

Commercial
Case Law Update
Rosling King LLP



Background

Astor Management AG (the “Claimant”) had an interest in a project known as the Rio Tinto Project (the “Project”). The Claimant entered into an agreement with Atalaya Mining plc (the “Defendant”) on 30 September 2008 (the “Agreement”), whereby the Claimant would give up their interest in the Project in exchange for a payment by way of deferred consideration, being up to EUR 63.3 million.

The Agreement included an undertaking given by the Defendant to use “all reasonable endeavours” to obtain a senior debt facility, and to procure the restart of mining activities in the Project, on or before 31 December 2010. The consideration payable under the Agreement would not become payable until (i) the Defendant had received all necessary permits to restart the mining activities and (ii) could draw down on the senior debt facility.

In June 2015, the Defendant raised the necessary funds by issuing shares in their group company, instead of obtaining a senior debt facility. The Defendant received the necessary permits in July 2015, and mining restarted on 31 July 2015. The Claimant subsequently requested payment of the deferred consideration from the Defendant, however the Defendant argued that as the senior debt facility was not obtained, this deferred consideration would never become payable.

Decision

The court considered, amongst other things, whether there was a legally enforceable obligation to use “*all reasonable endeavours*” to obtain the senior debt facility and, if so, whether that obligation expired on 31 December 2010. The court ultimately found that the intra group funding did not constitute a senior debt facility and therefore payment of the deferred consideration had not been triggered.

The Undertaking

Of most significance in this case was the Defendant’s obligation to use “*all reasonable endeavours*” to obtain a senior debt facility. The Defendant, placing reliance on the authority of *Dany Lions Ltd v Bristol Cards Ltd [2014]*, argued that an obligation to use reasonable endeavours would only be enforceable if (a) the object of the endeavours is sufficiently certain; and (b) there are sufficient objective criteria by which to evaluate the reasonableness of endeavours. The Defendant argued that the reasonable endeavours undertaking was not enforceable because there were no objective criteria by which the court could judge the reasonableness of the Defendant’s endeavours to obtain a senior debt facility. The court disagreed with the observations in the *Dany Lions* case, stating that “*the role of the court in a commercial dispute is to give effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy.*” The court therefore found that the reasonable endeavours undertaking in the Agreement was enforceable. Further, the Court rejected the Defendant’s argument that the obligation to use “all reasonable endeavours” fell away after 31 December 2010, commenting that the Defendant was under an obligation to obtain the senior debt facility by this date if practicable and, if not, that obligation continued and the Defendant was required to use all reasonable endeavours to obtain the senior debt facility as soon as practicable thereafter.

However, whilst determining that the reasonable endeavours undertaking was enforceable and the obligations on the Defendant under the Agreement remained in place, based on the facts of the case, the court found that the Defendant was not in breach of its obligation to use “*all reasonable endeavours*” to obtain a senior debt facility.

Duty to act in good faith

The Claimant also argued that the Defendant was under an implied obligation of good faith to use reasonable endeavours to obtain a senior debt facility and, by not doing so, the Defendant was in breach of this obligation. The court commented that “*a duty to act in good faith, where it exists, is a modest requirement*” and a duty of good faith “*is a lesser duty than the positive obligation to use all reasonable endeavours*”. As the Agreement contained an obligation to use all reasonable endeavours, there was no need or scope to imply a term requiring the Defendant to act in good faith to obtain a senior debt facility. In addition, the Claimant argued that a ‘principal of futility’ should be applied to the Agreement because, as the Defendant obtained funding by other means, compliance with the condition that the Defendant obtains a senior debt facility would be pointless and unnecessary. The court rejected this submission finding that there was no “*principle of law...which enables a contractual precondition to the accrual of a right or obligation to be disapplied just because complying with it is considered by the court to serve no useful purpose*”.

Commentary

Given the ambiguity which can surround the construction of an “endeavours” clause, this case serves as a reminder of the importance of ensuring each parties’ obligations are expressly set out in the contract. Whilst the reasonable endeavours undertaking was enforceable in this case, the lack of objective criteria in the Agreement meant that the court was required to interpret what the parties actually meant by ‘reasonable endeavours’. In order to achieve the aims and intentions of the contracting parties, when drafting a contract, the parties should ensure that they clearly identify what each party is required to do. For example, an undertaking by a contracting party may stipulate:

1. what steps each party is required to take, by when and how they should communicate their progress with other parties to the contract;
2. whether the end result could be obtained through any other means other than as required by the undertaking, and if so, how this would impact the undertaking; and
3. how long the parties would be bound by the undertaking, and what the result would be if the party giving the undertaking fails to comply by the agreed date.

If you would like to discuss this case, or commercial matters in general, then please do not hesitate to contact [James Walton](#) of this firm who would be happy to assist.