The decision in durham tees valley airport ltd v bmi baby ltd

Business, Industries

Introduction

Contract law abhors uncertainty and it is a well-accepted rule of commercial law that for an agreement to be enforceable its terms must be sufficiently certain and complete for the courts to elicit the meaning of an agreement[1]. Both vagueness[2] and incompleteness[3] disable an agreement from being binding and will often unless the court makes use of remedial measures to, inter alia, imply reasonable meaning into the contract or clarify the meaning of a word, be fatal to the contract as a whole[4]. The classic case which is usually cited to demonstrate this principle is G Scammell & Nephew Ltd v Ouston[5]where an agreement which provided for the acquisition of goods " on hire-purchase" was so vague as to prompt Viscount Maugham to observe that: " it is impossible to conclude that a binding agreement has been established"[6]. The tension between finding a contractor to be uncertain and attempting to satisfy the settled will of parties to an agreement and encourage commerce without undue restriction has led Professor Macneil to warn that the quest to identify settled principles in this area of contract law is but a " fool's errand"[7]. Cases in this area, as Ewen McKendrick rightfully observes, are dependent on their facts and the courts are chiefly concerned with whether there is a sufficiency of the evidence to justify the conclusion that a settled and binding agreement has indeed been concluded[8].

Unsurprisingly perhaps English courts have been criticized as being unduly restrictive which makes the judgment in Durham Tees Valley Airport Ltd v BMI Baby Ltd[9]a notable and welcome decision as it goes against the grain of the perception of English contract law by overturning on appeal a decision

of Davis J in the Chancery Court which held that a contract which imposed an obligation on BMI Baby to base and fly aircraft from an airport but which was unclear about the objective criteria relating to the performance of that obligation regarding passenger numbers was incapable of having a term implied and therefore was struck down[10]. The Court of Appeal allowed the appeal and unanimously found in favor of allowing the contract to stand: the judge at first instance had erred in construing the contract as being void for uncertainty[11]. This essay will critically discuss the above statement by examining the case itself in detail in part 1 before embarking upon a discussion of the balancing act involved in resolving uncertainty in contractual terms in part 2. The statement is justified in asserting that such cases as the instant one require a delicate balancing act and thisobservationis validated by the case law[12].

Part 1: The decision in Durham Tees Valley Airport Ltd v BMI Baby Ltd

1. 1 Facts of the case and terms of the contract

The brief facts are that an agreement was concluded between Durham Tees Valley Airport (hereafter DTVA) and British Midland Regional Limited (hereafter BMRL) in April 2003 which provided for BMRL to provide two B737 aircraft to operate exclusively from DTVA for a period of ten years[13]. This agreement was subsequently transferred to BMI Baby by virtue of a Novation and Variation Agreement (NVA) executed on 23 December 2005. As Lord Justice Patten, who delivered the leading judgment, observes “ both sides accept that the Base agreement created a binding contract but they differ on

how it should be construed”[14]. The defendants contended that the agreement granted them a right without an obligation while the airport argued that the agreement constituted a continuing obligation. The decision at first instance, delivered by Davis J, proceeded, without any notable discussion, on the assumption that the contract was unenforceable due to uncertainty[15]. The bulk of the first instance judgment was concerned with the attempt to imply a term into the NVA agreement to hold the contract to be enforceable and thus hold BMI Baby to the obligation[16]. As Treitel observes the court has a discretion as to whether or not a term can be implied into a contract using the standard of reasonableness[17]. Judge Davis pointed out that the NVA lacked any specification as to the number of flights required and as Lord Justice Patten points out, “ it is this which is said to be fatal to its enforceability”[18]. A leading case in the area of implied terms under the standard of reasonableness is Hillas & Co Ltd v Arcos where the timber sold was said, ambiguously, to be of “ fair specification”. This is a typical example of terms that come to the very heart of a contract[19] being expressed in vague or uncertain ways and requiring the construction of the court to crystallize an obligation.

Lord Justice Patten fundamentally disagreed with the first instance judge at this stage, arguing that it “ was wrong to regard the addition of a term as to the minimum number of flights as being necessary for the enforceability of the NVA”[20]. The judge had thus proceeded on an assumption of uncertainty and then attempted to imply a term into the NVA agreement which, mistakenly, he thought had a material bearing on the enforceability of

the contract[21]. The key elements of the contract were obviously in place and both parties considered that a binding contract was in place despite their differing interpretations. The real question, as Lord Justice Patten correctly identifies, is whether or not the airline was in fact flying its aircraft not the number of flights[22]. Upon this analysis, BMI Baby had fulfilled the obligation and thus they could be held accountable: “ BMIB is not required to do the impossible” as Lord Patten concluded[23]. His lordship found sufficient evidence that certainty existed in the contract without resort to any implied terms: “ This makes it unnecessary in my judgment for DTVAL to rely upon an implied term that BMIB would operate the aircraft in a way that was reasonable in all the circumstances. The NVA includes sufficient terms to enable the court to determine whether BMIB’s obligations have been broken.”[24]

Part 2: Discussion of the case

2. 1 A balancing act

The decision in Durham Tees Valley Airport Ltd v BMI Baby Ltd[25]is a good illustration of the fine balancing act which must be undertaken in cases that attempt to resolve the uncertainty of contractual terms in terms of sufficiency. At the most general level, there is a clear tension between the certainty rule and the reluctance of courts to strike down legally enforceable agreements. Striking a balance between these two opposites is difficult and has obvious implications not only for individual agreements but indeed the sanctity of contract in society. Lord Wright in Hillas & Co Ltd v Arcos Ltd

observed: “ Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects”.[26] These comments were endorsed recently in Scammell v Dicker[27] where Rix LJ emphasized that for a contract to be void for uncertainty the bar should be set very high: “ For to occur – and it very rarely occurs – it has to be legally or practically impossible to give to the parties agreement any sensible content”[28]. On a more specific level the court, when dealing with a question such as in the instance case, must first address whether the terms of the contract are enforceable or not. The price, quality, and quantity, as Lord Patten has identified, are key measures of a contract where objective criteria exist[29]. Each case evidently turns on its facts and there is a lot of gray area here which underlines just how fine the balancing exercise is. The answer to the question of just what is necessary for a contract’s enforceability appears to be inextricably linked with what would constitute a breach of contract. In the instant case, the minimum number of flights was something which was within the discretion of BMI Baby and so not something which compromised the terms of the contract concerning the aircraft’s “ operation”. There are some features of the instant case which render it particularly problematic: the length of the contract and the “ degree of discretion given to the airline”[30]. However, Lord Justice Toulson observes that it is not impossible to imagine facts on the borderline which would have rendered the case even more difficult[31].

Conclusion

In conclusion, the statement to be discussed is correct in identifying that the decision in Durham Tees Valley Airport Ltd v BMI Baby Ltd[32] is an apt illustration of the fine line which must be negotiated in deciding whether an agreement has sufficiently certain terms to be enforceable. As noted above there is a tension between allowing commercial agreements to stand and finding them void for lack of certainty. The court in Hillas & Co Ltd v Arcos Ltd[33]emphasizes the duty the courts have in allowing business agreements sometimes hastily drawn up to stand without being too clever with syntax. Each case turns upon its facts and there clearly can be cases that would stretch the balancing act even further than the instant case. As it stands the judge at first instance fell victim to the subtleties of this area of law and misinterpreted a term of the NVA contract which was within the discretion of BMI Baby. The Court of Appeal thus overturned his decision and made a decision of principle which demonstrates that Professor Macneil's observations may not be as accurate as previously thought[34].

Reference

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5. Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485
6. Durham Tees Valley Airport Ltd v BMI Baby Ltd [2009] EWHC 852
7. Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503
8. Perry v Suffield's Limited [1916] 2 CH 187
9. Scammel and Nephew Ltd v Ouston [1941] AC 251
10. Scammell v Dicker EWCA Civ 405
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22. [12] Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503
23. [13] Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485 per Lord Justice Patten at para 11
24. [14] Ibid at para 11
25. [15] Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485 per Lord Justice Patten at para 46
26. [16] Lawrence, Mark (2010) ‘ Grounded obligations’ New Law Journal 160(7421), 837-838
27. [17] Treitel, G. H. (2007) The Law of Contract Sweet & Maxwell: London at p. 52
28. [18] Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485 per Lord Justice Patten at para 57
29. [19] Such as quantity, quality or price
30. [20] Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485 per Lord Justice Patten at para 59
31. [21] The number of flights was something which was for the discretion of the airline;
32. [22] Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485 per Lord Justice Patten at para 59
33. [23] Ibid
34. [24] Ibid at para 61
35. [25] [2010] EWCA Civ 485

36. [26] Hillas & Co Ltd v Arcos Ltd(1932) 147 LT 503 per Lord Wright at p. 504
37. [27] EWCA Civ 405
38. [28] Ibid at para 30 per Rix LJ
39. [29] Lord Justice Patten gives the example of a tenancy agreement under which the tenant agrees to pay a reasonable rent
40. [30] Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485 per Lord Justice Toulson at para 91
41. [31] Ibid at para 90
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