

## **What are Best Endeavours?**

**By Jonathan Marvin**

“Best endeavours” obligations are commonly seen in construction contracts but what does this phrase really mean?

This question was considered earlier this year by the Court of Appeal, in the case of *Jet2.com Limited v Blackpool Airport Limited* [2012].

Blackpool Airport Limited (“BAL”) is commercial airport on the outskirts of Blackpool. Jet2.com Limited (“Jet2”) is a low-cost airline. In September 2005, Jet2 entered into a letter of agreement with BAL to operate from Blackpool airport for a period of 15 years. Under the agreement, BAL would provide ground services and marketing support to Jet2. The agreement included a best endeavours obligation that read:

*“Jet2.com and BAL will co-operate together and use their best endeavours to promote Jet2.com’s low cost services from BA...”*

The normal operating hours for the airport were 7am to 9pm but BAL accepted regular arrivals and departures by Jet2 outside of these hours. Such aircraft movements involved extra costs for BAL and these became a concern by 2010. So in October 2010, BAL gave notice to Jet2 that it would no longer accept departures or arrivals scheduled outside normal opening hours. Jet2 consequently had to divert flights from Blackpool to Manchester and brought proceedings against BAL.

The judge at first instance held that BAL was in breach of contract. In the Court of Appeal, Jet2 argued that the parties had taken it for granted that Jet2 would need to schedule aircraft movements outside normal operating hours and in the performance of its obligations to use best endeavours to promote its business, BAL would ensure that Jet2 could do so.

The Court of Appeal dismissed the appeal by a 2-1 majority. Moore-Bick LJ considered that the best endeavours obligation meant BAL had to do all it reasonably could to enable the business of Jet2 to succeed and grow. The extent to which a person who has undertaken to use best endeavours can have regard to their own financial interests will depend on the nature and terms of the contract in question. However, if it became clear Jet2 could never operate profitably, BAL was probably not obliged to promote a failing business.

Longmore LJ noted that a best endeavours obligation is usually enforceable unless its object is too vague or elusive or the parties have provided no criteria to assess whether best endeavours have been used. Best endeavours may involve some financial cost, which cannot be a trump card to escape from the obligation. He agreed with Moore-Bick LJ that this did not mean BAL could be expected to prop up the business.

However, Lewison LJ considered that a commitment to run a loss-making business is one that a business man would expect to be spelled out in clear words. He considered that the content of an obligation to use reasonable or best endeavours depends on the context in which the expression is used. The most important part of the context is the objective towards which the endeavours are to be directed. As to whether such an obligation was enforceable, it was wrong to focus on the particular factual situation that gave rise to the dispute. Other factual situations should also be considered. How far did BAL have to go to promote the business of Jet2? Did BAL have to offer its passengers complimentary refreshments? In his view, the best endeavours obligation was too uncertain to be enforceable.

It seems clear that accepting a best endeavours obligation may well mean you have to put aside your own financial interests. However, this is not an obligation without limits. Had the situation arisen, it would have been too much to ask BAL to bankroll Jet2. Although the majority of the Court of Appeal found that the obligation in question was sufficiently certain, the judgment is also a reminder that while “*best endeavours*” is an easy phrase to use, such obligations need to be carefully thought through and drafted to ensure they are not too vague and consequently unenforceable.

**Jonathan Marvin**