

Reasonable endeavours

This case is of interest to all those involved with drafting “reasonable endeavours” clauses in commercial contracts including development agreements, agreements for lease, leases, building contracts and appointments. It reaffirms the position that what constitutes “reasonable” or “best” endeavours depends on the facts of the case. Parties to contracts need to be aware of the uncertainty this causes and ensure that express wording is used where an enforceable obligation is required.

The case of *Jet2.com –v- Blackpool Airport Limited* involved an Agreement under which the low cost airline Jet2 operated flights out of Blackpool Airport. For over 4 years Jet2 had operated out of “normal” hours. Jet2 had 2 aircrafts. The airport BAL wanted them to add a third jet but Jet2 did not agree that this was commercially viable at that time. Commercial tension between the parties increased. Suddenly BAL gave Jet2 7 days’ notice that it would no longer accept flights out of “normal” hours. Jet2 obtained an injunction to allow its scheduled flights to continue and the case for breach of contract and a declaration on the operating hours then came before the commercial court.

The Agreement provided that BAL would use “all reasonable endeavours” to provide a cost base that would facilitate Jet2’s low cost pricing. But the Agreement did not mention the operating hours. Jet2 argued that this provision covered it being able to use the longer operating hours that it had been using.

The dispute involved the hours that the airline could operate at the airport. Jet2 wanted a declaration on the operating hours and claimed that the airport was in breach of contract for unilaterally refusing to allow the airline to continue operating out of “normal” hours.

BAL argued that it was not required to do anything contrary to its legitimate commercial interests. Jet2 argued that BAL could not simply choose to reduce the level of service committed by the Agreement potentially down to nothing, simply because it had subsequently decided that it was no longer in its commercial interests to do so.

The judge considered the known commercial risks

borne by the parties when entering into the contract. He noted that Blackpool is a small regional airport with published opening hours which provide for other hours only by agreement. The cost of opening the airport to service a single flight greatly exceeds the revenue which the operation will generate. He considered it an obvious requirement that the low cost services described in the Agreement would have been seen by the parties as requiring flexibility in scheduling early departures and late arrivals particularly during the peak summer season.

He found that the parties were assuming commercial and risk bearing obligations as part of the cooperative venture with each other. He said it could not have been intended that BAL should be able to pick and choose what to do in the light of what suits it. It had been losing money since the start and its profitability would have been affected by all sorts of considerations. It was improbable that the parties would have used an expression in the Agreement to mean that one of them could limit or abandon performance once it became commercially undesirable or unprofitable, just the sort of risks that parties expect to undertake when they contract.

He found that the contract started by saying that it is “in relation to low cost services from and to Blackpool airport” and that it referred in its first sentence to BAL using all reasonable endeavours to provide a cost base that will facilitate Jet2’s low cost pricing in the context of promoting low cost services. He noted that the absence of an express provision as to opening hours relied on by each side suggested, if anything, that it was too obvious to mention that Jet2, like its competitors at Blackpool, would not be confined to normal operating hours.

He found that opening outside normal hours was, at least in principle, taken to be part of the service BAL provided and part of the deal.

It followed from his conclusions about the meaning of the Agreement that the sudden and unilateral decision by BAL to refuse to honour Jet2’s flights except subject to conditions, was a serious breach of contract. However it did not follow from this conclusion that Jet2 had an immutable right to insist that particular hours must be observed throughout the lifetime of the Agreement. Even accepting that the provision of a cost

base by BAL required the wide and flexible hours contended for by Jet2, the words “all reasonable endeavours” must impose a lesser obligation than an absolute commitment to provide those specific hours regardless throughout a 15 year period. He could not grant a specific declaration on the operating hours allowed.

The case raises nothing new. But it is a reminder to those drafting contracts that express wording is required if you want to hold the other party to an absolute commitment. If the airline had wanted specific operating hours outside normal hours it should have included express wording in the Agreement to that effect. Relying on “reasonable endeavours to provide a cost base” that would facilitate the airline’s low cost pricing was too uncertain.

We are all used to inserting the words “use reasonable endeavours to” where needed to avoid committing to an absolute obligation which is not necessarily within direct control e.g. “the Developer will [use reasonable endeavours to] procure that the Contractor completes on time”. But “on time” could have different commercial outcomes for a potential Tenant, so to avoid uncertainty express wording should be used to cover all material points. .

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