IN THE COUNTY COURT AT CAMBRIDGE **Claims Nos 3JD05152 / 3DJ05169**

HHJ MOLONEY QC

PARKING EYE LIMITED **Claimant**

And

BARRY BEAVIS **Defendant (Claim - 152)**

MARTIN WARDLEY **Defendant (Claim -169)**

Jonathan Kirk QC and David Altaras, instructed by the Claimant's Head of Legal Services

The Defendants in person, assisted by Mr Foster and Mr Carrad (McKenzie Friends permitted to address the Court)

JUDGMENT

(handed down at the County Court at Southend on 19 May 2014)

1. INTRODUCTION

1.1 This judgment is given on the joint trial of two small claims, in each case for the sum of £85 in respect of a charge for overstaying at the car park of the Riverside Retail Park in Chelmsford; that car park is managed by the Claimant company. Because the two Defendants raise similar defences, of law rather than fact, and because there are many other similar cases pending in the courts of East Anglia, and indeed the country as a whole, as Designated Civil Judge I have taken the unusual course of hearing these two cases at first instance in the hope that this decision will assist the parties and District Judges hearing similar cases in the future.

1.2 I should however emphasise:

a. that since I am a Circuit Judge not a High Court Judge, this decision has only persuasive force;

b. that it is based on one particular set of the Claimant's standard notices and terms, which may have varied from time to time, a point which should be checked in other cases;

c. that although Mr Foster, the Defendants' McKenzie friend, put his case clearly and well, especially in his very helpful written submissions, and although leading and junior counsel for the Claimant were of course conscious of their duty to the Court to inform it of all relevant authorities that might assist either side, still the Defendants did not have the benefit of professional assistance that might in another case produce different arguments and perhaps a different result.

2. THE FACTS

2.1 The essential facts in both cases are similar and not materially disputed. (Mr Wardley also raises disability issues, which are considered at 8 below.)

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, (This is considered further at 3 below.)

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.

2.4 The signs are worded as follows (the words 1 have underlined being especially large and prominent, and the words 1 have italicised being in small print but still legible if one wished to read them):

"Parking Eye car park management

2 hour max stay

4 hour maximum stay for Fitness. Centre members

Failure to comply with the following will result in a Parking Charge of E85

CLOCK LOGO: Parking limited to 2 hours (no return within 1 hoar)

P LOGO: Park only within marked hays

WHEELCHAIR LOGO: Blue badge holders only in marked bays

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 if 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.

This car park is private property."

The signs also display legibly the telephone number and postal address of Parking Eye Ltd, the logo of the British Parking Association (BPA), and the statement that the car park is monitored by AN PR (automatic number plate recognition).

2.5 The ANPR cameras showed that:

a. on 2 February 2013, Mr Wardley's vehicle entered the car park at 1456 and left at 1738, a stay of 2 hours 42 minutes;

b. on 15 April 2013, Mr Beavis's vehicle entered the car park at 1429 and left at 1726, a stay of 2 hours and 56 minutes.

Each Defendant accepts that he was the driver of his car on that day, and does not dispute that the car was in the car park for more than 2 hours,

2.6 In each case, the Claimant obtained the registered keeper's details from the DVLA (paying it a fee for the purpose). It then sent each Defendant three successive standard letters, receipt of which is not disputed:

a. a First Parking Charge Notice, which included clear timed photographs of his car entering and Leaving the car park, and statements to the following effect:

- that the Parking Charge of £85 was payable within 28 days of the date of the Notice, but would be discounted to £50 if paid within 14 days;

- that the charge was payable by the driver, but that under Para.9(2) of Schedule 4 to the protection of Freedoms Act 2012 it would after 29 days be payable by the registered keeper if the driver had not by then paid or at least been identified to Parking Eye by the keeper:

- instructions for payment by Internet, telephone or post;

- details of an appeals procedure, to be pursued within 28 days. and involving an initial appeal to Parking Eye itself and a second appeal to an independent appeals service, POPLA.

b. a Reminder Notice, in similar terms, sent some 9 days later than the First Notice.

e. a warning letter to the registered keeper, sent after the expiry of 29 days. and stating that he was now liable in that capacity and that if he did not pay the £85 within a further 14 days "further action may be taken" such as the instruction of solicitors or the commencement of legal proceedings. which could incur further costs.

2.7 In each case these three Letters were ignored, as was a subsequent letter before action, and the present county court proceedings were therefore commenced, at which point Defences were served raising the various points of law dealt with below.

(It is relevant to mention that Parking Eye has attracted the attention of an online group, and the possible legal objections to its business model have been publicised online, which is one reason why these ¯test cases" have been thought useful on both sides.)

3. PARKING EYE'S CONTRACT WITH THE SITE OWNER

3.1 Underlying its dealings with individual motorists as set out above, and important in relation to several of the defences they raise, is the nature of the legal relationship between Parking Eye and the actual owner of the ear park site. As stated, their contract in this case dates from August 2011. What follows is a summary of that contract. (I have also been shown an earlier version dating from 2008, made with a landowner called GVA; that contract is different in some material respects. 1 was informed by the Claimant that the older contracts are gradually being replaced with contracts in the newer form.)

3.2 The 201 l contract is headed ¯Supply Agreement for Car Park Management - Basic" and consists of a front sheet dealing with the parties and terms specific to this contract, and two pages of "small print" containing a recital and 29 clauses of standard terms and conditions of supply.

3.3 The front sheet identifies the parties and the site. It includes the following provisions specific to this contract (the lettering is mine):

"A. The Customer authorises Parking Eyre to carry out the Services as its authorised car park management operator at the site.

B. Service type (Schedule 1) ANPR. Permit and Terminal System,

C. Services (Schedule 1): Parking Eye will provide car park management services in accordance with the Site Survey and Civils Specification to include, but not limited to,¯ Product installation and maintenance; Automatic parking Charge generation: DVLA searches and letter services: Call centre and cash collection processing services: and transparent data and reporting via the Parking Eye website. Parking Eye reserves the right to amend or supplement this Schedule 1 by written notice to the Customer from time to time as new Sites and new available car park management services are developed.

D. Car Park free stay time limit: 2 hours free stay.

E. Pay and Display Time Limits and Tariffs (if applicable): N/A.

F. Other parking details (e.g. Terminal. attendants): REDACTED

G. Charges (Schedule 2): Parking Charges: £80, reduced to £50 if paid within 14 days.

H. Schedule 2: The Charges shall be the Parking Charges together with the revenues earned from paid parking. e.g. P&D. Contract parking, and any other services performed by Parking Eye for the Customer, as set out in this Schedule as amended by Parking Eye from time to time.

I. Parking Eye supplies the Services in return for the following Revenues: NPR derived Parking Charge revenue — 100%. Parking Eve shall guarantee payment o f [AMOUNT REDACTED] to the Customer per week from the Go Live date for each week wail the date on which this Agreement terminates."

In addition the front sheet deals with the location of the sites, the term of the agreement (essentially, open ended with 3 months' notice on either side), and signatures on behalf of each party accepting the standard terms and conditions attached.

3.3 The standard terms are extensive, but the following are or may he particularly relevant to the issues arising before me for decision:

"1. DEFINITIONS AND INTERPRETATION

"Exemptions" means the circumstances when it is agreed that the Parking Charges should be cancelled agreed in writing between parking Eye and the customer as set out in the user manual on a site by site basis.

3. SUPPLY OF THE PRODUCT'S AND SERVICES

3.8 The Customer, being the landowner of the sites (or as agent for the landowner and having the prerequisite authority to bind the landowner) hereby appoints Parking Eye to act as agent as the appointed car park operator. Such appointment shall include the authority ice

3.8.1 carry out parking control and enforcement work at the sites in accordance with the BPA Approved Operator Scheme Code of Practice:

3.8.1.1 the conditions or restrictions on parking control including but not limited to the time limits to be notified for free parking or paid parking via the signage and grace periods at the sires... Parking Eye are hereby authorised to issue the Parking Charges (as defined in Schedule 2) should a breach of these conditions and restrictions occur. will collect such Parking Charges by any method up to and including by way of legal proceedings to recover charges due from drivers charged for unauthorised parking.

22. NO PARTNERSHIP OR AGENCY

Nothing in this Agreement is intended to create a partnership or joint venture or legal relationship of any kind that would impose liability upon one Parry far the act or failure to act of the other Party between the Parties or to authorise either party to act as agent for the other. Save as expressly provided in this Agreement, neither Party shall have authority to make representations, act in the name or on behalf of or otherwise to bind the other.

23. NO LANDLORD AND TENANT
Parking Eye and the Customer agree that no relationship of landlord and tenant as defined under the Landlord and Tenant Act 1954 is intended or deemed to be created in relation to the operation of this Agreement at any site, nor shall the provisions of this Agreement be deemed to create in favour of Parking Eye wry lease of or similar interest in the land in which the Products are situated.

3.4 It will be noted that the site owner does not pay Parking Eye anything for its services in operating the owner's car park. Rather (at least in this case) Parking Eye pays the owner a weekly amount for the right to operate in that car park. Neither Parking Eye nor the owner charges motorists anything for parking in the car park, provided they leave within 2 hours. So Parking Eye's sole or main income stream is derived from the sums it receives from over-stayers: £50 if paid within 14 days; £85 if paid thereafter (less of course its operating costs including the costs of enforcement).

3.5 I was shown Parking Eye's accounts for the year ended 31 August 2013, including of course the figures for the previous year. These showed the following (rounded to the nearest £10,000)

TURNOVER	£13,920K (2012)	£14,270K (2013)
OPERATING PROFIT	£4,480K	£1,640K
NET PROFIT BEFORE TAX	£3,290K	£1,020K

3.6 Although the site owners have played little or no part in this case (except as stated at 8 below) there was a consensus in Court that their objectives as commercial landlords in retaining Parking Eye to run a "traffic space maximisation scheme would obviously include:

a. the need to provide parking spaces for their commercial tenants' prospective customers;

b, the desirability of that parking being free so as to attract those customers;

c, the need to ensure a reasonable turnover of that parking so as to increase the potential number of such customers;

d. the related need to prevent "misuse" of the parking for purposes unconnected with the tenants' businesses, for example by commuters going to work or shoppers going to otT-park premises; and

e. the desirability of running that parking scheme at no cost, or ideally some profit, to themselves,

The Defendants did not contend that there was anything inherently wrong or oppressive to the general public or its interests in a site owner pursuing such objectives.

4. THE OPPOSING CASES

4.1 On the Defendants' behalf, Mr Foster raises some seven objections to the claims:

i. No contract for parking was entered into;

ii. Parking Eye has no standing to bring a claim,

iii. The charge purports to be for breach but is not a genuine pre-estimate of loss;

iv. The driver cannot be deemed to have agreed to the terms;

v. The Claimant has not complied with the 2012 Act;
vi. The charge is an unenforceable penalty;

vii. (In relation to Mr Wardley only) that his claim raises disability issues under the Equality Act 2010 and/or that Parking Eye cannot pursue him because the site owner has requested it not to do so,

4.2 The Claimants submit that there is some obvious overlap between the above objections and that in legal terms they can all properly be addressed under four main headings:

A. The contractual relationships between the landowner, Parking Eye and the Defendants;

B. The statutory regime under the 2012 Act;

C. The penalty clause issue;

D. The disability issues special to Mr Wardley.

I agree that this is a convenient way to approach the Defendants' cases and l shall adopt it below.

5.THE CONTRACTUAL RELATIONSHIPS

5.1 Offer and Acceptance

It may be helpful to begin by approaching this ease on the hypothetical basis that the claimant was in fact the owner of the land, operating the car park for its own benefit. In such a case, it is well established that a valid contract can be made by offer, in the form of the terms and conditions set out on the notice, and acceptance, in the form of parking one's car in the space provided. This is not a case like Thornton v. Shoe Lane [1971] 2 QB 163, in which the car park company seeks to rely on a clause which was not reasonably apparent to the motorist at or before the time he parked his ear. And though, on Parking Eye's system, there is no issuing of tickets or putting coins into slot-machines at the time of parking, or even of leaving the car park, still any unequivocal act of acceptance will suffice, and the signs clearly state (as anyone would nowadays expect) that parking constitutes acceptance.

5.2 Consideration from Motorist

The Defendants' first contention, which is independent of any issue about the operator's status, is that because the initial 2 hours of parking is free there is no consideration given by the motorist on his side of the bargain. But this overlooks the basic principle that to give a binding promise is itself sufficient consideration. even if the circumstances in which one would be obliged to fulfil the promise never in fact arise, So here, the motorist accepts the relatively valuable privilege of 2 hours' Free parking, in return for his promises that (a) he will leave when the 2 hours is up and (b) that if he does not then he will pay the specified charge, Those promises (which are beneficial to the operator and detrimental to the motorist) are given at the outset, and are themselves a species of valid consideration.

5.3 Consideration from Parking Eye

The Defendant& next point also relates to consideration, but turns on the fact that Parking Eye is not the landowner. It is that if, as Parking Eye contends, it is a principal contracting party then it does not give any consideration, because the alleged consideration on its side is a licence to park on the land, and since Parking Eye does not own or occupy the land it has no right or power to confer a valid licence of that sort However, the landowner itself certainly does have such a right or power, as part of the "bundle of rights" which together constitute ownership, and there is no reason in principle why the landowner cannot assign or licence to another person the right to permit third parties to use the land for a limited purpose,

5.4 Parking Eye's right to permit parking on land

The live issue on consideration thus becomes whether the contract between the landowner and Parking Eye does in fact confer such a right on Parking Eye, It is true that that contract does not expressly confer such a right on Parking Eye. But some aspects of a contract are so fundamental and obvious that they do not need to be spelt out in writing. The granting of licences to occupy parking

spaces is so fundamental to car park management that a car park might almost be defined as a place where such licences are available. Here, the contract expressly refers to the provision of car park management services, to 2 hours free stay, and to a Parking Charge of £85. The definition of "services" in Schedule 1 is expressly not exhaustive. In short, the business efficacy of the contract necessarily requires that Parking Eye shall have the right and power to confer valid licences to park cars on the site. In my judgment, its exercise of that power in a particular motorist's favour plainly constitutes sufficient consideration. And in any case, consideration need only move front one side.

(I should note at this point the decision of the Court of Appeal in Vehicle Control Services v. HMRC [2013] EWCA Civ 186, para, 22 per Lewison LJ, that even if the underlying contract with the landowner did not give the car park manager the right to grant such licences, that did not mean that it was unable to enter into a valid contract with the motorist to do so; on my interpretation of this contract, that question does not arise here.)

5.5 Principal and Agent

However, the Defendants challenge the Claimant's assertion that it did contract with them as a principal. (indeed, somewhat surprisingly, they also deny that it acted as agent for the landowner, their primary position apparently being that it had no right to act at all and that its purported acts are a nullity.)

5.6 Parking *Eye* certainly purports to contract as principal. Its name, not the landowner's, is on the signs. All the correspondence is in its name, and it (not the landowner) is the Claimant in each action. It claims payment of the Charge for itself, not to hold on account for another. But, the Defendants point out, there is an apparent contradiction on the face of its contract with the Landowner. At clause 3.8 (see above) the landowner appoints Parking Eye "to act as agent as the appointed car park operator". But clause 22 is headed "NO PARTNERSHIP OR AGENCY" and says that nothing in the Agreement is intended to authorise either party to act as agent for the other. What is the Court to make of this?

5.7 In construing a commercial contract with apparently contradictory provisions, the Court should where possible seek to give the contract business efficacy and adopt the interpretation which best fits the contract read as a whole- Here, it appears to me that the financial provisions of this contract give the best clue to its real nature so far as the question of "principal or agent?" is concerned. The landowner is not paying Parking Eye to carry out work for it or discharge functions on its behalf. Rather, Parking Eye is paying the landowner for the valuable privilege of being able to run a *car* park for Parking Eyes own profit, and specifically for being allowed to levy charges on over-stayers. Moreover, as the Claimant points out, the payments to the landlord are at a flat rate; the landlord does not take any percentage or other direct share in the sums received by Parking Eye and is not even entitled to an account of them. This fact renders implausible the Defendants' suggestion that Parking Eye owes some form of fiduciary duty to the landowner.

5.8 I accept the Claimant's submission that the legal character of the relationship between two contracting parties is to be defined by the overall nature of their respective rights and obligations as set out in the contract, and not simply by the label that they choose, perhaps erroneously, to give it. Here, the relationship has fewer of the characteristics of agency and more of the characteristics of a commercial contract between two equal businesses. As a matter of construction the express NO AGENCY clause prevails over the incidental use of the word "agent" in the earlier part of the document.

5.9 Conclusions on Contract Issues

For those reasons I conclude that in these two cases Parking Eye was entitled to and did contract with the motorists as principal, not as agent for the landowner, and is lawfully entitled to sue them for the charges in its own name and keep the proceeds for itself (subject of course to the Defendants' other points considered below).

This conclusion is strongly supported by the decision in VCS above. Although that case arose in a very different legal context (liability for VAT on the parking charges) and VCS operated a rather different business and contractual model from Parking Eye's. the Court of Appeal's decision that VCS was not the landlord's agent but an independent contractor receiving payment from the motorists not the landowner) relied on very similar considerations to those at 5.7 above. (See paras 28 to 31 of the judgment) It is also reinforced by the statutory provisions considered at 6 below.

6. THE PROTECTION OF FREEDOMS ACT 2012

6.1 The relevant provisions of this Act (s. 54 and Schedule 4) came into force on 1 October 2012 and therefore apply to both of these cases.

6.2 The principal object of this part of the Act is to lay down a procedure whereby the registered keeper of a vehicle may be rendered liable for a parking charge incurred in relation to it, even though he may not have been the driver (and therefore the contracting party) on that occasion. ln the present cases, the Defendants do not in fact deny being the drivers: but it is right to say that, because they did not respond to correspondence, the claims against them are made in their capacity as registered keepers.

6.3 The point taken by the Defendants, which is a variant of the more general contractual points considered at 5 above, is as follows:

- the liability under Sched. 4 is owed to "The creditor", who is there defined as "a person who is for the time being entitled to recover unpaid parking charges From the driver of the vehicle";

- before the registered keeper can be made liable in place of the driver, para, 6 of the Schedule requires that he be given a notice in accordance with paras 8 or 9:

- both paras 8(2)h and 9(2)h require that the notice must "identify the creditor";

- but here, the notices identified the creditor as Parking Eye itself, not as the landowner or Parking Eye as agent or representative of the landowner, and are therefore invalid.

6.4 The short answer to this is that, for the reasons set out at 5 above, Parking Eye does have a valid contractual right to payment from the driver on its own account, not the landowner's, and is properly named as the creditor on the notices, which are therefore valid. However, it is worth examining the statutory scheme a little more closely to see whether it is consistent with the common law analysis at 5 above.

6.5 By para. 1 of Schedule 4. the Schedule applies where the driver Is required by virtue of a relevant obligation to pay parking charges in respect of the parking of the vehicle on relevant land". This is amplified in the definitions section, para. 2, which defines a "relevant obligation" as one arising under a "relevant contract".

6.6 A "relevant contract" is there defined as:

"a *contract (including a contract arising only when the vehicle was parked on the relevant land, between the driver and a person who is-*

a. the owner or occupier of the land or

b. authorised, under or by arrangements made by the owner or occupier of the land, to enter into a contract with the driver requiring the payment of parking charges in respect of the parking of the vehicle on the land

6.7 It will be apparent that the contractual arrangements in this case, as analysed at 5 above, are entirely compatible with this statutory definition, which:

i. envisages that the contract may be made by the very act of parking the vehicle;

ii. envisages that the contract may either be between the driver and the owner or occupier, or between the driver and a person authorised by the owner/occupier to enter into such contracts. (The authorised person in *the* latter case must therefore be a principal contracting party not an agent, otherwise the owner or occupier would itself be a party to the contract); and

iii. does not require that the charge be payable to the owner or occupier, but leaves open the possibility that it may be payable to another person, for example the authorised person.

6.9 For these reasons, the 2012 Act reinforces rather than weakens Parking Eye's claim.

7. ARE THESE UNENFORCEABLE PENALTIES?

7.1 The Penalty Clause issue

The Defendants' strongest and most legally interesting objection to Liability may be summarised as follows:

a. The £85 parking charge levied on over-stayers is manifestly a penalty, both in everyday language and in legal terms. Similar charges imposed by local authorities are actually called ¯penalty charges" in subordinate legislation, for example in S.I. 2007 No. 3487, the Civil Enforcement of Parking Contraventions Order 2007. And in the original version of its contract with landowners, Parking Eye itself defined its Parking Charge as a "penalty fee", a definition dropped from the current version of the contract though the actual nature of the fee remains unchanged.

b. As Parking Eye slated in the User Manual to its original form of contract, the purpose of the Parking Eye ANPR system is to deter motorists from using the GVA Grimley car park for anything other than shopping within the stores" (my emphasis).

c. The £85 charge is in no sense a pre-estimate of any loss actually sustained by Parking Eye as a result of over-staying, especially given that Parking Eye does not charge a fee for the first two hours and is not therefore losing anything if newcomers are prevented from occupying the space.

d. It is well established at common law that a contractual provision for payment of a specified sum in the event of breach will be unenforceable and void if it is in the nature of a penalty rather than a genuine pre-estimate of loss, especially if its purpose is to operate *in terrorem.*

e. For the above reasons, this charge is plainly a penalty clause and therefore unenforceable.

7.2 The Unfair Terms Regulations

Running alongside this objection is a related one based on the Unfair Terms in Consumer Contracts Regulations 1999/2083, which provide by Regulation It that an unfair term in a consumer contract shall not be binding on the consumer.

An unfair term is one which "*contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*" (Reg. 5(1). Schedule 2 lists examples of such unfair terms, including at 1(e) terms which have the object or effect of *"requiring any consumer who fails to 1461 his obligation to pay a disproportionately high sum in compensation"*.

The Defendants contend that the purported contractual obligation to pay the £85 parking charge for overstaying plainly falls foul of this prohibition as well as the common law, The Claimant on the other hand goes so far as to contend that these Regulations have, in effect, superseded or crystallised the common law on penalties in the consumer context (as now developed) and that its contractual provision complies with the requirement of good faith, in particular because it is plain and apparent to the motorist and in accordance with the well-established norms of car parking.

7.3 The Authorities

The Claimants have helpfully provided me with a selection of the leading appellate authorities on the subject of penalty clauses, going back to 1905 and culminating in 2013. (It is right to point out that none of them relates to what we would now think of as a consumer contract.) For present purposes the main themes can be summarised as follows,

7.4 The older authorities begin with a simple dichotomy: is the clause which specifies a predetermined sum payable in the event *of* breach:

a. a genuine pre-estimate of loss, properly describable as liquidated damages? or

b. a penalty, that is, a payment stipulated as *in terrorem* of the offending party?

(See the judgment of Lord Dunedin in Dunlop Pneumatic Tyre Company [1915] AC 79.)

7,5 In considering whether the clause provides for liquidated damages, the court will bear in mind that there are many cases in which quantifying the loss from a single breach would be impracticable, though damage as a whole would certainly follow if the practice of breach became widespread. That may be a case in which it would be quite reasonable for the parties to estimate the damage from a single breach at a certain figure.

(See again Lord Dunedin's judgment, cited above.)

7.6 In considering whether the clause is a penalty, it is relevant whether the sum is "extravagant and unconscionable" by comparison with the greatest loss that could be proved as flowing from the breach.

(See Clydebank Engineering [1905) AC 6, per Lord Davey at 17.)

7.7 A payment will be *in terrorem* if its object is to deter the breach rather than to compensate the innocent party.

(See para. 13 of the judgment of Mance LJ in Cine Bes Filmcilik [2003) EWCA Civ 166g, quoting with approval the judgment of Colman J in Lordsvale Finance [19961 QB 752, and itself quoted with approval by the Court of Appeal in Murray v. Leisureplay 12005] EWCA Civ 963 at para. 38.)

7.8 The New Approach

The more recent cases have recognised that the original dichotomy may be too simple, and that there may be intermediate cases in which an apparent penalty can nevertheless be upheld where it has a "'good commercial justification".

(See Talal el Makdessi v. Cavendish Square Holdings [2013] EWCA Civ 1539, per Christopher Clarke LJ at paras 84 to 104, where the authorities are extensively reviewed and the conclusion reached (at 104) that *"these cases show the court adopting the broader test of whether the clause was extravagant and unconscionable with a predominant function of deterrence, and robustly declining to do so in circumstances where there was a commercial justification for the clause".)*

7.9 Christopher Clarke LJ did however remain cautious about any dilution of the courts' traditional hostility to mere deterrence, saying at para. 87 in relation to a passage from Colman J's judgment in Lordsvale (above) that *"the situations in which a clause is commercially justifiable but its dominant purpose is to deter are not readily discernible".* (It may be that he was not directing his mind to car park charges in that case, where the potential "penalty" sum was about $40 million.)

7.10 The Defendants rightly counsel caution in applying the "commercial justification" approach to a consumer case where the parties contract on the stronger party's standard terms, especially perhaps in a case like this where the contract is accepted by action without any opportunity for human interaction or negotiation at all. They refer me to the judgment of Burton J in E-Nik v. Dept for Communities [2012] EWHC 3027 Comm, where emphasis was given to the fact that the clause he upheld was negotiated and freely entered into between parties of comparable bargaining power and was not oppressive or *in terrorem.*

7.11 The Claimant's response is firstly that, although those were commercial rather than consumer cases, that does not exclude the legitimacy of considering the commercial justification of the clause here, and secondly that if the courts are looking for guidance on how to approach the "penalty clause" problem in the consumer context, where better than to the combined wisdom of the EU and Parliament as set out in the 1999 Regulations (above at 7.2) which in effect strike a balance between the commercial interests of the receiving party and fairness and good faith towards the paying party?

7.12 Analysis and discussion

It appears to me on the basis of the above authorities that the proper modern approach to deciding whether any particular clause is unenforceable as a penalty must be a global one, examining the clause from three overlapping perspectives: i. proportionality to actual loss., ii. tendency to deter rather than compensate; and iii. commercial justification/fairness, with a view to deciding whether, considered in the round, it is so extravagant, unconscionable and unjustifiable that the courts ought not to give effect to it.

7.13 Proportionality to Loss

a. It is a peculiar feature of the present case that the Claimant's only source of income is payment upon breach. If all its customers honoured their contracts, it would have no income at all. This is the opposite of the conventional business model, where one party's anticipated profit is dependent on the other party performing his side of the bargain. So the concept of pre-estimating loss of profit on account of the breach, as applicable to a normal commercial contract. for say merchant-ship building or delivery of goods, has no real application here. (Some guidance is given by the Clydebank case, above, in which the delayed goods were four new destroyers for the Spanish government. They were not profit-making chattels, nor could any pecuniary figure readily be put on the harm that would be done to Spain's interests if its navy were weakened. But that did not prevent the courts from upholding a clause providing for a substantial delay payment of £500 per ship per week as a legitimate pre-estimate of a loss otherwise difficult to compute.)

b. This case does however fit fairly well into Lord Davey's concept (at 7.5 above) of one where a single breach (that is, instance of overstaying) might cause no apparent loss, but if breach without compensation became widespread the business would plainly suffer, both because Parking Eye would have no income and because its "suppliers" the landowners would not achieve their commercial objectives. In such circumstances it would be permissible to specify a proportionate (i.e. not extravagant) sum as compensation for each individual breach, even though it bore no direct relationship to the loss caused by that one breach.

c. The evidence in this case suggests two bases for determining whether Parking Eye's charge of £85 (discounted to £50 for early payment) is proportionate or extravagant,

i. Comparison with the scale of penalties for local authority parking approved by Parliament in the 2007 Regulations, at 7.1(a) above. This provides a scale of charges varying between £20 and £105 according to the severity of the parking contravention and the time elapsed before payment. Exact comparison is not easy because a different method of calculation is used, but the figures are broadly similar to Parking Eye's. (The Claimant also relies on the BPA's suggested maximum breach charge for private car parks of £100 discounted to £60, though, this being a trade association, its figures may not be so objectively justifiable as the officially prescribed ones.)

ii_ The Claimant's profit margins as disclosed by its annual accounts, at 3.5 above. The Claimant rightly urged caution here, since it is not the court's usual role to say how much profit a business is entitled to make; but given that those profits are entirely derived from the charges in question, less the direct and indirect expenses of collecting them, they are plainly a legitimate source of evidence on the issue of extravagance or otherwise. The two years' accounts before the court show net profit as 24% of turnover in 2012 and 7% in 2013. I have not received any accountancy or similar evidence, such as might for example explain the considerable difference in performance between the two years. Doing the best I can, these figures would appear to disclose a very healthy profit, but not one in which the income is so great in relation to the expenses that opprobrious terms like "extravagant" or "unconscionable" would be justified.

7.14 Deterrence

a. Without into intellectual dishonesty, it is difficult to avoid the conclusion that a charge of £85, or even
£50, for an overstay of less than one hour in an otherwise free car park is intended to and does involve a strong element of penalty aimed at deterrence. Pointers to this conclusion are:

i. Parking Eye's own admissions in the GVA contract and manual, referred to at 7.1 (a) and (b) above, and the rather suspicious fact that those words have been deleted from the current contract though the nature of the charges has not changed;

ii. the fact that essentially similar charges levied by local authorities are described as penalties in the statutory instrument, and bear an obvious analogy to fixed-penalty fines for criminal offences;

iii. the fact, of which the court takes judicial notice, that the charge greatly exceeds even the highest market rates for agreed street or commercial parking, which in Central London can be between £5 and £10 per hour; and

iv. the whole concept of a "traffic space maximisation scheme" (to quote Parking Eye's current notices) which is plainly intended to ensure that motorists do not overstay their welcome by imposing on them a charge for overstaying which not even the wealthiest driver is likely to consider worth the price.

b. Is the charge ¯*extravagant and unconscionable with a predominant function of deterrence",* to adopt Christopher Clarke U's formulation in Talal el Makdessi, above? For the reasons given at 7.13, I do not consider the charge to be "extravagant and unconscionable" per se. It has a dual function, to finance a profitable business, and to deter overstaying. Perhaps by good luck rather than judgment, at present the two functions seem to go hand in hand so far as the level of the charge is concerned, But there is no avoiding the fact that, regardless of Parking Eye's profit margins, its business scheme would not work properly unless the amount of the charge remained so far above the market rate for a day's parking in the same area that the great majority of motorists would rather move along than incur the charge. I therefore conclude that, in that sense, this charge does have a predominant function of deterrence.

7.15 Commercial Justification

Christopher Clarke LI went on to say that the situations in which a clause was commercially justifiable but its dominant purpose was to deter were not readily discernible (7,9 above). But in the present case, which is of course utterly different on its facts from the sort of commercial cases which he and his predecessors were considering, my conclusion is that this is one such situation. My reasons are these:

a. The concept of "deterrence" has different significance in different fact situations, In the criminal law, to take the obvious example, it is not repugnant; on the contrary, it is accepted as an entirely legitimate basis for the majority of criminal offences and in particular sentences, because it tends to influence the majority to act in accordance with the social goals the legislation seeks to encourage,

b. it was repugnant to the commercial lawyers who developed the anti penalty clause doctrine, because in the sort of cases They were considering the existing doctrine of awarding damages as a compensation for losses occasioned by breach was generally sufficient to secure performance and penalise breach. There was normally no adequate justification for arbitrary payments exceeding the likely loss, though when as in Clydebank such a case arose they made room for it,

c. In the present case, though it arises under the civil rather than the criminal law, the policy at (a) applies and the policy at (b) does not. In any market town or shopping centre, the supply of parking, whether on- or off-street, is a limited and valuable commodity, and it makes little difference to the motorists whether that parking is provided by a public or private body. In either case, they are used to paying for a limited period of parking (or being given it for free), while understanding that they are at risk of liability for a much larger sum if they over-stay. While this can be described as a policy of deterrence, it is an entirely legitimate and acceptable one, as the statutory instrument shows. On the other hand, as set out at 7.13 above, the ordinary principles of compensation for breach have no application in a case such as this.

7.16 Is This Provision Enforceable?

For the above reasons, my overall conclusion is that, although there is a sense in which this contractual parking charge has the characteristics of a deterrent penalty, it is neither improper in its purpose nor manifestly excessive in its amount. It is commercially justifiable, not only from the viewpoints of the landowner and Parking Eye, but also from that of the great majority of motorists who enjoy the benefit of free parking at the site, effectively paid for by the minority of defaulters, who have been given clear notice of the consequences of over-staying.

7.17 This conclusion is reinforced to some extent by consideration of the 2012 Act (see 6 above). That Act set out to regulate abuses by privately-run car parks. In particular it prohibited damping and its associated charges. But so far as enforcing payment of private parking charges was concerned, it positively encouraged it by conferring on the private operators similar rights and powers in respect of registered keepers to those previously enjoyed by the local authorities. It laid down detailed provisions in that respect, but although charges similar to those in issue here were common before the Act was passed, it made no attempt to prohibit or regulate them, as it well could have done if this was thought to constitute an abuse like clamping.

7.18 The Unfair Terms Regulations

As set out at 7.2 above, these regulations provide an overlapping protection against unfairness in consumer contracts. They require the Court to address whether the provision in question causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer, in breach of the requirement of good faith, and give as an example a provision which requires the consumer a disproportionately high sum in compensation for failure to fulfil his obligations. For much the same reasons as those given above in respect of penalty clauses, my conclusion is that this provision is not an unfair term under those regulations:

a. It is difficult to characterise as not in good faith a simple and familiar provision of this sort of which very clear notice was given to the consumer in advance.

b. There is not a significant imbalance between the parties' rights and obligations, when the motorist is given a valuable privilege (2 hours free parking) in return for a promise to pay a specified sum in the event of overstaying, provided that sum is not disproportionately high.

c. The charge in question is not disproportionately high, and insofar as it exceeds compensation its amount is justifiable, and not in bad faith or detrimental to the consumer.

7.19 In reaching this conclusion, I bear in mind the guidance given by the House of Lords in Director General of Fair Trading v. First National Bank PLC (2002] 1 AC 481, in particular that of Lord Bingham at para. 17:

The requirement of good faith in this context is one affair 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 consumer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer... Good faith in this context is not an artificial or technical concept...It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote."

In this case, when I consider the number of notices displayed, their prominence, their layout (in particular the emphasis given to the £85 charge and the 2 hour time limit) and the fact that parking arrangements of this general nature are familiar to the great majority of motorists, I am satisfied on the facts that the requirement of good faith, as Lord Bingham explains it, have been met here.

7.20 Somerfield Stores v. Parking Eye

Finally on the subject of penalties and unfairness, I should refer to the above proceedings, in which judgment was given by HHJ Hegarty QC, sitting as a Judge of the High Court, on 18 March 2011, and by the Court of Appeal at (2012] EWCA Civ 1338, It differed from the present case in at least two important respects: it was a dispute between Parking Eye and a landowner, not a motorist; and the charges levied on the defaulting motorist were calculated on a different basis, with an uplift for delay in payment as well as a discount for prompt payment.

The penalty charge issue was marginal to the main grounds of dispute between the parties, and does not seem to have been argued as fully before the Court as it has been before me. Judge Hegarty QC considered it at pans 414 to 428 of his lengthy judgment, and concluded that the initial charge of £75 for overstay was probably not a penalty, though a further charge of £60 for late payment might well he. (It seems clear from the provisional language of para 428 that his decision on this issue was obiter; it bore little relevance to the main dispute between the parties.) The Court of Appeal upheld his decision on the main dispute; it noted his decision on penalties without disapproval, but the point does not appear to have been the subject of appeal,

Because of the differences between the clause in Somerfield and that in the present case, 1 do not consider that decision to be directly in point, though as the only High Court decision on penalty clauses in this context it has my full respect. On the central issue, is a charge of this kind necessarily an unlawful penalty? its conclusion was the same as mine, though on different facts and by a rather different route.

8. THE DISABILITY ISSUES

8.1 In his witness statement, Mr Wardley explained that he had had a knee operation on 15 January 2013. just over 2 weeks before his parking incident. (It was his second operation, in respect of a football injury.) As a result of this operation, for the next month he used crutches whenever possible and was much slower in carrying out physical activities, e.g. walking and trying on clothes. For this reason his shopping trip that day took him much longer than usual, and the 2 hour time limit on parking at the site was inadequate for his purposes. He contends that he was therefore at the relevant time a person suffering from a disability, who ought by reason of the Equality Act 2010 to have been allowed a longer period of free parking.

8.2 The Claimant pointed me to s. 6(1) of *the* Equality Act 2010, which defines a disability as a physical or mental impairment which has a substantial and long-term effect on the person's ability to carry out normal day-to-day activities. By para. 2 of Schedule 1, the effect of an impairment is long term if it has lasted, or is likely to last, at least 12 s (or if it is likely to recur). In cross-examination Mr Wardley accepted that his mobility problem had cleared up within about a month, in the sense that after that time he no longer needed the crutches.

8.3 I therefore conclude that in this case, the motorist has not passed the threshhold beyond which disability and equality considerations would or might apply to the way in which Parking Eye does business. Parking Eye submitted that in any event it was clear that their rules were objectively justifiable under the Act, but I do not consider it right to decide that question on a hypothetical basis. if a truly disabled person should raise this sort of point in a future case, it can be decided then on its merits.

8.4 Mr Wardley's case also raised a separate but related matter, He had corresponded with Savills, who manage the retail park on the owner's behalf. He raised the issue of his mobility problems, as a result of which Savills asked/instructed Parking Eye to cancel the charge. (It appears that there is a protocol between Parking Eye and the landowner as to the circumstances in which a charge notice may be cancelled on what might he called humanitarian grounds; that protocol is commercially sensitive and has not been disclosed.) However, by that stage proceedings had been commenced and additional costs incurred; without prejudice negotiations apparently took place but the case was not settled. Ultimately, on 5 March 2014, Savills emailed Mr Wardley telling him that the charge had not been cancelled.

8.5 Mr Wardley relied on this as a defence in the following way - that if Parking Eye as the landowner's agent, and the landowner instructed it not to pursue a particular case, then it could not lawfully proceed with it since it would be exceeding its authority. However, for the reasons set out at 5 and 6 above, I have decided that Parking Eye is not an agent but a principal so far as its contract with the motorist and its resulting rights against the registered keeper are concerned. There is nothing in that contract which limits Parking Eye's right to levy the charge by reference to the landowner's wishes or instructions in a particular case. Nor indeed is there anything to that effect in the written contract between Parking Eye and the landowner, which gives the landowner no right to fetter Parking Eye's pursuit of its charges. It appears from a document headed ¯Exemptions" forming part of the OVA material that there was in that case (and therefore may be here) a list of situations in which, apparently as a matter of discretion, Parking Eye might be requested not to pursue a particular case. But, on the basis of the limited material put before me at this trial, I conclude on the balance of probability that there is nothing in this point that could provide Mr Wardley with a defence to liability, or stand in the way of the claim, once the question of agency has been disposed of.