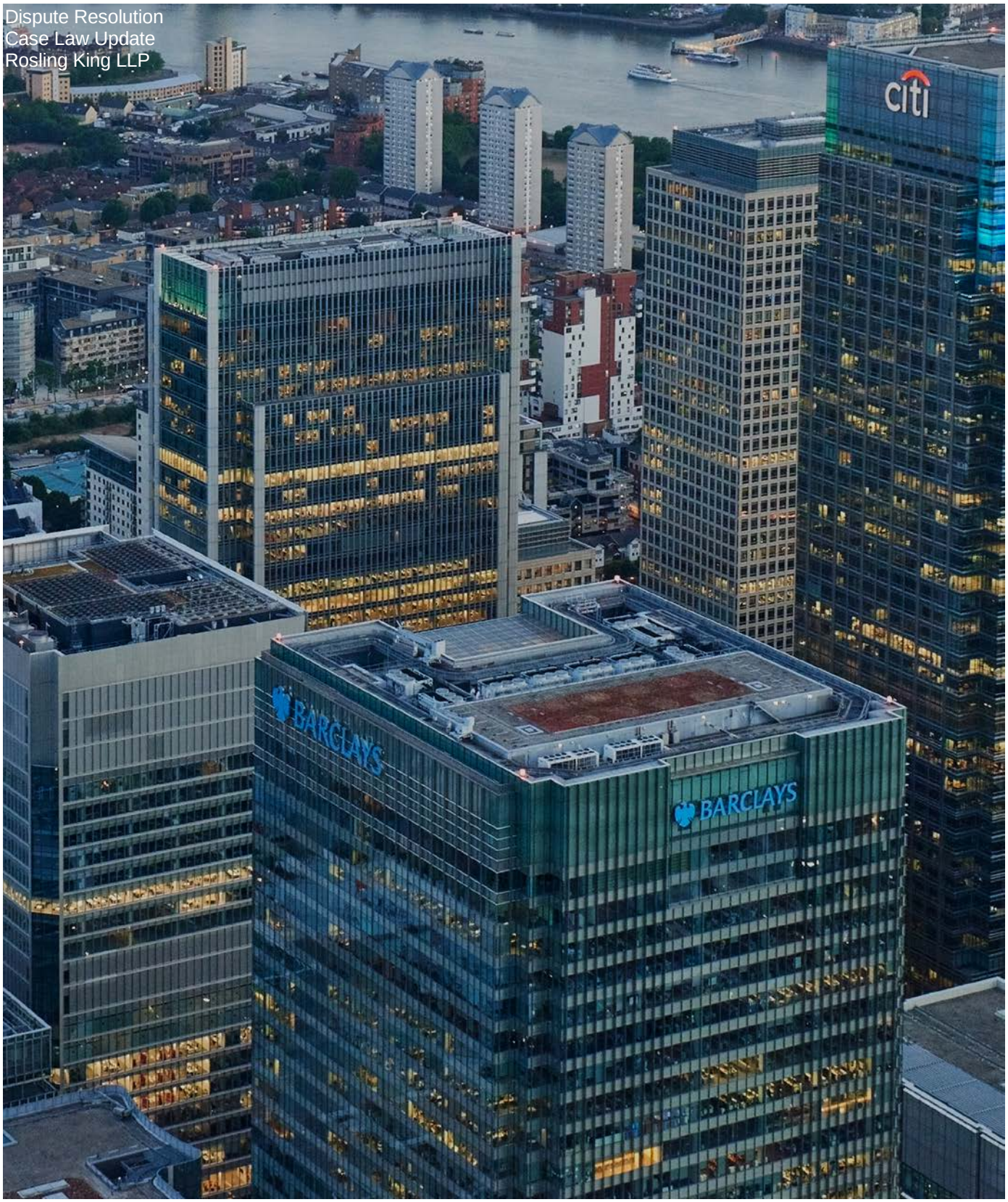
Dispute Resolution
Case Law Update
Rosling King LLP



Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent) & ParkingEye Limited (Respondent) v Beavis (Appellant) [2015] UKSC 67 On appeal from [2012] EWCA Civ 3852 Comm, [2013] EWCA Civ 1539 and [2015] EWCA Civ 402.

On 4 November 2015, the decision was handed down by the Supreme Court in the conjoined appeals of Beavis v ParkingEye Limited and Cavendish Square Holding BV v Talal El Makdessi. Both appeals concerned the application of the common law of penalties. The Supreme Court allowed the appeal in Cavendish v El Makdessi and dismissed the appeal in ParkingEye v Beavis. The effect of this decision was to uphold the validity of the disputed clauses in both cases concluding that neither of the terms, in either case, were penal.

Background

Beavis arose from a consumer contract for city centre parking. On 15 April 2015, Mr Beavis entered a car park managed by ParkingEye, which displayed numerous notices throughout stating that a failure to comply with the two hour time limit would "result in a parking charge of £85". Mr Beavis parked in the car park, but overstayed by 56 minutes and subsequently, ParkingEye demanded payment of the £85 charge. Mr Beavis alleged that the £85 charge was unenforceable at common law as a penalty, and/or that it was unfair and unenforceable under the Unfair Terms in Consumer Contract Regulations 1999. The Court of Appeal upheld the first instance decision rejecting both arguments.

Cavendish related to a contract in which Mr Makdessi agreed to sell to Cavendish a controlling stake in an advertising and marketing company founded by Mr Makdessi. A restrictive covenant included in the contract prevented Mr Makdessi from engaging in competing activities in specified regions within the Middle East, the purpose being to protect the goodwill of the company. If he was found in breach of these covenants, the contract provided that Mr Makdessi would forfeit his right to the final two instalments of the price paid by Cavendish and, at the option of Cavendish, oblige him to sell his remaining shares in the company to them. Mr Makdessi breached the covenant and those default provisions within the contract were enforced at a cost to Mr Makdessi of approximately $44m. His defence was that both the provisions within the contract were penalties at common law. The Court of Appeal held that the clauses were unenforceable penalties under the penalty rule.

The Supreme Court Judgment

Whilst recognising that the penal rule is an "ancient, haphazardly constructed edifice which has not weathered well" the Court asserted that the rule still has a place in law and should not be abolished. The Court reiterated that the fundamental principle is that the penalty rule regulates only the contractual remedy available for the breach of a primary contractual obligation, and not the fairness of those primary obligations themselves. The Court held that the correct test to be applied is whether the provision is a "secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation". The first step is therefore to consider whether any legitimate business interest is served and protected by the clause, and if so, whether the provision made for that interest is extravagant, exorbitant or unconscionable.

The Court concluded that neither of the clauses within the Cavendish contract were unenforceable penalty clauses, and allowed the appeal. The Court found that both clauses were primary obligations, and not secondary provisions, and therefore the penal rule did not apply and the court was unable to intervene.

In Beavis, the Court dismissed the appeal and declared that the £85 charge did not contravene either the penalty rule or the Unfair Terms in Consumer Contract Regulations 1999. Mr Beavis had a contractual license to park in the cark park on the terms of the notice posted at the entrance, including the two hour time limit. The £85 charge was a charge for contravening the terms of the contractual license, and had two main objectives. The first being the management of the efficient use of parking space and the second is the generation of income in order to run the parking scheme. Unlike Cavendish the penalty rule here was engaged, however the £85 was found not to be a penalty. Both ParkingEye and the landowners did have a legitimate business interest in charging the overstaying motorist, extending beyond the recovery of any loss. ParkingEye's interest was in income from the charge, which met the running costs of the legitimate parking scheme and the landowner's interest was the provision of efficient management of customer parking for the retail outlets. It was found that the charge was neither extravagant, nor unconscionable.

Further, under the Unfair Terms in Consumer Contract Regulations 1999, the Court found that any imbalance in the parties' rights did not arise 'contrary to the requirements of good faith' as was required under Regulations 5 and 6, because ParkingEye and the owners had a legitimate interest in inducing Mr Beavis not to overstay. The charge was no higher than was necessary to achieve that objective.

Commentary

This Judgment is a useful reminder of the test of what constitutes a penalty at common law, as well the considerations and factors that will taken into account when applying the Unfair Terms in Consumer Contracts Regulations 1999 (now Part 2 of the Consumer Rights Act 2015).

For further information, please contact Georgina Squire or the Partner with whom you usually deal.