How Much Effort Is Best?

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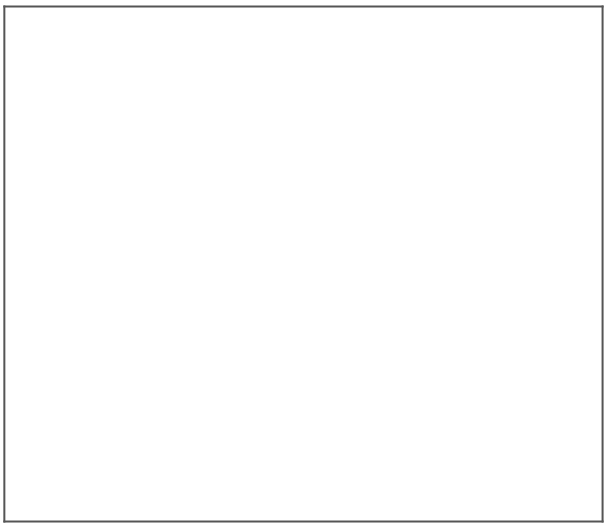
My client's prospective business partner, through his lawyer, inserted a clause into their business arrangement that required my client to exert "best efforts" to achieve an outcome. My client knew that he wanted to achieve the desired outcome, but what, exactly, did "best efforts" require him to do, and was it reasonable to expect him to do it?



"Best efforts" type language is ubiquitous in commercial agreements, and the terminology varies, from "best efforts", to "commercially reasonable efforts" to "reasonable efforts", and more. Is there any difference between them? The answer is yes, and in some cases, the difference is significant.

The leading case on "best efforts" goes back to the Supreme Court of B.C. in 1994 in Atmospheric Diving Systems Inc. v. International Hard Suits Inc., where the Court reviewed Canadian and English law on the issue. The defendant had been required to use its best efforts to re-sell the plaintiff's diving suits to a third party at the full purchase price (subject to normal wear and tear). The Court found on the facts that the defendant's efforts were perfunctory and fell far short of the best efforts standard. The principles as to that standard, extracted from the case, 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 endeavour.
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.

As you can see, "best efforts" is a fairly exacting standard; it requires that you leave no stone

unturned. My client was sure neither he nor his prospective business partner intended that degree of effort in the circumstances of their business arrangement. But what standard did they want?

One of the few higher court decisions on “commercially reasonable efforts” is a 1999 decision of the Ontario Court of Appeal in 364511 Ontario Ltd. v. Darena Holdings Ltd. The case involved an offer to lease by the plaintiff which was conditional upon the plaintiff’s obtaining approvals from municipal authorities to use the premises as a bingo hall. The plaintiff was to use reasonable commercial efforts to obtain the approvals. When the application for approval was made it became clear that there was strong opposition to bingo halls, including from the local councillor. The plaintiff met with the opposition, and ultimately agreed to look for another location. The defendant refused to return the plaintiff’s deposit, saying it had not used reasonable commercial efforts to obtain the approval. The trial judge held that:

“Reasonable implies sound judgment, a sensible view, a view that is not absurd. Commercial means having profit or financial gain as opposed to loss as a primary aim or object. These words impose a standard of reasonable commercial efforts, not one of the best efforts or bona fide efforts.”

In upholding the lower court decision, the Court of Appeal stated that in order to meet its obligation to use commercially reasonable efforts “a simple doubt would not suffice; uncertainty that made it commercially unreasonable to proceed was required”.

So, if the test of “reasonable” means “sound judgement, a sensible view”, then it is the standard of what a reasonable person would do in similar circumstances, and “commercially reasonable” is the standard of what the reasonable business person would do in similar circumstances. Is there any difference between the two? One certainly could argue that in a business context, what is “reasonable” implicitly means what is “commercially reasonable”. But I would not necessarily take that for granted. If my client wanted his, or his prospective business partner’s, efforts to be guided, or constrained, by common business practices, then I would recommend that they agree on a standard of “commercially reasonable efforts”.

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