

1. It is submitted that the case was found in the claimant's favour as the result of an error in law.

The claim was made under the law of contract and thus needed to fulfill all the elements of a contract (offer, acceptance, consideration). The appellant submits that the claimant's contract did not make a valid offer and the amount claimed is a clear contractual penalty. These factors were not explored in the case and the appellant seeks permission to appeal in order that the contractual arrangement between the two parties can be examined.

2. The wording of the contract displayed on signage is as follows:

### OPC Parking Restrictions

This area is private property and a controlled area.

By remaining in the controlled area you agree to be bound by the terms set out below. If you do not wish to be bound by these terms please leave the controlled area immediately. Do not park your vehicle or wait in the controlled area.

This is a private area in constant use by people who are using the private area with the owner's permission. To discourage unauthorised use of the area a charge will be made to anybody who uses the area without authority.

Details of the circumstances where you will be liable to pay charges are set out below.

The charge for unauthorised use is £100 (£50 if paid within 14 days). Repeat charges will be levied on a daily basis.

You will be liable to pay the parking charge if you, as the driver or registered keeper of a vehicle:

- Fail to clearly display a valid OPC permit within the windscreen area for inspection purposes.
- Fail to park within a demarcated parking bay
- Park anywhere upon the hatched areas.
- Park in the wrong bay for the permit displayed.
- Park in such a way to cause an obstruction to other users of the area.
- [sic] Visitor parking restricted to 4 hours on site.

### General conditions

- Parking tickets may be issued by OPC private parking attendants or
- Where necessary the DVLA will be contacted to obtain details of the registered keeper.
- In all instances digital imagery will be taken and may be used as evidence.
- The ticket will contain details of how to make payment.
- If payment or an appeal is not received within 28 days of the ticket being issued (see below for details) debt recovery action will be instituted which may include county court proceedings. You will be liable to pay all additional collection costs and court costs.

OPC P.O. Box 956, St. Albans, AL1 9HJ

Here there is no valid contractual offer. The offer cannot be that vehicles without authorisation can park for £100, because the sign forbids 'unauthorised' use - it is attempting to make an offer it is forbidding.

3. This is a clear case of breach of contract. The long established remedy for breach of contract is damages and the measure of the same is to put the injured party in the same position had the breach not occurred. In the event that a contract has been formed between the defendant and the claimant, it is submitted that the damages for breach of this contract are strictly limited to the losses suffered. Clearly, therefore in this instance the loss sustained is nowhere near the figure claimed. It is trite law (**Wilson v Love 1896, Dunlop Pneumatic Tyre v New Garage Motor 1915**) that a penalty cannot be imposed for breach of contract, i.e. where the sum bears no relation to the potential loss. In those cases the judges reached the conclusion that the sum to be paid for breach of contract was substantial and arbitrary and bore no relation to the actual loss of the other party and was therefore a penalty. It is submitted that the charges sought to be recovered by the claimant also constitute an unlawful contractual penalty.

The **Lordsvale Finance v Bank of Zambia** case found if a charge has a deterrent rather than compensatory nature this is a clear indicator of an unlawful penalty. The Court said:

"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 provision was to deter a party from breaking the contract or to compensate the innocent party for the breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if the breach occurred."

The court in **Excel Parking Services vs Hetherington-Jakeman** was clear that the charge there was an unlawful penalty. I would emphasise that this case is persuasive:

"I have already decided that the charges are not recoverable anyway, but it is important I think for me to say whether I think it is a penalty, and I think it is a penalty. It seems to me that it is not a pre-estimate of damages. It is a payment of a sum of money that is intended to effectively frighten or intimidate someone into making a payment promptly. It is a figure that is far beyond any costs that could realistically or reasonably be incurred by the claimants in trying to run this system."

Other cases of note which have established the unenforceability of a penalty for breach of contract include:

### **Ford Motor Co. v. Armstrong (1915)**

In this case, the judges reached the conclusion that the sum to be paid for a breach of the contract was substantial and arbitrary and bore no relation to the potential loss of the other party. It was, therefore, a penalty.

### **Bridge v. Campbell Discount Co. Ltd. (1962)**

In this case a customer bought a car under a hire purchase agreement. He paid the initial and first payments and then cancelled the agreement. The company tried to recover the sums specified in the contract for canceling the agreement, but the courts held that the sums payable were excessive and constituted a penalty clause. It was, therefore, unenforceable.

### **Murray v. Leisureplay (2004)**

Mr Murray was sacked by Leisureplay and he claimed three years' salary as per his contract of employment. The courts decided that this clause was a penalty clause and he was not entitled to this level of damages.

4. If the claimant does not benefit from (receive) the money paid for parking 'tickets' purchased at the location then the claimant suffered no personal loss and has therefore no grounds to claim damages. It was decided in the **Pratt v Excel Parking Services** case decided in Sheffield County Court in November 2008. It was judged that only the landowners or retailers at the car park could suffer a loss if the car was parked in breach of contract and not the claimant which merely polices the car park. As the claimant suffered no loss then no cause of action can exist in contract. The Pratt case is persuasive because the circumstances, charges, letters and correspondence and collection procedures are the same or very similar as in the current case.

5. Recent parliamentary debate clearly spells out the established view that the breach of such contracts can only be recompensed by actual damages - zero on a private car park:

**Q15 Tony Baldry [MP for Banbury]:** "I was concerned by Mr. Troy's suggestion that in this part of the Bill we were simply displacing clamping to private firms' ticketing. It would be helpful if we could remind ourselves where we are. This is a trespass. It is a civil tort. It is not a criminal offence. Professor King in his opening comments talked about the punishment not fitting the crime. There is no constitutional right for a private citizen to punish another private citizen. We are where we are because of the case of someone who parked in Exeter: the divisional court said that if you park where a sufficiently clear notice is placed, you are inviting someone to clamp you..."

"But that case gave no authority for fines. It gave no authority to impose a ticket. Otherwise you have to go to the small claims court or prove damage. What possible authority, Mr. Troy, do your members have to impose tickets on individuals? If you are to go around imposing tickets on individuals, clearly the Bill needs to deal with that as well, does it not?"

**Patrick Troy [Chief Executive, British Parking Association]:** "Absolutely. It should deal with both issues in order to control both issues. This is an entirely unregulated sector. What the private companies do on private land is unregulated both from their perspective and from the public's perspective. Therefore, there needs to be some form of regulation. Through the DVLA route some legitimacy has been given to ticketers because only those ticketers that are members of an accredited trade association can access keeper details. That gives the ticketing fraternity some legitimacy. But the Bill needs to address both these areas if it is to control parking properly."

**Q16 Tony Baldry:** "But if I park on your land and you send me a ticket in the post, which I tear up and then throw away, your only redress is to issue proceedings against me in the small claims court where you have to prove that I caused damage by parking where I parked and you have to prove the measure of that damage. That is right, is it not?"

Patrick Troy: "That is absolutely right."

6. It is submitted that the amount demanded is unenforceable under the **Unfair Terms in Consumer Contracts Regulations (1999)**:

Schedule 2 Indicative and Non-Exhaustive List of Terms which may be Regarded as Unfair:

(e) requiring any consumer who fails to fulfil his obligation to pay a dis-proportionately high sum in compensation.

Thus where a company charging £50-£100+ for what is a minimal loss on their part, the above regulations will apply. As this contract was not individually negotiated, Part 5 of the Act would also apply, demonstrating that such a contract would be unfair:

Unfair Terms

**5.** - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

**7.** People should be able to go about their daily business without finding that perfectly ordinary actions have bound them into contractual obligations. Whilst issues of offer and acceptance are relevant, the lack of any intention to enter into legal relations whilst undergoing such ordinary activities is clearly fundamental to the unenforceability of any such alleged contract. If this were not the case then people could be trapped into all sorts of liabilities. *Esso v Customs and Excise* (House of Lords 1976) is the relevant authority, in particular Lord Dilhorne: 'Nor do I see any reason to impute to every motorist who went to a garage where the posters were displayed to buy 4 gallons of petrol any intention to enter into a legally binding contract for the supply to him of a coin.'