



## LEGAL BRIEFING

### *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417

#### *The Facts*

By a 15 year agreement dated 23 September 2005 ("the Agreement"), Jet2.com Ltd ("Jet2") and Blackpool Airport Ltd ("BAL") agreed terms under which Jet2 operated flights out of Blackpool Airport.

- Clause 1 of the Agreement stated that Jet2 and BAL would cooperate together and use their best endeavours to promote Jet2's low cost services from Blackpool Airport and that BAL would use all reasonable endeavours to provide a cost base that would facilitate Jet2's low cost pricing.
- On that basis and with the support and cooperation of BAL for 4 years, Jet2 operated flights outside of the airport's "normal hours" of 7am to 9pm in the winter and 6am to 8pm in the summer. By allowing departures outside hours the airport ran at a loss.
- On 22 October 2010, BAL told Jet2 that from midnight on 29 October 2010 it would not accept departures or arrivals scheduled outside normal hours.
- Jet2 sued for breach of contract, and asked the Court for a declaration that under the Agreement BAL was obliged to accept aircraft movements from 6am to midnight. BAL argued that its duties under the Agreement to use best or all reasonable endeavours did not require it to act against its own commercial interests (i.e. by running the airport at a loss).
- The Judge at first instance held that BAL was in breach of contract in refusing to handle flights outside of normal operating hours, but he declined to grant Jet2 the declaration that aircraft movements should be allowed between 6am and midnight. BAL subsequently appealed against the Judge's decision.

#### *The Issues*

The only question before the Court of Appeal was whether BAL was in breach of contract in declaring with minimal notice that they would no longer accommodate Jet2's wish to operate outside the formal opening hours of the airport.

On appeal BAL renewed its argument that the provisions of the Agreement that:

- (i) obliged it to cooperate and use best endeavours to promote Jet2's low cost services from the airport; and
- (ii) use all reasonable endeavours to provide a costs base that would facilitate Jet2's low cost pricing did not require it to act against its own commercial interests.

BAL further submitted that the terms of the Agreement to use such best endeavours and all reasonable endeavours to promote low cost services and low cost pricing were too uncertain to create legally enforceable obligations.

Jet2 on the other hand argued that the nature of best and all reasonable endeavours obligations depended on the context in which they arose and how they were interpreted against the facts of each individual contract in which they are referred.

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Jet2 also argued that there was nothing uncertain about the obligations and that any attempt to restrict Blackpool Airport opening hours was, as the Judge had held at trial, a breach of contract.

### ***The Decision***

By a majority the Court of Appeal upheld the decision at first instance and in doing so rejected both of BAL's submissions. In arriving at its decision the Court considered the question of certainty and noted that generally:

*"an obligation to use best endeavours, or all reasonable endeavours, is not in itself regarded as too uncertain to be enforceable provided that the object of the endeavours can be ascertained with sufficient certainty".*

Applying this principle to the facts of the case, the majority held that the object of the "best endeavours" obligation to promote Jet2's business was not too uncertain and therefore placed a binding obligation on BAL which extended to accepting departures and arrivals outside of the airport's normal operating hours.

Incidentally, in respect of the second obligation in clause 1 i.e. to use all reasonable endeavours to provide a cost base that would facilitate Jet2's low cost pricing, the Court was undecided as to whether the object of this duty was certain enough to be enforceable.

On the question of whether BAL was required to act against its own commercial interests in promoting Jet2's low cost service, the majority agreed with the Judge in the first instance and held that the losses incurred by BAL had not justified its actions with Longmore LJ stating that:

*"the fact that [a party] has agreed to use his best endeavours pre-supposes that he may well be put to some financial cost, so financial cost cannot be a trump card to enable him to extricate himself from would otherwise be an obligation".*

However the Court accepted that once it became clear that Jet2 could never expect to operate profitably from the airport, BAL would not need to incur further losses promoting a failing business.

### ***Comment***

What is clear from this decision is that whilst the Courts are willing to uphold an endeavours clause especially where a contract is already being performed, for it to be valid the parties need to be clear on its objective. If it is not clear then the clause may not be enforceable.

This decision further highlights the fact that while a party's agreement to use best endeavours pre-supposes that he may well be put to some financial cost in discharging that obligation, the extent to which he will be expected to act against his financial interests is a question of fact, and will be dependent on a number of factors, including but not limited to the nature of the terms of the contract in question.

In order to avoid the uncertainties that arise as a result of obligations of this nature, it would surely be in the best interests of the parties to specify what steps each party is required to take in order to comply with its obligations and make express provision for it in the contract.

David Bebb  
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