IN THE NORWICH COUNTY COURT No. 3YS16797

Bishopsgate
Norwich NR3 1UR

Friday, 24th October 2014

Before:

HIS HONOUR JUDGE MOLONEY QC

B E T W E E N :

RANSOMES PARK LIMITED Claimant

- and -

NICHOLAS ANDERSON Defendant

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Official Court Reporters and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HR
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

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MR. WEBB appeared on behalf of the Claimant.

MR. EATON appeared on behalf of the Defendant.

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J U D G M E N T

(As approved by the Judge)

HIS HONOUR JUDGE MOLONEY QC:

THE APPEAL

1 This is a small claim appeal by the claimant against the decision of District Judge Parnell given on 21st February 2014 to dismiss the claimant's claim against the defendant following a trial. The grounds of appeal relate to three separate issues, those of contract, trespass and costs.

THE FACTS

2 The claimant company manages a large industrial estate, Ransomes Euro Park, at Ipswich. Most of the estate is owned by an associated company, Ransomes UK, but part, including the piece of road in question here, is actually owned by the claimant company. The claimant's responsibilities include ensuring the free flow of traffic on the estate roads to the various premises occupied by tenants and other businesses.

3 It is important to note that this is not a case about car parks in the ordinary sense of the term, i.e. places where people are permitted to park their cars in return for payment or in return for shopping in certain premises, or whatever it might be. Rather, this is a case about "No Parking" areas. In colloquial terms, it is about double yellow lines, about parking on a road not in a designated parking space, and doing so in a manner that does or might lead to some obstruction of traffic. I want to emphasise that because there are other cases about parking in car parks which raise very different considerations.

4 In this case, on 23rd October 2012 the defendant, Mr. Anderson, went to the industrial estate with a view to visiting some premises there. It appears he was unable to get into their designated parking area, because it was blocked off; so he parked on the road, on a corner, as it happens, and on a double yellow line. It will, I am sure, have been perfectly clear to him that that was not a place where he was intended or permitted by the land owner to park. (That is quite independent of the issues surrounding the notices displayed on the site, which I shall come to deal with in a moment.)

5 The claimant manages the estate through a contract with its associate company. The claimant had itself entered into another contract shortly before the incident when Mr. Anderson parked. This was a contract dated 26th September 2012 with a firm called Proserve Enforcement Solutions. The claimant, by that contract, appointed Proserve as what it described as its bailiffs. I should emphasise, as I did in the course of the hearing, that that does not mean bailiffs in the sense of court bailiffs; it is a term used to describe people who provide this kind of service, what

are described as enforcement measures in relation to parking, such as issuing notices for trespass.

6 Under the contract between itself and the claimant, Proserve was entitled to recover from the claimant certain fees. "The fees" means, according to the contract:

> "The fees advertised on the warning signs in relation to the implementation of any enforcement measures."

And it refers to other categories of fees, such as waiting times, out of pocket expenses, and administration costs involved in the provision of the services. It goes on to say:

> "The fee is payable once the client (that is to say the claimant) is provided by the company (that is to say Proserve) with sufficient proof that a trespass has occurred, and is satisfied that any enforcement measure or such other course of action is or was necessary to protect the property from trespassers."

7 The contract does not provide specifically for the level of fees that are to be displayed on the warning sign and then paid by Ransomes. It would appear, at least theoretically, that Proserve is entitled to set the fees at whatever level it chooses and Ransomes will pay them. But the point was made that:

> "The contract is terminable by not less than 28 days notice in writing, expiring not earlier than 12 months from the date of this agreement".

So the contract does contain the rather surprising feature that it appears that Proserve is entitled to set the fees at any level it chooses, and in principle Ransomes would appear to be liable to pay them.

8 The terms of the warning sign are of particular importance in this case, so I should set that out in full. Broadly speaking, the print is larger at the earlier part of the notice and gets smaller as one works one's way through it. But in big letters, which would, I am sure, be legible to any passing motorist, it begins:

> **"Warning: Private Property. Not Trespassing. No Parking. No Stopping. No Waiting. You have entered this private property. You are now subject to the terms and conditions of the land owner listed below."**

And then there is a familiar "No Parking" sign, and in big numbers: "24 hours":

> "This location is monitored constantly 24 hours a day."

Then in smaller print, legible, but only if one positively stopped to read it carefully, one reads the following:

> "If you park, stop, wait, or leave a vehicle or any item on this land without the authority of the land owner it will result in either you committing trespass or entering into a contract with the land owner. Permit holders only. Permits must be clearly displayed at all times. Bailiffs operate at this location. They have lawful authority from the land owner to remove any trespassing item under distress."

(I pause to say that if that is a reference to clamping and towing it may be somewhat questionable in law, but, in any event, that is what the document says.)

> "This land has a control by barrier policy, which may result in your vehicle being restricted from moving and leaving the land if you fail to pay the relevant sum associated with the trespass or breach of contract and waiting time. By parking, stopping, waiting, or trespassing, you, the owner, driver, or registered keeper, are exposing the owner of this property to a pre-agreed contractual loss under the terms of an agreement with Proserve Enforcement Solutions. This loss will be recoverable from you by the owner of the property as damages for breach of contract between yourself and the owner of this property or in trespass. The relevant contractually agreed sums are listed below. You will also be liable to pay any out of pocket expenses, legal, and/or administration fees involved with the recovery of any unpaid charge. Charge notices for trespass or contract are issued on this land to vehicles or traders parking, stopping, or waiting without authority. Photographic evidence is taken of any trespass or breach of contract. Charge notices are issued directly to vehicles or via the post. Vehicle keeper details will be requested via the DVLA to assist in prosecution of vehicles that have trespassed on the property who have not paid any charge listed below. Recoverable sums for trespass and/or breach of contract, are as follows: Removal car £300. Removal commercial £600. Charge notice car £150 per hour. Charge notice commercial £250 per hour. Control by barrier and restriction charge £100 per hour per person. Waiting time £100 per hour per person. Vehicle storage £60 a day. All the aforementioned sums are subject to VAT."

(The figures to which I have referred, £300 and so forth, are in the small print section and not the big print section.)

9 On 7th March 2013 the claimant company paid Proserve £7,170 in respect of an invoice that Proserve had served on it shortly before. That invoice was for 18 notices, the great majority of which were listed at £250, the sum attributable to commercial vehicles; but one, the one attributed to Mr. Anderson, was listed at £150. In addition, the invoice claimed administration fees of £675, and another item headed "Out of pocket expenses, solicitors, £900" (one eighteenth of those is £50 for the out of pocket expenses and solicitors and £37.50 for the administration fees). The total of those items is £287.50, and that is the sum which was claimed by way of an invoice sent to Mr. Anderson. I should say that although Proserve charged VAT to the claimant, the £287.50 submitted to Mr. Anderson did not include the VAT element.

10 What had happened, of course, was that in the now familiar way Proserve had photographed the defendant's car and number plate parked on the double yellow line; and it then obtained his details from the DVLA by using the procedure under the Protection of Freedom Act 2012. That legislation does cover cases of this kind, whether they are founded in contract or trespass. Having located the identity of the registered keeper of the car that had been thus parked, Mr. Anderson was sent an invoice, and when he refused to pay they commenced the present action against him for £287.50. The case was allocated to the small claims court and was heard by District Judge Hallett on 21st February.

11 In his judgment the district judge rejected the contract claim on the basis that the noticed was too vague and uncertain to generate contractual liability. As to trespass, he accepted in principle that there appeared to have been a trespass and that that trespass must have caused some loss to the claimant, in terms of expenses incurred, but made no award of damages in relation to it and dismissed the claim, because, firstly, he did not accept the validity or enforceability of the claimant's contract with Proserve, he considered the fact that Proserve alone was setting the fees rendered that contract unlikely to be enforceable; and, secondly, he took the view that the claimant company had failed in its duty of mitigation because it had failed to demonstrate to him that it could not have got similar services from other bailiffs for a lesser sum. In short, it had failed to prove that the sum it was claiming was a reasonable one. In those circumstances, no question of awarding the claimant its costs arose. But one aspect of the appeal is the assertion that the contract provides for the recovery of costs, and therefore those costs could be recovered in this litigation regardless of the general bar in small claims litigation on recovering legal costs.

12 Following the judgment the matter was appealed. Mr. Anderson, I am glad to say, has got very helpful professional representation, and the matter has been argued out before me today.

THE CONTRACT APPEAL

13 I dealt with this shortly in the hearing, and I can deal with it shortly in my judgment. It appears to me, on the basis of the notice, which I have read out, that the district judge was plainly right to say that this notice was insufficiently clear to constitute a valid contractual offer capable of acceptance by conduct. The principal flaws in the notice, so far as he and I are concerned, are these. First of all, the notice would leave the driver in complete uncertainty as to when and by what means he was accepting the offer, because on the one hand it says: "You have entered this private property, you are now subject to the terms and conditions of the land owner listed below, which must imply that by entry you have made yourself subject to the terms and conditions" (in other words, the act of entry is the act of acceptance and the moment of entry is the moment when the contract comes into effect), but then it goes on to say, by contrast: "If you park, stop, wait, or leave a vehicle or any item on this land without the authority of the land owner it will result in either you committing trespass or entering into a contract with the land owner". So, reverting to the first point, there is an inconsistency on the face of the notice. At one point it is saying: "You enter a contract by entering the land", but at another point it is saying: "You enter a contract by parking, stopping, waiting, or leaving a vehicle". So there is a fundamental uncertainty there.

14 Secondly, there is an uncertainty, at least in the second of the two clauses I quoted, as to whether you enter into a contract at all, because what it says is: "If you park, and so forth, it will result in either your committing trespass or entering into a contract with the land owner". So a person who read that whilst his car was moving, and considered pulling to a halt, would then be in utter uncertainty: "If I stop will I enter into a contract or will I commit a trespass? which is it?"

15 Although the doctrine of acceptance by conduct, on the basis of the terms set out on a notice in a parking place or similar zone, is an obviously right, valuable and useful one, it is an essential minimum that the contract be sufficiently simple and clear that the motorist is in no doubt before he performs the accepting conduct what he is letting himself in for. For the reasons that I have indicated, the district judge was plainly right to say that this notice, in contractual terms, was too vague and uncertain to have the requisite effect.

16 The district judge also pointed to a further uncertainty, which is that the charge, for example for a car, is stated as £150 an hour. Firstly, as the district judge said, it is very far from clear whether that means a complete hour, or part thereof. (For my part, I think that it is more likely to be pro-rata in the absence of the express words "or part thereof", but that may be neither here nor there.) Secondly, it is unclear whether it means per hour that the car is parked there, or per hour that Proserve is

working on the case. Whilst understanding the district judge's concerns on that point, which I shall come back to on another issue in due course, it appears to me not to be necessary to deal with that point because that is an ambiguity in the terms of the contract and the ambiguity that I particularly rely on is at the more fundamental level, of whether and in what circumstances you are entering the contract at all.

Whichever way one looks at it, this sign is insufficient to create a contractual liability. Particularly so because, as I think Ransomes and Proserve would accept, what they are seeking to offer here is not the usual model of parking charges based on the time that you spend parking, but a different model based on liability for the time of the bailiffs. If you are introducing a new contractual model to people who are used to traditional parking notices, it is incumbent on you to be exceptionally clear in your signage. For all those reasons, I agree entirely with the district judge on this issue, and the appeal on that ground must fail.

THE TRESPASS APPEAL

17 It is important to emphasise that trespass, which is a tort, raises very different considerations from a contract claim. First of all, to state the obvious, in a tort claim unlike a contract there is no need for any agreement to be proved between the claimant and the defendant. Secondly, liability for a tort arises without agreement, from the very fact of the wrongful act. In this case, it is the act of trespass involved in occupying somebody else's land without their permission, and indeed against their will. Merely parking on somebody else's land, knowing that you have no right to do so, constitutes a trespass, a tort. Thirdly, the damages rules are different between contract claims and trespass claims. In contract claims, subject to the law on penalties, one can have a pre-agreed contractual sum in case of breach. That often applies in parking cases where a fee is specified as what will be paid in the event of a breach of the rules. In tort cases, as a general proposition, damages are based on actual provable loss. There is no possibility of a prior agreement as to the measure of damages, because there is no prior agreement. It is not a contract case, so the law on contractual penalties and penalty charges is really inapplicable.

18 As to Mr. Anderson's basic liability, it is not seriously in dispute. The defendant was a trespasser, he knew he was a trespasser, and the district judge was right to find him so.

19 Given that finding, was the district judge right as a matter of law, to refuse to make any award to the claimant, and indeed to find for the defendant? The district judge's judgment rested on two bases: one based on what the district judge perceived as problems with the enforceability of the contract between Ransomes

and Proserve; and the other based on the claimant's failure to mitigate by demonstrating that there was not some more reasonable charge, some more reasonable firm of bailiffs that it could employ.

20 It is helpful at this point for the court to remind itself of the basic principles of tort damages. Firstly, the general object is to put the claimant back in the position he would be if no tort had been committed. In a case like the present what that means is this: if there had not been a tort, if there had not been a trespass, then Proserve would not have been able to call on Ransomes to make a payment of £287.50 plus, in their case, VAT.

Secondly, Proserve has called on Ransomes to make a payment of that level, and Ransomes has in fact made it, so Ransomes has in fact truly and undeniably suffered a loss as a result of the trespass.

21 Thirdly, however, it is not enough that you have in fact suffered a loss; you have to go further and show that that class of loss, (not necessarily the exact amount but that sort of loss), was reasonably foreseeable, by the tortfeasor. In this case, (a) it was perfectly obvious from the notices, that the claimant company was incurring expenses in policing parking on this estate; (b) it was reasonably clear from the notices, if one read them, that the claimant had contracted with a company called Proserve, that it was liable to pay fees to Proserve, and that those fees were likely to be passed on to the motorist; (c) while there is a controversy about whether the £150 an hour refers to an hour of parking or an hour of Proserve's time, the law does not require in tort cases that the amount of the liability be notified to, or known to, or foreseeable by, the tortfeasor, merely that it is reasonably foreseeable to him that that category of loss is likely to be incurred.

22 Fourthly, even in a case where the loss is foreseeable, and is actually incurred, it is open to the defendant to reduce the amount of his liability by proving that the claimant has failed to mitigate his loss. That is to say, proving that there were reasonable steps open to the claimant to reduce his loss but the claimant unreasonably failed to take those steps and thus, in effect, unnecessarily increased the amount of his own loss. If a defendant can show that, then he need only pay the lesser sum that the claimant ought to have lost and not the greater sum that he in fact lost.

23 Going back to the district judge's judgment, if the district judge's first finding, as to the problem with the Ransomes/ Proserve contract, were right, the effect would be that he would be finding that the claimant was not contractually liable to Proserve to pay its fees, for the reason, according to the district judge, that those fees were not agreed between Proserve and Ransomes but were set unilaterally by Proserve on these notices without any input from Ransomes.

24 It was a big step for the district judge to take to enter into interpretation of, and in effect into a decision on the validity of, that contract. It appears plain to me that what the Ransomes/ Proserve contact was, was a contract freely negotiated and entered into between two commercial concerns. One might say that it was imprudent of Ransomes to enter into something close to an open-ended commitment to pay whatever fees Proserve might choose to put on the notices, but that is a matter for Ransomes to decide so far as its contract with Proserve is concerned. It would be a strong finding requiring strong evidence to hold that a contract of that kind, entered into between two bodies of that kind, was unenforceable. In my conclusion, the district judge was wrong in law to hold that.

25 The second basis on which the district judge declined to uphold the damages claim was the failure to mitigate. A court cannot make a finding of failure to mitigate without having some evidence, or at least some material worthy of judicial notice, as to what steps of a less expensive nature it would have been reasonable for the claimant to take; and no such evidence was adduced by the defendant, or indeed by the claimant, in the trial before the district judge.

26 Counsel for the defendant/respondent has referred me to CPR 27.8, which says, among other things, that the strict rules of evidence do not apply in a small claims case. I think it is necessary to be careful about that. The strict rules of evidence may not apply in a small claims case but the substantive law remains the same; the court is not free to make whatever findings it thinks are just and reasonable. The rules of the substantive law, which include the rules on the computation of damages, remain the same whether a claim is in the small claims court or in a higher track. Secondly, it appears to me that counsel is wrong to submit that the rules on burden of proof are part of the strict rules of the evidence, in the sense in which that term is used in the rule. That rule of the small claims track, and this is borne out by the notes in the **White Book**, is intended to deal with such matters as the rule against hearsay and the rules on notice of evidence. It is intended to give the court flexibility in dealing swiftly and cheaply with disputes between ordinary members of the public. But, in my view, it does not go so far as to overturn fundamental rules of law such as the burden of proof.

27 It follows then that in order to make a finding that there had been failure to mitigate, the district judge should have had evidence on which to act, and in the absence of evidence he should not have reached any conclusion that there had been a failure to mitigate. I have referred to judicial notice. It does not appear to me that a fee of £150 an hour is necessarily so manifestly excessive and unreasonable that the court can infer, without evidence, that there was failure to mitigate. In order to know that, one would need to know a good deal more about the way Proserve works, the number of people it employs, the amount of equipment it

carries, and so on and so forth, and indeed the number of penalty charges it issues, before one could work out whether the fee was excessive or unreasonable.

28 It follows that the district judge's bases for rejecting the claim, at least for damages for trespass in the amount of £150, were wrong in law and that I should allow the appeal on that ground. In principle, I should, at the minimum, substitute a finding that there should be judgment for trespass for damages to be assessed.

29 This raises two further issues, relevant not only to this case but also to other similar cases, which I understand have been stayed pending this judgment and will shortly be coming up before other district judges. Firstly, I have said that the burden of proof of absence of mitigation is on the defendant. It is also, however, true that the burden of proof of loss, a related but different matter, is on the claimant. There is no evidence here that I can see that Proserve did do an hour's work on this case. I have re-read the evidence of Mr. Duff of Proserve, and Mr. Robson of Ransomes, and, so far as I can see, there is no attempt to show that an hour's work was done, or that any evidence was given to Ransomes that an hour's work was done. Even on the basis that one accepts that the £150 rate is pro-rata, not for an hour or part thereof, it appears in this case that the claimant has uncritically accepted Proserve's invoices without requiring any proof or evidence that the specified time was spent. I note that all 18 of the cases on the invoice I have seen are charged at precisely one hour each. That is inherently improbable. To be frank, it smacks to me of an attempt to introduce into a trespass claim the sort of "agreed flat fee" approach commonly used in contractual parking cases, which as I have explained cannot apply in a tort case.

30 What I am referring to here is an apparent failure by Ransomes to prove that it was ever liable to pay Proserve, based on the fact that it did not seek or receive any proof from Proserve that the time had been expended. That is not a ground of appeal in this case, but in future cases I consider that as part of proving its loss Ransomes should plead and prove the amount of work that Proserve did, or is likely on the basis of its general business model to have done, in relation to the particular case in question. Without some evidence of that kind, it is difficult to see how Ransomes could have discharged its duty to prove that it was liable to pay Proserve the amount that Proserve charged it; and if it could not prove that, it would not be able to reclaim the sum from the individual driver.

31 (It appears to me that I ought not in this case to direct any kind of re-trial or re-hearing. It would be right for me simply to do my best to assess a proper award in trespass on the basis of the material before me, and to do that immediately after I have finished giving this judgment. In doing so, I would be inclined, subject to the submissions of counsel, to adopt the following approaches. First of all, that as far as the basic trespass charge goes the court should award, in the absence of

evidence, at least the minimum amount that it would appear probable Proserve would be entitled to charge under that head, and I would have to hear submissions as to what that sum might be. Secondly, I would have to consider whether the £37.50 administrative fee was reasonable, or whether it should either be reduced or eliminated altogether. I will come back to that with counsel at the end of this part of my judgment.)

32 Whatever may be the position in relation to the £150 hourly fee, or the £37.50 administrative fee, it appears to me to be clear on the face of the invoice that the £50 attributed to "out-of-pocket expenses and solicitors" is inexplicable and very probably irrecoverable as damages. If solicitors have been involved then the likelihood is that their bill should be described not as damages but as costs, in which case it is irrecoverable in a small claim case. If, on the other hand, the £50 is said to be out-of-pocket expenses and not solicitors' fees, first of all, there is no way of telling which it is, and, secondly, if it is out-of-pocket expenses, what are these expenses and why are they not covered by the hourly fee or the administrative fee? As far as that head goes, it appears to me that it ought not to be allowed in this case, and will require clear justification in future similar cases.

COSTS

33 This may be a somewhat academic question. The point is this: on one possible interpretation of the notice, it might be thought to give rise to a contractual right to the legal fees and expenses associated with enforcement. Subject to the special rules attributable to small claims cases, it is, in principle, permissible to stipulate for a contractual right to legal costs; for example, a great many leases include such a provision. But I have held that the district judge was right to say that there is no contract here, and if there is no contract here then the costs clause falls, along with all the other ones. You cannot, by definition, have a costs clause in a tort case, whether a trespass or any other kind of tort, because there is no agreement. It follows, therefore, that on the findings that I have made, there is no question of recovering legal costs over and above the small claims limit by way of contract, because there is no contract here.

34 I should, however, add for the purpose of completeness, that if, contrary to the district judge's and my findings, there were such a contract, and if that contract did include a sufficient costs clause, still special considerations apply in small claims cases. At this point I refer with due trepidation to my own decision in the case of *Graham v Sand Martin*, OBQ12347, given at Southend on 4th November 2011, a copy of which has conveniently been put before me. I there considered the arguments for and against the proposition that costs are recoverable in a small claims case where there is a contractual costs clause, by way of exception to the general rule that one does not recover ordinary legal costs in a small claims case. I

repeat in this case my judgment in *Sand Martin*, and the reasons of law that I gave for my conclusion that you cannot recover costs through the contractual route in a small claims case - essentially because it is procedurally unjust since the other party has no countervailing right to his legal costs in such a situation. What I there said was that if it is desired, even in an otherwise small claim, to rely on a contractual costs cause, then the proper course is to have the matter allocated to the fast track and try out that claim there.

[LATER]

35 This is a brief addendum to my ruling on the question of damages. I have held, for the reasons above, that the appeal in relation to trespass is allowed, and that the district judge ought to have given judgment for trespass and then proceeded to assess the damages.

36 With the consent of the parties, I have decided to assess the damages myself on the basis of the limited information available rather than incur the manifestly disproportionate expense of ordering some further hearing with further evidence. Of course, it would, but for proportionality, be more satisfactory to have proper evidence on all of these issues. But in view of the fact that I am dealing with a claim with a maximum dimension of £187.50, that luxury is one that the court cannot allow itself. I have to do my best to work out, in fairness to the defendant, what is the minimum sum that it is likely that Ransomes would have been liable to pay to Proserve for the work that was actually done.

37 I accept the analysis that has been given by counsel for Ransomes. Some of the costs are fixed costs, of course, but some are variable to the individual case. The agent has to be called in, he has to photograph the vehicle, the DVLA has to be involved, and then the charge notice drawn up. It appears to me that when one considers that probably several employees are going to have to be involved, and that even though there are economies of scale, this will be a substantial part of their work, and that Proserve is entitled to its proper profits on whatever basic cost there might be in this, then the amount recoverable for the basic job cannot possibly be less than £60, together with the £37.50 for the administrative work involved in kicking off the claim. So that will be an award of £97.50. (I do not want this assessment to be regarded as a precedent, or a sum that ought to be awarded in other cases. I have indicated the desirability that proper evidence is produced that will justify whatever sum is in fact claimed in a particular case.)

38 So my order is: appeal allowed in part, the district judge's order set aside, and there be substituted an order that there be judgment for the claimant for trespass in the amount of £97.50.
