

OBSERVICES v THURLOW

Worcester County Court.Claim no 0QT34807

Appeal by Mr. Thurlow against decision of DJ Nield dated 18 March 2010.

Judgment.

1. The Claimants claimed the sum of £100 from the Defendant who had parked on an area of land controlled by them. The claim was based on the implicit acceptance by the Defendant of terms and conditions of parking which were clearly on display, amounting to a contractual obligation. The Defendant disputed their right on the basis that he had not seen the relevant notices and thus had not agreed to the terms and he was not causing an obstruction.
2. The matter came before DJ Nield on 13 July 2010. He gave judgment for the Claimant and gave his reasons. From that Judgment Mr. Thurlow appeals. The matter came before me on 11 January 2011. I heard from Mrs. Tomlin of the Claimant company who had given evidence and appeared for the Complainant before Judge Nield and Mr. Thurlow who appeared in person at both hearings.
3. This is an appeal by way of review and not a rehearing. The Judge approached the matter on the basis that the issue was whether there was a deemed contract between the parties, which in turn depended on the notices and whether Mr. Thurlow did or should have seen them. He did not disbelieve Mr. Thurlow who said that he did not see the notices but he concluded that the notices were prominent and if not seen should have been. There was a deemed contract on the terms set out and the Claimant was entitled to the sum claimed.
4. On the appeal Mr. Thurlow sought to argue that the notices were not prominent and the judge's conclusion was wrong on that. I see no reason to disturb that finding.
5. The real issue is the effect of the notices. The ticket placed on Mr. Thurlow's car states that he was "not authorised to leave or otherwise occupy the OPC area with your vehicle, the vehicle was parked in contravention to the terms and conditions of the OPC area. You are therefore required to pay the sum of £100 within 28 days, pursuant to the terms and conditions clearly displayed within the OPC area. The charge will be reduced to £50 if received within 14 days"

6. The wording of the relevant Notice is set out at paragraph 2 of Mr. Thurlow's statement, attached to his notice of appeal. The terms are clear. Parking without permission is not authorised. If you do so a charge will be made. It does not suggest you are permitted to park on payment of a fee. It says clearly that you are not permitted to park and seeks to agree the payment of a charge (£100/50) for unauthorised parking. Mr. Thurlow was at all times being treated as a trespasser. In my judgment that can only be an attempt to agree the damages payable for unauthorised parking, rather than the grant of permission to park on the basis of an agreed fee, pursuant to an implicit contractual agreement. The purpose of the notices was to show that parking was not permitted and if parking took place the purpose of the notices was to try to fix the damages payable to the sum of £100 specified.
7. In those circumstances the issue is whether there was an enforceable obligation effectively to pay liquidated damages in the sum agreed. Or was there an unenforceable attempt to claim pursuant to a penalty clause. The Claimant argues that it is the former and Mr. Thurlow the latter. The District Judge appears to have accepted that Mr. Thurlow was causing no obstruction, although the notice placed on his car suggested that he was - see document d to Mrs. Tomlin's statement. But the photographs annexed to Mrs. Tomlin's statement do not suggest an obstruction. In any event no loss or damage was asserted. This was not the essence of the claim.
8. The Notice does not have the same effect as an agreement in a contract to pay a sum of damages in the event of breach, but is analogous to it. The question then arises as to whether that is a genuine attempt to quantify loss or a penalty clause. I have been referred to a number of authorities. The law is clearly set out in McGregor on Damages 18 ed at chapter 13. However you word it the test is whether the sum agreed is a genuine pre-estimate of loss or a figure put forward as a threat and as a deterrent to breach. You look at the matter at the time of the agreement. What is the sort of loss that might be sustained in the event of a trespass? It could be anything, but the notice only applies to unauthorised parking, although that can be committed in a number of ways as set out in the Notice. It is difficult to see what sort of loss that could occasion. The Notice indicates that the purpose of the charge is to discourage use. The burden of showing that it is a penalty falls on Mr. Thurlow.

9. In the present case in my judgment the answer is clear: £100 is not a genuine pre-estimate of loss-if it were why be prepared to accept £50 if paid promptly? It was clearly a threat intended to deter parking. I agree with Mr. Thurlow's submission.

10. I was referred to cases such as Arthur v Anker [1997] QB 564 and Vine v London Borough of Waltham Forset [2000]EWCA Civ 106. In my judgment they are not directly relevant because although they are concerned with illegal parking they in fact deal with the issue of wheel clamping and the landowners' entitlement to clamp and charge a fee for release. They address the issue as to the extent to which consent obtained by prominent notices can justify wheel clamping which would otherwise be a tort and the reasonableness of the charge made for wheel release. None of those issues arise here.

11. I note the Scottish case of University of Edinburgh v Onifade [2004] Scot SC 89 which the Claimant referred me to as some persuasive support of its case. In my judgement the terms of the Notice there relied on were different and have different effects. That notice permitted use without permit on payment of an agreed charge. It was enforceable as a contractually agreed fee for a parking place. In the present case there was no suggestion of permission-Mr. Thurlow was at all times treated as a trespasser. In any event the legal issue addressed in that case was no the same as here

12. On the basis that the effect of the Notice is effectively to seek to impose a penalty clause, it is unenforceable. No loss or damage is asserted or proved. In those circumstances the Claimant has no claim and the appeal is allowed.

13. This draft judgment is to be sent to the parties. If they can agree the consequential orders they can submit an agreed order which will be made when the judgment is formally handed down No attendance will be required. If they cannot agree, the matter can be listed for hearing at which the judgment will be handed down and I will hear any further argument.

HH Judge Daniel Pearce-Higgins QC
Worcester Combined Court Centre
10 February 2011.