



Endeavouring to get it right

Readers may recall the Red Line entitled “Elusive Endeavours” in September 2010 noting the importance of drafting and negotiating “endeavours” clauses (such as “best endeavours”, “all reasonable endeavours” or “reasonable endeavours”) in commercial contracts and how pivotal they can be in a contractual dispute.

The recent case of *Jet2.com Limited v Blackpool Airport Ltd*,¹ further illustrates the importance of getting these clauses drafted correctly at the time when a commercial contract is entered into. In this case the English High Court considered the meaning and construction of an “all reasonable endeavours” clause. The High Court rejected the argument that a duty to use “all reasonable endeavours” did not require a party to act against its own commercial interests in circumstances where the discharge of that duty was in that party’s, and not a third party’s, control.

Whilst there is no specific Guernsey case law on the issue, English law, and therefore this judgment, is likely to be considered persuasive by a Guernsey court in looking at similar issues.

We set out a brief summary of the facts and the decision of the Court below.

Facts

In 2005 Blackpool Airport Limited (“BAL”) and Jet2.Com Limited (“Jet2”) entered into a 15 year agreement with regard to the operation of low cost services from and to Blackpool Airport (the “Agreement”). At the time BAL had been making an operating loss. The Agreement was set out in

a relatively short letter from Jet2 addressed to BAL prepared with little legal assistance and was expressed in broad but not uncertain terms.

In particular clause 1 of the Agreement provided as follows:

“1. Jet2 and BAL will co-operate together and use their “best endeavours” to promote Jet2’s low cost services from BA (i.e. Blackpool Airport) and BAL will use “all reasonable endeavours” to provide a cost base that will facilitate Jet2’s low cost pricing”.

For the first four and a half years Jet2 operated some flights, particularly at peak times in summer, outside the airport’s normal operating hours and did so with the support and co-operation of BAL. The normal operating hours were 0700 to 2100 in winter and 0600 to 2000 in summer.

In 2008 there was a change of ownership of BAL. At that time the airport was still making an operating loss and the new team was keen to eliminate or at least reduce that loss. At the outset of the Agreement Jet2 had one aircraft based at Blackpool Airport. BAL’s new owners wanted Jet2 to agree to provide additional aircraft. However, Jet2 concluded that, despite its business flourishing at other airports, further aircraft at Blackpool Airport in the midst of a recession would not be viable.

Commercial tension increased between the parties and came to a head in October 2010 when BAL told Jet2 that it would not accept departures or arrivals scheduled outside normal operating hours. At short notice two of Jet2’s flights had to be diverted from Blackpool to Manchester causing inconvenience to passengers and expense to Jet2.

¹ [2011] EWHC 1529 (Comm)

Jet2 sued for breach of contract and asked for a declaration from the Court as to what operating hours the airport must offer for the next ten years.

Clause 1 of the Agreement was broadly framed and therefore different interpretations were put to the Court by counsel for Jet2 and BAL. For the purposes of the case, and of note for readers, the parties agreed that “best endeavours” and “all reasonable endeavours” had the same meaning and so the Judge treated the terms interchangeably.

Jet2 argued that the obligation under clause 1 to “promote” Jet2’s low cost services meant to further or advance Jet2’s low cost services (and therefore to keep the airport open outside of normal operating hours), and not merely to market them. Further, the obligation to “provide a cost base to facilitate Jet2’s low cost pricing” required BAL to keep the airport open to enable Jet2 to operate cost effectively.

BAL argued that the “commitment to use “all reasonable endeavours” to provide a cost base” was limited “first to a provision of a cost base, meaning an obligation to charge a certain level of prices, and secondly to ‘all reasonable endeavours’ which is no more than a commitment on a party to act in a way consistent with its commercial interests.” In contrast to Jet2’s argument, it argued that “promote” in clause 1 simply meant marketing. BAL also stated that the Agreement did not require it to operate outside normal hours unless it chose to do so, as it had done to a limited extent over the years.

BAL also argued that by consciously including the “best endeavours” and “all reasonable endeavours” wording it followed that BAL was obliged to act only in a way which was consistent with its commercial interests and that BAL could

not be required to take steps which were commercially unreasonable.

In response Jet2 argued that BAL could not 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.

Decision

Judge Mackie preferred Jet2’s interpretation of clause 1 of the Agreement and concluded that the object to which the parties were obliged to direct their “best endeavours” included securing flexible operating hours beyond those promulgated by BAL. He also held that the sudden and unilateral decision by BAL to refuse to honour Jet2’s flights save on certain conditions was a serious breach of contract. He also disagreed that BAL’s action was justified to protect its commercial interests. His principal reasoning was as follows:

- Whilst the obligation to use “best endeavours” to promote low cost services under clause 1 was a joint one, the obligation to use “all reasonable endeavours” to provide a low cost base was on BAL alone. It was common ground that there was no difference between “best” and “all reasonable endeavours”.
- The parties assumed commercial and risk-bearing obligations as part of the co-operative venture with each other and the words “all reasonable endeavours” were not used in the context of leaving matters open for later negotiation. It was an otherwise explicit commitment.
- It could not have been intended that BAL should be able to pick and choose what to do in the light of what suited it or its shareholder financially. These are the sort of risks that commercial parties should expect to

undertake when they contract. Any such unusual provision would have to be made explicit before it would be considered to have been part of what was agreed.

Conclusion

The case illustrates the importance of ensuring clear drafting of commercial agreements and the importance of obtaining legal advice at the time when the contract is drafted. Neither of the parties obtained significant legal advice on the provisions of the Agreement before entering into it, including the “endeavours” provisions. It is likely that obtaining legal advice and ensuring clear and concise drafting at the time would have saved time and money for both parties. Nor had the parties considered the construction of the “endeavours” obligation with reference to future issues, in particular the change in operating hours. An express obligation in the Agreement in relation to opening hours rather than an “endeavours” clause would have allowed less scope for argument on interpretation.

Drafting an “endeavours” clause requires parties to consider how strict an obligation you need to impose or are prepared to undertake. An undertaking of “all reasonable” or “best endeavours” is an onerous undertaking. Having given such an undertaking, BAL was in breach of contract by refusing to schedule services outside the published opening hours, notwithstanding the fact that doing so would be against its legitimate commercial interests.

This Red Line is only intended to give a brief summary and general overview of this area of law. It is not intended to be, nor does it constitute, legal advice and should not be relied upon as doing so. If you would like legal advice or more information in relation to the matters covered in this Red Line or generally in relation to a corporate issue, please contact our corporate team on +44 (0)1481 723723, or by email at corporate@aohall.com. Members of our corporate team, together with their contact details, are listed on our website at www.aohall.com.

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TEL: +44 (0)1481 723723
FAX: +44 (0)1481 723023

12-14 NEW STREET ST PETER PORT
GUERNSEY GY1 2PF

EMAIL: enquiries@aohall.com
www.aohall.com

PARTNERS: ALISON OZANNE, LOUISE HALL, JON BARCLAY AND ELAINE GRAY