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POPLA
PARKING ON PRIVATE LAND APPEALS

21 November 2013

Reference 6062813079
always quote in any communication with POPLA

Paul Cummins (Appellant)

-v-

ParkingEye Ltd (Operator)

The Operator issued parking charge notice number 080963/889519 arising out of the presence at Associated British Ports Town Quay (Short Stay) car park, on 22 August 2013, of a vehicle with registration mark R743AOC.

The Appellant appealed against liability for the parking charge.

The Assessor has considered the evidence of both parties and has determined that the appeal be **allowed**

The Assessor's reasons are as set out.

The Operator should now cancel the parking charge notice forthwith.

Reasons for the Assessor's Determination

It is the Operator's case that the parking charge notice was issued for failing to purchase the appropriate parking time and parking without authority. The Operator submits that a parking charge is now due in accordance with the clearly displayed terms of parking.

The Appellant does not dispute the terms and conditions for parking or the facts of the case.

In his appeal, the Appellant submits that;

He is not liable for the parking charge as the Registered Keeper. The Appellant explains that they were not the driver at the date and time in question. The Appellant submits that the Operator cannot peruse him as the Registered Keeper under Schedule 4 of the Protection of Freedoms Act 2012 (the 2012 Act) as this Act does not apply to the land in question. It is the Appellant's case that the land is question does not fall under "relevant land" to which the 2012 Act applies as the land is covered under Associated British Ports Southampton Harbour Byelaws 2003 (the 2003 Byelaws). I note the Operator has not dealt with this submission.

In a further submission, the Appellant submits that;

The Parking Charge Notice (PCN) exceeds the appropriate amount. The Appellant in his original representations to the operator says that the charge is an unlawful, unfair penalty and no loss has been incurred by the Operator by the alleged breach. I note the Operator has dealt with this submission, however it has been raised again in an email by the Appellant so I will be taking into account the original representations and rejections in relation to this matter.

The Appellant also submits that, the vehicle was not improperly parked as no evidence of parking has been produced by the Operator. The Appellant is submitting that the breach of failing to pay for the appropriate parking time, or having authority to park by way of permit, did not occur as the Operator cannot show that the vehicle was 'parked' at the site.

I note the Operator has refuted this submission by way of images showing entry and exit of the vehicle in question and a calculated stay of 2 hours 45 minutes, which on the balance of probabilities shows the vehicle was in fact 'parked' at the site.

The Appellant has submitted that the parking charge does not reflect the loss caused by the alleged breach. Clearly, it is the Appellant's case that the parking charge is not compensatory in nature.

The signage produced states that a parking charge notice would be issued for a "*Failure to comply*" with the terms and conditions of parking displayed. This wording seems to indicate that the charge represents damages for a breach of the parking contract. Accordingly, the charge must be a genuine pre-estimate of loss.

The Operator submits that the charge is in fact a genuine pre-estimate of loss, and further submits that the charge is justified commercially and so need not in any case be a genuine pre-estimate of loss.

It seems that the courts have accepted a third category of liquidated damages, a sum which is commercially justified – in cases where the sum is neither a penalty nor is it strictly a genuine pre-estimate of loss – where the Operator has substantiated the loss incurred, or the loss that might reasonably be incurred, by the breach. However, I do not accept the Operator's submission that the inclusion of costs which in reality amount to the general business costs incurred for the provision of their car park management services is commercially justified. The whole business model of an Operator in respect of a particular car park operation cannot of itself amount to commercial justification. I find that the charge is not justified commercially and so must be shown to be a genuine pre-estimate of loss in order to be enforceable against the Appellant.

The Operator has produced a list of costs which it submits justifies the charge as a pre-estimate of loss, however, a substantial proportion of these appear to be general operational costs, and not losses consequential to the Appellant's breach and so I am not minded to accept this justification.

The Operator must show that the charge sought is a genuine estimate of the potential loss caused by the parking breach, in this case, the Appellant's failure to purchase parking covering the stay of 2 hours 45 minutes. The aim of damages for breach of contract is to put the parties in the position they would have been in had the contract been performed. Accordingly, the Operator cannot include in its pre-estimate of loss costs which are not in fact contractual losses, but the costs of running its business and which would have been incurred irrespective of the Appellant's conduct.

The Operator has referred to the well-known case on whether a sum is a genuine pre-estimate of loss or a penalty, *Dunlop Pneumatic Tyre Company*

Limited v New Garage and Motor Company [1915] AC 79. However, therein is the classic statement, in the speech of Lord Dunedin, that a stipulation: "… will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach".

The Operator has also cited a number of more recent cases, including a reference in county court matter called *ParkingEye Limited v Shelley (2013)*, there is no other citation, in which District Judge Dodd apparently adhered to the finding of Colman J in *Lordsvale Finance Plc -v- Bank of Zambia [1996] QB 752* that "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provisions was to deter a party from breaking the contract or to compensate the innocent part for the breach […] deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred".

However, in that same case Coleman J made reference to "a dichotomy between a genuine pre-estimate of damages and a penalty does not necessarily cover all the possibilities. There are clauses which may operate on breach, but which fall into neither category, and they may be commercially perfectly justifiable"

This was referred to by Manse LJ, as he then was, in *Cine Bes Filmcilik Ve Yapimcilik and Another -v- United International Pictures and Others [2003] EWCA Civ 1669*, which case the Operator has also cited. The matter involved was the licencing of cinema films and the agreement provided that in the event of certain failures, one party could accelerate the payment of licence fees that would fall due. However, in neither this case nor the *Lordsvale* case did the total sum of money payable under the disputed provision, effectively amount to the whole basis of the business of one party to the contract.

Decisions in the High Court and above may well offer some specific guidance as to the general issues arising in parking tickets cases but those higher decisions are generally from matters that involve sums and issues so far removed from parking appeals as to be of perhaps only limited assistance to the Assessor. Decisions in the county courts, as already noted, do appear to vary widely as to what a genuine pre-estimate of loss might be in these situations.

The Operator refers to another their cases in the county court, that of *ParkingEye Limited -v- Julie Lee (2013)*. I was not provided with the full judgment but the Operator states that in that case they had submitted that that the

charge was a genuine pre-estimate of loss but also that there was a need for the turnover of cars and shoppers and a need to 'deter overstays'. They also said they submitted that it is more fair for the charge to vary where there is early payment, as it reflects the lesser amount of work undertaken and the lesser costs thereby incurred. They state that the Judge ruled in their favour. The reduced payment for early settlement may be correct but it is not clear how far, if at all, the charge amounting to deterrence, even in part, was approved.

The Operator submits that Judge Dodd in 2013 *Shelley* case, again I do not have the full judgment, found the key issue was not whether or not the charge was a pre-estimate of loss but rather whether the purpose of the parking charge is to deter breach, or if the dominant purpose is commercially justified. Further, they submit that he found on a balance of probabilities that the dominant purpose was regulation of the car park area, that it was not common for the courts to find a penalty within a contract and that a breakdown of the costs was not required, as the contract was formed on its own terms.

It is not particularly clear as to how 'regulation' and 'deter' actually differ in the scenario of a car park operation. Again in any event, the whole business model of an operator in respect of a particular car park operation cannot of itself amount to commercial justification

Consequently I must find that the Operator has not produced sufficient evidence to demonstrate that this parking charge is a genuine pre-estimate of loss caused by this breach.

Accordingly, I allow the appeal and no further issues need be determined.

Marina Kapour
Assessor