# Court of Appeal finds a penalty can be enforced if it has a commercial purpose and is not extravagant and unconscionable.

## By Elizabeth Tremayne

**Judgment handed down in Parkingeye Limited v Barry Beavis [2015] EWCA Civ 402**

1. Henderson Chambers' Julia Smith appeared for the intervener (the Consumers' Association) in a landmark decision on penalties. The matter came before Moore-Bick LJ, Patten LJ and Sir Timothy Lloyd and was on appeal from a county court decision of HHJ Moloney QC.

2. At first instance HHJ Moloney QC had given judgment for ParkingEye limited ('**ParkingEye**') against Mr Barry Beavis on its claim to recover a charge of £85 for overstaying the permitted period of free parking in a Chelmsford car park. The car park displayed signs which expressly warned that there was a 2 hour maximum stay and that failure to comply with that limit would result in a parking charge of £85. The sign also informed drivers that '*by parking within the car park, motorists agree to comply with the car park regulations. Should a motorist fail to comply with the car park regulations, the motorist accepts that they are liable to pay a Parking Charge and that their name and address will be requested from the DVLA*'.

3. Mr Beavis overstayed the two hour limit by nearly an hour and ParkingEye sought to recover the charge. It was recognised at an early stage that this and its

companion case, also heard by HHJ Moloney QC, gave rise to points of principle which were likely to affect many similar claims. At first instance the Defendant raised a number of arguments of which only two remained for consideration on appeal, namely:

3.1 whether the charge was unenforceable at common law because it was a penalty; and

3.2 whether it was unfair and therefore unenforceable by virtue of the Unfair Terms in Consumer Contracts Regulations 1999 (**'the Regulations'**).

4. HHJ Moloney QC held that a motorist entered into a contract with ParkingEye by parking and was subject to the express terms which included an obligation to leave within two hours or to pay the fee identified. The judge accepted that ParkingEye did not suffer any financial loss if a motorist overstayed because if the space in question had been vacated it would have either remained unoccupied or would have been occupied by another car free of charge. He therefore held that the parking charge had the characteristics of a penalty but nevertheless found it was commercially justifiable because it was neither improper in its purpose nor manifestly excessive in amount.

5. In reaching that conclusion he was influenced by the terms of section 56 and schedule 4 of the Protection of Freedoms Act 2012 which confer on operators of private car parks the right to recover parking charges from the registered keepers of vehicles. For similar reasons he held that the undertaking to pay the charge was not an unfair term and was not rendered unenforceable by the Regulations.

6. HHJ Moloney QC held that a modern approach to deciding whether any particular clause was unenforceable as a penalty required an examination of its role from a number of different perspectives including its proportionality to actual loss, deterrence and commercial justification.

## The historic position at common law

7. It was submitted on behalf of the Defendant before the Court of Appeal that a contractual term by which a party undertakes to pay a sum of money on breach which exceeds the loss which the other can reasonably be expected to incur as a result of that breach is a penalty and is unenforceable. Such a term is treated as nothing more than a deterrent designed to encourage the other to perform the contract. It was submitted that the key question for examination was therefore whether the payment was intended to deter.

8. Counsel for the Claimant accepted that the concept of deterrence has played a large part in the development of the law relating to penalties but submitted that the true principles on which courts decline to enforce penalties are those of extravagance and unconscionability. He submitted that in this case the charge was neither extravagant nor unconscionable and, further, there were commercial justifications for imposing a deterrent charge on those who failed to comply with the rules of the car park.

9. The Court of Appeal considered the long line of Authorities in which the courts of equity have refused to enforce what they considered to be unconscionable bargains, including *Ashley v Weldon* (1801) 2 Bos. & Pul. 346, *Kemble v Farren* (1829) 6 Bing. 141 and *Clydebank Engineering & Shipbuilding Co. Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6. They also considered the well known case of *Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Co. Ltd* [1915] A.C. 79 which concerned a resale price maintenance agreement with an added clause under which the customer agreed to pay £5 by way of liquidated damages for every tyre, cover or tube sold or offered in breach of the agreement. The clause was held to constitute a liquidated damages provision rather than a penalty despite the difficulty of establishing what loss, if any, was likely to flow from any individual breach of the agreement. Lord Dunedin summarised: '*the essence of a penalty is a*

*payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage'*.

## The modern approach

10. Moore-Bick LJ identified a movement away from the simple dichotomy between liquidated damages (genuine pre-estimates of loss) and penalty charges (*in terrorem* or 'intended to deter') because such distinction *'fails to take into account the fact that some clauses which require payment on breach of a sum which cannot be justified as liquidated damages in accordance with established principles should nonetheless be enforceable because they are not extravagant and unconscionable and are justifiable in other terms'*.

11. The concept of a 'commercially justifiable' payment which has the hallmarks of a penalty has precedent, having been considered by the Court of Appeal in *Cine Bes Filmcilik ve Yapimcilik v United International Pictures* [2003] EWCA Civ 1669, [2004] 1 CLC 401 in which Mance L.J. accepted that there are clauses which may operate on breach, but which fall into neither liquidated damages nor penalty categories and may be commercially justifiable and therefore enforceable.

12. In *El Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539, [2013] 2 CLC 968 Christopher Clarke L.J. (with whom Tomlinson and Patten L.JJ. agreed) concluded that a term which provides for excessive payment on breach may be valid if it has a proper commercial justification though also accepted that there was a degree of ambiguity as to what the terms '*extravagant*' and '*unconscionable*' meant in this context.

13. The modern cases therefore, Moore-Bick LJ concluded, appear to accept that '*a clause providing for the payment on breach of a sum of money that exceeds the amount that a court would award as compensation, or which requires a transfer of property for*

*no consideration or at an undervalue, may not be regarded as penal if it can be justified commercially and if its predominant purpose is not to deter breach'*.

14. Whilst the Court of Appeal accepted that no direct loss was suffered by ParkingEye from an individual overstay it considered that if a sufficient number of motorists stayed longer that 2 hours this may lead to ParkingEye losing its contract with the owner of the land (the Pension Fund). To that extent it found that ParkingEye had a commercial interest in adherence to the contractual terms which was similar to the interest of the manufacturer in the *Dunlop* case.

15. Moore-Bick LJ concluded '*the fact that the contract provides for the payment on breach of a sum which significantly exceeds the greatest loss that the law would recognise as having been suffered by the injured party is in most circumstances a strong indication that the bargain is extravagant and unconscionable, but other factors may be present which rob the bargain of that character. Those factors may be of a commercial nature*'.

## The Regulations

16. In relation to the Regulations the Court of Appeal considered two questions:

    16.1 whether ParkingEye acted contrary to the requirements of good faith in imposing a charge of £85 for overstaying the free period, and,

    16.2 if so, whether that term caused a significant imbalance in the parties' rights and obligations under the contract to the detriment of the motorist.

17. The Court of Appeal found that there was no lack of good faith. The conditions on which motorists were allowed to use the car park were prominently displayed and contained no concealed pitfalls and no advantage was taken of any weaknesses on the part of those using the car park. The Court also found that the term did not cause a significant imbalance between the parties' rights and obligations and that the amount payable was not extravagant or unconscionable.

## Conclusion

18. The judgment widens the ground upon which a party seeking to levy a charge may argue that even though it is not a genuine pre-estimate of loss it is nevertheless justifiable in '*other terms*' encompassing, but not limited to, a commercial justification. Given Moore-Bick LJ considered that a charge may be justified even where the sum '*significantly exceeds the greatest loss that the law would recognise as having been suffered by the injured party*' a significant ambiguity remains over what terms would be sufficient to constitute an 'extravagant' or 'unconscionable' bargain. Further clarity may be provided if Mr Beavis decides to exercise the permission he has been given to appeal to the Supreme Court.

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