IN THE LUTON COUNTY COURT **Claim No. 3YK50188**

2nd Floor
Cresta House
Alma Street
Luton
LU1 2PU

Friday, 21st February 2014

Before:

MR RECORDER GIBSON QC

Between:

CIVIL ENFORCEMENT LIMITED

Appellant

-v-

MRS KERRY McCAFFERTY

Respondent

Counsel for the Appellant: MR R RITCHIE

The Defendant appeared In Person, assisted by her McKenzie Friend, Mr D Carrod

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JUDGMENT APPROVED BY THE COURT

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JUDGMENT

1. THE RECORDER: This case concerns a claim by the claimants for £150 originally, which increased by the time the claim was brought, but originally it was a £150 claim against the defendant for parking in the Watford Station car park on 12th September 2012 without paying the £5 daily charge on arrival by means of her mobile telephone.

2. The defendant was a regular user of the car park, although I understand that it is now closed, and her account is that she must simply have forgotten to make the payment when she arrived at seven o'clock that morning. She was recorded as leaving the car park at 2.42pm but it is common ground that she did not pay the £5 daily charge, nor did she contact the claimants after leaving the car park. In due course she received a demand for £150 on the grounds that by entering the car park and parking there this is an agreed fee if she did not pay the daily rate of £5 in accordance with the signs displayed in the car park.

3. The defendant said that she was advised by consumer groups not to respond to this claim, or perhaps she believed that this was the advice that consumer groups gave in such circumstances, but in any event she did not respond to the claimant's demands and these proceedings were eventually commenced. Although the claim form that I have in my file does not show the date when they were in fact started, I do not think it matters for the purposes of this appeal.

4. The claim form was for an increased sum of £265 and it was said on the claim form that this was damages arising from breach of contract. The particulars of claim on the back of the claim form asserted in paragraph 3:

> "In the car park there are many clear and visible signs displayed advising drivers of the terms and charges applicable when parking in the car park. Drivers are permitted to park in the car park in accordance with the terms displayed on the signage. These signs constitute an offer by the claimant to enter into a contract with drivers."

Paragraph 5 said:

> "When the defendant parked [they mean her] vehicle in the car park she accepted by her conduct the claimant's offer as set out on the signage. Consequently a contract was formed between the claimant and defendant."

Paragraph 6: "As a result of the defendant's conduct a charge was incurred."

Paragraph 7: "The defendant has not paid the outstanding charge" and then there is a claim for interest and the prayer says that it is a claim for damages in the sum of £350.

5. The defendant filed a defence as a litigant in person. She denied that she had agreed to pay the sum of £150 to park in the car park and said that it would, in any event, have been an unfair contract term. She said in her paragraph 4 that:

> "The sign was not an offer but a threat of a punitive sanction to dissuade drivers from parking without payment and was therefore a penalty clause."

6. These words echo the words of Mr Justice Coleman in the case of *Lordvale Finance*. That was presumably not an accident.

7. She also referred in her defence to the British Parking Association code of practice and she referred to the cases of *VCS v Ibbotson* and *VCS v HMRC*. Her case was and is that this sum was in truth an unenforceable penalty for breach of contract rather than a contractual charge for the parking.

8. The case duly came on for hearing before District Judge Warton on 3rd October 2013 at the Watford County Court. He dismissed the claim giving judgment for the defendant. There is no transcript of the district judge's judgment, nor is there an agreed note. The claimant has produced their note of the judgment and I have a copy of that in my bundle, but the defendant said that she had thrown away her notes that she had taken at the hearing in the belief that the matter was at an end and she was unable to agree the note produced by the claimant. I have read it with interest and care and I am prepared to accept it for what it is, that is to say, that it is the claimant's best effort at a note of what the district judge said. Initially the district judge appears to have been concerned at the claimant's entitlement to sue in respect of parking charges at this car park, but he appears to have accepted that they are entitled to assert a claim in respect of parking charges if there is a claim to be asserted. It appears that this point does not arise on this appeal.

9. The note of the judgment and the grounds of appeal are on the basis that the signage referring to the charge of £150, if the £5 was not paid, was too small. The district judge held that there was a contract, and a breach of it by the defendant, by failing to make payment for the parking. The district judge considered that the case was similar to the case of *OB Services Parking Consultancy Ltd v Thurlow*. He considered that the structure of the agreement formed by conduct in this case was that a charge of £5 was payable for a day's parking and if that was not paid then the notices purported, or tried, to fix the damages payable for breach of that obligation at £150. He referred to paragraphs 8 and 9 of the *OB Services Parking Consultancy Ltd v Thurlow* judgment, which I have been provided with and is in my bundle, and he appears to have read them out in the course of his judgment. He said that the facts of this case were analogous and, as I have said, he then dismissed the claim. I understand that at the hearing he refused permission to appeal, although permission was later given by Her Honour Judge Davies, I think, on paper and this is the hearing of the appeal pursuant to that permission.

10. The appeal is based on two propositions. The first is that the judge was wrong to hold, if in fact he did hold, that the conditions relating to the payment of £150 were not incorporated into the contract, and secondly (which has been considered by the parties, I think, to be the main point) that the district judge was wrong to hold that this was a penalty in strictly being a claim for liquidated damages for breach of contract that was not a genuine estimate of loss, but that properly construed it is said that the charge is simply an agreed contract term to pay the sum of £150 in certain circumstances which occurred in this case.

11. I have heard Mr Ritchie for the claimant and the defendant has appeared before me with the assistance of a lay representative, Mr David Carrod, and these are the points that have been argued.

12. Mr Ritchie for the claimant has submitted that what I have described in argument as the small print of the contract was clearly incorporated into the agreement that was made by conduct by the defendant parking in this car park. Further, on the matter of construction the scope of the rule against penalties is very narrow. Mr Ritchie helpfully referred me extensively to the reports provided in the appeal bundle in the cases of *Export Credit Guarantee Department v Universal Oil Products & Ors [1983] 1 WLR 391* and the case of *Euro London Appointments Ltd v Claessens [2006] EWCA Civ 385*. The passage that was referred to in the grounds of appeal and the skeleton argument from the report in the case of *Euro London Appointments Ltd v Claessens [2006] EWCA Civ 385* is in fact a quote from Lord Justice Diplock, as he then was, in the case of *Philip Bernstein (Successors) Ltd v Lydiate Textiles Ltd[?]*. The quotation reads as follows:

> "A penalty clause is a sum which, by the terms of a contract, a promisor agrees to pay in the event of non-performance by the promisor of one or more of the obligations and which is in excess of the damage caused by such non-performance."

13. The skeleton argument served for this hearing by the respondent, which I understand was drafted by Mr Carrod, has pointed out that it is an odd contention on the part of the claimant, that this is not a claim for damages which might be attacked as a penalty, but is in truth a claim for a contractually agreed sum, because the claim form and the particulars of claim only refer to a claim for damages arising out of the defendant's failure to pay the parking charge that she incurred. But this is no technical pleading point. The issue is whether, on the proper construction of the contract formed by the defendant entering the car park and parking there, the claim for £150 is a figure that has been provided for in the event of a breach of a contract term, or whether it is simply a sum that has been agreed as payable for the parking that the claimant took advantage of, and in the way that she took advantage of it.

14. I have seen a number of good quality pictures of the signs and a sample sign has even been brought to the court. There are two different signs, or different types of sign, that appear in the car park and I have in my bundle a sketch plan showing where the signs are situated in the car park. There is, firstly, a simple sign that sets out only a welcome to the car park describing it as a phone and pay car park, a big 'P' for parking and then three lines which say in large print: "Station car park, £1 per hour or £5 all day." Beneath that there is then an address of an internet website and on the right there is a symbol that says that it is an approved car park operator. That is all that sign says.

15. There is a second, more detailed sign which has the words "Phone and pay" underneath in the largest print "Parking" and then the same three lines that are on the straightforward sign: "Station car park, £1 per hour or £5 all day" and then the words, and we are in descending size of font, but still in a substantial size font, "Payment must be made by phone upon arrival." Beneath that, and the font is continuing to get smaller, there is a telephone number to call, a site code to provide and then "Provide your credit or debit card details" and then "State your registration number." That is the procedure for using your telephone to pay for parking. Then the words "Terms and conditions" and then beneath that in still smaller print but perfectly legible print:

> "This land is private property. To deter abuse these parking terms apply 24 hours a day. There is no need to display a ticket in your windscreen. A

> receipt for your payment can be obtained at www.phoneandpay.co.uk. Disabled badge holders are not exempt from these conditions…"

and then this:

> "If you do not pay within ten minutes of arrival or if you park longer than the period paid for you agree to pay £150 to Civil Enforcement Limited (reduced to £75 if paid within 14 days). To settle this charge at a further reduced rate call [and then there is a telephone number] before leaving this site. Additional costs will be incurred if payment is not received within 28 days. Enforcement is carried out by Civil Enforcement Limited. Civil Enforcement Limited monitors compliance of these terms and conditions using ANPR cameras and will contact the DVLA for your details in order to send you a parking charge notice."

Then they give a phone number and an address for Civil Enforcement Limited. Finally, on the sign there is again the address of the website of starpark.co.uk and the symbol showing that it is an approved car park operator.

16. Mr Ritchie for the claimant says that I have to look at the contract as a whole and he says that I must consider the words of the sign and give them their ordinary and every day meaning. He says that if I do that I cannot conclude, or I should not conclude, that the words "payment must be made by phone upon arrival" impose a contractual obligation. He says that this is simply drawing attention to the fact that this must be done to take advantage of the lower rate of £5 rather than the increased rate of £150 or £75 or another unspecified rate. On that basis he says that the higher charge, the increased charge, is not a charge imposed within the definition of Lord Justice Diplock that I have referred to for non-performance of an obligation under the contract.

17. Mrs McCafferty has argued that the smaller print does not mean that the provisions in that smaller print are not included in the contract, but that the font size shows that the proper and appropriate construction of the agreement is that these are the provisions for breach of the agreement and that the larger print, including the words "payment must be made by phone upon arrival", set out the obligations accepted under the contract by parking in the car park.

18. I have no doubt that the terms and conditions that I have referred to as being the small print were incorporated into the contract. These are clearly and legibly set out. They could easily be read and it is clear from reading the sign that gave the instructions how to pay that these terms were included into the agreement that was to be created. The words "terms and conditions" themselves are in substantial print and I can see no basis for saying that this part of the contract was not incorporated into the agreement that was created when the defendant parked in this car park.

19. But I cannot accept Mr Ritchie's argument that the words "payment must be made by phone upon arrival" did not themselves impose a contractual obligation. In my judgment the plain and obvious meaning of these words is that they impose an obligation to do what they say. If you chose to park in the car park there is an obligation to make payment by phone upon arrival. I do not accept Mr Ritchie's argument that the commercial purpose of the £150 charge is to give customers flexibility as to how to pay. The purpose is clearly, in my judgment, a deterrent, to

discourage customers from not paying and necessitating a time consuming and expensive process of chasing them or of simply losing revenue.

20. In my judgment the proper construction of the contract formed by these signs and Mrs McCafferty's actions in parking in the car park is to the effect that she had accepted an obligation to pay by phone upon arrival. The contract then provided for a charge which can, in my judgment, properly be described in everyday language as a penalty charge, of £150, or a lower sum if certain actions were taken, in default of complying with that initial obligation. No attempt has been made at this appeal to justify the charge of £150 as being an actual loss suffered by the claimant and accordingly this appeal is dismissed.

[Application for costs follows]