"The First Party undertakes to use all reasonable endeavours"

This is a phrase that often appears in commercial contracts, particularly where there are various hurdles that have to be overcome in order to enable the parties to a contract to achieve their objectives.

There are variants on the level of endeavours to be used and generally they fall into three categories:-

1. To use "reasonable" endeavours;
2. To use "all reasonable" endeavours; and
3. To use "best" endeavours.

There have been two recent cases in Scotland where the phrase "reasonable endeavours" and "all reasonable endeavours" have been considered by the Courts. Useful guidance has been given and it has become clear that there is a difference between "reasonable endeavours" and "all reasonable endeavours". What is less clear is to what the difference is between "all reasonable endeavours" and "best endeavours".

What also is interesting is that Lord Hodge has indicated "whichever phrase is used I do not think that the obligation of this nature requires the obligant to disregard its own commercial interests. Where the balance between the obligation to try and countervailing commercial considerations is struck depends on the wording of the obligation. The phrase in this contract [*use reasonable endeavours*] is the least onerous of the three phrases." In that instance, it was clear that the Board of Directors should consider the best interests of the Company in deciding what was reasonable to do in order to obtain the planning permission. An English case was quoted which made clear that if there was an insuperable obstacle which would prevent the object being achieved then the obligant was not required to take steps which in the end of the day would inevitably be unsuccessful in the overall objective. Lord Glennie in the other recent case indicated that he thought where there was an obligation to use all reasonable endeavours the Court would require to consider whether there were reasonable steps which could have been taken but were not taken. The party on whom the obligation is placed will be expected to explore all avenues reasonably open to him and to explore them all to the extent reasonable. However, unless the contract otherwise stipulated, he is not required to act against his own commercial interests.

Lord Glennie also went on to state that there may well be an obligation for the party who is bound to use all reasonable endeavours to inform the other party of any difficulties encountered.

The decisions however are less clear on what the difference between "all reasonable endeavours" and "best endeavours" is. Lord Glennie was of the view that any difference was likely to be metaphysical rather than practical and he found it difficult to conceive that an obligation to use best endeavours required a party to take steps which were *ex hypothesi* unreasonable.

Lord Glennie's decision has now gone to appeal and his decision has been upheld on appeal. On appeal the Second Division of the Court of Session did not discuss further the difference between the various expressions but reiterated and affirmed the view that a party who was required to use reasonable endeavours did not have to leave no stone unturned. The judges agreed that if an obligant can show that it would have been useless to have taken a particular step or steps because it would not have been sufficient to achieve success, that would be sufficient to show that they had used all reasonable endeavours.

What has clearly come out from the cases is that barring wording to the contrary, it is perfectly legitimate for a party to consider its own commercial interests. Inevitably, in the interpretation of any such obligation, the context will be looked at and the words will be interpreted in light of what the parties intended and their respective experiences.

s:\dalgleishg\jmh\charities articles\reasonable endeavours article.doc