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Interpreting Efforts Clauses in a Commercial Contract

November 8, 2022

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Canadian courts have gone to great lengths to assign distinct, differing meanings to efforts clauses. The terms "best efforts", "commercially reasonable efforts", and "commercially reasonable best efforts" (together, "efforts clauses") are often used to indicate the efforts and lengths a party must take in order to fulfil an obligation under an agreement.

For the most part, the term "best efforts" has been interpreted consistently, however there is considerable uncertainty in the application of "commercially reasonable efforts" and "commercially reasonable best efforts". For these reasons, many have argued against the allocation of different meanings to such terms, arguing that this could lead to further confusion and uncertainty.

This article provides an overview of the judicial interpretation of the different types of efforts clauses.

1. *Best Efforts*

In comparison to other efforts clauses, the best efforts standard imposes the most onerous obligations on the party that agrees to be bound by such a clause. In the leading case of *Atmospheric Diving Systems Inc v International Hard Suits* Inc,[1] ["*Atmospheric Diving Systems*"] the British Columbia Supreme Court ("**BCSC**") distilled seven principles to evaluate a best efforts clause. These have colloquially been referred to as the "no stone unturned test":

In summary, the principles extracted from the cases on the issue of "best efforts" are:

1. "Best efforts" **imposes a higher obligation** than a "reasonable effort".
2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion **and leaving no stone unturned.**
3. "Best efforts" includes doing **everything known to be usual**, necessary and proper for ensuring the success of the endeavor.
4. The **meaning of "best efforts" is, however, not boundless**. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
5. While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
6. Evidence of "inevitable failure" is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.
7. Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test is relevant evidence that the defendant did not use its best efforts."[2] (**emphasis added**)

In Ontario, the "best efforts" clause was discussed extensively in *Eastwalsh Homes Ltd v Anatal Developments Ltd*.[3] Here, a contract for the purchase and sale of land required a vendor to use his best efforts to obtain subdivision approvals. The Court defined best efforts as an objective and not a subjective standard and stated that best efforts "does not require a party to sacrifice itself totally

to the economic interests of the party to whom the duty is owed, although the interests of that party must predominate."[4]

The more recent case of *Federal Electric (1976) Limited v McDonald Brothers Construction*[5] followed the principles set out in *Atmospheric Diving Systems.* In this case, McDonald Brothers Construction entered into a contract with the former Public Works and Government Services Canada ("**PWGSC**"), whereby McDonald Brothers were the general contractors for the fit-up of a building in Ottawa. Shortly after, McDonald Brothers entered into a subcontracting agreement with Federal Electric to supply labour and material for the electric scope of work for the project.

The project became significantly delayed as a result of issues unrelated to the subcontract, causing Federal Electric to suffer additional expenses and costs. During these delays, McDonald Brothers issued thirteen delay notifications to PWGSC's consultant, and several follow up requests in the years following. McDonald Brothers also retained a delay expert to assist with preparing the delay claims.

Despite the steps taken, Federal Electric argued that McDonald Brothers had not made best efforts to move their delay claims forward with PWGSC. However, following the principles in *Atmospheric Diving Systems*, the Court stated that McDonald Brothers had met the best efforts standard by filing their claim with the PWGSC within the timeline set out in the contract, following up with the PGWSC on the status of their claims, and retaining an expert to provide a report to the PGWSC.[6] As such, the claim by Federal Electric was dismissed.

2. *Commercially Reasonable Efforts*

"Commercially reasonable efforts" imposes a less onerous standard than "best efforts". The standard describes the effort that a reasonable person, committed to achieving the objective, would be expected to undertake. In this case, "reasonable" implies sound judgement and "commercial" implies the goal of making a profit or financial gain.[7]

Commentators have viewed the analysis in *1092369 Alberta Ltd v Joben Investments Ltd*[8] as the most helpful guidance in distinguishing reasonable efforts from best efforts. In this case, Justice Brown stated:

"While "reasonableness" does not require that a party spare no effort or leave no stone unturned [...] it nonetheless denotes a prudent and moderate measure of sustained diligence necessary to give business efficacy to the object of the parties' underlying agreement [...] Alternatively put, it describes the effort that a reasonable person, committed to achieving the objective, would have undertaken."[9]

What is clear is that under the commercially reasonable efforts standard, a party does not have to take every possible step to meet a contractual obligation. Instead, a party should proceed up to a point where it is commercially unreasonable to proceed.

3. *Commercially Reasonable Best Efforts*

The definition of the "commercially reasonable best efforts" standard is found in the recent case of *Sutter Hill Management Corporation v Mpire Capital Corporation ("**Sutter Hill**").*[10] Here, the British Columbia Court of Appeal ("**BCCA**") stated that the standard was somewhere between "commercially reasonable efforts" and "best efforts", keeping in mind the parties' clear intention.

In *Sutter Hill,* the parties entered into an agreement for the purchase and sale of a care home in 2016. A deposit of $300,000 was paid by the defendant. The agreement imposed a condition precedent on the purchaser to use "commercially reasonable best efforts" to obtain regulatory approvals from the Fraser Health Authority ("**FHA**"). By 2017, the FHA had not provided the required approvals and in November 2017 defendant's counsel withdrew from representation causing further delays. As a result, the vendors maintained that the purchaser breached the condition precedent and gave notice of default. The vendors also demanded payment from the trust of the $300,000 deposit, arguing that the purchaser had breached its purchase obligations and failed to proceed with the agreement.

In its ruling, the BCSC held that “commercially reasonable best efforts” had no measurable meaning beyond “commercially reasonable efforts.” The Court went on to hold that the defendant did not breach the agreement, as a delay of 12 days waiting for new counsel to prepare was consistent with the “commercially reasonable efforts” standard. The chambers judge further stated that “commercially reasonable best efforts” was a “victim of over-drafting”[11] and contained inconsistent language “since what is reasonable is not always what is best.”[12]

In overturning the decision, the BCCA interpreted “commercially reasonable best efforts” to mean that the purchaser would do “everything it reasonably could to obtain the necessary approvals as soon as possible, excepting only such steps as would be commercially unreasonable.”[13] Further, the BCCA held that when determining whether a commercially reasonable standard has been met, the question is not when it “became reasonable to abandon the pursuit of approval, but how the pursuit was to be undertaken.”[14]

The BCCA noted that the purchaser offered no evidence to explain the delay other than attributing it to its solicitor. The BCCA held that this was not consistent with the obligation to do “everything it reasonably could to obtain the necessary approvals as soon as possible.”[15]

Takeaways

In summary, best efforts clauses impose more onerous obligations than reasonable efforts clauses, and the use of the term “commercially” in an efforts clause indicates that the standard will be informed by the impact of actions on profits or financial gains.

While Canadian common law has attempted to give efforts clauses distinct meanings, contract drafters should be wary of how courts may interpret such terms. The interpretation of an efforts clause is largely dependent on the specific language of the contract and factual matrix underlying a dispute. As such, it may be advisable for important contractual obligations relating to efforts clauses to be clearly detailed in an agreement.

[1] *Atmospheric Diving Systems Inc v International Hard Suits Inc* 1994 CanLII 16658 (BCSC).

[2] *Ibid* at para 71.

[3] *Eastwalsh Homes Ltd v Anatal Developments Ltd,* 1990 Carswell 532 (affirmed on this point in [1993] O.J. No. 676).

[4] *Ibid* at para 43

[5] *Federal Electric (1976) Limited v McDonald Brothers Construction,* 2019 ONSC 496.

[6] *Ibid* at para 34.

[7] *364511 Ontario Ltd v Darena Holdings Ltd,* [1998] OJ No 603 at para 59 (varied and affirmed in 1999 CanLII 2422 (ONCA)).

[8] *1092369 Alberta Ltd v Joben Investments Ltd*, 2013 ABQB 310.

[9] *Ibid* at para 75.

[10] *Sutter Hill Management Corporation v Mpire Capital Corporation*, 2022 BCCA 13 ("***Sutter Hill BCCA***"). Leave to appeal to the Supreme Court of Canada was dismissed: *Mpire Capital Corporation v. Sutter Hill Management Corporation, et al.*, 2022 CanLII 78993 (SCC).

[11] *Sutter Hill Management Corporation v Mpire Capital Corporation,* 2020 BCSC 238 at para 51.

[12] *Ibid* at para 130.

[13] *Sutter Hill (BCCA)*, *supra* note 10, at para 41.

[14] *Ibid* at para 42.

[15] *Ibid* at para 108.

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