

## “ENDEAVOURS” CLAUSES

“Endeavours” clauses are very common in contracts, especially promises to use best endeavours to reach agreement on something and promises to use reasonable endeavours to put things right if they go wrong.

I am often asked what these phrases mean, but they don't have a fixed meaning: they take their meaning from the context in which they are used, including the rest of the contract. This is what makes them so useful. But they are definitely not empty words.

The High Court recently considered an “all reasonable endeavours” clause in some heads of agreement. These are skeleton agreements which act as stepping stones to a full contract when the parties are keen to get started on a project before they have finished negotiating. This is nearly always a risky strategy, but sometimes it is the only way forward.

As is common, these particular heads of agreement obliged the parties to use all reasonable endeavours to negotiate and conclude a full contract, so when one party concluded that the other was dragging its heels, it sued.

The judge confirmed that the term obliged each party to be proactive and to genuinely consider and try all reasonable courses of action. He ruled that the defendant's lack of progress did not meet this obligation, and awarded the claimant damages based on the profit it would have made if a full contract had been agreed and put into effect. The judge had to make some assumptions and some rough-and-ready estimates, but doing the best he could he awarded the claimant over £13m. Definitely not empty words!

### Recommendations

Avoid heads of terms whenever you can. Strive for a full contract while everyone is fully motivated – a lot of the motivation for one party can disappear as soon as the work starts.

If you have to use heads of terms, set clear objectives and deadlines. Crucially, cover what is to happen if a full contract is not concluded.

Agree as much detail as possible. This applies to heads of terms and final contracts.

Only use “endeavours” clauses when and where they are appropriate. Recognise that they involve real commitments, and consider carefully what that might involve. If it is important that it does or doesn't include doing something, spell that out.

For help with any of these issues, contact:  
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**Disclaimer:** This note is intended as a signpost to some important issues on which professional advice should be obtained. It is not comprehensive, it is not a substitute for proper advice, and it is provided without any responsibility or liability.