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JISCBAILII_CASE_CONTRACT

Neutral Citation Number: [1970] EWCA Civ 2
Case No.:

IN THE SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.
Appeal of defendants from judgment of
Mr. Justice Mocatta on 18th June, 1970.

Royal Courts of Justice.
18th December. 1970.

B e f o r e :

THE MASTER OF THE ROLLS (Lord Denning
LORD JUSTICE MEGAW
and
Sir GORDON WILLMER.

Between:

FRANCIS CHARLES WILLIAM THORNTON — **Plaintiff Respondent**

and

SHOE LANE PARKING LIMITED — **Defendants Appellants**

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd., Room 392, Royal Courts of Justice, and 3, New Square, Lincoln's Inn, London, W.C. 2.)

Mr. A. MACHIN (instructed by Messrs. Barlow Lyde and Gilbert) appeared on behalf of the Appellant Defendants.
Mr. JOHN NEWEY, Q.C., and Mr. M. BURKE-GAFFNEY (instructed by Messrs. Alastair Thomson

and Partners) appeared on behalf of the Respondent Plaintiff.

HTML VERSION OF JUDGMENT

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THE MASTER OF THE ROLLS: In 1964 Mr. Thornton, who was a free-lance trumpeter of the highest quality, had an engagement with the B.B.C. at Farringdon Hall. He drove to the City in his motorcar and went to park it at a multi-storey automatic car park. It had only been open a few months. He had never gone there before. There was a notice on the outside headed "Shoe Lane Parking". It gave the parking charges: "5/" for two hours: 7/6d. for three hours", and so forth; and at the bottoms "All cars parked at owner's risk". Mr. Thornton drove up to the entrance. There was not a man in attendance. There was a traffic light which showed red. As he drove in and got to the appropriate place, the traffic light turned green and a ticket was pushed out from the machine. Mr. Thornton took it. He drove on into the garage. The motorcar was taken up by mechanical means to a floor above. Mr. Thornton left it there and went off to keep his appointment with the B.B.C. Three hours later Mr. Thornton came back. He went to the office and paid the charge for the time the car was there. His car was brought down from the upper floor. He went to put his belongings into the boot of the car. But unfortunately there was an accident. Mr. Thornton was severely injured. The Judge has found it was half his own fault, but half the fault of the Shoe Lane Parking Ltd. The Judge awarded him £3,637.6s.lld.

On this appeal the garage company do not contest the Judge's findings about the accident. They acknowledge that they were at fault, but they claim that they are protected by some exempting conditions. They rely on the ticket which was issued to Mr. Thornton by the machine. They say that it was a contractual document and that it incorporated a condition which exempts them from liability to him. The ticket was headed "Shoe Lane Parking". Just below there was a "box" in which was automatically recorded the time when the car went into the garage. There was a notice alongside: "Please present this ticket to cashier to claim your car". Just below the time, there was some small print in the left hand corner which said: "This ticket is issued subject to the conditions of issue as displayed on the premises". That is all.

Mr. Thornton says he looked at the ticket to see the time on it, and put it in his pocket. He could see there was printing on the ticket, but he did not read it. He only read the time. He did not read the words which said that the ticket was issued subject to the conditions as displayed on the premises.

If Mr. Thornton had read those words on the ticket and had looked round the premises to see where the conditions were displayed, he would have had to have driven his car on into the garage and walked round. Then he would have found, on a pillar opposite the ticket machine, a set of printed conditions in a panel. He would also have found, in the paying office (to be visited when coming back for the car) two more panels containing the printed conditions. If he had the time to read the conditions -- It would take him a very considerable time — he would read this.

> "CONDITIONS: The following are the conditions upon which alone motor vehicles are accepted for parking:
>
> > 1. The customer agrees to pay the charges of Shoe Lane Parking Developments Limited", and so on.
> >
> > 2. The Customer is deemed to be fully insured at all times against all risks (including, without prejudice to the generality of the foregoing, fire, damage and theft, whether due to the negligence of others or not) and the Company shall not be responsible or liable for any loss or misdelivery of or damage of whatever kind to the Customer's motor vehicle, or any articles carried therein or thereon or of or to any accessories carried thereon or therein or injury to the Customer or any other person occurring; when the Customer's motor vehicle is in the Parking Building howsoever that loss, misdelivery, damage or injury shall be caused; and it is agreed and understood that the Customer's motor

> vehicle is parked and permitted by the Company to be parked in the Parking Building in accordance with this Licence entirely at the Customer's risk."

There is a lot more. I have only read about one-tenth of the conditions. The important thing to notice is that the Company seeks by this condition to exempt themselves from liability, not only to damage to the car, but also for injury to the customer howsoever caused. The condition talks about insurance. It is well known that the customer is usually insured against damage to the car. But he is not insured against damage to himself. If the condition is incorporated into the contract of parking, it means that Mr. Thornton will be unable to recover any damages for his personal injuries which were caused by the negligence of the company.

We have been referred to the ticket cases of former times from Parker v. The South Eastern Railway Co. (1877 2 C.P.D. 4l6) to McCutcheon v. MacBrayne Ltd. (1964 1 WLR 125). They were concerned with railways, steamships and cloakrooms where booking clerks issued tickets to customers who took them away without reading them. In those cases the issue of the ticket was regarded as an offer by the company. If the customer took it and retained it without objection, his act was regarded as an acceptance of the offer: see Watkins v. Rymill (1883) 10 Q.B.D. at page 188; Thompson v. L.M.S., (1930) 1 K.B. at page 47. These cases were based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.

None of those cases has any application to a ticket which is issued by an automatic machine. The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made: see Olley v. Maryborough Court (1949 1 K.B. 532). The ticket is no more than a voucher or receipt for the money that has been paid (as in the deckchair case, Chapelton v. Barry U.D.C. ...1940 1 K.B. 532), on terms which have been offered and accepted before the ticket is issued.

In the present case the offer was contained in the notice at the entrance giving the charges for garaging and saying "at owner's risk", i.e. at the risk of the owner so far as damage to the car was concerned. The offer was accepted when Mr. Thornton drove up to the entrance and, by the movement of his car, turned the light from red to green, and the ticket was thrust at him. The contract was then concluded, and it could not be altered by any words printed on the ticket itself. In particular, it could not be altered so as to exempt the company from liability for personal injury due to their negligence.

Assuming, however, that an automatic machine is a booking clerk in disguise — so that the old fashioned ticket cases still apply to it. We then have to go back to the three questions put by Lord Justice Mellish in Parker v. The South Eastern Railway Co. (1877) 2 C.P.D. at page 423, subject to this qualification: Lord Justice Mellish used the word "conditions' in the plural, whereas it would be more apt to use the word "condition" in the singular, as indeed the Lord Justice himself did on the next page. After all, the only condition that matters for this purpose is the exempting condition. It is no use telling the customer that the ticket is issued subject to some "conditions" or other, without mores for he may reasonably regard "conditions" in general as merely regulatory, and not as taking away his rights, unless the exempting condition is drawn specifically to his attention. (Alternatively, if the plural "conditions" is used, it would be better prefaced with the word "exempting", because the exempting conditions are the only conditions that matter for this purpose.) Telescoping the three questions, they come to this: the customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or, if the company did what was reasonably sufficient to give him notice of it.

Mr. Machin admitted here that the company did not do what was reasonably sufficient to give Mr. Thornton notice of the exempting condition. That admission was properly made. I do not pause to inquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the Court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in Spurling v. Bradshaw . 1956, 1 W.L.R. at page 466. In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it - or something equally startling.

But, although reasonable notice of it was not given, Mr. Machin said that this case came within the second question propounded by Lord Justice Mellish, namely that Mr. Thornton "knew or believed that the writing contained conditions". There was no finding to that effect. The burden was on the company to prove it, and they did not do so. Certainly there was no evidence that Mr. Thornton knew of this exempting condition. He is not, therefore, bound by it.

Mr. Machin relied on a case in this Court last year -Mendelsshon v. Normand Ltd. (1970 1 K.B. 177). Mr. Mendelssohn parked his car in the Cumberland Garage at Marble Arch, and was given a ticket which contained an exempting condition. There was no discussion as to whether the condition formed part of the contract. It was conceded that it did. That is shown by the report in the Law Reports at page 180. Yet the garage company were not entitled to rely on the exempting condition for the reasons there given.

That case does not touch the present, where the whole question is whether the exempting condition formed part of the contract. I do not think it did. Mr. Thornton did not know of the condition, and the company did not do what was reasonably sufficient to give him notice of it.

I do not think the garage company can escape liability by reason of the exemption condition. I would, therefore, dismiss the appeal.

LORD JUSTICE MEGAW: For myself, I would reserve a final view on. the question at what precise moment of time the contract was concluded.

In relation to the main arguments that have been put before us, I would refer to the opening paragraph of the speech of Lord Dunedin in Hood v. Anchor Line 1918 A.C. at page 846:

> "My Lords, this is a class of case in which of citing of authorities there is no end, and yet it is, I think, quite possible to say 'Hear the conclusion of the whole matter.' The case of Parker v. South Eastern Ry. Co.. which has been approved in every case since its date, really stereotyped the question which the tribunal, be it jury or judge, must put to itself when such a question arises."

I shall come back to the question as it was formulated by Lord Dunedin.

That case was a ticket case. It related to a ticket for a trans-Atlantic voyage taken by Mr. Hood, which contained on its face conditions limiting liability. The company issuing the ticket had taken great care both on the ticket itself and on the accompanying documents to call attention to the limiting conditions. An accident happened when the ship was sunk off the coast of Ireland. Mr. Hood suffered serious injury. His contract was held to be subject to the limiting conditions. It was accepted that the shipping company had been unable to prove that Mr. Hood had actually read, or was aware of, any of the warnings that the shipping company had tried to convey to him as to the limiting conditions. In that case Lord Finlay, Lord Chancellor, giving the leading judgment, said, in relation to Parker v. South Eastern Railway Co. and Richardson. Spence & Co.'s case:-

> "The second and third of these cases" — that is the two cases I have just mentioned -- "show that if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket the person taking the ticket would be bound by such conditions."

That was Lord Finlay's view of the effect of that decision. Viscount Haldane said: "I agree that the appellant here" — that was Mr. Hood —

> "was entitled to ask that all that was reasonably necessary as matter of ordinary practice should have been done to bring to his notice the fact that the contract tendered to him when he paid his passage money excluded the right which the general law would give him, unless the contract did exclude it, to full damage if he was injured by the negligence of those who contracted to carry him on their steamer. Whether all that was reasonably necessary to give him this notice was done is, however, a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties."

And as to Parker v. South Eastern Railway Co.. Viscount Haldane said:

> "In Parker v. South Eastern Ry. Co. the only question was whether the question had been properly put to the jury."

The essence of the decision in Parker v. South Eastern Railway Co. was expressed by Lord Hodson in McCutcheon v. David MacBrane Ltd. (1964 1 WLR 125) at page 129. He said:

> "That case, affirmed in Hood v. Anchor Line (Henderson Brothers) Ltd.. established that the appropriate questions for the jury in a ticket case were:
>
> (1) Did the passenger know that there was printing on the railway ticket?
>
> (2) Did he know that the ticket contained or referred to conditions? and
>
> (3) Did the railway company do what was reasonable in the way of notifying prospective passengers of the existence of conditions and where their terms might be considered?"

Now take those questions in relation to the present case. First, did the passenger know that there was printing on the railway ticket? Mr. Justice Mocatta has answered that question, being a question of fact, with the answer Yes. Therefore one moves on to the second question: did he know that the ticket contained or referred to conditions? Mr. Justice Mocatta made no express finding on that point. In my view there is the clearest implication from the way in which he stated and dealt with the third question that his finding on the second question was to answer it No. But even if I should be wrong in that view of the implication of the judgment, it would not do the defendants any good; because the onus is on them to establish the existence of this term in the contract, and they have not got the necessary finding, express or by implication, of an affirmative answer to the second question. Mr. Machin has gallantly striven to suggest that the learned Judge's finding of fact, that Mr. Thornton, the plaintiff, did not read the words on the ticket referring to the conditions, was a wrong finding. But the learned Judge saw and heard the witnesses, and I see no reason whatever to challenge or doubt his conclusion of fact on that matter.

So I come to the third of the three questions. That question, if I may return to the speech of Lord Dunedin in Hood v. Anchor Line, was posed by him in this way;

> "Accordingly it is in each case a question of circumstance whether the sort of restriction that is expressed in any writing (which, of course, includes printed matter) is a thing that is usual, and whether, being usual, it has been fairly brought before the notice of the accepting party."

That, though it is more fully stated by Lord Dunedin, is essentially the same question, I think, as was formulated by Lord Justice Mellish in Parker's case at the very end of his judgment, where he said that the question which ought to have been left to the jury was: whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition. (I emphasise the use by Lord Justice Mellish of the definite article and of the word "condition" in the singular.) I agree with my Lord, the Master of the Rolls, that the question here is of the particular condition on which the defendants seek to rely, and not of the conditions in general.

When the conditions sought to be attached all constitute, in Lord Dunedin's words "the sort of restriction .... that is usual", it may not be necessary for a defendant to prove more than that the

intention to attach some conditions has been fairly brought to the notice of the other party. But at least where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition of that particular nature was fairly brought to the notice of the other party. How much is required as being, in the words of Lord Justice Mellish, "reasonably sufficient to give the plaintiff notice of the condition", depends upon the nature of the restrictive condition.

In the present case what has to be sought in answer to the third question is whether the defendant company did what was reasonable fairly to bring to the notice of the plaintiff, at or before the time when the contract was made, the existence of this particular condition. This condition is that part of the clause — a few words embedded in a lengthy clause — which my Lord has read, by which, in the midst of provisions as to damage to property, the defendants sought to exempt themselves from liability for any personal injury suffered by the customer while he was on their premises. Be it noted that such a condition is one which involves the abrogation of the right given to a person such as the plaintiff by statute, the Occupiers Liability Act of 1957. True, it is open under that statute for the occupier of property by a contractual term to exclude that liability. In my view, however, before it can be said that a condition of that sort, restrictive of statutory rights, has been fairly brought to the notice of a party to a contract there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury, was sought to be included. I certainly would not accept that the position has been reached today in which it is to be assumed as a matter of general knowledge, custom, practice, or whatever is the phrase that is chosen to describe it, that when one is invited to go upon the property of another for such purposes as garaging a car, a contractual term is normally included that if one suffers any injury on those premises as a result of negligence on the part of the occupiers of the premises they shall not be liable.

Even if I were wrong in the view that I take that the third question has to be posed in relation to this particular term, it would still not avail the defendants here. In my view the learned Judge was wholly right on the evidence in the conclusion which he reached that the defendants have not taken proper or adequate steps fairly to bring to the notice of the plaintiff at or before the time when the contract was made that any special conditions were sought to be imposed.

I think it is a highly relevant factor in considering whether proper steps were taken fairly to bring that matter to the notice of the plaintiff that the first attempt to bring to his notice the intended inclusion of those conditions was at a time when as a matter of hard reality it would have been practically impossible for him to withdraw from his intended entry upon the premises for the purpose of leaving his car there. It does not take much imagination to picture the indignation of the defendants if their potential customers, having taken their tickets and observed the reference therein to contractual conditions which, they said, could be seen in notices on the premises, were one after the other to get out of their cars, leaving the cars blocking the entrances to the garage, in order to search for, find and peruse the notices! Yet unless the defendants genuinely intended the potential customers should do just that, it would be fiction, if not farce, to treat those customers as persons who have been given a fair opportunity, before the contracts are made, of discovering the conditions by which they are to be bound.

I agree that this appeal should be dismissed.

Sir GORDON WILLMER; I have reached the same conclusion, and there is very little for me to add. It seems to me that the really distinguishing feature of this case is the fact that the ticket on which reliance is placed was issued out of an automatic machine. I think it is right to say - at any rate, it is the fact so far as the cases that have been called to our attention are concerned - that in all the previous so-called "ticket cases" the ticket has been proffered by a human hand, and there has always been at least the notional opportunity for the customer to say - if he did not like the conditions - "I do not like your conditions: I will not have this ticket." But in the case of a ticket which is proffered by an automatic machine, there is something quite irrevocable about the process. There can be no locus poenitentiae. I do not propose to say any more upon the difficult question which has been raised as to the precise moment when a contract was concluded in this case; but at least it seems to me that any attempt to introduce conditions after the irrevocable step has been taken of causing the machine to operate must be doomed to failure. It may be that those who operate garages of this nature, as well as those who

install other types of automatic machines, should give their attention to this problem. But it seems to me that the learned Judge below was on the right track when he said, towards the end of his judgment, that in this sort of case, if you do desire to impose upon your customers stringent conditions such as these, the least you can do is to post a prominent notice at the entrance to the premises, warning your customers that there are conditions which will apply. So far as the rest of the case is concerned, I agree with what has been said by my Lords and do not wish to add anything further.

Appeal dismissed with costs.

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