[2019] EWCA Crim 1889

2018/04836/B2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 29th October 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE MOULDER DBE

and

HIS HONOUR JUDGE THOMAS QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

CHRISTOPHER WHATCOTT

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Mr S Parham appeared on behalf of the Applicant

J U D G M E N T

Tuesday 29th October 2019

LORD JUSTICE SIMON: I shall ask Mrs Justice Moulder to give the judgment of the court.

MRS JUSTICE MOULDER:
1. This is a renewed application for leave to appeal against conviction following refusal by the single judge. For reasons which will become apparent, we grant leave.

2. On 26th October 2018, following a trial in the Crown Court at St Albans, the appellant (as he now is) was convicted of fraud, contrary to section 1 of the Fraud Act 2006 (counts 2 and 4), and of engaging in an unfair commercial practice, contrary to regulation 11 of the Consumer Protection from Unfair Trading Regulations 2008 (count 6).

3. On 22nd November 2018, he was sentenced to consecutive terms of three months' imprisonment on each of counts 2 and 4; a consecutive term of three months' imprisonment on count 6; and, as the appellant was in breach of a suspended sentence of eight and a half months' imprisonment, imposed on 24th February 2017, a consecutive, but reduced, term of six months' imprisonment. The total sentence was, therefore, one of fifteen months' imprisonment.

4. The background to this matter is that between 1st May 2014 and 31st March 2016, and between 15th July 2017 and 1st September 2017, the appellant ran a business which involved the supply of Energy Performance Certificates ("EPCs") for domestic premises.

5. The trial in October 2018 was the second time that the appellant had been prosecuted for offences arising out of his trading in EPCs.

6. His trading had been as an intermediary, connecting customers requiring an EPC with independent energy assessors. The first prosecution resulted in a trial in January and February 2017, in the course of which he pleaded guilty to three counts under the Consumer Protection from Unfair Trading Regulations 2008, for which he received a suspended sentence. He subsequently renewed an application for leave to appeal against that conviction. His renewed application was refused by the full court. While he pursued that application, he recommenced trading online, which led to the fresh prosecution.

7. The appellant resumed trading in July 2017. Over a six week period, he returned to offering to supply EPCs and to charging what the prosecution said were excessive and grossly disproportionate fees. Having been disqualified by his 2017 conviction from acting as a company director, he traded as a sole trader under the name “how cost EPC”.

8. In relation to new customers, his business model was similar to that which led to his conviction in 2017. Customers who ordered an EPC from him were required to pay a referral fee to him of £9.95. This was due within 24 hours of him referring the customer to an energy assessor at which point it increased to £14.95; if not paid, a late payment fee of £85 became due. If that was not paid, legal action was threatened, and letters of claim were issued by his solicitors.

9. The prosecution case on count 4 was that the appellant committed fraud by dishonestly seeking to recover from consumers late payment charges when he knew that they were not lawfully due because, as he was aware, they were unlawful charges and were unfair terms in consumer contracts.

10. The defence case on count 4 was that the appellant believed that the payments claimed were

legally due to him. He did not act dishonestly. He chased for payment of the amounts because he believed that he was entitled to do so, as the payments were legally due. The appellant's evidence was that he considered the fees that he charged to be proportionate and to represent a genuine pre-estimate of his loss, which he set out in a business plan and submitted to Trading Standards before launching it. He considered that it was a substantially different business model from the previous one, and was of the firm belief that none of his representations or trading practices was unlawful.

11. The appellant disagreed with the Court of Appeal's finding that the judgment in *ParkingEye Ltd v Beavis* [2015] UKSC 67 did not give him a defence. It was his belief that his business model closely resembled that in *ParkingEye*.

12. On 22nd November 2018, the trial judge ruled that the contractual payments which were the subject of count 4 was not enforceable as a matter of law and so the payments claimed by the appellant from customers were not due in law.

13. The jury were accordingly directed that on count 4 the judge had already determined that the fees claimed by the appellant were not legally due. The issue for the jury was, therefore, whether he knew that his representations that the fees were due were or might be untrue; and, if so, whether he acted dishonestly.

14. Following a note dated 22nd October 2019 from counsel for the appellant, only the following grounds of appeal are now pursued before this court, and in relation to count 4 only. On behalf of the appellant, it is submitted that the conviction on count 4 is unsafe for the following three reasons:

> 1. The judge erred in ruling that the issue of whether late payment fees or cancellation fees were unlawful penalty charges was a matter of law for him to determine. It is submitted that the essential element of "were the representations untrue" was a matter for the jury.
>
> 2. The judge erred in ruling that the prosecution needed to prove this element of "were the representations untrue" to the civil standard rather than the criminal standard. The judge took the wrong approach by applying the civil standard.
>
> 3. The judge erred in finding that, as a matter of law, the contractual terms in question were unenforceable because they amounted to illegal penalty charges or unfair contractual terms.

<u>Ground 1</u>

15. We take each of those grounds in turn. First, it is asserted on behalf of the appellant that the judge erred in ruling that the issue of whether late payment fees or cancellation fees were unlawful penalty charges was a matter of law for him to determine. It is submitted that the essential element of "were the representations untrue" was a matter for the jury. Counsel for the appellant relied on the admittedly *obiter* comments of the Court of Appeal in *R v Whatcott* [2018] EWCA Crim 1678 at [22], where it was said that:

> "… ultimately it would have been <u>for the judge to rule and/or for the jury to decide</u> whether the cancellation charges in the present case were to be regarded as a 'penalty'." [Emphasis added]

That comment leaves the point open. Since the point did not need to be addressed by the Court of Appeal (the appellant having pleaded guilty), the *dictum*, in our view, does not assist.

16. The elements of the offence of fraud are:
(i) dishonesty;
(ii) an intention to make a gain;
(iii) the making of representations which were untrue; and
(iv) that the maker knew that they were or might be untrue.

17. It was not in dispute that the appellant intended to make a gain and that he made the representations. The representations were untrue if, as a matter of law, the customers did not owe him fees. The customers did not owe fees if the provision in the contract relating to such fees was unenforceable as a penalty.

18. Whether the contractual provision amounted to a penalty is a question of construction of the contract: see *ParkingEye* at [9] and [99].

19. Whilst we accept that the jury decide the facts of a case, here the provisions of the contract (that is, the amount charged and when it was payable) were not in dispute. The judge had to construe the terms of the contract. The jury did not need to determine what the terms of the contract were.

20. The judge had to apply the test in *ParkingEye* and decide whether the amounts claimed were disproportionate and unconscionable, and whether the provision under challenge lacked commercial justification and a legitimate objective: Parking Eye at [31] [32] and [99] cited below

21. There was no disputed evidence as to the purpose of and justification for the contractual term. The only basis relied upon by the appellant was that he suffered a financial loss as a result of late payment and that he needed quick payment to fund the business. This was accepted by the judge as the factual basis for his analysis. But he concluded that this did not amount to a commercial justification or legitimate objective of the type identified by the Supreme Court in *ParkingEye* (see page 5H of the sentencing remarks).

22. Accordingly, neither the terms of the contractual provision nor its purpose was in dispute. There were no facts which needed to be determined in order for the judge to be able to rule on the construction of the contractual provision and its consequent enforceability. It was, therefore, in our view, for the judge to apply the law to the facts.

23. In the circumstances, the judge's ruling on enforceability was in effect decisive of whether the appellant had made a representation which was untrue. Once the judge concluded that the provision was unenforceable, the representations that payments were due were automatically rendered untrue. This does not, however, mean that the ruling of the judge can in any way be said to be erroneous.

24. We note that, before convicting on count 4, the jury in any event still had to decide the elements of dishonesty and whether the appellant knew that the representations were or might be untrue. These remained matters for the jury; and the jury was directed accordingly.

25. In our view, therefore, for the reasons discussed, the judge was correct to conclude that the enforceability of the contractual provision was a matter of law for him to determine.

Ground 2

26. The second ground of appeal relates to the burden of proof. It is submitted that the judge was in error in ruling that the prosecution needed to prove the element of "were the representations untrue" to the civil standard rather than the criminal standard; and that the judge took the wrong approach by applying the civil standard.

27. The judge stated (at page 3D of his ruling) that he was "sure" that the contract was not enforceable. Therefore, it would appear that, in any event, he was satisfied to the criminal standard.

28. In its Respondent's Notice, the respondent raises the issue as to whether the concept of the standard of proof is engaged. We note that *Blackstone Criminal Practice* 2020 (at F3.1) states:

> "Questions of construction are questions of law in respect of which no burden lies on either party (*Scott v Martin* [1987] 2 All ER 813)."

29. In *Scott v Martin*, the court stated:

> "With respect to the judge, I do not think that it is correct to say that the burden of proof on a question of construction lies on the plaintiff. A question of construction is a question of law, in respect of which no burden lies on either side. It is true that, if the plaintiff relies on surrounding circumstances as an aid to construction, then the onus is on him to prove those circumstances, but that is rather a different point."

30. In our view, therefore, the authorities support a conclusion that the respondent is correct in its submission that the concept of the standard of proof is not engaged in relation to the issue of construction.

31. Although, therefore, the approach which the judge took could be said to be erroneous, the approach which he took was to the benefit of the appellant. We therefore take the view that there is nothing in this ground of appeal.

Ground 3

32. The third ground of appeal is whether the judge was correct as a matter of law to find that the contractual provision was a penalty. It is asserted on behalf of the appellant that the judge erred in finding that, as a matter of law, the contractual terms in question were unenforceable because they amounted to illegal penalty charges or unfair contractual terms.

33. In his ruling, the judge referred to the judgment of Lord Neuberger in the Supreme Court decision in *ParkingEye*. The following paragraphs are, in our view, relevant to the test to be applied as to whether the contractual provision in this case was a penalty:

> "9. The distinction between a clause providing for a genuine pre-estimate of damages and a penalty clause has remained fundamental to the modern law, as it is currently understood. The

question whether a damages clause is a penalty falls to be decided as a matter of construction, therefore as at the time that it is agreed: *Public Works Comr v Hills* [1906] AC 368, 376; *Webster v Bosanquet* [1912] AC 394; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, at pp 86-87 (Lord Dunedin); and *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86, 94 (Somervell LJ). This is because it depends on the character of the provision, not on the circumstances in which it falls to be enforced. It is a species of agreement which the common law considers to be by its nature contrary to the policy of the law. One consequence of this is that relief from the effects of a penalty is, as Hoffmann LJ put it in *Else (1982) Ltd v Parkland Holdings Ltd* [1994] 1 BCLC 130, 144, 'mechanical in effect and involves no exercise of discretion at all'. Another is that the penalty clause is wholly unenforceable: *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* 1905] AC6, 9, 10 (Lord Halsbury LC); *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 698 (Lord Reid), 703 (Lord Morris of Borth-y-Gest) and 723-724 (Lord Salmon); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The 'Scaptrade')* [1983] 2 AC 694, 702 (Lord Diplock); *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 191-193 (Mason and Wilson JJ). Deprived of the benefit of the provision, the innocent party is left to his remedy in damages under the general law. As Lord Diplock put it in *The 'Scaptrade'* at p 702:

> 'The classic form of penalty clause is one which provides that upon breach of a primary obligation under the contract a secondary obligation shall arise on the part of the party in breach to pay to the other party a sum of money which does not represent a genuine pre-estimate of any loss likely to be sustained by him as the result of the breach of primary obligation but is substantially in excess of that sum. The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of primary obligation instead'.

…

32. <u>The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.</u> The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend

beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter’s primary obligations. This was recognised in the early days of the penalty rule, when it was still the creature of equity, and is reflected in Lord Macclesfield’s observation in *Peachy* (quoted in para 5 above) about the application of the penalty rule to provisions which were 'never intended by way of compensation', for which equity would not relieve. It was reflected in the result in *Dunlop*. And it is recognised in the more recent decisions about commercial justification. And, as Lord Hodge shows, it is the principle underlying the Scottish authorities.

…

99. In our opinion, while the penalty rule is plainly engaged, the £85 charge is not a penalty. The reason is that although ParkingEye was not liable to suffer loss as a result of overstaying motorists, it had a legitimate interest in charging them which extended beyond the recovery of any loss. The scheme in operation here (and in many similar car parks) is that the landowner authorises ParkingEye to control access to the car park and to impose the agreed charges, with a view to managing the car park in the interests of the retail outlets, their customers and the public at large. That is an interest of the landowners because (i) they receive a fee from ParkingEye for the right to operate the scheme, and (ii) they lease sites on the retail park to various retailers, for whom the availability of customer parking was a valuable facility. It is an interest of ParkingEye, because it sells its services as the managers of such schemes and meets the costs of doing so from charges for breach of the terms (and if the scheme was run directly by the landowners, the analysis would be no different). As we have pointed out, deterrence is not penal if there is a legitimate interest in influencing the conduct of the contracting party which is not satisfied by the mere right to recover damages for breach of contract. Mr Butcher QC, who appeared for the Consumers' Association (interveners), submitted that because ParkingEye was the contracting party its interest was the only one which could count. For the reason which we have given, ParkingEye had a sufficient interest even if that submission be correct. But in our opinion it is not correct. The penal character of this scheme cannot depend on whether the landowner operates it himself or employs a contractor like ParkingEye to operate it. The motorist would not know or care what if any interest the operator has in the land, or what relationship it has with the landowner if it has no interest. This conclusion is reinforced when one bears in mind that the question whether a contractual provision is a penalty turns on the construction of the contract, which cannot normally turn on facts not recorded in the contract unless they are known, or could

> reasonably be known, to both parties.
>
> 100. None of this means that ParkingEye could charge overstayers whatever it liked. It could not charge a sum which would be out of all proportion to its interest or that of the landowner for whom it is providing the service. But there is no reason to suppose that £85 is out of all proportion to its interests. The trial judge, Judge Moloney QC, found that the £85 charge was neither extravagant nor unconscionable having regard to the level of charges imposed by local authorities for overstaying in car parks on public land. The Court of Appeal agreed and so do we. It is higher than the penalty that a motorist would have had to pay for overstaying in an on-street parking space or a local authority car park. But a local authority would not necessarily allow two hours of free parking, and in any event the difference is not substantial. The charge is less than the maximum above which members of the BPA must justify their charges under their code of practice. The charge is prominently displayed in large letters at the entrance to the car park and at frequent intervals within it. The mere fact that many motorists regularly use the car park knowing of the charge is some evidence of its reasonableness. They are not constrained to use this car park as opposed to other parking facilities provided by local authorities, Network Rail, commercial car park contractors or other private landowners. They must regard the risk of having to pay £85 for overstaying as an acceptable price for the convenience of parking there. The observations of Lord Browne-Wilkinson in *Workers Bank* at p 580 referred to in para 35 above are in point. While not necessarily conclusive, the fact that ParkingEye's payment structure in its car parks (free for two hours and then a relatively substantial sum for overstaying) and the actual level of charge for overstaying (£85) are common in the UK provides support for the proposition that the charge in question is not a penalty. No other evidence was furnished by Mr Beavis to show that the charge was excessive." [Emphasis added]

34. It was submitted on behalf of the appellant that the £85 late payment charge was not a penalty: Low Cost EPC sought to provide cheaper EPCs than anyone else and in order to do so, it was essential that the business had a healthy cashflow and so consumers were required to make payment of the referral fee within 24 hours of the referral. It was submitted that individuals chose to contract with Low Cost EPC on the basis of the agreed terms and conditions. Low Cost EPC suffered financial loss as a consequence of late payers and so was entitled to impose a fee to deter customers from late payment. The charge deterred customers from paying late; it encouraged prompt payment and thus a health cashflow, which enabled the business to reinvest in internet advertising and to attract new customers. It was submitted accordingly, that the position in this case is analogous to the facts in *ParkingEye*, where motorists benefited from free parking for two hours; but if they overstayed, an £85 charge was levied. Finally, it was submitted that customers are used to agreeing contractual terms, which involve the equivalent of late payment charges: for example, parking charges and bank charges for overdrafts.

37. In *ParkingEye,* at [31] the Supreme Court said:

> "31. In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent. …
>
> All definition is treacherous as applied to such a protean concept. This one can fairly be said to be too wide in the sense that it appears to be apt to cover many provisions which would not be penalties … However, in so far as it refers to 'punishment' and 'an additional or different liability' … this definition seems to us to get closer to the concept of a penalty than any other definition we have seen. The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. … <u>The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are 'unconscionable'</u> or (which will usually amount to the same thing) 'extravagant' by reference to some norm.
>
> 32. The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. …"
> [Emphasis added]

38. Applying these principles, the judge in the instant case found that the sums in question were disproportionate, extravagant and unconscionable. He noted that payment was required within 24 hours, at which point it increased from £9.95 to £14.95, and then after another five days to £85. That was an additional £70 which, he noted, was seven times the original fee, and just over four times the late payment fee.

39. We agree with the judge's conclusion. We also agree with the judge that this case is quite different from the scenario of facts in *ParkingEye*. In *ParkingEye*, the Supreme Court found that there was a legitimate interest in influencing the conduct of the contracting party, which is not satisfied by the mere right to recover damages for breach of contract. The legitimate interest identified by the Supreme Court was that the landowner authorised *ParkingEye* to control access to the car park and to impose the agreed charges, with a view to managing the car park in the interests of the retail outlets, their customers and the public at large.

40. By contrast, in the instant case, the only interest advanced by the appellant is to benefit the cashflow of the business. If that were to be a legitimate interest for these purposes, any business could impose a fee to deter customers from late payment well in excess of the actual cost to the business of such late payment.

41. Whilst on the facts in *ParkingEye*, the Supreme Court found that customers were prepared to accept the contractual charges, there is no evidence here that customers chose to accept them.

The analogy with bank charges is not apt, as there is no evidence before us that the amount of bank charges is fixed at a level to deter customers.

42. For all these reasons, we conclude that the judge's ruling on the construction of the contractual provision as amounting to a penalty was correct. In the light of that conclusion, it is not necessary for us to decide the issue of whether the contractual term was also unfair, pursuant to section 62(1) of the Consumer Rights Act 2015.

43. Accordingly, this appeal against conviction is dismissed.

44. **MR PARHAM:** May I ask for a representation order in the circumstances where leave was granted?

45. **LORD JUSTICE SIMON:** You may ask, and it will be granted. But perhaps we should note that you did appear initially pro bono, and we are very grateful to you for that. It is important that the Bar is prepared to do such work pro bono.

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