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The biggest legal highlight for commercial lawyers for the last month has come in the Supreme Court decision in the joined cases of *Cavendish Square Holdings BV v El Makdessi and ParkingEye* Limited v Beavis ([2015] UKSC 67). It is hard to understate the importance of the cases involving, as they did, a panel of seven judges, five sets of solicitors, 13 counsel including the Oxford professor who is the editor of *Treitel* on the Law of Contract and six QCs.

Bearing in mind that the dispute in one of the cases involved an £85 ticket for overstaying at a car park, it is hard not to resist the conclusion that sometimes an overdeveloped sense of justice might not always make commercial sense. In any event, commercial lawyers are certainly grateful to Barry Beavis for raising this issue on the law of penalty clauses (although not so grateful as to pick up the legal costs – ouch), as the law has not been considered by the highest courts in this country for a century, and certainly not in the context of the Unfair Terms in Consumer Contracts Regulations 1999.

The conclusions in both cases were straightforward, helpful and generally consistent with the reasoning (if not the formula) that most commercial lawyers have been working with until now. The first case concerned a specific obligation on the seller of shares in an advertising company, who retained a minority shareholding. He was obliged to sell his remaining shares at a discount on the share value as determined by reference to the "goodwill" value. The court concluded that this obligation was not a penalty.

In the second, an £85 flat rate fee payable for overstaying in a private car park where parking was free for a limited two hours, was similarly considered not to be a penalty. In addition, as the notice clearly set out the conditions for the charge, which was in line with commercial practice and industry guidance, the Supreme Court held that it was not void because it was an "unfair" term either.

The lead judgment of the Supreme Court retained the common law of penalties with a subtle and extremely helpful re-statement of the law. The standard formula that commercial lawyers have been guided by is that a remedy, to be enforceable, should represent a "genuine pre-estimate" of the loss. This is why, for instance, lawyers invest so much in service credits (price deductions) in long-term PFI/PPP contracts: to avoid the payment mechanism being unenforceable because a minor, technical, breach is treated the same as a more serious one.

What was interesting was the helpful explanation which took in legal history and decisions from other parts of the common law world and concluded that the real test was, in fact, a simple one: is the provision penal? This, of course begs the question: how to determine if a clause is penal? The test is whether it "imposes a detriment out of all proportion" to any legitimate interest of the innocent party in the enforcement of the primary obligation. The Supreme Court took a pretty pragmatic view in the light of the principle of supporting freedom of contract. This decision pretty much flips the thought-process on its head, not by considering whether the provision is a forward-looking genuine pre-estimate of loss – which puts the party defending the clause on the back foot - but, in contrast, asking whether the detriment is out of all proportion, which, to me, sounds a pretty high hurdle on the part of the party trying to get out of an obligation to which he has agreed. This means that we can afford to be rather more bullish in considering whether a clause is an unenforceable penalty or not.

A link to the case report can be found at https://www.supremecourt.uk/cases/uksc-2013-0280.html

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