The Pursuit of Certainty: A New Approach to Best Endeavours Clauses

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Though a useful instrument for commercial parties to contracts, endeavours clauses are plagued with problems. This article argues a single standard should be applied across endeavours obligations and a more stringent level of certainty required to give effect to them. This approach is preferable to the traditional English hierarchy of vague endeavours formulations, differentiation of which is "a pointless hair-splitting exercise". Endeavours clauses are always determined in their particular context. This fact, for the most part, renders the traditional hierarchy useless. A single standard and stricter level of certainty would improve certainty of contract, give better effect to the actual intentions of contracting parties, and facilitate the drafting of better contracts.

I INTRODUCTION

An endeavours clause is a qualified obligation to fulfil a condition in a contract. It is typically formulated as follows: "The parties will each use [*best* / *all reasonable* / *reasonable*] endeavours to procure the satisfaction of the conditions in clause [x]."[1]

A party employs an endeavours clause when it cannot give an absolute assurance about its performance. This can be due to factors outside its control, such as third-party approvals, or simply because the party does not wish to assume an absolute obligation.[2] Not unsurprisingly, these clauses have proved to be fertile grounds for litigation.[3] This consequently poses problems for commercial parties seeking to rely on their contracts.

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1 Jane Anderson and Jenny Stevens "What to Do When the Contract Goes Wrong" (New Zealand Law Society seminar, May 2017) at 9.

2 Cameron Ross and Sam White "Recent Judicial Consideration of Endeavours Clauses in Australia and Singapore" (2014) 9 Const L Int'l 9 at 9–10.

3 See for example *Ironsands Investments Ltd v Towards Industries Ltd* HC Auckland CIV-2010-404-4879, 8 July 2011; *Sheffield District Railway Co v Great Central Railway Co* (1911) 27 TLR 451 (Railway and Canal Commission); *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417, [2012] 2 All ER (Comm) 1053; *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16, [2014] 2 SLR 905; and *Energy Generation Corp v Woodside Energy Ltd* [2014] HCA 7, (2014) 251 CLR 640.

The status quo treatment of these clauses by courts in New Zealand (and elsewhere) is inadequate. The result is often that parties are held to contracts they did not design themselves.

The following reforms are necessary: first, a single standard of effort should be imported into endeavours obligations; and secondly, there should be a heightened requisite degree of certainty before the courts will give effect to an endeavours obligation. These two reforms — though they do not resolve *all* the problems plaguing these clauses — will make endeavours clauses more effective in contracts and help courts to achieve more certain outcomes. As a by-product, parties will be able to engage in more honest negotiations and draft better contracts.

To identify the problems with endeavours clauses and suggest robust solutions for them, this article will critically examine the status quo treatment of the clauses in New Zealand, as well as in Singapore, Australia and the United States.

II THE IMPORTANCE OF CERTAINTY IN CONTRACT

Contract law allows parties to a contract to rely on one another's commitments. It ensures that if one side fails to fulfil its commitment, the court will impose a secondary obligation — for example, to pay damages.[4] This enforcement of commitments, or substitution of their economic worth, forms the legal foundation of our economy.

Certainty about the obligations contained in a contract is necessary for the court to give effect to parties' intentions. If the object of a contract is clear, the court can give effect to the parties' respective intentions. This is why liquidated damages clauses are useful for the court; instead of having to determine the quantum of damages, the court knows exactly the award of damages to impose on the breaching party, because the parties to the contract had already considered and consented to this eventuality. Discussions of the penalty doctrine aside, this is why decisions such as *Honey Bees Preschool Ltd v 127 Hobson Street Ltd*[5] and *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)*[6] are welcome developments in contract law.

Difficulty arises, however, when a court has to impose an award of damages in a climate of uncertainty. The imposition of damages in response to a breach of something uncertain is likely to be something neither party

4 Stephen Todd "Remedies" in Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) 813 at 815.

5 *Honey Bees Preschool Ltd v 127 Hobson Street Ltd* [2018] NZHC 32, [2018] 3 NZLR 330. Here, for the defendant's failure to install a lift, the High Court enforced a penalty clause against it that was equivalent roughly to twice the cost of installing the lift.

6 *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)* [2017] NZCA 152, [2017] 3 NZLR 293. Here, a penalty clause was enforced against the respondent, who had failed to pay back a high-risk short-term loan. Both *Honey Bees* and *Torchlight* illustrate the phenomenon that where parties' intentions are clear and the contract is certain, the courts will generally enforce the contract.

consented to nor contemplated. In that situation, the court is not giving effect to the parties' intentions; rather, it is substituting its judgment for the contract and essentially inventing and enforcing a clause that neither party wrote.[7] Certainty about the obligations contained in an agreement is a pillar of contract law. Courts should err on the side of caution before enforcing agreements or clauses that lack this crucial quality. In principle, courts should have the role of contractual enforcement, not contract-making.

III INTERPRETATION GENERALLY

A recurring theme in the interpretation of endeavours clauses is that the clauses are inevitably interpreted in context. The use of context (being the environment in which the contract is to be performed), pre-contractual negotiations and background facts known to both parties as aids to contractual interpretation has not been without controversy.[8] Currently, contractual interpretation in New Zealand "straddle[s] the Grand Canyon" between interpretive approaches.[9] There are many differences between textualism (giving effect to the expressed meaning of the document) and subjectivism (giving effect to the intended meaning). Textualism only employs context to *resolve* ambiguities in a contract, whereas subjectivism allows for context to *create* ambiguity. Endeavours clauses are not interpreted in a special way; the approach of the courts will still align with generally accepted methods of contractual interpretation. Because of the ambiguity inherent in endeavours clauses, context will be and always has been used to interpret them.[10] Their relationship to their context, to some extent, isolates the treatment of them from the arguments between textualism and subjectivism. However, there is still disagreement as to the admissibility of certain evidence and, crucially, the weight that is given to the words themselves.

7 Jeremy Finn "The phenomena of agreement" in Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) 37 at 92–93 and 99–100.

8 See Matthew Barber "Contents of the contract" in Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) 177 at 184–206.

9 Francis Dawson "Contract Objectivity and Interpretation in the Supreme Court" in A Stockley and M Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 219 at 242.

10 Jessica Young "An Endeavour to Understand Endeavours Undertakings" (2014) 44 HKLJ 95 at 96–97 and 100.

IV WHAT IS AN ENDEAVOURS OBLIGATION?

An endeavours[11] clause is a qualified obligation.[12] Parties agree to a standard of effort that is required to be met in order to discharge an obligation under the contract.[13] A variety of situations can arise that make performance of an absolute obligation impossible, yet fall short of frustration:[14] a third party may refuse to grant consent,[15] costs may rise drastically, or a party may do all it reasonably can to complete the contractual objective but, due to circumstances outside its control, fail to satisfy that obligation.[16] Qualifying an absolute obligation is a commercially prudent step for any party when there is the potential for impact from circumstances outside its control. Endeavours clauses, depending on the jurisdiction, allow parties to outline the requisite degree of effort to satisfy the obligation. A party may wish to put in minimal effort to achieve the obligation, as much effort as possible or an amount anywhere in between.

Another function of an endeavours clause is to allow parties to a contract to create ambiguity about their respective obligations and, by doing so, park issues on which they are unable to agree. To some extent, they are dealmaker clauses. Having ambiguity in these clauses may have some form of economic benefit — after all, most contracts do not result in litigation and parties generally work together towards the desired goal.

The language of endeavours clauses is flexible and can adapt to a variety of circumstances; for example, obtaining planning consent from a third party.[17] Alternatively, as was the case in *Jet2.com Ltd v Blackpool Airport Ltd*, endeavours clauses can promote the other party's business interests.[18] It is important further to note that the word "endeavours" is not the only means by which a party can qualify an obligation in a contract. Indeed, parties are limited only by their imagination and vocabulary. Endeavours clauses are formed by a variety of expressions, including "best efforts", which is popular in the United States, "all due diligence" and others.

11 The term "endeavours clause" is used to refer to all manner of clauses stipulating an obligation to fulfil a condition of a contract to a prescribed standard of effort. This category includes, but is not limited to, reasonable endeavours, all reasonable endeavours, best endeavours, all due diligence, best efforts and all best efforts.

12 Young, above n 10, at 95.

13 At 95.

14 See Matthew Barber "Frustration" in Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) 779 at 781.

15 See *Ironsands Investments*, above n 3.

16 See *KS Energy Services*, above n 3.

17 *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch).

18 *Jet2.com*, above n 3.

V OVERVIEW OF THE INQUIRY

The inquiry determining what an endeavours clause requires consists of two steps:[19]

(1) What is the endeavour in question?
(2) What is the degree of effort required to meet the obligation?

The answer to the first question is, in many cases, a straightforward affair. When there is a clear and desired goal in question, it is easy to establish what a given clause seeks to facilitate. Examples include seeking Overseas Investment Office approval,[20] obtaining planning consent,[21] towing a boat from point A to point B,[22] or supplying an oil rig.[23] In all these cases, the object of the clause is clear, and the court, as well as any other third party, can see what needs to be done.

Difficulty arises when the object of the clause is poorly defined, or appears to be at odds with the purpose of an endeavours clause. These situations often occur in cases where a clause seeks to promote in some way the business of the other party. The *Jet2.com* decision illustrates this situation:[24]

> In *Jet2.com Ltd*, Jet2.com Ltd ("Jet2"), a budget airline, and Blackpool Airport Ltd ("BAL"), a company that owned and operated an airport, *agreed that they would use their "best endeavours" to promote Jet2's low-cost services* from Blackpool. In that case, the question was whether the "best endeavours" clause required BAL to accept Jet2 departures and arrivals scheduled outside normal hours, if this would cause BAL to incur additional costs in providing support services and render its business unprofitable. The English Court of Appeal held, by a 2:1 majority, that the clause required BAL to keep the airport open to accommodate flights outside normal hours, subject to any right that it might have to protect its own financial interests. The court found that the ability to operate flights outside of normal hours was central to Jet2's business and the agreement, and that BAL could not restrict Jet2's aircraft movements to normal opening hours merely because keeping the airport open outside normal hours proved to be more expensive than it had originally expected.

The clause requiring promotion of Jet2.com's low-cost services was problematic because the goal was ill-defined. Lewison LJ described the issue succinctly in his compelling dissent:[25]

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19 Young, above n 10, at 96.
20 *Ironsands Investments*, above n 3.
21 *CPC Group*, above n 17.
22 *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admlty), [2009] 2 All ER (Comm) 624.
23 *KS Services Energy*, above n 3.
24 Tian Yi Tan "The Interpretation of Endeavours Clauses" (2015) 27 S Ac LJ 250 at [24] (emphasis added).
25 *Jet2.com*, above n 3, at [41].

> … the most important part of the context is the objective towards which the endeavours are to be directed. If the endeavours are directed towards a result which can be identified with certainty, then whether the endeavours satisfy the obligation can also be decided …

If the object of the contract is unclear or ill-defined, any decision the court comes to when enforcing the contract, whether advantageous for one party or not, is unlikely to be the agreement into which the parties entered. In cases such as *Jet2.com*, how can the court realistically define the parameters of promoting another party's business interests? How is the court to define or limit this obligation? Clauses without a clear objective are too uncertain to be enforced effectively. If the parties want to enforce them, they should outline clear steps, measurable goals or some other means of clarifying the outcome sought.

Now to the second question in the inquiry. The standard for endeavours clauses is an objective one: what would the reasonable person do to satisfy their contractual obligation under the stipulated standard?[26] With reference to the traditional hierarchy of obligations endorsed in New Zealand law and in current English law, the clauses will be examined from the most to least onerous.

A recurring theme is that interpretation of these clauses "remains a question of construction not of extrapolation from other cases" and that a given expression "will not always mean the same thing".[27] Each case turns on its own facts, with reference to the undertaking that is to be performed.[28] In saying that, the standards to which endeavours clauses have been held have created a de facto hierarchy: "best" is more onerous than "reasonable" if employed in the same circumstances. However, the circumstances change and to a great extent drive the standard required. Of note, enforcement of any explicitly outlined steps to be followed to satisfy the endeavours obligation will always occur.[29] This is regardless of the formulation of the clause in question.[30]

Best Endeavours

The "best endeavours" obligation is often defined by reference to several key cases rather than by an articulation of a single clear rule. In general, it requires taking all possible courses of action to fulfil the objective of the clause within the bounds of reason. *Sheffield District Railway Co v Great Central Railway Co* demonstrates this principle.[31] There, it was held that "'best endeavours'

26 Young, above n 10, at 100.
27 At 97 quoting *Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm), [2011] 2 All ER (Comm) 988 at [46].
28 At 97.
29 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [115].
30 Quentin Lowcay, Leah Hamilton and Brendan Kevany "Reasonable, best and other endeavours" [2012] NZLJ 349 at 352.
31 *Sheffield*, above n 3.

means what the words say; they do not mean second-best endeavours."[32] However, as cases like *Artifakts Design Group v NP Rigg Ltd*[33] make clear, the bounds of reason limit the requirement for all possible efforts. *Jet2.com* establishes that a best endeavours obligation can require commercial sacrifice but does not require a party to go to commercial ruin or to prop up a failing business.[34] All the cases reiterate that interpretation of these clauses should occur in their context.[35]

Sheffield is frequently cited as a starting point for best endeavours clauses.[36] The facts of the case are as follows. Sheffield District Railway Company had an agreement with Great Central Railway Company that included an obligation to use best endeavours to increase traffic on Sheffield's railway line. However, goods were consistently taken to or from Great Central's stations rather than Sheffield's. Sheffield complained that Great Central was in breach of the best endeavours clause. The Railway and Canal Commission held that the words "best endeavours" imposed on Great Central an obligation to "leave no stone unturned", within the bounds of reason, to develop Sheffield's traffic.[37] Despite reservations about the uncertainty of the objective of the endeavour in question, *Sheffield* has long been an authority for interpreting best endeavours clauses as requiring a party to "leave no stone unturned".[38]

All Reasonable Endeavours

Generally, the "all reasonable endeavours" obligation is substantially the same as the best endeavours obligation, so the performing party must follow all possible courses of action, except that it is unlikely to require a commercial sacrifice.[39] This is the least clarified of the standards.

Reasonable Endeavours

The least onerous of endeavours clauses, the "reasonable endeavours" clause requires an honest try.[40] This will be assessed, as all endeavours clauses are, objectively. If there are multiple courses of action available, a reasonable endeavours clause will only require a party to pursue one of those courses. Usually, any financial or practical impediments can justify not taking any action at all.[41] A reasonable endeavours clause allows a party to consider their commercial interests.[42] The clause places such a low level of obligation on the

32 At 452.
33 *Artifakts Design Group v NP Rigg Ltd* [1993] 1 NZLR 196 (HC).
34 Lowcay, Hamilton and Kevany, above n 30, at 349–350. See also Young, above n 10, at 99–100.
35 Tan, above n 24, at [14].
36 Young, above n 10, at 97.
37 *Sheffield*, above n 3, at 452.
38 Young, above n 10, at 97.
39 Lowcay, Hamilton and Kevany, above n 30, at 349 citing *CPC Group*, above n 17.
40 Quentin Lowcay "'Best Endeavours' and 'Reasonable Endeavours'" [1999] NZLJ 211 at 215; and Young, above n 10, at 100.
41 Young, above n 10, at 100.
42 At 100.

parties that it raises serious questions as to the utility of the clause. In fact, in some circumstances, the clause has been held to be unenforceable for lack of certainty.[43]

VI OVERSEAS JURISDICTIONS

The decisions of the High Court of Australia and the Court of Appeal of Singapore provide useful illustrations of legal changes that could benefit the law in New Zealand, and highlight pitfalls for New Zealand to avoid.

Australia

Australia has quashed any distinction between the differently formed endeavours clauses, establishing that every endeavours clause, regardless of the terminology it employs, requires the same amount of effort to satisfy the obligation.[44] The standard of effort endeavours clauses impose is low in Australia compared to other jurisdictions. The Australian standard requires the party to do all they reasonably can in the circumstances, but no more, to achieve the contractual objective.[45] Given that the goal of an endeavours clause generally is to qualify an obligation but still to encourage performance, this test, stated in the abstract, seems like a reasonable position for the jurisdiction to take. In practice, however, the High Court of Australia's treatment of endeavours clauses is even more lacking than our own. This is illustrated in *Energy Generation Corp v Woodside Energy*, the facts of which are as follows.[46]

Woodside Energy and others (the sellers) supplied natural gas to Electricity Generation Corporation (the buyer) under a long-term gas supply agreement. The buyer was a major generator and supplier of electricity in Western Australia. Clause 9.3 of the agreement stated the sellers were to use "reasonable endeavours" to make the gas available to the buyer above the maximum daily quantity if the buyer so nominated. This extra gas was to be paid at a predetermined higher price than the gas supplied up to the maximum daily quantity. On 3 June 2008, there was an explosion at an unrelated gas plant, the effect of which was to reduce gas supply in Western Australia by 30 per cent. Consequently, demand greatly exceeded available supply. Following the incident, the sellers were unwilling to supply extra gas under the agreement and repudiated their obligation to use reasonable endeavours to do so. The buyer sued for breach of contract, and the majority of the HCA held that the sellers did not breach their obligation to use reasonable endeavours.

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43 Lowcay, above n 40, at 212–213.

44 JW Carter, Wayne Courtney and Gregory Tolhurst "'Reasonable Endeavours' in Contract Construction" (2014) 32 JCL 36 at 52.

45 See Young, above n 10, at 99 and 106.

46 *Woodside Energy*, above n 3. See also Tan, above n 24, at [26]–[30].

This decision has come under heavy criticism. It illustrates the rare phenomenon of an easy case making bad law, and it has been said to "[lack] the sound commercial judgment essential to [contractual] construction."[47] The main problem with the *Woodside Energy* decision is that the standard of effort required under the endeavours obligation was low or, more accurately, non-existent. The sellers made no effort at all to satisfy their obligation to supply the buyer with extra gas.

Woodside Energy, while bad law, is a helpful illustration of the role of commercial interests in endeavours obligations. Commercial interests are often a consideration when interpreting an endeavours clause. However, they cannot be taken to mean simply that a party is allowed to do what is in its best commercial interests, as this defeats the very purpose of an endeavours clause. The approach taken in *Woodside Energy* sets the standard of effort exceptionally low by allowing commercial interests to reduce the obligation required. Parties will always have commercial interests in mind, but this should not allow them to be relieved from an endeavours obligation when it becomes commercially undesirable.

Singapore

By contrast, Singapore jurisprudence takes a clear, pragmatic and principled approach to endeavours clauses. This is demonstrated in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd*,[48] for which Tan provides the following summary:[49]

> In *KS Energy Services*, KS Energy Services Ltd ("KSE") contracted with BR Energy (M) Sdn Bhd ("BRE"), under cl 6.2 of a joint venture agreement, to use "all reasonable endeavours" to procure the construction and delivery of an oil rig within six months after a charter agreement was executed. KSE subsequently engaged a third-party rig builder, Oderco Inc ("Oderco"), to complete the work. Oderco ultimately failed to deliver the oil rig on the stipulated deadline despite the fact that the deadline had been revised a number of times. The joint venture agreement between KSE and BRE was later terminated.
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> BRE alleged that KSE breached cl 6.2 of the agreement, and that KSE had failed to take reasonable steps to ensure the timely completion of the project. The Singapore Court of Appeal held that KSE did not breach cl 6.2, since it had monitored the goings-on at Oderco and, amongst other things, deployed its own employee to Oderco's yard to supervise the project, assisted in the procurement of pieces of critical equipment, and paid salaries of Oderco's staff. The court held that these sufficed to discharge the "all reasonable endeavours" obligation.
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> In its judgment, the Singapore Court of Appeal provided helpful clarification on the interpretation of endeavours clauses. First, it held that there was little or no relevant difference between the standard of conduct constituted by the formulation "all reasonable endeavours" and that constituted by the formulation "best endeavours", but that "all reasonable endeavours" clauses were ordinarily more onerous than "reasonable

47 Carter, Courtney and Tolhurst, above n 44, at 36.
48 *KS Energy Services*, above n 3.
49 Tan, above n 24, at [3]–[5].

> endeavours" clauses. Second, it held that "all reasonable endeavours" and "best endeavours" clauses required the obligor to take "all those reasonable steps which a prudent and determined man, acting in the interests of the *obligee* and anxious to procure the contractually-stipulated outcome within the available time, would have taken" [emphasis in original],[50] though it was not necessary for the obligor to disregard his own commercial interests.

The Singapore Court of Appeal correctly identified that the purpose of endeavours clauses is to qualify an obligation and not hold a party to an unrealistic agreement. KS Energy Services was held not to be in breach for failing to deliver the oil rig because it could demonstrate the clear and thorough steps it took. The Court correctly identified that the standard of effort required is determined by the context, and that meaningless distinctions between "best" and "all reasonable" only complicate an already difficult exercise. The Court did, however, recognise "reasonable endeavours" as its own distinct standard.[51]

The Court also helpfully laid out a series of guiding principles.[52] These principles, far from being a tautological restatement of "best endeavours", are useful considerations for a judge in determining what is reasonable in the circumstances. By contrast, in the United States, a "best efforts" clause has been held to require a party "to use reasonable efforts and due diligence".[53]

VII WHAT IS THE PROBLEM?

The consequences for a party that repudiates a contract without sufficient justification are severe. Thus, inquiry into endeavours obligations is important; parties under a contract need to understand their level of obligation because the stakes are too high for avoidable ambiguity.

The difficulty with endeavours obligations arises when parties try to understand exactly how to satisfy their contractual obligations. Ambiguity often emerges at both steps of the two-stage inquiry outlined above. Given the complexity of the question regarding parties' specific obligations under an endeavours clause, under the status quo, rather than holding parties to obligations they intended, the courts impose an artificial standard of performance that, quite possibly, neither party contemplated or intended at the time of forming the contract. To some extent, that is inherent in the purpose of endeavours clauses with regard to commercial transactions. Parties are agreeing to a standard of effort in any number of potential scenarios. This means parties could have genuine disagreements about what is required of

50 *KS Energy Services*, above n 3, at [52].
51 At [63].
52 At [93].
53 *Gilson v Rainin Instrument LLC* WD Wis 04-C-852-S, 9 August 2005 at 14 as cited in Lowcay, Hamilton and Kevany, above n 30, at 352.

them at the outset of the contract despite accepting the formulation of an endeavours clause.

The problem inherent in endeavours clauses is clear: parties do not know when their endeavours obligations will be satisfied. Some parties can try to use this ambiguity as a release from their contractual obligations. This problem is compounded by the varying standards of performance to which parties can agree in an endeavours clause. Disputes arise about whether a "best endeavours" obligation is more onerous than an "all reasonable endeavours" obligation. This is where the traditional hierarchy of endeavours proves problematic. While potentially straightforward and applicable in the abstract, as discussed above, the practical application of endeavours clauses proves difficult.

VIII REFORM

Before outlining the proposed standard for endeavours clauses and how the courts should treat them, it is worth noting that many of the problems are inherent in endeavours clauses and cannot be solved. Rather than resolving the issues with endeavours clauses, then, the reform this article proposes seeks instead to move the law in a positive direction. Fundamentally, despite their inherent flaws, these clauses are useful to contracting parties and should remain.

It is clear from the discussion above that two issues plague the endeavours clause as it currently stands: the uncertainty of the objective of the clause, and the appropriate standard of effort required to satisfy an obligation under the clause.

Why a Higher Degree of Certainty?

As identified at the beginning of this article, and clarified in the discussion of the *Jet2.com* decision, it is appropriate and desirable for the courts to require a higher degree of certainty of the objective of an endeavours clause. There is a necessary degree of certainty of contract to give effect to parties' intentions. The mechanism by which the court gives effect to parties' intentions is the imposition of secondary obligations on the breaching party. If the court cannot tell what the agreement is about, it will have a difficult job imposing secondary obligations to enforce that agreement. This is why courts will not enforce agreements to agree, or best endeavours to agree; they are plagued with such uncertainty as to make it unrealistic for a court to find a limit.[54]

The majority of endeavours clauses appear to aim towards a specific goal. However, if they are deployed in a creative fashion, that too needs to reach a sufficient degree of certainty. While absolute certainty is desirable,

54 See *May and Butcher Ltd v The King* [1934] 2 KB 17 (HL); and *Fletcher*, above n 29, at [114]–[115].

every legal rule is plagued with some level of uncertainty. We therefore need to decide when a term is *sufficiently* certain. Decisions such as the majority's in *Jet2.com* are problematic because it is unclear where the obligation ends. When the court enforces a rule in a case where the contract is too vague, it moves from a position of contract *enforcement* to one of contract *construction*.

Why One Standard?

The proposed solution to some of the problems associated with endeavours clauses is to employ only one standard of interpretation. Thus, no matter which variation is used to qualify the endeavours obligation — "best", "all reasonable" or "reasonable" — the court will interpret it in the same way. A single standard has numerous benefits for commercial parties themselves, which will be explored below. However, from a theoretical and purposive view of contract law — giving effect to parties' respective intentions — this is also the best approach to take.

The proposed single standard works, to some extent, as a channelling mechanism. The channelling mechanism has two key benefits. First, there is the brute force channelling mechanism that happens once the contract has been made and the court is interpreting what the endeavours clause means; the court will always apply the same standard despite the difference in terminology used to qualify the obligation. Secondly, this mechanism forces parties to negotiate up front; either they agree to go with the standard endeavours clause and they both know what the obligation means, or they negotiate specific steps they want each other to take to satisfy the endeavours obligation. *Rhodia International Holdings Ltd v Huntsman International LLC* illustrates the effectiveness of outlining such steps.[55] The result: parties draft better contracts.

These actual steps are precisely what parties should be discussing in negotiations, not the meaningless or confusing distinction between "best" and "all reasonable". The distinction between the standards of "best endeavours" and "all reasonable endeavours" is so minor that they are in effect the same standard. *KS Energy Services* hammers this point home. There, the judges described the effort to determine a difference between the two as "a pointless hair-splitting exercise".[56]

Counterarguments

These proposed reforms are not without potential criticism. While scholars have found an issue with the status quo, and indicated support for one standard and higher degrees of certainty,[57] it appears either that those in favour of the status quo are unaware of the criticisms or simply that this is an

55 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577 as cited in Lowcay, Hamilton and Kevany, above n 30, at 349.
56 *KS Energy Services*, above n 3, at [62].
57 See generally Tan, above n 24.

underdeveloped academic area of contract law.[58] In light of the lack of commentary with which to contend, this article makes an effort charitably to construct the likely responses to the proposed reforms.

The first likely response is that we are limiting the utility that these clauses offer to parties in forming their contracts. While the three standards are confusing, and the distinctions sometimes small, that should not mean parties should not be allowed to use the words to carve out those distinctions. The distinction is clearest in the significant jump from "reasonable" to "all reasonable" as identified by the courts. Parties can always choose to use more specific language and implement actual steps, but sometimes ambiguity and murkiness are an asset in endeavours clauses to get a deal across the line. A fudge factor, while difficult for the court to deal with, is an immensely useful tool in negotiation.

Secondly, it might be argued that we instead take the middle ground between a single standard and three: two standards. The "hair-splitting" differences the Court identified in *KS Energy Services* only exist between "best" and "all reasonable", not between those formulations and the "reasonable" standard, which is a lower level of obligation. Adopting a two-standard model could be a happy compromise: it would provide utility for the parties in having two separate standards from which to choose, while also eliminating the problem of the "all reasonable" and "best" distinction.

Thirdly, the proposed reform is likely to come under criticism from those in support of a textualist approach — their argument: words matter. As it was put in *Sheffield*, "best" does not mean "second-best".[59] If words are the primary expression of the parties' intentions, courts should give them the weight they deserve.

A further argument against the proposed one-standard model might focus on the need for greater certainty to give effect to single-level endeavours clauses. While certainty is a requirement of a contract, the courts should aim to give effect to parties' intentions and seek to enforce contracts.[60] Even if the exact aim of the clause in question is unclear, the court is still representing the intentions of the parties by giving effect to that clause.

This was the approach taken by the majority in *Jet2.com*. The majority gave effect to the best endeavours clause "to promote Jet2.com's low cost services" and a further all reasonable endeavours clause for Blackpool Airport "to provide a cost base that will facilitate Jet2.com's low cost pricing."[61] It held that these clauses required Blackpool Airport to keep the airport open beyond the posted operating hours, even though it was suffering financial hardship. This could be seen as the correct outcome of that case because it gave effect to the respective intentions of the parties, despite the fact the parameters of the best endeavours and all reasonable endeavours clauses were unclear. Moore-Bick LJ stated:[62]

58 At [1].
59 *Sheffield*, above n 3, at 452.
60 See generally Todd, above n 4, at 90–104.
61 *Jet2.com*, above n 3, at [6].
62 At [29].

> As to Mr Leggatt's submission that the first paragraph of clause 1 of the Letter Agreement is too uncertain to be capable of giving rise to any legal obligation, I think there is an important difference between a clause whose content is so uncertain that it is incapable of creating a binding obligation and a clause which gives rise to a binding obligation, the precise limits of which are difficult to define in advance, but which can nonetheless be given practical content.

His Lordship went on, in support of this, to cite *Sheffield* and *Terrell v Mabie Todd and Co Ltd*[63] — the former involving an endeavours clause promoting a railway's traffic and the latter involving one promoting fountain pen sales.[64] The clauses in both these cases were enforced. It should be noted that Moore-Bick LJ in *Jet2.com* did express some concerns regarding the certainty needed to give effect to contractual obligations:[65]

> … an obligation to use all reasonable endeavours to provide a cost base that will facilitate some essential element of another person's business seems to me to pose greater problems, because it is much more difficult to identify its content. The words are said to import an obligation to use all reasonable endeavours to enable Jet2 to keep its unit costs (and therefore ticket prices) down by enabling it to use its aircraft in the most efficient manner, but I find them too opaque to enable me to give them that meaning with any confidence.

To summarise, the likely arguments against the proposed reform are as follows: that it would limit the utility of endeavours clauses by depriving contracting parties of options; that if there is to be reform it should be a two-standard model; that, on a textualist account, the words matter; and that there would need to be greater weight given to certainty. These objections will be examined in turn.

Response to Counterarguments

It is worth reiterating that the proposed reform does not fix all problems. Rather, it is the *preferable* approach to take.

The first response addresses the argument that a single standard for endeavours clauses would limit the utility of the clauses for the parties involved. When parties negotiate a contract, it is often a point of contention which phrasing of an endeavours obligation should be used. Eliminating the distinction between the various formulations would accelerate the negotiating process and free it from splitting semantic hairs. By employing only one standard, parties can be confident as to what their level of obligation is under the contract, giving better effect to their intentions. Additionally, this reform would incentivise parties to draft better contracts and outline the actual measurable steps that need to be taken to fulfil their contractual objective.

63 *Terrell v Mabie Todd & Co* [1952] 2 TLR 574 (QB).
64 *Jet2.com*, above n 3, at [29].
65 At [31].

Even if the proposed model decreases the clauses' utility, the benefits in certainty of contract and contractual drafting far outweigh the loss of options.

The two-standard model, as articulated in *KS Energy Services*, would appear to be a convincing middle ground but for the fact the "reasonable endeavours" obligation is rife with problems and each set of factual circumstances is unique, with interpretation driven by context. If the obligation is low enough to mark a meaningful distinction from "all reasonable" or "best", then it is so low that the courts will struggle ever to enforce it for lack of certainty. Further, what these clauses mean is so context-specific that we should avoid resorting to semantics. The streamlining effect achieved by scrapping the distinctions outright far outweighs the value of keeping "reasonable endeavours" as a separate standard.

The third potential criticism is less a qualm about the proposed reform and more a criticism of the subjectivist or contextual approach to interpretation, which erodes the value given to particular words. This article's response is that context must be used to interpret endeavours clauses as this is the best way to give effect to them and the parties' actual intentions. The meaning of these clauses is "fluid and context-specific."[66] The facts of each situation are likely to be unique, and it is better to ascertain what is reasonable in the circumstances with general guidelines than to distort the obligation by importing pre-formulated distinctions between "best", "all reasonable" and "reasonable".[67]

Finally, a higher degree of certainty is needed to give effect to the intentions of the parties. Otherwise, the court is pushed into the business of making contracts rather than enforcing them. Moore-Bick LJ in *Jet2.com* acknowledged that identifying the content of the all reasonable endeavours clause was difficult, but he considered the object of the best endeavours clause of promoting the airline's business to be certain enough.[68] Respectfully, both clauses were equally opaque as to their meaning, and it was wrong for the Court to give effect to either of them. Certainty is needed to give effect to parties' intentions and preserve the value of contracts without holding parties to obligations they did not intend.

What Should the Single Standard Be?

The proposed reform is an amalgamation of the decisions in *Woodside Energy* and *KS Energy Services* and the dissent in *Jet2.com*. That is to say, there should be a single standard of effort (*Woodside Energy*), based on the one articulated in *KS Energy Services*, with a requisite high degree of certainty (*Jet2.com* dissent).

The importance of context in the interpretation of endeavours clauses is difficult to overstate. The facts of every case are different and what is "reasonable" depends on the circumstances and the industry-specific nature

66 Tan, above n 24, at [14].
67 At [14].
68 *Jet2.com*, above n 3, at [31].

of the agreement. Expert evidence and the general commercial context can aid this inquiry, especially if the object of the endeavours clause is clear. However, further guidelines are needed to help parties navigate the inevitable uncertainty.

Finding the proper test for the standard of effort under an endeavours clause is difficult. It needs both to encourage parties to perform their obligations and to recognise the changing nature of commercial circumstances. The test cannot be too flexible or the clause becomes unenforceable and deprived of any meaning. The *KS Energy Services* decision seems to strike the right balance. It sits as a middle ground between *Woodside Energy* and *Jet2.com*. *Woodside Energy* renders best endeavours clauses useless, while *Jet2.com* enforces too onerous a standard by requiring parties to go to such great lengths that they suffer long-term financial loss.

The standard of effort for endeavours clauses employed in *KS Energy Services*, and so the one proposed, is as follows:[69]

> … an obligor … is to take all those reasonable steps which a prudent and determined man, acting in the interests of *the obligee* and anxious to procure the contractually-stipulated outcome within the available time, would have taken.

The following guidelines provide helpful elaboration of this standard:[70]

> (a) Such clauses require the obligor "to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted" … or "to do all that it reasonably could" …
>
> (b) The obligor need only do that which has a significant … or real prospect of success … in procuring the contractually-stipulated outcome.
>
> (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved …
>
> (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations … but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice …
>
> (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken …
>
> (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those

69 *KS Energy Services*, above n 3, at [52].
70 At [93] (citations omitted).

> steps were not reasonably required, or that those steps would have been bound to fail …

As affirmed in *Rhodia International Holdings*, if parties outline actual steps they want to be enforced, these will always be enforced.[71] If the parties say what they want in clear language, the court should give effect to it.

IX LESSONS FOR COMMERCIAL PARTIES USING ENDEAVOURS CLAUSES

The reality is that proposing reform and arguing the merits thereof is the luxury of academia, and commercial parties need to use endeavours clauses in contracts as they stand. From the above discussion, a few key lessons stand out for parties wishing to rely on these clauses.

When contracting across jurisdictions, the first thing of which to be wary is the jurisdiction enforcing the contract, because how endeavours clauses will be treated will depend on that.[72] Secondly — and this appears to be a common theme across the jurisdictions referenced here — commercial parties to a contract should avoid using an endeavours clause in place of actual steps they want to enforce. It is preferable to list steps that need to be taken as part of an endeavours clause.[73] This is good advice, but it is often offered in hindsight. In practice, when forming a contract, it can be difficult to foresee every eventuality. Outlining actual steps is easier said than done, and it is not a complete solution to the issues surrounding endeavours clauses.

As the law currently stands, either party to a contract can gain the upper hand in the level of obligation. On one hand, obligors can achieve an advantage by stipulating a low level of obligation and including caveats and qualifications such as "all commercial considerations", as was the case in *Woodside Energy*.[74] On the other, it is in the interest of obligees to require the highest level of obligation with as few caveats and qualifications as possible. This only goes to show why it is preferable that we have a single standard of effort to channel parties into negotiating actual steps they want each other to take.

X CONCLUSION

Endeavours clauses are a useful instrument for commercial parties because they allow them to qualify an obligation. However, problems plague these clauses and they are frequently grounds for litigation. To some extent, these

71 *Rhodia International Holdings*, above n 55.
72 Lowcay, Hamilton and Kevany, above n 30, at 350.
73 At 352.
74 See *Woodside Energy*, above n 3.

problems are inherent in endeavours clauses as the standard of effort they prescribe can apply in numerous unknown situations. Determining exactly what an endeavours clause means in context is always a difficult exercise for the court, and indeed the parties themselves, to undertake.

Under the status quo, this exercise is complicated further when the clause lacks clear objective. In this situation, the court is grasping in the dark, trying to give effect to the parties' intentions, and will most likely end up redesigning the contract rather than enforcing it in its originally intended form. Such was the case in *Jet2.com*. A second complication arises from the different standards of effort under the traditional English approach to endeavours clauses. The court, instead of determining what is reasonable or not in the circumstances, has to scrutinise minor semantic distinctions between "best" and "all reasonable" and decide whether these amount to different obligations.

Adopting a single standard of effort, with clear guidelines and a more stringent requisite degree of certainty, would improve the treatment of endeavours clauses and make for a simpler and more consistent exercise. Parties would be incentivised to draft better contracts, expressing clearer objectives and outlining actual steps. As a result, their agreements would be enforced, and courts would not need to rewrite agreements ex post facto, adrift in a sea of ambiguity. The single standard and its guidelines should be modelled on the Singapore Court of Appeal's decision in *KS Energy Services* and should explicitly quash any distinction between the various formulations of endeavours clauses.

As long as the status quo remains, commercial parties seeking to employ endeavours clauses in their contracts should do so with caution. They should attempt to outline, with actual steps, exactly what they want their contract to achieve. Endeavours clauses are a useful contractual instrument to assist parties in effecting their goals, but they need to rest on a strong foundation.