

CASE UPDATE

SINGAPORE COURT OF APPEAL CLARIFIES LEGAL OBLIGATIONS IMPOSED BY “BEST ENDEAVOURS” CLAUSE

Travista Development Pte Ltd v Tan Kim Swee Augustine & Others [2007] SGCA 57

Executive Summary

A contractual “best endeavours” clause obliges the covenantor to take all reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain the desired result, would have taken.

Davinder Singh SC, Hri Kumar SC, Tham Feei Sy and James Low of Drew & Napier LLC acted for the successful respondents in this appeal.

Background

On 12 December 2006, Travista Development Pte Ltd (the “**Appellant**”) entered into an agreement (the “**S&P Agreement**”) for the sale and purchase of Mayer Mansion (the “**Property**”) with the collective owners of the Property’s strata title units (the “**Respondents**”).

The sale and purchase of the Property was to be completed within 6 weeks from the receipt of the qualifying certificate (the “**QC**”) from the Land Dealing Unit of the Singapore Land Authority or within 3 months from the date of the S&P Agreement (ie. 12 March 2007), whichever was the later. The Appellant was to use its “*best endeavours*” to obtain the QC.

A prerequisite to the issuance of the QC was the procurement by the Appellant of a banker’s or insurance guarantee (the “**Guarantee**”) for a \$3.05 million deposit (the “**Deposit**”). However, it appeared that the Appellant only applied for the Guarantee as part and parcel of its overall financing package for the purchase and subsequent redevelopment of the Property (instead of securing the Guarantee separately to expedite the issuance of the QC). This slowed down the process considerably and resulted in the Appellant obtaining the QC only on 10 April 2007.

On 13 March 2007, Respondents issued the Appellant a 21-day notice to complete the transaction. When the Appellant failed to close the transaction within the stipulated time, the Respondents rescinded the S&P Agreement.

The trial judge held that the S&P Agreement had been validly rescinded by the Respondents as the Appellant had failed to use its best endeavours to procure the QC. Accordingly, the Deposit paid to the Respondents was ordered to be forfeited. The Appellant appealed against the trial judge’s decision.

The Court of Appeal’s Decision

The Court of Appeal agreed with the trial judge that if the Appellant had used its best endeavours to obtain the QC (which it had not), it would have been able to complete the purchase of the Property by 12 March 2007. The appeal was dismissed.

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The “Best Endeavours” Obligation: An Objective And Composite Test

The Court of Appeal noted that the test to determine whether a party has exercised its best endeavours was not only an objective test but also a composite one, in that the covenantor is permitted to take into account its own interests.

The covenantor has to “*do everything reasonable in good faith with a view to obtaining the required result within the time allowed*”. This involves a factual analysis of the circumstances of each case, such as the nature of the approval(s) sought, the practice (if any) of the trade concerned, the availability of an appeal process and evidence of futility of further efforts.

In the context of the present case, the Court of Appeal was of the view that the Appellant’s failure to apply for the Guarantee separately from the credit facilities in connection with the overall financing of the project was “*clear evidence*” that it had failed to use its best endeavours to obtain the QC so as to complete the sale and purchase of the Property in a timely manner. The evidence adduced by the Respondents showed that if the Appellant had applied to the banks for the Guarantee alone, the transaction could have closed on or before 12 March 2007.

Comment

A clause requiring a party to exercise best endeavours to achieve a particular goal is a common feature of many contracts. The present case confirms that the courts will hold a party who is under an obligation to exercise “best endeavours” (ie. the covenantor) to a high standard. Be that as it may, in adding that the covenantor is permitted to take into account its own interests, the courts have signalled that they will take a realistic approach to determining whether the covenantor had used its best endeavours.

In the majority of cases, parties to a contract will have a common interest to see that the desired goal is achieved. However, where the interests of parties diverge, uncertainties remain as to what extent the covenantor is entitled to look to his own interests. It can be anticipated that there will be potential for genuine disagreements to arise on this issue.

As the present case demonstrates, a covenantor’s failure to use its best endeavours can have far reaching practical and legal implications. The present case is a timely reminder that an agreement to use one’s best endeavours is a serious obligation which should not be undertaken lightly.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors’ Profiles at our [website](#)), or any of the following lawyers:

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The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

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