



LEGAL BRIEFING

Standing room only

London Bus Services Limited v Tramtrack Croydon Limited

Sedley LJ, Longmore LJ, Hallett LJ, [2006] EWCA Civ 1743

The Facts

London Bus Services Limited (“LBS”) appealed against a decision that Tramtrack Croydon Limited (“TCL”) was not in breach of obligations under a concession agreement relating to the operation of the Croydon Tramlink. TCL is a private company and operates the tram system pursuant to a concession granted by LBS as regulator. The concession granted was for a term of 99 years from 1996.

The concession contained a performance specification, whereby TCL was obliged to operate the tramlink in accordance with certain parameters set out in section 9 of the performance specification. Section 5 of the specification dealt with tram capacity. Paragraph 3.11 of section 5 stipulated that standing passengers should not exceed four or five per square metre. Significantly, clause 25 of the concession provided that the service levels could be varied with LBS’s consent. The parties agreed that the design of the tram system would permit a 33 per cent increase in passenger-carrying capacity and TCL increased service levels accordingly. There then followed a dispute between the parties in relation to overcrowding.

The Issues

The central question was who, if either of the parties, was responsible for dealing with overcrowding on the tram. The main issues were (a) whether paragraph 3.11 of section 5 and section 9 imposed both a design obligation and an ongoing performance obligation in relation to overcrowding for the duration of the concession; and (b) whether an increase in capacity to avoid overcrowding at LBS’s request could be a service charge, rather than a service parameters change which might require payment of compensation by TCL.

The Decision

The Court of Appeal held that the correct interpretation of paragraph 3.11 dealt with the number of trams required to comply with the requirements as to frequency and journey time and with capacity; not with conditions actually encountered in service. It was not intended to mean that TCL would be in breach of the concession every time the number of passengers exceeded five per square metre and did not impose an ongoing performance obligation.

LBS was entitled to effect a change by giving notice to TCL after consulting with TCL and providing reasons for its proposed change and anticipated consequences. As none of these events had occurred, the Court of Appeal held that this issue would be best determined after a formal notice of change had been served by LBS in accordance with clause 25.

Comment

Performance specifications, by their very nature, are often difficult to apply and measure in practice. It is therefore imperative that any performance specification is drafted unambiguously, with the performer's obligations and ramifications for non-compliance clearly spelt out. If there is any confusion in relation to obligations under a performance specification, it must be ironed out before performance commences. If there is a contractual mechanism in place for varying the specification, then parties should strictly adhere to that mechanism before making any changes to it, no matter whether the other party agrees to those changes in principle.

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