IN THE COUNTY COURT AT SALISBURY
ON APPEAL FROM THE COUNTY COURT AT SOUTHAMPTON
Claim No. F0DP806M

BEFORE HH JUDGE RICHARD PARKES QC, DESIGNATED CIVIL JUDGE

BRITANNIA PARKING GROUP LTD

Claimant

v

MATTHEW SEMARK-JULLIEN

Defendant

16, 29 July 2020

Stefan Ramel, instructed by BW Legal Services Ltd, for the claimant
The defendant appeared in person for part of the hearing

JUDGMENT

1. On 16 July 2020 I allowed an appeal by the claimant from an order of District Judge Grand made on 18 Nov 2019, by which the judge refused to set aside a decision of District Judge Taylor made on the papers on 23 May 2019. I now give my reasons for allowing the appeal.

2. This is a small claim for £160 plus interest arising from the defendant parking his van without paying the prescribed charge at a car park in New Road, Southampton, on 24 July 2017. The £160 claimed is made up of £100 claimed under a Parking Notice Charge (PCN), plus £60 described as 'contractual costs pursuant to PCN Terms and Conditions'.

3. The claimant, represented by Mr Stefan Ramel of counsel, is a company that operates and manages the car park in question for the owners of the land, in return for the right to levy parking charges. He and the defendant both appeared at the hearing of the appeal at Salisbury Crown Court.

THE EVIDENCE

4. Evidence from Mr Corrin Brown, the claimant's solicitor, was before Judge Grand (but not Judge Taylor).

5. That evidence shows that the claimant is a member of the British Parking Association, the BPA, which is an accredited trade association and maintains a Code of Practice for the enforcement of charges on private land.

6. According to Mr Brown's evidence, the signage at the New Road car park makes clear that where parking charges are not paid, a £100 parking charge may be issued. Photographs of the signage show that the £100 parking charge is displayed in large and obvious type. When the PCN is sent out, it offers a discounted fee of £60 for payment within 14 days. The signage also states that where parking charges remain unpaid for more than 28 days, 'recovery charges in respect of further action' may apply. The lettering of that element of the terms and conditions is very much smaller, although it would no doubt be legible to those who take the trouble to read it. A ten minute grace period is allowed for parking, reading the signage and then paying the charge or leaving the car park.

7. The BPA Code of Practice allows members to charge a reasonable sum (which must not exceed £70 without prior approval from the BPA) for debt recovery fees. The fact that a trade association permits the charging of such fees does not, of course, necessarily mean that they are properly recoverable from someone using the car park who fails to pay parking charges.

8. The defendant did not pay the £2 charge for parking up to one hour. He received a PCN; he did not pay either the discounted or the full charge.

9. He has pleaded a defence which relies on the claimant's supposed failure to supply an invoice, which he asserts is an offence under the Bills of Exchange Act 1882. That is not a defence which I have encountered before, but I say nothing about its possible merits, because they did not arise for consideration on the appeal. Although the defendant appeared in person on the hearing of the appeal, he did not wish to say anything on the issues that did arise, and left before the court's decision was announced. Just as District Judge Grand described him at the previous hearing, he was in effect a spectator.

THE DECISION OF DISTRICT JUDGE TAYLOR

10. The case came before District Judge Taylor in boxwork on 23 May 2019. He struck the claim out as an abuse of process, on the ground that the £60 charge was not recoverable under the Protection of Freedoms Act 2012 schedule 4, nor by reference to the judgment of the Supreme Court in the case of *Parking Eye v Beavis* (reported primarily under the name of the parties to the other appeal heard with *Beavis*, namely *Cavendish Square Holding BV v Makdessi* [2016] AC 1172). The judge asserted that it was an abuse of process for the claimant to issue what he described as a 'knowingly inflated' claim.

THE APPLICATION TO SET ASIDE THE ORDER OF DJ TAYLOR

11. Since the order was made of the court's own initiative without a hearing, pursuant to CPR 3.3(4), the claimant had the right under 3.3(5) to apply to set it aside. That application was duly made by notice dated 14 June

2019. It was heard on 11 November 2019 by District Judge Grand, together with a similar application in another matter, *Britannia v Crosby*, which is not now before the court.

12. The judge dismissed the claimant's application to set aside the order of District Judge Taylor, even though it was not resisted by the defendant. He did so on the basis that the £60 charge was 'quite transparently an attempt to gild the lily, to garnish the margin' of the Supreme Court's decision in *Beavis* as to what was a reasonable charge, by adding a further 'inflated' charge. He found that the Supreme Court had not intended that parking schemes should make charges amounting to £160, or make one charge and then another substantial charge on top of it. Therefore, he reasoned, what the claimant was seeking to do was to charge far more to someone who did not comply with the parking terms than was approved by the Supreme Court in *Beavis*. That extra charge, he held, was therefore unlawful.

13. The judge also held that, had he not regarded the extra charge as unlawful, he would have held that the charges were unfair terms within ss62, 71 and schedule 2 of the Consumer Rights Act, and in particular example 14 in the schedule, because the reference on the signage to charges left to the discretion of the parking company the amount of additional charges that they could levy.

14. In the judge's view, the whole claim was tainted by the inclusion of the additional £60 charge, which he felt the claimant should have known was not lawful. He held that the very fact that the claimant brought the claim was an abuse of the process of the court, and all the more so because in many such cases, companies such as the claimant are often able to enter default judgment for charges which are unlawful.

THE APPEAL

15. The claimant applied for permission to appeal. Permission was granted by HH Judge Iain Hughes QC on 2 March 2020, on the basis that the Grounds of Appeal settled by counsel were certainly arguable.

16. The claimant's amended grounds of appeal were, in slightly abbreviated form, as follows:

    (1) There was no evidence before the judge which could entitle him (and still less Judge Taylor) to reach conclusions as to the claimant's motives or intentions;
    (2) The Supreme Court in *Beavis* did not address the lawfulness of additional charges in parking cases, so there was no basis on which to hold that the £60 charge imposed by the claimant fell foul of that decision;
    (3) The guidance of the BPA should not have been ignored;

(4) The Judge did not consider whether the defendant was a consumer for the purposes of the Consumer Rights Act 2015, nor did he consider the statutory requirements of unfairness in ss62(4), (5), and could not have done, absent any evidence on the point, and was wrong to consider that the example terms 6, 10 and 14 in part 1 of schedule 2 of the Act were determinative;
(5) Even if the Judge was right to find that the £60 charge was unlawful, there was no basis on which he could have concluded that the claimant should have known that it was unlawful, or that the claim was an abuse of process, and in any event should have had regard to s67 of the 2015 Act, by which where a specific clause is void for unfairness, the contract otherwise continues to have effect; and
(6) The Judge failed to have regard to the fact that, in reaching his decision under CPR 3.3(4), District Judge Taylor did not have all the relevant material before him.

17. Mr Ramel reminded me that there has been no trial, and that neither side has had the opportunity of filing factual evidence in preparation for a trial. The claimant has only put in evidence in support of the application to set aside the judgment. That is true so far as it goes, but it was open to the claimant to put in further evidence had it chosen to do so.

18. Mr Ramel began his submissions by dealing with the way in which the jurisdiction to make orders under CPR 3.3(4), and to strike out claims under CPR 3.4(2)(b), should be exercised. He made the point, in reliance on *Shawton Engineering Ltd v DGP International Ltd* [2003] Civ 1956 at [16ff], that the court should not make orders of its own initiative under CPR 3.3(4) unless it is certain that it has all the material it needs to make a fair order in accordance with the overriding objective. He directs that point at District Judge Taylor, although of course it is not that judge's decision that is under appeal.

19. CPR 3.4(2)(b) provides that "the court may strike out a statement of case if it appears to the court … (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".

20. The power to strike a claim out as an abuse under 3.4(2)(b) is a draconian one. Mr Ramel referred to *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685; [2015] 1 WLR 4534, in which the claimant solicitors sought to recover unpaid fees from a client. On the defendant's application to strike out the claim as an abuse the judge found, on written evidence, that some of the bills were false and deliberately fabricated or based on fabricated documents, and struck out the claims as an abuse of the process. On appeal by the claimants, Vos LJ, with whom the other members of the court agreed, said at [21] that while striking out was available at an early stage in the proceedings, it was only appropriate "where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to

prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined". He went on:

> [22] .... In my judgment, the court should exercise caution in the early stages of a case in striking out the entirety of a claim on the grounds that a part has been improperly or even fraudulently exaggerated. That is because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The court is not easily affronted, and in my judgment the emphasis should be on the availability of fair trial of the issues between the parties....
>
> [24] ..... it must be remembered that the remedy should be proportionate to the abuse. In the context of this case, it is also worth emphasising before I turn to the particular circumstances that litigants should not be deprived of their claims unless the abuse relied on has been clearly established. The court cannot be affronted if the case has not been satisfactorily proved. This aspect is obviously inter-related with whether or not a fair trial remains possible.

21. Vos LJ concluded that the judge could not have been properly satisfied that the solicitors had been guilty of misconduct which was so serious that it was an affront to the court to permit them to continue to prosecute their claims, had not been justified in saying that the abuses created a serious risk that a fair trial would not be possible, and should not have decided issues of fraud without disclosure and cross-examination.

22. What *Alpha Rocks* shows is that the courts should be very slow to strike out a claim on the papers except in the very clearest cases of indisputably serious misconduct.

23. Mr Ramel also made submissions about the effect of the decision in *Beavis*.

24. It is important to note that in that case, the claim in dispute was the amount of the charge for contravening the terms of the licence to park, which was found to be no higher than necessary to achieve the necessary and reasonable objectives of managing the efficient use of parking space by inducing the defendant not to overstay so that others could use the available parking space, and of providing an income stream to enable the operator to meet the costs of the scheme and make a profit in doing so. The terms of the parking management company's contract allowed for the possibility of recovering further costs, but in *Beavis* they were not claimed, so were not in issue. The case did not decide that such further costs are not recoverable.

25. While the £85 charge in *Beavis* was found to be reasonable and not a penalty, the court stressed that the operator could not 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 provided the service. The court did not decide that a higher charge would not be reasonable; merely that the charge in that case was reasonable.

26. The Supreme Court also looked at the Unfair Terms in Consumer Contracts Regulations 1999, now replaced by the Consumer Rights Act 2015, and found that the same considerations that showed that the £85 charge was not a penalty showed that it was not unfair for the purposes of the Regulations. A factor in the assessment of the fairness of a term was the regulatory framework, which included the BPA Code of Practice, which was in practice binding on the operator because compliance with it was a condition of the operator's ability to obtain details of the registered keeper from the DVLA.

27. It is necessary to consider briefly the 2015 Act, which replaced the 1999 Regulations. For the purposes of the Act, a 'consumer' is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

28. By s62 (headed 'Requirement for contract terms and notices to be fair'),

> (1) An unfair term of a consumer contract is not binding on the consumer.
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
> (5) Whether it is fair is to be determined -
> (a) taking into account the nature of the subject matter of the contract, and
> (b) by reference to all the circumstances existing when the contract was agreed and to all the other terms of the contract or of any other contract on which it depends.

29. Section 63 of the Act brings in Schedule 2, part 1 of which contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of that part of the Act. The examples given at paragraphs 6, 10 and 14 are relevant, because they were considered by the judge.

> (6) A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation;
> (10) A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract;
> (14) A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.

30. By s67, headed 'Effect of an unfair term on the rest of the contract',

> Where a term of a consumer contract is not binding on the consumer as a result of this Part, the contract continues, so far as practicable, to have effect in every other respect.

Mr Ramel relies on that section to argue that even if the court was entitled to regard the £60 debt recovery charge as unfair, the claim to the £100 PCN survived.

31. By s71, which is headed 'Duty of court to consider fairness of term',

(1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.
(2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.
(3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.

32. Mr Ramel relied on s71(3), submitting that the judge could not have had before him sufficient legal and factual material to consider the fairness of the term for debt recovery charges. He also submitted that the judge failed to consider the elements of s62 (whether or not there was good faith, whether there was a significant imbalance in the parties' rights) and that there was insufficient material before the court on which the judge could determine whether paragraphs 6, 10 or 14 of Schedule 2 were engaged.

DISCUSSION

33. It seems to me that the fundamental difficulty about the decision of the district judge is that it will only be in the clearest cases that it will be right to strike out a claim as an abuse of process. There is no doubt that deliberately to make a false claim is an abuse of process, but the *Alpha Rocks* judgment shows that the abuse must be clearly established. In this case, District Judge Taylor felt able to decide on the papers that the claimant had made a 'knowingly inflated' claim for a sum which it was not entitled to recover. He made what amounted to a finding of fraud, or at least dishonesty, without the benefit of any evidence. District Judge Grand made in effect the same conclusion, although he had the undisputed evidence of Mr Brown before him, holding that the charge was unlawful because it was disproportionate, fell foul of *Beavis* and also of the unfair contract terms provisions of the 2015 Act, and that the entire claim was tainted by the attempt to recover the debt recovery charge.

34. With great respect to two experienced and able judges, there are a number of errors in this approach.

35. Firstly, it is wrong in principle to strike out a claim as an abuse of process on the footing that the claimant knows it to be inflated and unlawful, when there is no evidence that the claimant knows anything of the kind, and no proper basis on which such a state of mind can be inferred. As Vos LJ said in *Alpha Rocks*, litigants should not be deprived of their claims unless the abuse relied on has been clearly established, and the court cannot be affronted if the case has not been satisfactorily proved.

36. Secondly, the debt recovery charge does not fall foul of the decision of the Supreme Court in *Beavis*. The court was not considering debt recovery charges in that case.

37. Thirdly, whether or not the term is an unfair one, so that the charge is irrecoverable, cannot be determined simply on the basis that the term 'fits' the examples given at paras 6, 10 or 14 of Schedule 2: those are simply examples of terms that may be unfair. Whether or not the term is in fact unfair depends on the factors stated at s62(4) and (5), but the judge did not refer to that section or take those matters into account.

38. Fourthly, even if it had been right to regard the debt recovery charge as unlawful, the effect of s67 of the 2015 Act is in principle that the contract otherwise continues to have effect. In other words, the claim for the £100 PCN did not necessarily fail as a result. However, the judge appeared not to have considered s67.

CONCLUSION

39. The appeal is allowed, and the claim must be remitted to another district judge for directions to be given and for a date to be fixed for the final hearing.

40. There will be no order for the costs of the appeal, which was not opposed by the defendant. Realistically, the claimant seeks no such order.