Neutral Citation Number: [2015] EWCA Civ 402

Case No: B2/2014/2010

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CHELMSFORD
His Honour Judge Moloney Q.C.
Claim No. 3JD05152

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 April 2015

Before :

LORD JUSTICE MOORE-BICK
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE PATTEN
and
SIR TIMOTHY LLOYD

- -

Between :

PARKINGEYE LIMITED	**Claimant/ Respondent**
- and -	
BARRY BEAVIS	**Defendant Appellant**
THE CONSUMERS' ASSOCIATION	**Intervener**

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- -

Mr. Sa'ad Hossain Q.C. (instructed by **Harcus Sinclair**) for the **appellant**
Mr. Jonathan Kirk Q.C. and Mr. David Altaras (instructed by **Cubism Law**) for the **respondent**
Miss Julia Smith (instructed by **The Consumers' Association**) for the **intervener** (written submissions only)

Hearing date : 24th February 2015

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Judgment

Lord Justice Moore-Bick :

1. This is an appeal against the order of His Honour Judge Moloney Q.C. giving judgment in favour of the respondent, ParkingEye Ltd, against the appellant, Mr. Barry Beavis, on its claim to recover a charge of £85 for overstaying the permitted period of free parking in the car park at the Riverside Retail Park in Chelmsford.

2. The circumstances giving rise to the proceedings are set out succinctly in the judgment below. The judge heard two similar claims together, which explains why he referred to two defendants rather than one, but this appeal is concerned only with the case involving Mr. Beavis. The judge made the following findings of fact:

> "2.2 The car park in question is located on a retail park owned by British Airways Pension Fund, which leases sites on the retail park to various well-known chains but retains overall control of the site. On 25 August 2011, the landowner entered into a contract with the Claimant in respect of car park management services.
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> 2.3 At all material times since then, the Claimant has displayed about 20 signs at the entrance to the car park and at frequent intervals throughout it. The Defendants do not dispute that the signs are reasonably large, prominent and legible, so that any reasonable user of the car park, including themselves, would be aware of their existence and nature and would have a fair opportunity to read them if they wished.
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> 2.4 The signs are worded as follows (the words I have underlined being especially large and prominent, and the words I have italicised being in small print but still legible if one wished to read them)
>
> **Parking Eye car park management**
> **2 hour max stay**
> **. . .**
> **Failure to comply . . . will result in Parking Charge of £85**
> **. . .**
>
> ***Parking Eye Ltd is solely engaged to provide a traffic space maximisation scheme. We are not responsible for the car park surface, other motor vehicles, damage or loss to or from motor vehicles or user's safety. The parking regulations for this car park apply 24 hours a day, all year round, irrespective of the site opening hours. Parking is at the absolute discretion of the site. By parking within the car park, motorists agree to comply with the car park regulations. Should a motorist fail to comply with the car park regulations, the motorist accepts that they are liable to pay a Parking Charge and that their name and address will be requested from the DVLA.***

> ***Parking charge Information: A reduction of the Parking Charge is available for a period, as detailed in the Parking Charge Notice. The reduced amount payable will not exceed £75, and the overall amount will not exceed £150 prior to any court action, after which additional costs will be incurred.***
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> ***This car park is private property."***

3. At 14:29 pm on 15th April 2013 Mr. Beavis drove into the car park. He did not leave until 17:26 pm and therefore overstayed the two hour limit by nearly an hour. ParkingEye set in motion the procedure for recovering the charge, but Mr. Beavis ignored it and eventually it began proceedings in the county court to recover the sum alleged to be due. A claim of this size would normally have been dealt with by a district judge under the small claims procedure, but it was recognised that the two cases then before the court gave rise to some points of principle which were likely to affect many other similar claims and so directions were given for them to be heard by Judge Moloney Q.C., the Designated Civil Judge for East Anglia.

4. Before the judge the defendants raised a number of arguments, of which only two remain for consideration on the appeal, namely, (a) whether the charge is unenforceable at common law because it is a penalty; and (b) whether it is unfair and therefore unenforceable by virtue of the Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations").

5. The judge held that a motorist who parks his car in the car park does so on the terms displayed in the notice. As a result, he enters into a contract with ParkingEye to abide by the rules of the car park, which include an obligation to leave within two hours. He also agrees that if he overstays he will pay the parking charge (£85, reduced to £50 for payment within 14 days). The judge accepted that ParkingEye did not suffer any specific financial loss if a motorist overstayed, because, if the space in question had been vacated, it would have either have remained unoccupied or would have been occupied by another car free of charge. He therefore held that the parking charge had the characteristics of a penalty, in the sense in which that expression is conventionally used, but one that was commercially justifiable because it was neither improper in its purpose nor manifestly excessive in its amount. In reaching that conclusion he was influenced by the terms of section 56 and schedule 4 of the Protection of Freedoms Act 2012, which confer on operators of private car parks the right to recover parking charges from the registered keepers of vehicles. (For these purposes a "parking charge" is defined as a sum in the nature of a fee or charge payable under a contract or a sum in the nature of damages for tort.) For similar reasons he held that the undertaking to pay the charge was not an unfair term and was not rendered unenforceable by the Regulations.

The position at common law

6. Mr. Hossain Q.C. submitted that a contractual term by which a party undertakes to pay a sum of money on breach which exceeds the loss which the other can reasonably be expected to incur as a result of the breach is a penalty and unenforceable in law. Such a term is treated as nothing more than a deterrent designed to encourage the other to perform the contract. The key question, in his submission, therefore was whether the payment was intended to deter. If it was, it was a penalty and therefore

unenforceable. In the present case the only purpose of the parking charge was to deter motorists from staying longer than two hours; it had no other function. Although it had been recognised in some recent cases that a stipulation for the payment on breach of a sum larger than could reasonably have been expected to be recovered in damages may be commercially justifiable and therefore not unenforceable as a penalty, such a payment can never be enforceable if its predominant purpose is to deter breach. He accepted that if he was right, the Regulations added little or nothing to his argument.

7. Mr. Kirk Q.C. accepted that the concept of deterrence has played a large part in the development of the law relating to penalties, but he submitted that the true principles on the basis of which the courts decline to enforce penalties are those of extravagance and unconscionability. He submitted that both the early cases and the modern cases can best be explained by reference to those principles. He submitted that in this case the charge was neither extravagant nor unconscionable and that there were commercial justifications for imposing a deterrent charge on those who failed to comply with the rules of the car park. If ParkingEye were unable to regulate use of the car park effectively, it would risk losing its contract with the landowner and although it was impossible to quantify in money terms the effect of any individual breach of the rules, the cumulative effect of many individual breaches would be significant in economic terms.

8. Both in the judgment below and in the argument before this court some reliance was placed on the terms of the contract between ParkingEye and British Airways Pension Fund ("the Pension Fund"). There was a lively debate before the judge about whether ParkingEye contracted with Mr. Beavis as a principal or as agent for the Pension Fund. The judge held that it contracted as principal and there is no appeal against that decision. One consequence is that, unlike the Pension Fund, which had a commercial interest in the regular turnover of vehicles using the car park and the consequent availability of parking spaces for its tenants' customers, ParkingEye had no direct interest in the turnover of cars other than the need to satisfy its own customer, the Pension Fund.

9. The contract between ParkingEye and the Pension Fund specified both the free stay time limit and the parking charge. However, the important features of the contract for present purposes are that ParkingEye agreed to pay the Pension Fund a fixed amount each week during the term of the agreement and was entitled to retain any parking charges that it might collect. (In fact there was evidence before the judge that ParkingEye was able to make a significant profit from its business as a whole, although that is likely to have resulted from the operation of a number of different sites, not necessarily on the same terms in each case.) That enabled Mr. Hossain to argue that ParkingEye made a profit only out of breaches of contract on the part of motorists using the car park. To put it another way, he submitted that ParkingEye's business depended on making money out of the weaknesses and negligence of motorists using the car park.

10. The refusal of the courts of equity to enforce what they considered to be unconscionable bargains is of long standing. Mr. Kirk Q.C. drew our attention to a number of early cases including *Ashley v Weldon* (1801) 2 Bos. & Pul. 346 and *Kemble v Farren* (1829) 6 Bing. 141. For present purposes, however, I can begin with the decision of the House of Lords in *Clydebank Engineering & Shipbuilding Co. Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6, a case in which the

appellant agreed to build four torpedo boats for the Spanish Government and to deliver them within a specified period. The contract contained a clause providing for the payment of a "penalty" for late delivery. The vessels were delivered late and the government claimed the penalty. The House held that, although described as a penalty, the sum in question was to be regarded as liquidated damages and therefore recoverable.

11. It is perhaps not surprising, given the nature of the contract under consideration, that the whole of the debate revolved around the question whether the sum in question was to be regarded as liquidated damages or as a payment stipulated for merely in terrorem to discourage the shipyard from failing to meet the agreed delivery dates. The decision is also of interest, however, for the statements of principle which one finds in their Lordships' speeches. Lord Halsbury (at page 10) was of the view that the court's power to intervene by refusing to enforce a penalty clause arose from the agreement being unconscionable and extravagant. Lord Davey was of a similar view. It is true, however, that all three of their Lordships were of the view that the critical question for the purpose of the case before them was whether the sum in question was extravagant (or exorbitant) and unconscionable by comparison with the damages that could reasonably have been expected to be suffered by the injured party and not intended simply to deter from breach.

12. *Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Co. Ltd* [1915] A.C. 79 concerned a resale price maintenance agreement with an added clause under which the customer agreed to pay £5 by way of liquidated damages for every tyre, cover or tube sold or offered in breach of the agreement. The clause was also held to constitute a liquidated damages provision rather than a penalty, despite (or because of) the difficulty of establishing what loss, if any, was likely to flow from any individual breach of the agreement. At pages 86-88 Lord Dunedin summarised the principles which, in his view, were to be derived from the earlier cases. Of these only the second and fourth are of direct relevance to the present case. They are as follows:

> " . . .
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co. Ltd v Don Jose Ramos Yzquierdo y Castaneda*).
>
> . . .
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> 4.To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
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> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case*).

> . . .
>
> (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury; *Webster v. Bosanquet*, Lord Mersey)."

13. Other examples of the court's declining to enforce penal clauses were drawn to our attention, but none of them shed any further light on the principles involved. The cases all concerned clauses stipulating for sums payable on breach of contract and since the contract in each case was of an ordinary commercial nature it was possible to take only two views of the clause: either it was a genuine pre-estimate of damage or a conventional amount agreed upon to dispense with the need to ascertain damages in circumstances where they would be difficult to quantify, in which case it would be enforceable as liquidated damages; or it far exceeded any loss which the injured party could conceivably suffer, in which case it was regarded as being extravagant and unconscionable and therefore unenforceable as a penalty. As a result, it was for a long time routine to examine clauses of this kind by reference to a dichotomy between liquidated damages and penalties. The characteristic of deterrence, as opposed to compensation, which has sometimes been treated as the key to drawing a distinction between the two, seems to me simply to reflect the fact that only a stipulation which is extravagant and unconscionable is likely to be regarded as a deterrent, and therefore as a penalty, and so justify the courts in refusing to enforce it. I do not find it surprising, therefore, that in *Campbell Discount Co. Ltd v Bridge* [1962] A.C. 600, 622 Lord Radcliffe expressed the view that the expression "in terrorem" added nothing to that which was inherent in the concept of a penalty.

14. More recently, however, there has been a tendency to recognise that a simple dichotomy between liquidated damages and penalty is inadequate, because it fails to take into account the fact that some clauses which require payment on breach of a sum which cannot be justified as liquidated damages in accordance with established principles should nonetheless be enforceable because they are not extravagant and unconscionable and are justifiable in other terms.

15. In *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752 a facility agreement opened by a bank in favour of the defendant provided that in the event of default the defendant should pay interest during the period of default at an aggregate rate equal to the cost to the bank of obtaining the deposits required to fund its participation, an agreed margin and an additional unexplained 1%. A question arose whether the additional 1% was unenforceable as a penalty. Colman J. held that it was not. He said at page 763:

> "Where, however, the loan agreement provides that the rate of interest will only increase prospectively from the time of default in payment, a rather different picture emerges. The additional amount payable is ex hypothesi directly proportional to the period of time during which the default in payment continues. Moreover, the borrower in default is not the same

> credit risk as the prospective borrower with whom the loan agreement was first negotiated. Merely for the pre-existing rate of interest to continue to accrue on the outstanding amount of the debt would not reflect the fact that the borrower no longer has a clean record. Given that money is more expensive for a less good credit risk than for a good credit risk, there would in principle seem to be no reason to deduce that a small rateable increase in interest charged prospectively upon default would have the dominant purpose of deterring default. That is not because there is in any real sense a genuine pre-estimate of loss, but because there is a good commercial reason for deducing that deterrence of breach is not the dominant contractual purpose of the term."

16. The concept of a commercially justifiable payment was touched on by this court in *Cine Bes Filmcilik ve Yapimcilik v United International Pictures* [2003] EWCA Civ 1669, [2004] 1 CLC 401. A licence agreement under which a Turkish television company was permitted to show films belonging to the defendant, UIP. A clause in the licence provided that on default by the claimant all licence fees for the remainder of the licence period would immediately become due and all rights in relation to the films would revert to UIP. Mance L.J. noted with approval Colman J.'s observation at page 763 of *Lordsvale Finance Plc v Bank of Zambia*, which had indicated that a dichotomy between a genuine pre-estimate of damages and a penalty does not necessarily cover all the possibilities. He appears to have accepted that there are clauses which may operate on breach, but which fall into neither category and may be commercially justifiable and therefore enforceable.

17. In *Murray v Leisureplay Plc* [2005] EWCA Civ 963 (unreported) the claimant's contract of service with the defendant provided that he was to be paid one year's gross salary, pension contributions and other benefits in kind if his employment were determined without one year's notice. The defendant argued that the clause was unenforceable as a penalty, since it provided for the payment of a greater amount than could conceivably have been recovered by the claimant as damages for breach of contract. Arden L.J. held that for the purposes of deciding whether a payment is a penalty it may be appropriate to enquire into the parties' reasons for agreeing the relevant clause and that there may be a justification for any discrepancy between the amount payable under the agreement and the amount recoverable at common law (see paragraph 55). In reaching the conclusion that the clause was not a penalty she appears to have accepted that it was permissible to take into account as justifying the payment of a sum that would otherwise be unenforceable as a penalty factors such as commercial considerations (paragraph 70), restrictions on competition (paragraph 71) and the desirability from the employer's point of view of being able to effect a clean break (paragraph 74).

18. Buxton L.J. (with whom Clarke L.J. agreed) expressed the view in paragraph 108 that the two alternatives, deterrent penalty or genuine pre-estimate of loss, are indeed alternatives which underlie the requirement that in order to be enforceable the clause should be compensatory rather than deterrent. However, he appears to have considered that the court should take a broad view of the matter and deprecated excessive concentration on the difference between the amount payable under the

clause and the measure of damages recoverable at common law, because it overlooked the principal test formulated by Lord Dunedin in *Dunlop* by reference to extravagance and unconscionability.

19. The most recent foray into this area of the law is *El Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539, [2013] 2 CLC 968. The appellant and a colleague agreed to sell the respondent a majority interest in the holding company of a marketing and advertising group which they had founded and developed together. A large part of the price reflected goodwill. The agreement contained a clause providing that if a seller became a defaulting shareholder he would not be entitled to receive any further payment in respect of the price. Clause 11.2 of the sale agreement contained various restrictive covenants and a shareholder who acted in breach of those covenants became a defaulting shareholder. Moreover, by clause 5.6 each seller granted the purchaser a right to buy his remaining shareholding at a price calculated by reference to the net asset value of the group if he became a defaulting shareholder. A question arose whether clause 11.2 or 5.6 was unenforceable as a penalty. This court held that the principles under which penalties are unenforceable apply to clauses which disentitle a party in breach of contract from receiving a sum of money otherwise due to him or which require a transfer of property for nothing or at an undervalue and so were potentially applicable to clauses 11.2 and 5.6. The modern approach to penalty clauses suggested that a clause might not be a penalty, even though it did not contain a genuine pre-estimate of loss, if its dominant purpose was not to deter breach and the fact that there was a good commercial justification for it might lead to the conclusion that that was not the case. The clause would be a penalty only if the sum stipulated was extravagant and unconscionable. Christopher Clarke L.J., with whom Tomlinson and Patten L.JJ. agreed, explained the position as follows:

> "120. The underlying rationale of the doctrine of penalties is that the Court will grant relief against the enforcement of provisions for payment (or the loss of rights or the compulsory transfer of property at nil or an undervalue) in the event of breach, where the amount to be paid or lost is out of all proportion to the loss attributable to the breach. If that is so, the provisions are likely to be regarded as penal because their function is to act as a deterrent."

20. Having applied that approach to the case before him and having concluded that clauses 11.2 and 5.6 were penal in nature he said:

> "124. I am conscious that the approach I have adopted may be viewed as similar to that of Arden LJ in *Murray*, with which Buxton LJ disagreed and which Clarke LJ did not prefer. It is however difficult to address any question of penalty without considering whether the provision is extravagant, and, if it is, whether there is a commercial justification. I venture to think that the difference in approach may not be as marked as it might appear provided that (a) undue significance is not given to the discrepancy between the amount payable under the

> clause and the loss that might be sustained on breach – the significance of the discrepancy may depend on how closely the justification relates to the nature or extent of the loss; (b) no presumptions are treated as irrebuttable; (c) proper account is taken of the desirability of upholding bargains freely entered into and of any commercial justification for allegedly penal clauses, before deciding that the predominant function of the clause is deterrent and that it is penal. That seems to me to be the case here, not least because the relevant clauses fall foul of Lord Dunedin's Proposition 4 (a) as well as having several other indicia of their penal nature.
>
> 125. I am also conscious that there is a degree of ambiguity as to what is meant by the terms "extravagant" and "unconscionable" and how such descriptions fit with the concept of deterrence. "Extravagant" and "unconscionable" were terms originally used to characterise a provision which required far too high a payment in the event of breach. That it did so offended the conscience of equity, which treated it as penal – because its function was not to compensate but to deter breaches of obligations - and unenforceable (save as to the amount of the proved damage). Nowadays, when a term which provides for excessive payment on breach may be valid if it has a proper commercial justification, the term "unconscionable" would, perhaps more appropriately be used for a clause which provides for extravagant payment without sufficient commercial justification. Such a clause is likely to be regarded as penal and deterrence its predominate function, on the basis that if it requires excessive payment and lacks commercial justification for doing so, there is little room for any conclusion other than its function is to deter breach or, to put it positively, to secure performance."

21. The modern cases thus appear to accept that a clause providing for the payment on breach of a sum of money that exceeds the amount that a court would award as compensation, or which requires a transfer of property for no consideration or at an undervalue, may not be regarded as penal if it can be justified commercially and if its predominant purpose is not to deter breach. However, they also demonstrate a greater measure of flexibility and a willingness to recognise the underlying principles on which the doctrine of penalties as a whole rests in order to determine the outcome in any particular case.

22. The decisions in which the modern approach to the doctrine of penalties has been developed have largely, if not entirely, concerned commercial contracts under which the parties' respective interests can usually be measured without too much difficulty

in financial terms. For similar reasons the concept of commercial justification is one that fits readily into that context. However, if commercial justification means anything more than justification as compensation for financial loss of some kind (as it appears it must), it is difficult to see why justification for payment of a sum unrelated to financial loss should depend solely on commercial as opposed some other kinds of considerations. A correct application of the underlying principle that the court will not enforce a bargain for an extravagant and unconscionable payment should provide a sufficient basis on which to decide whether the court should decline to enforce a contract of this kind, notwithstanding the usual desirability of enforcing contracts into which the parties have freely entered.

23. It was common ground before us that a motorist making use of the car park enters into a contract with ParkingEye under which he agrees to leave the car park within a period of two hours. Failure to do so constitutes a breach of contract in respect of which he agrees to a parking charge of £85. For the purposes of the present appeal I am content to assume that that is so, but it seems to me that the relationship between the motorist and ParkingEye might be better analysed in terms of a licence to use the car park, subject to certain conditions, coupled with an agreement to pay a parking charge in the stated amount if the terms of the licence are not adhered to. On that basis it could be argued that the parking charge was no more than a conditional payment which the motorist could choose whether to incur or not and that the authorities on penalties for breach of contract were of no relevance.

24. ParkingEye did not seek to raise that argument before the judge or before us, and in those circumstances I do not think it is open to us to pursue it. However, even if it had done so, I doubt whether it would have materially affected the outcome. The origin of the rule against the enforcement of penalties lies in the unwillingness of equity to enforce penal bonds. As far as the motorist is concerned, it matters not whether the parking charge is technically a sum payable on breach of contract or on the use of the facility for longer than the advertised period of free parking. In either case the reality is the same: the motorist incurs a flat rate charge regardless of the length of time for which he overstays.

25. The present case throws up considerations of an entirely different character from those which arise in the ordinary commercial context. Viewed in purely financial terms, ParkingEye suffers no direct financial loss if an individual motorist overstays the period of free parking, because it has no interest in the land over which the licence is granted and suffers no immediate loss in terms of income that might otherwise have been derived from another motorist using the car park, as it would if customers were charged a flat rate for using it. However, it may suffer a loss indirectly, because its contract with the Pension Fund requires it to manage the car park in a way that enables it to provide the service which the Pension Fund contracts for, namely, making free parking available for a limited period for the benefit of its tenants and their customers. That involves allowing motorists free parking for up to two hours only. An inability to deliver the service required by the Pension Fund would be likely to result in the loss of its contract, with consequential financial loss and damage to its commercial reputation. To that extent ParkingEye has a commercial interest in the due observance of the terms of the licence which is similar to the interest of the manufacturer in the *Dunlop* case. Moreover, although it would in theory be possible to charge motorists a much more modest amount for overstaying the free period, it

would be wholly uneconomic to enforce such charges by taking legal proceedings against them.

26. It is difficult to quarrel with Mr. Hossain's submission that the principal purpose of the parking charge in this case is to deter motorists from breaching the terms of their licence by staying beyond the free period. However, does that necessarily lead to the conclusion that the charge is extravagant and unconscionable so that the court should decline to enforce it as a matter of public policy? The judge thought not. He held that the proper modern approach to deciding whether any particular clause is unenforceable as a penalty requires an examination of its role from a number of different perspectives, including proportionality to actual loss, deterrence and commercial justification. In his view, although the principal object of the charge was to deter overstaying, it was neither improper in its purpose nor manifestly excessive in amount, having regard to the level of charges imposed by local authorities and others for overstaying in public car parks. It was in his view commercially justifiable, both from the point of view of the Pension Fund and ParkingEye and from the point of view of motorists at large (paragraph 7.16).

27. In my view the judge was right to approach the matter in that way. The application in a case of this kind of a rule based on a simple comparison between the amount of the payment and the direct loss suffered by the innocent party is inappropriate. In order to achieve a just outcome it is necessary in my view to return to the principles which underlie what is ultimately no more than a rule grounded in public policy, namely, that the court will not enforce an agreement for the payment in the event of breach of an amount which is extravagant and unconscionable, despite the importance which it would normally attach to enforcing contracts freely entered into. As was pointed out in *Murray v Leisureplay* and *El Makdessi*, the fact that the contract provides for the payment on breach of a sum which significantly exceeds the greatest loss that the law would recognise as having been suffered by the injured party is in most circumstances a strong indication that the bargain is extravagant and unconscionable, but other factors may be present which rob the bargain of that character. Those factors may be of a commercial nature, as they were in *Lordsvale* and *Murray*, but I see no reason in principle why other factors should not be capable of leading to the same conclusion. In the present case it is possible to present the charges, as the judge did, as commercially justifiable, but in truth they are justified by a combination of factors, social as well as commercial. In the commercial context a "dominant purpose of deterrence" has been equated to extravagance and unconscionability, but in another context that need not be the case.

28. I agree with the judge that some support for the view that charges of this kind are not to be regarded as unenforceable can be found in the terms of section 56 and Schedule 4 of the Protection of Freedoms Act 2012. Paragraph 4 of Schedule 4 gives operators of private car parks a right to recover unpaid parking charges from the registered keepers of vehicles. "Parking charges", however described, are defined to include both sums in the nature of fees or charges arising under the terms of a contract and sums in the nature of damages arising as a result of a trespass or other tort, but in the latter case adequate notice must have been given to drivers when using the car park in question (see generally paragraph 2 of the Schedule). These provisions strongly support the conclusion that Parliament considered it to be in the public interest that parking charges of the kind now under consideration should be recoverable, provided

that they had been brought clearly to the attention of the motorist at the time he made use of the car park. In those circumstances it is difficult to see on what basis it can be said that the charges which are not in themselves grossly unreasonable, are to be treated as unenforceable at common law.

29. In the course of argument a good deal of reliance was placed on ParkingEye's contract with the Pension Fund, under which it received no revenue from its operation of the car park if motorists adhered to the terms of the licence. Thus, both the appellant and the Consumers' Association submitted that ParkingEye's need to obtain revenue to fund the operation of the car park could not provide a commercial justification for what would otherwise be unenforceable as a penalty. They also submitted that the fact that ParkingEye suffered no direct loss as a result of motorists' overstaying the free period was entirely a consequence of its own choice of "business model", that is, its decision to structure its business in a way that gave it no interest in the land but obliged it to obtain its revenue entirely from charges levied on overstayers. This combination of factors does, of course, enable the respondent to argue that the charge is a penalty, but for the reasons I have given I think that fails to deal with the true nature of the problem. In my view the terms on which ParkingEye chose to contract with the Pension Fund are irrelevant. If ParkingEye had had an interest in the retail park itself, it might have been possible for it to put forward a more robust commercial justification for imposing the parking charge by reference to a financial interest of an indirect nature in ensuring a constant turnover of customers' cars. However, the effect on motorists would have been exactly the same.

30. Moreover, in my view these submissions fail to pay sufficient regard to the practicalities of providing a facility of this kind. There are obvious benefits to both consumers and retail businesses in having free or cheap car parking available close to the shops for limited periods. That can be achieved only if there is some mechanism for ensuring that in most cases those who make use of the facilities do not abuse them by overstaying. That would not be achieved by a scale of charges graduated by reference to the length of the overstay unless they were sufficient to act as a deterrent. Moreover, the amount of the charge, however, calculated, would have to be large enough to justify collection.

31. It would be idle to deny that one of the principal purposes of imposing a parking charge of the kind in this case was to deter motorists from abusing the facility by staying beyond the period of free parking. Unlike the cases on which Mr. Hossain relied, most of which deal with the commercial contracts of one kind or another, the parking charge was not principally concerned to obtain compensation for breach of contract or trespass and did not represent an attempt to obtain by contractual means more than the law would award as damages. Christopher Clarke L.J. in *El Makdessi*, while not ruling out the possibility altogether, found it difficult to conceive of a situation in which a clause could be commercially justifiable despite the fact that its dominant purpose was to deter (paragraph 87), but his remarks were made in a wholly different context and it is important to note that he had already recognised a tendency on the part of the courts to return to the fundamental test of extravagance and unconscionability. The judge, faced with a novel situation, was of the opinion that the parking charge in this case was not extravagant or unconscionable and that the contract was therefore enforceable at common law. In my view he was right to do so.

The Regulations

32. The material parts of the Regulations provide as follows:

> "5.— Unfair Terms
>
> (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.
>
> 6.— Assessment of unfair terms
>
> (1) . . . the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract . . .
>
> 8.— Effect of unfair term
>
> (a) An unfair term in a contract concluded by a seller or supplier shall not be binding on the consumer."

33. Schedule 2 contains an indicative and non-exhaustive list of terms which may be regarded as unfair. It includes terms which have the effect of requiring a consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation. I have no doubt that a term which entitles the operator of a car park to recover disproportionately high parking charges on motorists who overstay the permitted time falls within the scope of the Regulations. However, the judge held that the term imposing the parking charge in this case was not unfair within the meaning of the Regulations, because the size of the charge was similar to those levied by local authorities and because very clear notice had been given to consumers when they entered the car park.

34. The important questions, so far as the Regulations are concerned, are (i) whether ParkingEye acted contrary to the requirements of good faith in imposing a charge of £85 for overstaying the free period, and, (ii) if so, whether that term caused a significant imbalance in the parties' rights and obligations under the contract to the detriment of the motorist. The judge held that there was no breach of the duty of good faith, since the terms of the contract were prominently displayed and clear to any motorist who might wish to use the car park. He also held that the term did not cause a significant imbalance in the parties' rights and obligations because the charge was no greater than that which a motorist could expect to pay for overstaying in a municipal car park.

35. The nature of the duty to act in good faith as described in the Regulations was discussed by Lord Bingham in paragraph 17 of his speech in *Director General of Fair Trading v First National Bank Plc* [2002] 1 A.C. 481. He said:

> "The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice."

36. I agree with the judge that there was no want of good faith in the present case. The conditions on which motorists were allowed to use the car park were prominently displayed and contained no concealed pitfalls or traps. Nor did ParkingEye take advantage of any weaknesses on the part of those using the car park. The suggestion by the Consumers' Association that ParkingEye, in making a profit out of parking charges in general, acted in breach of good faith is one that I cannot accept. No doubt from time to time motorists misjudge the time and incur charges as a result, but that is a routine aspect of life for those who use on-street parking meters and car parks operated by local authorities. It is true that the full charge was incurred however brief the period of overstaying, but that is also a familiar characteristic of municipal car parks. It is also the case that the equipment monitoring cars entering and leaving the car park made it impossible for a motorist who had overstayed to leave without that fact being recorded and a note taken of the car's registration number, but that too is a recognised feature of other charging regimes.

37. I also think that the judge was right to hold that the term did not cause a significant imbalance between the parties' rights and obligations. Lord Bingham in *Director General of Fair Trading v First National Bank* explained that concept as follows:

> "The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole."

38. Again, I agree with the judge that the term in question did not create a significant imbalance between the parties' rights and obligations in this case, viewed as a whole. I agree that two hours' free parking in or close to a city centre is a valuable right, but

even if a motorist overstayed by as much as two hours, an average charge of over £20 an hour would be high. The real question is whether the imposition of a charge of £85 (or £50 for prompt payment) in order to promote a regular turnover of vehicles for the benefit of the community as a whole creates a significant imbalance in the relationship of a kind which renders the term unfair, given that the motorist is made aware of the term when he enters the car park. Here, too, it seems to me that the everyday experience of the use of charges of this kind by local councils to manage the use of a scarce resource tends to show that, provided the charge is not set excessively high, it does not create a significant imbalance in the parties' rights and obligations. It is perhaps not surprising, therefore, that neither side was disposed to argue strongly that the Regulations added significantly to the position at common law.

39. In the end I am satisfied that in this case the amount payable by the appellant is not extravagant or unconscionable and that the court should therefore not decline to enforce the contract. I would therefore dismiss the appeal.

Lord Justice Patten :

40. I have had the benefit of reading in advance a draft of the judgment to be delivered by Sir Timothy Lloyd. I agree with both judgments.

Sir Timothy Lloyd :

41. I agree with Moore-Bick LJ that the appeal should be dismissed, for the reasons he gives. I add some observations of my own because of the novelty of the circumstances in which the rules about contractual penalties are invoked.

42. For the appellant, Mr Hossain placed emphasis, understandably, on the phrases used, in the older cases "in terrorem" and as put in more modern language, "intended to deter" a breach of contract, and he relied on passages from recent judgments in which judges have spoken of this as one thing that makes a given contractual provision unenforceable as a penalty.

43. It is clear that the purpose of the £85 parking charge is to deter those who use the car park from overstaying beyond the free permitted two hours. So, Mr Hossain submitted, the case is clear and the parking charge provision is unenforceable.

44. All the previous cases shown to us have concerned contracts of a financial or at least an economic nature, where the transaction between the contracting parties can be assessed in monetary terms, as can the effects of a breach of the contract by one party or the other. Sometimes such measurement is difficult because of inherent uncertainties, and in those an agreed liquidated damages provision may be upheld for those reasons. But, however difficult it may be to measure, it is clear that there are economic and commercial effects on the parties.

45. The contract in the present case is entirely different. There is no economic transaction between the car park operator and the driver who uses the car park, if he or she stays no longer than two hours; there is no more than (for that time) a gratuitous licence to use the land. The operator affords the driver a free facility. That facility is, of course, of economic value to the driver, as well as of convenience, in assisting the driver to visit the shops in the shopping centre which the car park serves. It is thus useful to

the driver, being close to the shops, and free. It is also useful to the shopkeepers, in encouraging visitors, and in particular in encouraging a turnover of visitors because of the two hour limit. A car owner cannot simply come to the car park and park there all day. To do that would be to clog up the facility and to prevent those arriving later from using the park for its intended purpose.

46. The terms of use of the car park need, therefore, to provide a disincentive to drivers which will make them tend to comply with the two hour limit. That is afforded by the parking charge of £85. It would not be afforded by a system of imposing a rate per hour according to the time overstayed, unless that rate were also substantial, and well above what might be regarded as a market rate for the elapsed time, even if the market rate were in some way adjusted to take account of the benefit to the driver of the first two hours being free.

47. It seems to me that the principles underlying the doctrine of penalty ought not to strike down a provision of this kind, in relation to a contract such as we are concerned with, merely on the basis that the contractual provision is a disincentive, or deterrent, against overstaying. When the court is considering an ordinary financial or commercial contract, then it is understandable that the law, which lays down its own rules as to the compensation due from a contract breaker to the innocent party, should prohibit terms which require the payment of compensation going far beyond that which the law allows in the absence of any contract provision governing this outcome. The classic and simple case is that referred to by Tindal CJ in *Kemble v Farren* (1829) 6 Bing. 141 at 148:

> "But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

48. Lord Dunedin referred to this in his proposition 4(b) in *Dunlop v New Garage*, at [1915] AC 79, at 87.

49. In a case such as the present, however, for the law to prohibit a provision such as the overstaying charge, on the basis that it bears no relationship to the loss (if any) suffered by the car park operator would fail to take account of the nature of the contract, with its gratuitous but valuable benefit of two hours' free parking, and of the entirely legitimate reason for limiting that facility to a two hour period.

50. It is an oddity of the facts that the respondent appears not to make any money out of the contract unless drivers do overstay, so enabling Mr Hossain to argue that, so far from suffering loss by a driver overstaying, the respondent only stands to gain by that breach of contract (though of course if the appellant is right and the parking charge is unenforceable, the operator does not stand to gain anything under any circumstances). The law would allow damages for trespass against the overstayer without regard to what the operator would have done but for the trespass: see for example *Swordheath Properties v Tabet* [1979] 1 WLR 285. Thus, the actual effect of the trespass on the car park operator's position is not relevant in any event. However, unless the defendant's occupation has been of particular value to him, the compensation would

be limited to the market value of the occupation during the period of trespass. That would provide no disincentive against overstaying.

51. This is not to say that the rules about penalties could have no application to such a case. If the charge were grossly disproportionate, it could fall foul of this principle. It would be extravagant and unconscionable. But, as Moore-Bick LJ says, that is not this case, where the charge is £85 for any period of overstaying, long or short, and is reducible to £50 on prompt payment. The judge held that the charge was not improper in its purpose or manifestly excessive in amount, and this was not challenged on appeal. I agree with Moore-Bick LJ that an intention to deter, by means of a term or terms which seek to impose manifestly excessive obligations in a commercial case, may well show that the provision is extravagant and unconscionable. In a case of the present type, which is not a commercial contract, it seems to me that an intention to deter is not sufficient in itself to invalidate the term. The term must in itself amount to something which is extravagant and unconscionable if it is to be found invalid under the rules about contractual penalties.

52. Accordingly, like Moore-Bick LJ, I find nothing in the circumstances of this contract which requires or allows the application of the rules about contractual penalties to invalidate the provision under which the judge below held the defendant liable. I do not wish to add anything to what he has said about the regulations.