

English High Court provides guidance on when a common mistake will render a contract void

Introduction

One of the most fundamental purposes (and indeed contractual legal principles) of a contract is that its terms should be certain, such that each party to the contract knows what it is signing up to and the terms by which it must abide. However, in some instances, it may be the case that the parties agree to the terms of a contract on the basis of a shared mistaken assumption about a fact which is integral to the contract. In such circumstances, the equitable doctrine of “common mistake” may be used as a defence and, if successful, render the contract void.

In the recent case of *Triple Seven MSN 27251 Limited & another v Azman Air Services Limited*¹, the English High Court held that the doctrine of “common mistake” did not apply and the contracts in question were not void. In reaching its decision, the court provided some useful guidance on how this doctrine will be assessed and applied by the English courts.

Background

Two members of the Triple Seven group of aircraft leasing companies (the “**Claimants**”) entered into two five-year aircraft leases with Azman Air Services Limited (the “**Defendant**”), whereby the Defendant would rent two Boeing 777 airliners. It was understood by the parties that the aircraft would be used to transport passengers from Nigeria to Saudi Arabia for the Hajj and Umrah pilgrimages. However, hours after signing the contracts, the Defendant received a letter from the General Authority of Civil Aviation of Saudi Arabia (the “**GACA**”) excluding it from participating in the 2016 Hajj airlift.

Within the first two weeks of executing the contracts, the Claimants tendered the aircraft for delivery to the Defendant. However, the Defendant refused to accept delivery of the aircraft on the basis that it was no longer able to participate in the 2016 Hajj airlift. The Claimants therefore terminated the leases and sued for damages arising from the Defendant’s non-performance of such leases.

The Defendants had pleaded a number of defences to this claim but, by the time of the trial, the only substantive defence advanced was that the lease agreements were void at common law for “common mistake”.

The High Court’s analysis of the defence of common mistake

In his judgment, the judge considered the test for common mistake, as had been stated and clarified by the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*². In that case, the court held that the mistaken common assumption between the parties must “*render the performance of the contract impossible*”. That case had, in turn, elaborated on the previous decision in *Associated Japanese Bank (International) Ltd v Credit du Nord SA*³, which had considered that the relevant mistake must have rendered the subject matter of the contract “*essentially and radically different from the subject matter which the parties believed to exist*”.

In the present case, the judge noted a previous attempt to reconcile these two differing formulations of the test⁴ but acknowledged that some adjustment was necessary. He considered that the most appropriate

¹ [2018] EWHC 1348 (Comm).

² [2002] EWCA Civ 1407.

³ [1989] 1 WLR 255.

⁴ *Apvovedo NV v Collins* [2008] EWHC 775 (Ch).

test for determining the application of the doctrine of “common mistake” is to: (a) assess the fundamental nature of the shared assumption to the contract; and (b) compare the disparity between the assumed state of affairs and the actual state of affairs and analyse whether that disparity is sufficiently fundamental or essential or radical.

More specifically, the judge used the existing case law to break down that test into the following consolidated set of six key principles:

- (a) at the time the contract was executed, the parties must have substantially shared an assumption as to the existence of a state of affairs;
- (b) the assumption itself must have been fundamental to the contract;
- (c) the assumption must have been incorrect at the time the contract was executed;
- (d) by reason of the assumption being incorrect, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time the contract was executed, or the contract must be impossible to perform having regard to the common assumption. Put another way, there must be a fundamental difference between the assumed and actual state of affairs;
- (e) the parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common assumption was incorrect; and
- (f) the contract must not have made provision in the event that the common assumption was mistaken.

Were the aircraft leasing contracts rendered void?

Applying the principles described above, the judge concluded that the parties did share an incorrect assumption as to the existence of a state of affairs, as per items (a) and (c) above. More specifically, this was that the parties had entered into the lease agreements on the assumption that the Defendant expected to obtain approval from the GACA to participate in the 2016 Hajj airlift. This approval had in fact been refused prior to the execution of the contract, albeit that the Defendant was not aware of this at that time.

However, this in itself was of course insufficient for the doctrine of “common mistake” to apply. The additional principles needed to be considered and, in doing so, the judge held that the mistaken assumptions shared by the parties did not make the lease agreements void, because they:

- (a) were not “*sufficiently fundamental*” to the lease agreements (item (b) above);
- (b) did not make the lease agreements “*essentially and radically different*” from what the parties understood them to be (item (d) above); and
- (c) did not make the lease agreements “*impossible to perform*” (also item (d) above).

In forming these conclusions, the judge explained that the lease agreements were each for a period of five years and, therefore, the 2016 Hajj airlift represented only “*a relatively short period of the entire lease period as a whole*”. As such, the revenue earned from participating in the Hajj airlift was not fundamental to the performance of the leases, as there remained “*a substantial profit to be earned*” in subsequent years. It therefore remained possible for the parties to perform the lease agreements even without the defendant’s participation in the 2016 Hajj airlift.

In addition, even if the mistaken common assumption had been “*sufficiently fundamental*” and/or led to the lease agreements being “*essentially and radically different*”, the lease agreements had provided that the Defendant’s obligations were “*absolute and unconditional, irrespective of any contingency or circumstance whatsoever...*”. As such, the parties had allocated the risk of the failure to obtain the GACA’s approval to the Defendant. Item (f) above had therefore not been satisfied and this in itself would have been enough to prevent the doctrine from applying and the contract being voidable.

Conclusions

Although this case turns on its specific facts, the decision is useful in providing a distilled and codified list of principles which can be used to assess whether the equitable doctrine of “common mistake” will apply. Given the nature of the guidance, and as shown by the outcome of this case, the threshold for relying on this defence is high and it will likely only be in limited circumstances that a contract will be considered void on this ground.

This case is also useful in confirming that the doctrine of “common mistake” will not in any way cut across the principles of contractual certainty. On the one hand, by clarifying that the doctrine will only apply in extreme circumstances, namely where the shared mistaken assumption is, amongst other things, “*sufficiently fundamental*” to the contract, the value of certainty attached to a contract is not, as noted by the judge, “*unjustifiably undermined*”. However, equally, this decision also ensures that where a mistaken belief would lead to a material injustice to one or either of the parties (on the basis of the principles set out in the judgment), this will be remedied by voiding the contract. This, therefore, strikes a fair balance between protecting the certainty of the contractual terms and avoiding any undue prejudice to the parties caused as a result of the mistaken assumption.

If you have any questions or comments in relation to the above, please contact Susan Rosser or Robert Hobson, or your usual Mayer Brown contact.

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