Case No: A3/2011/0909

Neutral Citation Number: **[2012] EWCA Civ 1338**
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MANCHESTER MERCANTILE COURT
HHJ HEGARTY Q.C.

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th October 2012

Before:

LORD JUSTICE LAWS
LORD JUSTICE TOULSON
and
SIR ROBIN JACOB

- -

Between:

PARKINGEYE LIMITED	**Claimant/ Respondent**
- and -	
SOMERFIELD STORES LIMITED	**Defendant/ Appellant**

- -
- -

Michael FEALY (instructed by **Legal Department of the Co-operative**) for the **Appellant**
Clive FREEDMAN Q.C. and Andrew GRANTHAM (instructed by **Pannone LLP**) for the **Respondents**

Hearing date: 25 July 2012

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Judgment

Sir Robin Jacob (giving the first judgment at the invitation of Laws LJ):

1. This appeal is by Somerfield from one aspect only of the judgment dated 18th March 2011 of HHJ Hegarty QC sitting as a High Court Judge in Manchester. Mr Michael Fealy appeared for the appellants, Somerfield and Mr Clive Freedman QC and Mr Andrew Grantham for the respondents, ParkingEye.

The Facts and Background

2. The parties entered into a contract dated 19th August 2005 with a commencement date of 1st September 2005. It was for the provision by ParkingEye of an automated monitoring and control system to some of the car parks owned or operated by Somerfield as adjuncts to its supermarkets. The system read and recorded the vehicle registration numbers and times of entry and departure of vehicles using the car park. The system could thus determine how long a vehicle was parked.

3. As is common with supermarkets, customers are given a certain amount of free parking time. Under the ParkingEye scheme, after that had expired, a charge was imposed. The Judge found that sufficient notice of the charges was given to create a contract between the motorist and Somerfield whereby the motorist was contractually bound to pay Somerfield the charges of which notice was given if he or she overstayed.

4. The ParkingEye system was designed to catch those who overstayed and induce them to pay the charges. The names and addresses of the owners of overstaying vehicles were, using the registration number, obtained from the Driver and Vehicle Licensing Agency. ParkingEye would then send a letter of demand for the charge. If no payment or response was received, a second, third and even fourth letter in stronger and stronger terms would be sent.

5. The basic charge was £75, reduced to £37.50 if paid within 14 days of the "Penalty Ticket," i.e. the first letter. This amount the Judge held not to be a penalty and thus enforceable as against the motorist. If payment was not made within a specified time the charge increased to £135 which the Judge held was probably a penalty and thus unenforceable.

6. Under the contract, ParkingEye provided all the equipment and were responsible for its operation. It received no payment from Somerfield for this. Instead it was entitled to retain all the "fines" collected. So of course ParkingEye had an incentive to operate the "fine" system aggressively.

7. This it did – too much so: some of the letters it wrote to motorists contained falsehoods. The first letter was not so held. It perhaps might have been. For it was dressed up rather like police issued document with a chequered edging and described the amount claimed as a "penalty" when it was no more than a contractual obligation to pay. I say no more because there is no challenge to the finding that this was not a false representation. The letter claimed £75 but £37.50 if paid within 14 days.

8. The second letter called itself a "Parking Charge Reminder". Again it was held not to contain any falsehood, despite its police style edging, the use of the word "penalty"

and even the assertion, which would not have been true if the motorist who had actually overstayed had not been the owner of the vehicle as registered with the DVLA, that "as keeper, owner or hirer of the vehicle in question … you are responsible for the outstanding PARKING CHARGE NOTICE". There is no challenge to the Judge's finding in this regard.

9. The third letter was different. This was held to contain serious falsehoods. By this stage ParkingEye transferred the collection of money from the defaulting motorist to a company called Commercial Collection Services Ltd. This company issued the third (and in default of payment) fourth letters.

10. The third letter, sent seven days after the second if payment had not been made, was issued by "Commercial Collection Services". It was headed "Debt £75 Due to PARKING EYE (sic)". The key passages read (the emphasis is in the original):

> I promise this isn't just another debt collector's letter. If you read it I believe that you will understand.
>
> My client is determined to protect the interests of their genuine customers, so they are therefore prepared to go "all the way." The cost of the issue of proceedings for what you might regard as a rather small amount is irrelevant to them, as you will understand. Customers are of paramount importance.
>
> "As PARKING EYE have explained to you already, their objective is to deter the dishonest, the people who are not their genuine customers.
>
> You may choose to ignore this demand but that approach will not succeed. PARKING EYE **will issue legal proceedings** and will instruct us to prepare the documentation. The consequences of legal proceedings are, [the comma is in the original] that you would receive a Claim, and if you ignore that, a bailiff will attend your address, [comma in original] to remove goods.
>
> If you prefer to avoid all the hassle and the costs (which will become substantial if our client's [apostrophe in original] the means of payment are set out below and overleaf.

11. This semi-literate letter was false in a number of respects:

    i) It said that the debt was due to ParkingEye. It was not. It was due to Somerfield.

    ii) It talked of "their genuine customers" which suggested the letter was sent on behalf of Somerfield. It was not.

    iii) It said "ParkingEye will issue proceedings" indicating that ParkingEye had authority to do so. It did not.

iv) In any event neither ParkingEye nor Somerfield actually had any settled intention of issuing legal proceedings if the money was not paid. The contract provided by Schedule 2 that if the registered keeper did not pay after a fourth letter, no further action would be taken but detailed records of non-payers and persistent offenders would be stored. If Somerfield decided to sue ParkingEye was to assist.

v) In the case of any vehicle driven by someone other than the registered keeper the recipient of the letter was not liable at all.

12. In the event of non-payment there was a fourth letter in the same crude fashion. Its most aggressive passage reads:

> You may not have considered also the implications of a judgment being recorded against you. Such as credit becoming more expensive. **For you, with a judgment against you, interest rates could become very high, <u>if you are able to obtain credit at all</u>**.

The letter ended with: "This is your last chance."

13. The Judge not only found that the third letter contained falsehoods but that those falsehoods were deliberately made by the relevant ParkingEye executive, albeit without dishonesty. Hence the Judge found ParkingEye was guilty of the tort of deceit on those occasions when the third letter was sent on its behalf. ParkingEye does not challenge this decision.

14. Apart from the tort of deceit, Somerfield alleged other illegalities springing from the third letter. These were the offence of obtaining a money transfer by deception contrary to the Theft Act 1968 and the Fraud Act 2006 and unlawful harassment of a debtor contrary to s.40 of the Administration of Justice Act 1970. Somerfield abandoned the first of these allegations during the trial and the judge rejected the s.40 allegation from which there is no cross-appeal. In the result it was not shown that ParkingEye had committed any criminal offence. The third letter amounted only to a breach of civil law.

15. Prior to entry into the contract, on the balance of probabilities, the relevant Somerfield executive had seen the letters in draft and had approved them.

16. However the contract itself did not prescribe the form of the letters. All it said (in Schedule 2) was that:

> A maximum of four Parking Fine letters are then generated and issued, explaining that the vehicle committed a parking offence on private land and as such a charge is now due.

The Schedule went on to provide for the timing and amounts to be paid but no more.

17. The Judge said this about ParkingEye's intentions:

> [556] …. I am not satisfied that it would be right to conclude that ParkingEye had a firm and settled intention to act in an

> unlawful manner at the time when the Agreement was executed. As I have already pointed out, the form and content of the various notices was not prescribed. Nor, indeed was there any provision on the face of the contract conferring any right of veto on Somerfield in relation to their form and content. It was open to ParkingEye at any time, no doubt in consultation with Somerfield, to decide what form the third and fourth letters should take. As I have previously observed, I have little doubt that if Somerfield had, at any time, required changes to these letters, ParkingEye would have complied with its wishes.

18. The first sentence, out of context, is a little puzzling, since at the time of execution of the contract ParkingEye did intend, if it came to it, to use the unlawful third letter as the Judge had discussed in detail. But the sentence in context makes sense if one reads the sentence as saying that it would be wrong to conclude that ParkingEye had a firm intention always to act in an unlawful manner at the time of execution of the Agreement. In summary ParkingEye's intention at the outset was to use the offending letters but that intention remained provisional in the sense that at any time thereafter it would have ceased to do so if so asked by Somerfield. In the end the appeal was argued before us on that basis.

19. The Judge acquitted ParkingEye of any intention deliberately to break the law. He said:

> [557] Furthermore, insofar as it is material, I rather doubt if either Mr Mckerney [of ParkingEye] or Mr Ogden [of Somerfield] fully appreciated the potential legal implications of the draft letters, though Mr Mckerney must obviously have been aware, at least by the time the Agreement was executed, that some of the statements in the third letter were untrue. If someone had pointed out the potentially objectionable aspects of these letters, I am quite sure they would have been changed.

20. The Judge also made no finding of dishonesty against ParkingEye at [489] though that must be understood in a limited sense since he did find that its executive knew the third letter contained falsehoods, which is to say the least not exactly honest. What the Judge meant in context is clear enough, dishonesty in the sense of intentionally obtaining payment of sums which were not due by false statements.

21. ParkingEye duly installed its system at 17 Somerfield stores, though not all went live at once. During the period of its operation, 5,928 charges were made and first letters were issued. There were 2593 second, 1024 third and 299 fourth letters. Only 2994 charges were actually paid. Only 127 people paid either £75 or £135, i.e. 4% of those who received a first letter. Most (87.6%) of those who received the false third letter did not pay. But although the proportion of third letter or fourth letter payers was only 4%, ParkingEye obtained £11,145, 9% of its revenue, from them because of the enhanced rates involved.

22. Of course the bulk of this revenue was in fact due and owing to Somerfield because there was a contract between the motorist and Somerfield. Only in those cases where

the owner of the car had not been the actual driver did the driver not have an obligation to pay. And even in those cases, it may well be that the contractual obligation to pay fell upon a member of the owner's family.

23. The contract had an initial term of 15 months from its commencement date of 1st September 2005. By a letter of 7th March 2006 (following some discussion and correspondence which included some partial discussion as to the form of the letters) Somerfield terminated the contract. This was held to be a repudiatory breach accepted by ParkingEye subject to its right to damages for lost revenue during the unexpired term of the contract. That term was just under 9 months. It was assessed on the basis of lost income from the 17 Somerfield stores where the ParkingEye system had been installed

24. The Judge heard a mass of complex evidence about the amount of damages. In the event he awarded a sum of £350,000. Although he had rejected illegality as a defence to the whole claim he made a "modest discount" from what would have been a higher sum to reflect the income which would have been received if the third and fourth letters had been innocuous.

25. The amount awarded is not challenged. So it is not necessary to go into the detailed logic of the discount: it can be justified on the simple basis that the Judge had found that if the contract had gone on the letters would have been modified to be innocuous [at 52 and 564] or possibly on a legally more complex basis that ParkingEye could not recover such proportion of income which it would have received as a consequence of its false representations if these had continued.

26. Further it is not necessary to go into the question of whether there might have been small further reduction to reflect the payments received ParkingEye during the currency of the contract as a result of the falsity of the third letter. All that is at issue on this appeal is simply whether Somerfield have a complete illegality defence.

The Judgment below on the illegality defence

27. The Judge rejected the defence. His reason essentially was that insofar as there was an agreement on the form of the misleading third letter, that agreement was collateral and distinct from the main contract, which in itself was free from an illegality. ParkingEye had not:

> entered into a binding commitment to perform its obligations in such a way as to render the entire Agreement illegal and unenforceable [559]

And:

> ".. it [i.e. the pre-contract agreement on the form of the letter] could properly be regarded as an entirely separate contract, so that any illegality is not to be treated as tainting the principal Agreement itself and rendering that Agreement illegal and unenforceable."

My reasoning and conclusion

28. Illegality and the law of contract is notoriously knotty territory. Etherton LJ put it this way in the most recent case on the subject to reach this court, *Les Laboritoires Servier v Apotex Inc* [2012] EWCA Civ 593, decided after the judgment below in this case:

> It is not necessary in order to resolve this appeal to undertake a comprehensive analysis of the decided cases. Such an exercise would in any event be complex, very lengthy and in large part unrewarding. The decisions inevitably turn on their own particular facts. The statements of law or principle they contain are not all consistent or easily reconciled. The jurisprudence in this area has been an evolving one, but its evolution has not followed a consistent pattern.

So, like Etherton LJ, I shall duck out of a comprehensive review of the cases. I would add that to my mind the facts of this case lead to its comparatively easy resolution. I do not think it is borderline, which is yet another reason for eschewing a comprehensive review.

29. The starting point for an examination of the law in this area are two Law Commission papers on the subject, the consultation paper of 2009, No. 189 and the final report of 2010 (Law Com 230) entitled "The Illegality Defence." It is the consultation paper which examines the cases in detail. Of particular relevance here is the section dealing with "Illegality under common law." One of the Law Commission's categories of this is headed "When the contract is performed in an unlawful manner" (Paras. 3.27 *et seq.*). It says:

> 3.27 In some circumstances a contract that does not require the commission of any unlawful act, and which was not entered into to facilitate an unlawful purpose is nevertheless *performed* in an unlawful way. The effect that this unlawful performance has on the parties' contractual rights is very unclear [footnote omitted].
>
> 3.28 At common law, historically, a distinction has been drawn between cases where the guilty party intended from the time of entering the contract unlawfully and cases where the intention to perform unlawfully was only made subsequently. …

30. Mr Fealy invokes the principle stated in its generality here. He says the guilty party, ParkingEye, had the intention from the outset to perform the contract unlawfully. He reinforced his submissions by reference to what Waller LJ said in *Colen v Cebrian* [2003] EWCA Civ 1676, [2004] ICR 568 at [23]:

> … an analysis needs to be done as to what the party's intentions were from time to time. If the contract was unlawful at its formation or if there was an intention to perform the contract

> unlawfully as at the date of the contract, then the contract will be unenforceable.

31. Strong though the passage is, I do not read it as applying to any intended illegality of performance, however partial or peripheral. Indeed I do not think Waller LJ was considering a case such as the present where the intention was limited to only a partial (and minor on the facts) mode of performance, and was itself qualified in that it could be changed at any time and would be changed if the illegality had been pointed out.

32. The Law Commission itself was not prepared to accept that the law was in a straightjacket: that once it was shown illegal performance of any sort was intended at the time of the making of the contract, unenforceability would follow automatically. It said:

> 3.31 However it clearly cannot be in every case that a contract is unlawfully performed, even where this was the original intention, that the offending party loses his or her remedies. Such a proposition would result in the widespread forfeiture of contractual remedies as a result of minor and incidental transgressions. Although there is general agreement on this point amongst academic commentators, there is surprisingly little authority [footnote omitted].

33. I would add that there is something distinctly odd about the supposed "intention from the outset" rule. Mr Fealy rightly accepted that if the relevant intention in this case (i.e. what the form of the third letter was to be) had only been formed after execution of the main contract, the rule would not apply. Instead the test would be as Waller LJ put it in *Colen* at [22]

> whether the method of performance chosen and the degree of participation in that illegal performance is such as to "turn the contract into an illegal contract" [the phrase is that of Jenkins LJ in *B&B Viennese Fashions v Losame* [1952] 1 All ER 909 at 913.

34. I elaborate on this oddity by reference to the facts of this case. It would surely not make any rational sense for the question of whether ParkingEye had a remedy to depend on the happenstance of when the form of the letters was decided, before or after the contract was executed. Or suppose the intention was formed before the contract, but altered immediately after, so that there never was an illegal third letter? Or just one such letter before its form was changed? These considerations are, I think, linked to the Judge's reason for rejecting the illegality defence. They show or at least tend to show that the decision or agreement as to the form of letters was peripheral and something apart from the main contract.

35. It is important to emphasise that the facts in this case are different from those in any of the cases to which we were referred. For the contract here was not all-or-nothing, legal or illegal, either as regards its performance or its intended performance. That may, for instance, generally be the case in a contract of sale or one for carriage of goods. But this contract involved continuous performance over time. And its performance was never intended to be carried in a wholly illegal manner. On the

contrary the performance could be carried out and was intended to be carried mainly lawfully. Indeed it was in fact largely carried out lawfully because most motorists paid on the first or second letters and never received the third, offending, letter. Moreover the Judge's finding that if the contract had carried on instead of being repudiated the letters would all have been rendered innocuous means that no part of the damages claimed would be compensation for loss of income obtained by any unlawful means.

36. There is also this factor, considered important in many of the authorities (including Waller LJ in *Colen*), that it is not necessary for ParkingEye to plead or rely upon any illegality. Of likewise importance are the facts that illegal performance was not an object of the contract nor by any means necessary for its performance.

37. Mr Fealy submitted that despite all these matters, what was crucial here was the intention at the outset to use illegal means where necessary (i.e. in the event of non-payment after the first or second letter) to induce motorists to pay. It made no difference that in most cases the motorists were in fact liable. The contemplated illegal means tainted the whole contract and public policy required that it be held unenforceable as a whole. ParkingEye's intention at the outset of the contract was so imbued with moral turpitude that the law will not assist it to enforce the contract.

38. I do not agree. Such a conclusion would be unduly sanctimonious: it would lead to the disproportionate result that Somerfield's wrongful repudiation of the contract left ParkingEye with no remedy for a lost income which would have been wholly lawful.

39. In applying the "disproportionate" test I do not think I am exercising a judicial discretion. It was settled by *Tinsley v Milligan* [1994] AC 340 that a defence of illegality point cannot be solved by applying a discretion based on public conscience. Proportionality as I see it is something rather different. It involves the assessment of how far refusal of the remedy furthers one or more of the specific policies underlying the defence of illegality. Those policies Etherton LJ identified in *Servier* (from the Law Commission report) as:

> [66] … furthering the purpose of the rule which the illegal conduct has infringed; consistency; the claimant should not profit from his or her wrong; deterrence; and maintaining the integrity of the legal system.

Etherton LJ was careful to add:

> As the cases plainly show, this does not mean that the illegality will always apply where one of these policy rationales is relevant. It means that, if the illegality defence applies at all, it must find its justification firmly in one or more of them.

40. For the reasons I have already given, I do not think the facts of this case, considered with a sense of proportionality, involve such an invasion of any of the policy rationales as to deprive ParkingEye of its remedy. There is not a firm enough justification for that course of action.

41. I would add that I would also dismiss this appeal for the reasons given by the Judge. As I have noted, the form of the letters was too far removed from the basic operation of the contract to taint the latter.

42. For these reasons I would dismiss this appeal.

Lord Justice Toulson:

43. I agree. As Sir Robin Jacob has said, the doctrine of illegality in the law of contract is knotty. That is a mild way to describe it. It is one of the least satisfactory parts of the law of contract. Sir Robin Jacob's judgment has cut through the knots in a way which is incisive and delivers a just result.

Contract law and the doctrine of illegality

44. The fundamental reason why illegality is a difficult topic is that the doctrine is founded on public policy, and public policy not infrequently gives rise to conflicting considerations. As Lord Wright observed in *Vita Food Products Inc v Unus Shipping Co* [1939] AC 277, 293:

> "Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

In the present case the contract is not sought to be nullified for disobedience to a statute, but for another form of illegality. However, the broad point made by Lord Wright is no less important.

45. There is a public interest in the court not appearing to reward wrong doing or condone a breach of the law. But where, as in this case, both parties were complicit in the illegality, denial of one party's claim on that ground will be to give an unjustified benefit to the other. The rule that where both parties are equally at fault the defendant should prevail may be right in more serious cases (on the ground that the court should, in effect, wash its hands of the dispute), but may be a disproportionatly severe response in less serious cases, especially where the parties did not appreciate that they were acting contrary to the law. There is a public interest in doing justice between the parties and, as Lord Wright said, in nullifying a bargain only on serious and sufficient grounds.

46. It is unsurprising that over several centuries the courts have never found a simple formula for resolving these policy considerations in every situation. It is wise to be wary of extracting statements from the case law which appear to lay down universal propositions and applying them in different circumstances. There are, of course, general rules but their boundaries are not always precise and the context is always important.

47. That is not to suggest that the court has a general discretion whether to disallow a claim on grounds of illegality. The courts came close to fashioning such a discretion when they developed the "public conscience test", but the House of Lords rejected that test in *Tinsley v Milligan* [1994] AC 340. At the same time Lord Goff (at page 364) lamented that the illegality rules were indiscriminate in their effect and capable of producing injustice. He urged an investigation by the Law Commission, and he subsequently encouraged the Commission to recommend that the court should be given a statutory discretion on the lines of the New Zealand Illegal Contracts Act 1970.

48. The Law Commission wrestled with the problem over the next 15 years. The subject was included in its Sixth Programme of Law Reform, (1995) LC 234, and it produced a number of consultation documents before producing its Consultative Report, (2009) LCCP 189, to which Sir Robin Jacob has referred, and its final confirmatory Report, (2010) LC 320. After much study and consultation, it concluded that a statutory scheme was not the best solution to the problems of illegality in the law of contract, because of the difficulties which close study showed that such a scheme would itself present; and it believed that the courts had the ability to develop and apply the law in a manner which was principled but moved away from the indiscriminate application of inflexible rules capable of producing injustice.

49. In its Consultative Report, (2009) LCCP No 189, the Law Commission realistically observed (paragraph 3.52) that to "expect one set of detailed and ostensibly rigid rules to cater for all circumstances that may be encountered is overly ambitious". It summarised the present state of the law follows:

> "3.53 As our overview of the present law has shown, the crude application of the general contractual illegality rules could lead to unnecessarily harsh decisions. So how have the courts successfully avoided this potential for injustice in relation to the dispute before them? This has been achieved largely by the use of two methods. The first is by the creation of the numerous exceptions to the application of the general rules…
>
> 3.54 The second method of avoiding harsh decisions is seen in the way in which the application of the relevant rules can be strained in order to meet the justice of the particular case…
>
> 3.55 Overall, the result has been a complex body of case law with technical distinctions that are difficult to justify. As one respondent to CP154 noted, illegality disputes are often adjudicated by lay arbitrators to whom the complexities and uncertainties, not to mention the contradictions, of the present law can present a formidable obstacle to its understanding, and which can therefore impede a fair resolution of the dispute."

50. The Commission commented on the public conscience test as follows:

"3.140 We agree that the public conscience test was vague. However, we believe that it was useful in suggesting that the present rules should be regarded as no more than guidance that help the court to focus its attention on particular features of the case before it. What lies behind these "rules" is a set of policies. This is why the courts are sometimes required to "bend" the rules (if possible) to give better effect to the underlying policies as they apply to the facts of the case before them. It would be preferable if the courts were to base their decisions transparently on these policies. They could then accept that existing authority helps, but only in so far as the case law illustrates the various policies to be applied.

3.141 If this approach were adopted, we consider that the illegality defence would succeed in only the most serious of cases. That is, we believe that the policy issues underlying the defence would have to be overwhelming before it would be a proportionate response to deny the claimant his or her usual contractual rights."

51. The Commission made the following provisional recommendations:

"3.142 We provisionally recommend that the courts should consider in each case whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system. Against those polices must be weighed the legitimate expectation of the claimant that his or her legal rights will be protected. Ultimately a balancing exercise is called for which weighs up the application of the various policies at stake. Only when depriving the claimant of his or her rights is a proportionate response based on the relevant illegality policies, should the defence succeed. The judgment should explain the basis on which it has done so.

3.143 We also consider that it would be helpful if, rather than simply asking whether the contact is illegal – a term which itself is vague and confusing – the courts were to ask whether the particular claimant, in the circumstances which have occurred, should be denied his or her usual relief in respect of the particular claim. This focus on the particular claimant and particular claim are important. As we have suggested, one of the

> most important factors bearing on the case will be the closeness of the connection between the claim and the unlawful conduct. It may well be the case that it would be a proportionate response to deny the claimant relief in respect of one of the defendant's obligations, where this is closely linked to the claimant's unlawful actions, but not to any other.
>
> 3.144 We provisionally recommend that the courts should consider whether illegality is a defence to the particular claim brought by the particular claimant, rather than whether the contract is "illegal" as a whole."

52. The Law Commission's final Report was to the same effect. Over the years the Commission has explored at length the complexities of the subject and the possible ways forward. I am in no doubt about the wisdom and justice of the general approach now advocated by it. Rather than having over complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each case for reasons articulated by it.

53. This is not to suggest that a list of policy factors should become a complete substitute for the rules about illegality in the law of contract which the courts have developed, but rather that those rules are to be developed and applied with the degree of flexibility necessary to give proper effect to the underlying policy factors. The decision in *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593 provides a good example. I would particularly endorse Etherton LJ's statement at paragraph 75 that:

> "…what is required in each case is an intensive analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce a just and proportionate response to the illegality. This is not the same as an unbridled discretion."

54. In some parts of the law of contract it is necessary in the interests of commercial certainty to have fixed rules, sometimes with exceptions. But in the area of illegality, experience has shown that it is better to recognise that there may be conflicting considerations and that the rules need to be developed and applied in a way which enables the court to balance them fairly.

55. This approach recognises the truth of Lord Hoffmann's statement in *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] AC 1339 at paragraph 30:

> "The maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations."

Facts

56. Sir Robin Jacob has explained the facts of the present case. ParkingEye agreed to provide an automated monitoring and control system at some of Somerfield's car parks. This involved a substantial capital outlay by ParkingEye. Payment for ParkingEye's services was to come from parking charges levied on customers who overstayed. The contract was to be for an initial period of 15 months from 1 September 2005. Somerfield terminated the contract in early March 2006. By that time the monitoring system had been installed at 17 stores. ParkingEye claimed damages for its loss of revenue resulting from the early termination of the contract. Somerfield advanced a number of defences which the judge rejected and in respect of which there is no appeal.

The principle relied on by the appellant

57. Somerfield's illegality defence is based on the manner in which it was intended that part of the contract should be performed. The contract was not unlawful in itself. It was capable of being performed in a lawful manner and it was not entered into as a way of achieving an unlawful objective. The feature relied upon in support of the illegality defence was that the contract provided for ParkingEye to send out letters of demand to customers who overstayed and the third pro forma letter was deceptive. It represented that ParkingEye had the authority and intention to commence legal proceedings if payment was not received within the stipulated time limit, whereas in truth it was agreed that Somerfield should decide whether to take such proceedings and it was most unlikely in reality that Somerfield would decide to do so. The judge accepted that the sending of that letter would give rise to the tort of deceit if the deception induced the recipient to pay even if he was not liable to make the payment in question. The form of letter was not required by the contract but it had been drafted by ParkingEye and approved by Somerfield before the contract was made.

58. In these circumstances Somerfield relies on the rule that a contract may not be enforced by a party who intended from the outset to perform it in an illegal manner. In *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, 283 Devlin J stated as a general principle that:

> "…a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it."

59. Devlin J did not attempt to define the precise boundaries of the principle, either as to the nature and significance of the illegal act or as to the precise meaning of the words "object" and "intent", which he used without differentiation. It was not relevant for him to do so. The same applies to the cases which have followed it, including *Colen v Cebrian (UK) Ltd* [2003] EWCA Civ 1676, [2004] ICR 568, about which I agree with Sir Robin Jacob's comment in paragraph 31.

60. The contract in *St John Shipping Corporation v Joseph Rank Ltd* was one of carriage. The defendants were holders of a bill of lading in respect of a part of the cargo carried

on the plaintiffs' vessel from Mobile, Alabama, to Birkenhead. The vessel was over laden and the plaintiffs were guilty of an offence under the Merchant Shipping (Safety and Load Line Conventions) Act 1932. The defendants relied on the plaintiffs' illegality in the performance of the contract as a ground for refusal to pay the freight otherwise due. Devlin J held that the mere fact that the vessel was over laden did not preclude the plaintiffs from enforcing their claim for freight, but he said, at 287-288, that "if the parties knowingly agree to ship goods by an over loaded vessel, such a contract would be illegal", because the case would then fall under the head of illegality which he had earlier identified.

61. One can see the justice of treating a party who deliberately sets out to break the law in a serious respect, such as over loading a vessel, differently from a party who breaks the law without meaning to do so or in a way which may be minor. Devlin J had such differences in mind. He said at page 288:

> "Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case – perhaps of such triviality no authority would have felt it worthwhile to prosecute – a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality."

62. He said of the defendants' submission, at page 281, that:

> "…the principle which they invoke for this purpose cares not at all for the element of deliberation or for the gravity of the infraction, and does not adjust the penalty to the profits unjustifiably earned…A ship owner who accidentally over loads by a fraction of an inch will not be able to recover from any of the shippers or consignees a penny of the freight."

63. When Devlin J's judgment is read as a whole his reasoning is characteristically subtle and cogent. To draw from it a fixed rule that any intention from the outset to do something in the performance of the contract which would in fact be illegal must vitiate any claim by the party concerned does not do justice to his judgment. It is too crude and capable of giving rise to injustice. If there were such a cast iron rule, I agree with Sir Robin Jacob's comments in paragraphs 33-34 about its oddity in the present case.

64. I do not accept the unqualified form of the rule as advanced by Somerfield. In considering its proper scope and application, there may be and are in this case a number of relevant factors.

Object and intent of the Claimant

65. The first factor concerns the object and intent of the claimant. In its first Consultation Paper on Illegal Transactions: The Effect of Illegality on Contracts and Trusts, (1999) LCCP 154, paragraph 2.31, the Law Commission cited *St John Shipping Corporation v Joseph Rank Limited* as authority for the proposition that if one party intends to perform a contract in a way that involves the commission of an illegal wrong at the time of entering into the contract, he will not be able to enforce the contract. I have already remarked, however, that in the relevant passage Devlin J used the expressions "with the object of committing a criminal act" and having "the intent at the time the contract was made to break the law" without differentiation or further analysis. The Law Commission added in a footnote that:

> "…it would seem that where the party or parties were not aware that the intended performance was illegal and, on discovery, are subsequently content that the contract be performed in a legal manner within its terms, the contract is enforceable: *Waugh v Morris* (1873) LR 8 QB 202."

66. I referred to *Waugh v Morris* in *Anglo Petroleum Limited v T F B (Mortgages) Limited* [2007] EWCA Civ 456 and would repeat what I said:

> "60. *Waugh v Morris*… arose from a voyage charter party by which the plaintiff's vessel was chartered for a voyage from Trouville to London. Under the charter party a cargo of pressed hay was to be loaded at Trouville and brought to London where it was to be taken from the ship alongside. The charterer's agent told the master that the consignees under the bills of lading would require the hay to be delivered to them at a particular wharf in Deptford Creek and that he should proceed there on his arrival in London, which the master promised to do.
>
> 61. On arriving in the Thames, the master learned for the first time that by an Order in Council made under the Contagious Diseases (Animals) Act, 1869, France was declared to be an infected country, and it was made illegal to land in Great Britain any hay brought from that country. The Order had been made and published before the charter party was entered into, but neither the master of the ship nor the charterer's agent was aware of it. On learning of the Order, the master refrained from landing the cargo at the wharf. After some delay, during which the contractual number of laydays elapsed, the charterer received the cargo from alongside the ship into another vessel and exported it. The owner claimed for detention. The claim was resisted by the charterer on the ground that the contract was unenforceable for illegality, because the purpose of the contract was the delivery of the consignment to

London, which was prohibited by law. The defence was rejected.

62. Giving the judgment of the court, Blackburn J (p 207 – 208) distinguished the case from one where the contract could not be performed without illegality or which was entered into for the object of satisfying an illegal purpose. He observed that all that the owner had bargained for, and could properly be said to have intended, was that on the ship's arrival in London his freight should be paid and the hay taken out of the ship. As to an illegal object, he never contemplated that the charterer would violate the law. He contemplated that the charterer would land the goods and thought that this would be lawful; but if he had thought of the possibility of the landing being prohibited, he would probably, and correctly, have expected the charterer not to break the law. The principle applied by the court was stated by Blackburn J as follows:

> "We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance."

63. 130 years later, this statement of the law has added importance because of the explosion in the number of statutory regulations of one kind or another under English and European law."

67. The subject is dealt with in Chitty on Contracts, 30th Ed (2008) at paragraph 16-012:

> "…where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced on the ground that there was never a "fixed intention" to do that which was later discovered to be lawful and that while the parties "contemplated" such unlawful act, they did not "intend" to do it. In other words, knowledge of the law is of evidential significance with respect to the parties' intended mode of performance. It is important in this situation that at least the

> party seeking to enforce the contract can carry it out in a legal manner."

68. The judge cited this passage in his judgment. He went on to hold that ParkingEye did not have a "fixed intention" to use pro forma letter 3. He found that ParkingEye did not appreciate its legally objectionable aspects and that, if someone had pointed them out, the letter would have been changed.

Centrality of the illegality

69. A second factor is the centrality and gravity of the illegality in the context of the contract and more particularly the claim. It is worth repeating the passage from the Law Commission's Consultative Report, at paragraph 3.31, which Sir Robin Jacob has cited:

> "However, it clearly cannot be in every case that a contract is unlawfully performed, even where this was the original intention, that the offending party loses his or her remedies. Such a proposition would result in the widespread forfeiture of contractual remedies as a result of minor and incidental transgressions. Although there is general agreement on this point amongst academic commentators, there is surprisingly little authority."

70. There is a pertinent passage in *St John Shipping Corporation v Joseph Rank Limited*. Commenting that the court should be slow to imply the statutory prohibition of a contract, Devlin J said at page 289:

> "In the statutes to which the principle has been applied, what was prohibited was a contract which had at its centre – indeed often filling the whole space within its circumference – the prohibited act; contracts for the sale of prohibited goods, contracts for the sale of goods without accompanying documents when the statutes specifically said there must be accompanying documents; contracts for work and labour done by persons who were prohibited from doing the whole of the work and labour for which they demanded recompense."

71. I highlight the final phrase "…prohibited from doing the whole of the work and labour for which they demanded recompense". In the present case the most important part of the service provided by ParkingEye was the installation of the system in 17 car parks. That work was perfectly lawful. The misrepresentation contained in pro forma letter 3 was hardly central to the performance of the contract. The judge found that it could not properly be said that the use of unlawful means to collect charges from customers who over stayed was one of the purposes of the agreement. He held that any illegality was, in his words, too remote to render the agreement unenforceable.

Nature of the illegality

72. A third and related factor is the nature of the illegality, which may be relevant to its gravity. The only form of illegality found by the judge was in tort. Somerfield

alleged in its pleadings that ParkingEye obtained money by deception contrary to the Theft Act 1968 and the Fraud Act 2006 and that it committed the offence of unlawful harassment of a debtor contrary to section 40 of the Administration of Justice Act 1970, but the first allegation was not pursued at the trial and the second was rejected by the judge. In its first Consultation Paper, LCCP 154, the Law Commission observed at paragraph 223 that while a contract had been held to be unenforceable because it had as its object the commission of the tort of deceit (*Brown Jenkinson and Co Limited v Percy Dalton (London) Limited* [1957] 2 QB 621),

> "Where neither party is aware that performance of a contract would involve a tort, we are not aware of any case law to suggest that the contract is unenforceable."

73. The judge rejected the idea that deceit could properly be considered to be the object of the contract and he found that the parties did not appreciate that pro forma letter 3 was legally objectionable when they agreed on its format.

74. The significance of the third factor was not the subject of argument and, while I regard it as relevant, my conclusion does not depend on it.

Conclusion

75. The judge was in my view right to reject Somerfield's illegality defence. The considerations which caused him to do so were that ParkingEye had no "fixed intention" of acting unlawfully, for reasons which I have discussed, and that the illegality was incidental to part of the performance of the contract but far from central to it.

76. My reasons for agreeing with the judge can be shortly stated. If the court thought it right to do so, it could develop and apply the principle expressed in broad terms in *St John Shipping Corporation Ltd v Joseph Rank Ltd*, and repeated in cases such as *Colen v Cebrian (UK) Ltd*, so as to defeat ParkingEye's claim, but it is necessary to consider whether that would be justified by the policies underlying this branch of the law.

77. As Sir Robin Jacob has emphasised at paragraph 35, the contract was not a one-off contract, such as a contract for the sale or carriage of goods, but a contract creating a relationship that was to last for a minimum term of 15 months. The claim is for loss caused to ParkingEye by Somerfield's termination the contract after a little over 6 months. It could have been lawfully performed for the rest of the contractual term, and it would have been if Somerfield had drawn attention to the objectionable feature of pro forma letter 3 which it had previously approved. The objectionable feature of that letter was neither essential nor central to the performance of the contract as a whole.

78. If and when it belatedly dawned on Somerfield that pro forma letter 3 was objectionable in its form, the proper and just course would have been for Somerfield to have drawn this to the attention of ParkingEye and to have continued to honour the contract, provided that ParkingEye performed it in a lawful manner, as it would have done on the judge's findings. I see no justice in Somerfield having the option of either behaving in that way or, if it preferred, of repudiating the contract. This would

give Somerfield a windfall reward for its own previous illegality. If Somerfield's argument is taken to its logical conlusion, on appreciating that the letter was objectionable, it could have kept the point up its sleeve until ParkingEye had installed all the monitoring equipment at its car parks which it required, and then terminated the contract at whatever moment best suited its commercial interest, so enabling it to keep for itself all subsequent payments by users of the car parks who overstayed. To borrow Devlin J's phrase, that would not contribute to public morality.

79. In summary, the disallowance of ParkingEye's claim on the ground of illegality is not compelled by the authorities, and it would not be a just and proportionate response to the illegality.

80. Finally, I applaud the skill and care with which Judge Hegarty QC navigated his way through a difficult area of the law, as well as the succinctness and clarity of the judgment of Sir Robin Jacob with which I fully agree. Essentially our navigational routes are the same.

Lord Justice Laws: I agree that the appeal should be dismissed for the reasons given by Sir Robin Jacob.