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ENDEAVOUR OBLIGATIONS: WHEN DOING YOUR BEST IS NOT THE BEST YOU CAN DO

Jonathan Walker & Keomi Lourenço

Contracts between parties set out the obligations that each party owes to the other. In a theoretical ideal world, each of those obligations would be described in a precise and unambiguous manner so that both parties know exactly where they stand. However, in the real world this is not always possible. In many cases, some obligations relate to matters that are not within the 100% control of the parties, but instead require either the permission, consent or other input from a third party. For instance, a property purchaser/developer may not wish to agree that he must obtain planning permission as a condition precedent to the sale of the property since the decision to grant planning permission lies in the hands of the Town & Country Planning Division. He can, however, agree to use his best efforts in procuring such permission.

This situation presents a difficulty. The party who is responsible for performing the obligation may not wish to undertake an unqualified "shall" "will" or "must" duty, given that the successful performance of the obligation is not wholly within its control. However, the other party will require assurance that the potential obligor will pursue the fulfilment of the obligation with an appropriate level of determination.

One mechanism that is often used in order to satisfy and balance the concerns of both parties is the employment of "endeavour obligations". Over time parties have developed several variations of endeavour obligation expressions, three of the most common being "best efforts", "all reasonable efforts" and "reasonable efforts".

Each of these expressions establish the same general principle. However, there are some subtle yet important differences between them. Understanding these differences is crucial as it will help the parties to:

- use an endeavour obligation expression that is appropriate for their particular case; and
- understand the extent of the obligation being undertaken.

The Expressions Compared

The subtle differences in meaning among the three most commonly used endeavour obligation expressions were highlighted in the recent case of ***CPC Group Limited v Qatari Diar Real Estate Investment Company*** *[2010] EWHC 1535 (Ch)* referred herein as the CPC case. These differences may be summarised as follows:

- **"Best efforts"** – the obligor must leave no stone unturned and must pursue all the reasonable efforts he can. It requires the obligor to take all the steps in his power which are capable of producing the desired result, being the steps a reasonable, prudent, determined obligee acting

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in his own interests and desiring to achieve that result would take. It has been held, for example, that a failure to appeal a rejected planning permission application amounted to a breach of the party's obligation to use its best efforts to obtain such permission.

- "**Reasonable Efforts"** – this obligation imposes a slightly lower standard than the "best efforts" obligation and can be satisfied by the obligor's pursuit of one reasonable course of action.
- "**All reasonable efforts"**– while it was previously thought that this phrase placed a slightly lower standard on the obligor, dicta in the CPC case strongly indicate that the expression "all reasonable efforts" is equal to an obligation to use "best efforts" since both obligations require the obligor to take all reasonable steps and pursue all reasonable courses of action within its power.

Parties may expand or restrict the general meaning

The Court in the CPC case also noted that it was open to the parties to include additional wording which could affect the way in which the particular endeavour obligation was to be interpreted. In that case the parties included the qualifying words "*but commercially prudent endeavours"*. The Court found that these words made it clear that it did not require a sacrifice of commercial interest but instead provided a brake on the lengths to which the obligor had to go in using all reasonable endeavours.

Whilst the particular wording in the CPC case was held to have provided a brake, parties should be aware that by selecting particular wording, they could also expand the scope of their obligation. For example, by stating that certain steps will be taken as part of a party's best endeavours, the obligor will be required to take those identified steps even if this involves the sacrifice of its commercial or financial interests.

Recommendations

Notwithstanding the clarification of the standard to which each expression will hold an obligor, there still remains a degree of uncertainty with respect to the application of such standards and in particular the precise extent of each obligation and the course of action or steps that should be taken to fulfil an endeavour obligation.

In order to mitigate and manage this risk the parties may wish to consider:

- Discussing and identifying the steps that the parties expect should be taken in order to fulfill the endeavour obligation and to expressly record in the Agreement those steps that the obligor agrees to perform. For example where a party is under an obligation to obtain permission from a regulatory authority, then it would be useful to discuss and specify whether this obligation would include challenging the decision of the authority (whether by way of appeal or even judicial review). In approaching the issue in this manner, some useful questions that the parties should consider are:
  - Whether there are specific activities that a party is expected to carry out;
  - Whether pursuing these activities might have an impact on its commercial or financial interest;
  - Whether there are any costs associated with those steps; and if so
  - Which party should bear the costs associated with complying with any step, and whether there should be a limit or range to those costs;
  - Whether there should be any stated time period over which the party should pursue a particular objective;
  - Whether taking legal action to achieve the objective is required.

- Defining endeavour obligations in a flexible yet quantifiable manner. For example, an agreement may provide that an endeavour obligation is satisfied if the effort used is comparable to efforts made in similar type transactions or dealings or in accordance with industry standard or best practice. Such additions may provide a reference point for the parties to know what is required of them from the outset.

It is clear that parties who wish to include endeavour obligations in their contracts as a means of striking a compromise between them should approach the matter with extreme caution and apply thought to the application of the obligation in the specific circumstance.

COURT ANNEXED MEDIATION COMES TO TRINIDAD & TOBAGO

Christopher Hamel-Smith, S.C.
& Luke Hamel-Smith

In a new and encouraging development, the Chief Justice (in his recent address at the opening of the 2010 -2011 Law Term) signalled that Court Annexed Mediation is to become a standard part of the process for resolving civil disputes in Trinidad and Tobago.

Mediation is a way of resolving disputes in which a neutral third party (the mediator) assists the parties to arrive at an agreed resolution. Unlike a judge or arbitrator, the mediator has no power to impose a decision. As such, a resolution can only be achieved through mediation if the parties voluntarily agree to it as a result of the process. In Court Annexed Mediation the Court identifies matters that may benefit from mediation and then either refers the parties to mediation or uses its influence over the parties to encourage them into going to mediation.

The Chief Justice saw Court Annexed Mediation as a useful tool in the context of the following:

- The capacity of the Judiciary is stretched to breaking point and that increasing delay will result if there is no timely and appropriate intervention.
- The new Civil Procedure Rules (and the case management process which is at their core) contemplated a much higher percentage of cases achieving early disposition (and therefore for fewer cases to reach the stage of a trial) than has been achieved to date.
- The very encouraging interim results of a pilot project on Court Annexed Mediation initiated by the Judiciary, with the involvement of the Dispute Resolution Centre of the Trinidad & Tobago Chamber of Commerce.

Reporting on the interim results of that pilot project, the Chief Justice indicated that:

- 60% of the cases which the Courts had referred to mediation had resulted in a settlement.
- Some of the cases that were not immediately resolved by mediation subsequently settled because issues had been narrowed and greater clarity had been brought to the parties' interests.
- 95% of the participants in the mediation process reported it is a positive experience and confirmed that they would use mediation again if they had a subsequent dispute.

These interim results of the pilot project on Court Annexed Mediation are consistent with Hamel-Smith's experience with the utility of mediation as a process for resolving commercial disputes. Indeed, we have found that an even higher percentage of cases can be resolved through mediation than appears from the Chief Justice's interim report on the pilot project which included, but was not confined to, commercial disputes.

The use of Court Annexed Mediation is a welcome move. Not only will it assist in reducing the Judiciary's caseload, thereby speeding up the progress of matters that go to trial, but it also has the potential of providing parties with a solution to their disputes that has compelling advantages over full-blown litigation.

Mediation has always been a very useful tool in resolving disputes. Particularly now that Court Annexed Mediation is to become a standard part of the litigation process, it is vital that business persons in Trinidad & Tobago become more familiar with the mediation process and how it can be used to achieve quicker, less expensive and better resolutions to their disputes. A more detailed description of the mediation process was presented in the April 2010 issue of the MHS Forum which is available for download from our website: http://www.trinidadlaw.com/home/general/content.aspx?CategoryID=31

PAYING AGAIN FOR CRIME NOT TO PAY

Details on the Increased Compliance Requirements for Financial Institutions as well as Companies, Professionals and Individuals in Specified Areas of Business Following New Amendments to the Proceeds of Crime Act

M. Glenn Hamel-Smith & Kevin Nurse

In this article (the second of a three part series), we provide an overview of some of the specific amendments under the Proceeds of Crime (Amendment) Act, 2009. These amendments impact financial institutions and a wide range of other businesses. Since many of the listed businesses were not previously required to comply with the Act, they must now familiarise themselves with its provisions and their obligations under same.

New Persons Required to Comply

One of the most significant changes made by the Amendment Act is the significant expansion of the types of businesses that are made subject to and required to comply with its obligations. This change is made by amendments to the First Schedule which now includes several new categories of business. It also includes a description or interpretation of the activities which qualify the entity as a Listed Business and which require it to comply with the obligations under the Act (as amended).

Listed Businesses

Listed businesses include:

- *Money or Value Transfer Services* (a financial service that accepts cash, cheques, other monetary instruments or other stores of value in one location and pays a corresponding sum in cash or other form to a beneficiary in another location by means of a communication, message, transfer or through a clearing network to which the money value service belongs);
- P*rivate Members Clubs* (a club with the meaning of the Registration of Clubs Act);
- An *Accountant*, an *Attorney-at-Law* or other *Independent Legal Professional* (Such a person is accountable when performing the following functions on behalf of a client:
  (a) buying and selling of real estate;
  (b) managing of client money, securities and other assets;
  (c) management of banking, savings or
  (d) organization of contributions for the creation, operation or management of companies, legal persons or arrangements;
  (e) buying or selling of business entities);
- *Art Dealers* (An individual or company that buys and sells works of any category of art);
- *Trust and Company Service Providers* (Any such person when he prepares for and when he carries out transactions for a client in relation to the following activities:
  (a) acting as a formation agent of legal persons;
  (b) acting (or arranging for another person to act) as a director or secretary of a company, a partner of a partnership or a similar position on relation to other legal persons;
  (c) providing a registered office, business address or accommodation, correspondence or administrative address for a company a partnership or any other legal person or arrangement;
  (d) acting (or arranging for another person to act) as a nominee shareholder for another person).

The list of entities that are deemed to be financial institutions under the Act and that must comply with the Act (as amended) has been expanded to include entities providing mutual funds, development banks, trust companies and mortgage companies.

Given that banks and non-bank financial institutions registered under the Financial Institutions Act are already defined as financial institutions for the purpose of this Act, it is assumed that the additions identified above have been included in case any of those entities may be exempt from being registered under the Financial Institutions Act.

New Authority–Financial Investigations Unit

The Financial Intelligence Unit of Trinidad and Tobago (**FIU**), formed under the Financial Investigations Unit of Trinidad and Tobago Act, 2009 is vested with the power to carry out investigations into the affairs of Reporting Entities in relation to money-laundering. Financial institutions and businesses are required to report any suspicious transactions to the FIU.

Expanded definition of Police Officer

The definition of Police Officer under the Act (which included an Officer of the Trinidad and Tobago Police Service, an Officer of the Customs and Excise Division, an Officer of the Board of Inland Revenue) has now been expanded to include any officer of an agency of the

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PAYING AGAIN FOR CRIME NOT TO PAY *(cont'd)*

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state, lawfully vested with the investigative powers similar to those exercisable by a police officer appointed under the Police Service Act, 2006.

Definition of Security
The new definition of "security" closely mirrors the definition in the proposed Securities Bill 2009 without the exceptions provided therein. The exclusion of the exceptions appears to be both deliberate and appropriate as the State could arguably be prevented from creating a charge to secure a payment owing to it under a Confiscation Order over assets that would otherwise have been excluded from the definition of security.

Drug Trafficking
One of the main areas of focus under the Act was the confiscation of the proceeds of drug trafficking such that even the long title of the Act referred to same. An indictable offence, drug-trafficking remains one of the specified offences for which proceeds can be confiscated, but the emphasis on drug trafficking has been removed from Part 2 of the Act which provides that money laundering the proceeds of any specified offence is in itself an indictable offence.

Penalties and Punishment
Some modifications have been made to the offences for which a person may be tried summarily or indictably, and the penalties have also been adjusted. Persons who fail to comply with any regulations made under the Act are also now subject to similar penalties for failing to comply with the general record-keeping and reporting requirements.

Record-keeping and Reporting Requirements
Reporting Entities must pay special attention to:
(i) all business transactions with persons and financial institutions in or from other countries which do not or insufficiently comply with the recommendations of the Financial Action Task Force; and
(ii) complex, unusual, or large transactions, whether completed or not, to all unusual patterns of transaction; and to insignificant but periodic transactions which have no apparent economic or visible lawful purpose.

All complex, unusual, or large transactions (transactions with a value of $95,000 ***or greater*** or such other amount prescribed by an Order of the Minister, emphasis added) referred to in (i) or (ii) above must be reported to the FIU and the background of all transactions which have no economic or visible legal purpose under (i) above must be examined following which written findings of such examinations must be made available to the Supervisory Authority of the Reporting Entity.

If a Reporting Entity knows or has reasonable grounds to suspect that funds being used for the purpose of a transaction referred to above are the proceeds of a specified offence, a suspicious transaction or activity, report must be made to the FIU in the prescribed form as soon as possible but no later than fourteen days after the knowledge or reasonable grounds referred to above arose. Any person at a Reporting Entity who discloses the fact or content of such reports to any person commits an offence and is liable on summary conviction to a fine of two hundred and fifty thousand dollars ($250,000.) and imprisonment for three years.

Under the Act (as amended), compliance programmes required to be developed and implemented by Reporting Entities must now be approved by the FIU. It may be that the FIU intends to provide pre-approved forms of compliance programmes or instructions.

Regulations
The Act expands upon the regulations which may be made by the Minister of Finance to ensure that Reporting Entities comply with the Act and to provide guidance for same. The Act also now provides that such regulations shall be subject to a negative resolution of Parliament rather than an affirmative one as was previously the case.

Conclusion
The expansion of the list of Reporting Entities has resulted in a wider variety of different types of businesses now being required to pay attention to and disclose suspicious transactions which may come to their knowledge. The Financial Obligations Regulations 2010 (which replaced the Financial Obligation Regulations 2009 referred to in our previous article) address six (6) important items with which Reporting Entities should become familiar so as to meet their obligations under the Act. In the third and final part of this series, we will highlight some of these provisions.

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