **best endeavours** laid down in the *IBM* case would not apply to construction **Const. L.J. 295* cases because, in that case, the court were not dealing with contractual obligations. The author is not persuaded by this view. What the Court of Appeal stated was that the obligation (arising out of the land sale contract) was not to be *measured* by reference to someone who is under a contractual obligation, but someone who is acting in his own interests.

Endeavours: "best" v. "every" v. "reasonable"

Clearly, the word "constantly", as used in JCT 80 and NSC/4 to qualify the words "**best endeavours**", increases the contractor's obligation. Assistance as to the standard of endeavour attributable to the words "**best endeavours**" can however also be gleaned from a comparison with other standards of "**endeavours**" commonly imposed on contracting parties.

Evans J. in *Carreras Rothman DS Limited v. Container Wear*⁴ rejected an argument that an obligation to use "every endeavour" carries with it a higher obligation than to use "**best endeavours**". In his view, there was no difference between the two expressions. However, in *UBH (Mechanical Services) Limited v. Standard Life Assurance Company*⁵, Rougier J. held that "reasonable **endeavours**" carries with it a lesser obligation than to use "**best endeavours**".

Accordingly, less expenditure would be expected of a party under an obligation to use reasonable **endeavours** than a party under an obligation to use **best endeavours**. However, subject to the terms of their contract, contractors and sub-contractors who agree constantly to use **best endeavours** to prevent delay ought constantly to use every endeavour so to do!

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As stated, there is an absence of case law to assist us as to the meaning of the important words used in construction industry standard forms. Of the entire proviso, contained in sub-clause 25.3.4 cited above, the learned editor of *Keating on Building Contracts* (sixth edition), states at page 642:

"Clause 25.3.4. This proviso is an important qualification of the right to an extension of time. Thus, for example, in some cases it might be the Contractor's duty to reprogramme the Works either to reduce or prevent delay. How far the Contractor must

take other steps depends upon the circumstances of each case, but it is thought that the proviso does not contemplate the expenditure of substantial sums of money.” Does this mean that there is a “de minimis” obligation on the contractor to do only the minimum required to satisfy the obligation to use “**best endeavours**” to prevent delays? The answer must be a resounding “no”, for the reasons given above. Furthermore, it cannot be ignored that contracting organisations, subject to the terms of JCT 80 or NSC/4, also have obligations to proceed regularly and diligently with the works. However, there are several matters which a contractor or sub-contractor ought to be quick to divulge to those responsible for administering construction contracts: **Const. L.J. 296* (i) contractors, although obliged to expend some monies to meet their obligations constantly to use their **best endeavours** to prevent delay, are not obliged to expend substantial sums;

- (ii) the culpability of the employer and/or his advisors for the delay;
- (iii) contract administrators' (as well as contractors' and sub-contractors') compliance with the procedure laid down in the contract; and
- (iv) the application of the contract “variation” clause.

In order to decide whether the “constant **best endeavours**” test has been satisfied, the scope of the variation clause incorporated in the standard form of contract is a most important consideration. In particular, a contractor must be paid for matters which constitute a variation and he would be wise to ensure the necessary procedures are adhered to and that the paperwork is in order. This would also have to be in the forefront of the mind of the architect and/or quantity surveyor when considering any independent claim under clause 26 for direct loss and/or expense, in order to prevent double recovery.

Implications for main contractors, sub-contractors, architects and quantity surveyors

Whilst it is conceded that the cases cited above are not on all fours with building contract situations, or the contract wording to be found in JCT 80 and NSC/4, they are, subject to the latter contracts, highly persuasive as to the level of endeavour required of a main contractor and/or sub-contractor.

Accordingly, contractors and sub-contractors must not adopt an inactive approach to their obligation and overriding requirement constantly to use their **best endeavours** to prevent delay. In short, contractors and sub-contractors ought to manage delay by reacting when the spectre of a delay arises, by taking predetermined steps to prevent

delays when it has become apparent that the progress of the works is likely to be delayed, or further delayed.

On the other hand, contractors and sub-contractors are entitled to payment for variations authorised in accordance with the standard form of contract, which arise out of their active response to the management of the delay, and they ought to ensure that the necessary paperwork is in place to avoid any misunderstandings. Although not obliged to expend substantial sums of money, contractors ought to reprogramme the works, reschedule material deliveries and information request schedules, and keep all parties advised of the situation. Further, they ought to ensure the situation is properly monitored in order that the necessary particularisation under JCT 80 and/or NSC/4 can be provided.

Contract administrators, including architects and quantity surveyors, cannot expect contractors and sub-contractors to expend substantial sums of money on preventing delay, but they are entitled to expect the proper management of delay. Architects, in particular, must be prepared to be flexible and respond to variations to information request schedules from contractors and nominated sub-contractors. Contractors and nominated sub-contractors on the other hand, if dissatisfied with the architect's decision that **best endeavours** have not been constantly used to prevent delay, can challenge that decision in arbitration.

Const. L.J. 1997, 13(5), 293-296

1.

[1952] 2 T.L.R. 574.

2.

[1980] F.S.R. 335.

3.

[1980] 2 Lloyd's Rep. 608.