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LITIGATION AND DISPUTE RESOLUTION

In our August 2011 briefing, we considered the case of *Jet2.com Limited v Blackpool Airport Limited*, where the Commercial Court considered the meaning of an obligation in a contract for a party to use “best endeavours”. This briefing addresses the subsequent decision of the Court of Appeal, which recently heard the appeal.

BACKGROUND

Jet2.com Limited (Jet) is a low cost airline. Blackpool Airport Limited (BAL) runs one of the airports from which Jet operates.

In September 2005, the parties entered into a 15 year agreement for Jet to use Blackpool airport. For the first four years of the agreement, Jet operated a number of flights from Blackpool airport outside of BAL's standard hours of operation. However, because the airport was running at a loss, BAL eventually decided that it could no longer afford to open the airport outside of its standard hours in order to accommodate Jet.

Jet issued proceedings against BAL, claiming that by restricting departure and arrival times, BAL was in breach of the agreement.

THE RELEVANT CLAUSES

The agreement stated that:

- ◆ “*Jet2.com and BAL will co-operate together to use their best endeavours to promote Jet2.com's low cost services*”; and
- ◆ “*BAL will use all reasonable endeavours to provide a cost base that will facilitate Jet2.com's low cost pricing*”.

THE HIGH COURT

At first instance, the judge held that BAL's obligation to “promote” Jet's services was not restricted to marketing activities, but should be interpreted as an obligation to “further” or “advance” Jet's low cost services. This, the court held, included being flexible about opening hours.

The judge then went on to consider the extent to which BAL's obligation in this respect was potentially limited by the requirement for BAL only to use it “best endeavours” and “all reasonable endeavours”.

BAL argued that the words “best endeavours” and “all reasonable endeavours” could not impose an obligation on BAL to act contrary to its own commercial interests. Opening the airport outside of standard opening hours caused BAL a loss and this was clearly not in BAL's commercial interests.

However, the court drew an important distinction between (a) an obligation to obtain something from a third party, which would **not normally** require a party to sacrifice its own commercial interests and (b) an obligation to do something within the party's control, which **may** require a party to sacrifice its own commercial interests.

In this case, it was entirely within BAL's control to open the airport outside of its standard hours. In the context of the agreement between Jet and BAL, the court held that BAL's obligation to use its “best endeavours” to promote Jet's low cost services included BAL opening the airport outside of its standard hours, even if this was against BAL's own commercial interests.

THE COURT OF APPEAL

BAL appealed the decision, arguing that:

- ◆ the obligations “*to promote Jet2.com's low cost services*” and “*to provide a cost base that will facilitate Jet2.com's low cost pricing*” were too uncertain to be enforceable; and
- ◆ in the alternative, the inclusion of the words “best endeavours” and “all reasonable endeavours” meant that BAL was not required to act against its own commercial interests, which included opening the airport outside of its standard hours.

Certainty of the obligations – the majority view

Dealing with the first argument, the Court of Appeal applied the common law principles regarding the certainty of contract terms. If an obligation is vague or ambiguous, it may not amount to an enforceable contractual term, despite the intention of the parties. Here, the majority of the Court of Appeal decided that BAL's obligation to promote Jet's services was not too uncertain. In particular, the Court of Appeal drew a distinction between (a) a clause that is so uncertain that it is incapable of creating a binding obligation and (b) a clause that creates a binding obligation, where the precise limits of the obligation are difficult to define in advance, but which can be enforced in the proper context.

Moore-Bick LJ summarised the position in the following terms:

“An obligation to use best endeavours to promote another person's business is not so uncertain as to be incapable of giving rise to a legally binding obligation, although it may be difficult to determine in any given case whether there has been a breach of it.”

By contrast, the Court of Appeal considered that the obligation "to provide a low cost base" was perhaps too oblique to be enforceable. However, given its findings in relation to the first obligation, the Court of Appeal did not need to reach a final decision on this issue.

Certainty of the obligations – the minority view

There was a lone dissenting voice in the Court of Appeal. Lewison LJ considered that because the agreement between Jet and BAL was silent regarding the airport's opening hours, the default position should be that the topic was not in fact covered by the agreement at all. In those circumstances, Lewison LJ concluded that BAL's decision to operate the airport only during standard hours was not a breach of the agreement.

Lewison LJ also considered that the reasonable/best endeavours clauses in question were too vague and did not provide the court with any objective criteria to say whether or not the obligation had been fulfilled.

The limit of "best endeavours"

Addressing the second argument, the Court of Appeal affirmed the decision of the High Court and held that, in these particular circumstances, BAL's promise to use "best endeavours" to promote Jet's business extended to keeping the airport open to accommodate flights outside standard hours, even if this was against BAL's own commercial interests.

The Court of Appeal considered the nature of the low-cost airline industry and both parties' understanding of that industry at the time that they entered into the agreement. In particular, the parties had clearly recognised that the ability to operate aircraft early in the morning and late at night (i.e. outside of BAL's standard hours) was essential in order for Jet's business to prosper.

In those circumstances, it was not appropriate, when considering what BAL's "best endeavours" ought to include, to have regard to the impact on BAL of opening the airport outside the standard hours.

COMMENT

This case demonstrates that courts will, where possible, seek to uphold an agreement between parties to use their "best endeavours" to achieve an objective. Even Lewison LJ, who dissented from the majority in the Court of Appeal and thought that these particular clauses were unenforceable, stated that he was reluctant to come to that conclusion. Given the prevalence of reasonable/best endeavours clauses in commercial contracts, the decision of the majority that these specific clauses were not void for uncertainty is to be welcomed.

However, when agreeing endeavours clauses, parties will need to be very careful about what the fulfilment of the underlying obligation will actually entail. If (a) a party has agreed to use its "best endeavours" or "all reasonable endeavours" and (b) fulfilment of the underlying obligation is entirely in the hands of that party, it may be necessary for that party to incur costs and even act against its own commercial interests in order to fulfil that obligation.

Wherever possible, parties should set out exactly what "endeavours" ought to be undertaken in order to achieve the desired objective. This will avoid the need for costly disputes about whether or not a party has, in fact, used its best endeavours.

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