Is a parking penalty charge of £85 in a consumer contract enforceable or fair?

31/07/2015

Litigation: Is a parking penalty charge of £85 enforceable or not? Does such a parking charge comply with consumer protection legislation? David Bowden, freelance independent consultant, comments on the submissions made to the Supreme Court of the United Kingdom on 21 to 23 July 2015 in this expedited appeal and talks to Which? Executive director, Richard Lloyd and Henry Hickman, Partner of Harcus Sinclair LLP.

Original news
ParkingEye Limited v. Barry Beavis
UKSC 2015/0116

ParkingEye operates a car park in Chelmsford offering 2 hours free parking. Mr Beavis parked there for 2hours 56minutes. ParkingEye sent Mr Beavis an £85 penalty notice for overstaying. Mr Beavis refused to pay it saying it was not a genuine pre-estimate of ParkingEye's loss.

ParkingEye brought a claim in Cambridge County Court to recover this penalty. Mr Beavis defended the claim and also said the charge was an unfair contract term. Although this was a small claim, HHJ Moloney QC heard the case and ruled in favour of ParkingEye. Mr Beavis appealed unsuccessfully to the Court of Appeal who handed down their judgment on 23 April 2015 **[2015] EWCA Civ 402.**

However the Court of Appeal itself gave permission for a final appeal to the Supreme Court of the United Kingdom. As this case also concerned an allegation that a contract term was an unlawful penalty, Mr Beavis's case was listed to be heard with Cavendish. The Consumer's Association intervened in the case to make submissions supporting Mr Beavis's case.

What are the facts?
At the Riverside Retail park in Chelmsford Essex is a car park operated by ParkingEye Limited. A sign at the entrance to this car park says this:

> "*ParkingEye car park management. 2 hour max stay. Failure to comply . . . will result in Parking Charge of £85. . .*
>
> *"ParkingEye Ltd is solely engaged to provide a traffic space maximisation scheme. We are not responsible for the car park surface, other motor vehicles, damage or loss to or from motor vehicles or user's safety. The parking regulations for this car park apply 24 hours a day, all year round, irrespective of the site opening hours. Parking is at the absolute discretion of the site. By parking within the car park, motorists agree to comply with the car park regulations. Should a motorist fail to comply with the car park regulations, the motorist accepts that they are liable to pay a Parking Charge and that their name and address will be requested from the DVLA.*
>
> *"Parking charge Information: A reduction of the Parking Charge is available for a period, as detailed in the Parking Charge Notice. The reduced amount payable will not exceed £75, and the overall amount will not exceed £150 prior to any court action, after which additional costs will be incurred. This car park is private property."*

Mr Beavis parked his car in the car park and stayed there for 2 hours and 56minutes. ParkingEye obtained his details from the Driver and Vehicle Licensing Agency and sent him a penalty charge

notice. Mr Beavis refused to pay. Mr Beavis contended that the £85 charge was not a genuine pre-estimate of Parking Eye's losses and was an unfair contract term.

The car park is owned by the British Airways Pension Fund ("BA"). It has a contract with ParkingEye to manage the car park. ParkingEye pays BA a fee of £5000 a month for operating the parking management scheme. ParkingEye cannot make a profit unless it generates income from motorists that over stay. Mr Beavis says this is a "bait and trap" scheme and that ParkingEye operates a flawed business model.

The business model has proved hugely lucrative for Parking Eye. In its filed accounts for the year ending 31 August 2013, it records a turnover of £14.3million and a healthy profit from all its parking fines of £1million after tax. In the 2011-2 financial year, on turnover of £13.9million it made an operating profit of £4.5million. Parking Eye has companies in the group of the well-known outsourcing company Capita as a corporate director and company secretary. It has missed the 30 May 2015 deadline for filing its accounts for the 2013-14 financial year and its auditors resigned on 6 March 2014.

What ruling did HHJ Moloney QC give?
It should be noted that this was a case on the small claims track and correspondingly there was little or limited disclosure. Mr Beavis made 6 submissions why he should not have to pay:

- He had no contract with ParkingEye,
- ParkingEye was not the landowner and had no standing,
- The £85 charge was not a genuine pre-estimate of loss,
- He had not agreed ParkingEye's terms,
- ParkingEye had not complied with the Protection of Freedoms Act 2012 (PoFA), and
- The £85 charge was an unenforceable penalty.

In an unreported judgment handed down on 19 May 2014, HHJ Moloney dismissed all of Mr Beavis's submissions. He ruled there was a valid offer and acceptance of ParkingEye's terms and that ParkingEye contracted validly as principal with Mr Beavis. Judge Moloney said that the "strongest and most legally interesting objection" was that in relation to penalty clauses. In doing so he noted that:

> "*It is a peculiar feature of the present case that the Claimant's only source of income is payment upon breach. If all the customers honoured their contracts it would have no income at all*."

Judge Moloney applied the test set out in *Dunlop* and that in the Court of Appeal in *Makdessi* and against that considered whether the £85 charge was "extravagant or unconscionable". He compared the lower penalties that local authorities charged, the profits that ParkingEye made but in the end Judge Moloney held it was not a penalty because it was commercially justified.

As to whether the £85 was an unfair contract term, Judge Moloney said there was an overlap with the penalty issue. The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) require an assessment of whether there is a "significant imbalance in the parties' rights" where a consumer is required to pay a "disproportionately high sum in compensation". This meant applying the ruling of Lord Bingham in *First National* **[2002] 1 AC 481** where he set out the test:

> "*The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations. 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."*

When Judge Moloney applied this test, he found that ParkingEye's terms met this test and were not unfair contract terms.

What happened in the Court of Appeal?
Mr Beavis's appeal to the Court of Appeal was dismissed on 23 April 2015 by Lords Justices Moore-Bick, Patten and Lloyd - **[2015] EWCA Civ 402**. In that appeal the Consumer's Association intervened to make written submissions broadly supporting Mr Beavis's case but did not appear at the hearing.

Moore-Bick LJ set out what he considered to be the modern position on the law of penalties in contracts:

> "*The decisions in which the modern approach to the doctrine of penalties has been developed have largely, if not entirely, concerned commercial contracts under which the parties' respective interests can usually be measured without too much difficulty in financial terms. For similar reasons the concept of commercial justification is one that fits readily into that context. However, if commercial justification means anything more than justification as compensation for financial loss of some kind (as it appears it must), it is difficult to see why justification for payment of a sum unrelated to financial loss should depend solely on commercial as opposed some other kinds of considerations. A correct application of the underlying principle that the court will not enforce a bargain for an extravagant and unconscionable payment should provide a sufficient basis on which to decide whether the court should decline to enforce a contract of this kind, notwithstanding the usual desirability of enforcing contracts into which the parties have freely entered*."

Moore-Bick LJ found this to be the deciding factor:

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

For reasons broadly similar to that given by HHJ Moloney, Mr Beavis's appeal was dismissed in part by reliance on the Court of Appeal judgment in *Makdessi*. However, by the time that judgment came to be handed down, the *Makdessi* case had already been listed for hearing in the Supreme Court in July 2015 and so the Court of Appeal took the unusual step of granting permission for a final appeal.

What has happened so far in the Supreme Court?
Mr Beavis changed counsel for the Supreme Court and instructed John de Waal QC and David Lewis (both from Hardwicke Building) who acted *pro bono*. As in the Court of Appeal, the Consumer's Association intervened. Its written case was prepared by Julia Smith who prepared the intervener's written submissions in the Court of Appeal. However at the hearing, the Consumer's Association was represented by Mr Christopher Butcher QC. The Supreme Court heard the *Makdessi* appeal first on the first 2 days, and then the *Beavis* appeal followed on 23 July 2015. At the end of the Beavis appeal, counsel in *Makdessi* were each permitted to make closing submissions on what all counsel had said in *Beavis*. Judgment has been reserved.

What is the significance of this case?
The case is significant for 2 main reasons.

The first is that the Supreme Court has had an opportunity to re-examine the common law relating to penalty clauses and genuine pre-estimates of loss. Whilst it remains to be seen whether it will actually do so, one possibility is that the Supreme Court will over-rule the 100 year old rule set out in *Dunlop*. At the very least this will give the Supreme Court a chance to re-explain *Dunlop* in a 21st century

context. In doing so, it will re-set the rules on penalties in contracts which will have wide implications for all those drafting contracts.

The second relates to the £85 parking charge and whether it complies with the UTCCR 1999. We see these sorts of small charges in a whole variety of different contexts in the consumer arena. *Beavis* is a very different case to *First National* where the terms relating to interest after judgement were clearly set out in an agreement that the consumer signed and had a 7 day cooling off period. Similarly in *First National* there was no penalty because the interest payable after judgment was at the same rate and the lender could show it suffered a loss because it was kept out of payment. For this reason the Consumer's Association intervened in the appeal.

Which? Executive director, Richard Lloyd, said:

> *"The Supreme Court has given us permission to intervene again in this case to ensure the court is fully aware of the ramifications of this decision for all consumers. We are pleased this case is being taken to the highest level as we are concerned the Court of Appeal's decision could water down the law on penalty charges and may encourage excessive default charges across a wide range of consumer markets."*

What were the issues the Supreme Court of the United Kingdom was asked to address?
The Supreme Court had to address the following 4 issues:

- What is the test for determining whether a term is an unenforceable penalty?
- Should the test be uniformly applied to commercial and consumer contracts?
- Is the £85 charge an unenforceable penalty?
- Is the £85 charge unfair and unenforceable under the UTCCR 1999?

What does the Beavis say?
Beavis's printed cases was much shorter than ParkingEye's at 13 pages, Beavis's oral submissions were much longer at around 2 hours in length.

In relation to the 4 issues, Beavis invited the Supreme Court to conclude in relation to Parking Eye's £85 parking charge it claims from Beavis for overstaying his welcome that :

- The dominant purpose of charge is to deter,
- The charge is "extravagant and unconscionable" in comparison with the greatest loss that could conceivably be proved to have followed from the breach,
- If "commercial justification" is relevant at all to consumer contracts there is no "commercial justification" for the charge, and
- The charge is unfair within the meaning of the UTCCR 1999 in that it is contrary to the requirement of good faith in that it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

Beavis' case says that a motorist who overstays by 1 minute will be hit with the same £85 penalty as someone who overstays by many hours. Beavis says whilst ParkingEye's notice says "Parking limited to 2 hours" – this is misleading because ParkingEye's ANPR cameras record a vehicle's entry time and exit time to the car park and it may take some minutes of the 2 hours to find a suitable car parking place. In relation to other car parks that ParkingEye operates, there have been complaints that Parking Eye has issued penalties where shoppers with disabled family members or who have been caught in long queues in supermarket checkouts have, through no fault of their own, gone over the grace period.

Beavis also sought to draw comparisons with charges that local authorities are permitted to charge by way of penalties for those parking on yellow lines and the like. Beavis notes that in Chelmsford these charges are capped at £50 or £25 for prompt payment. Beavis's submission is that these statutory charges bear out its case that ParkingEye's £85 penalty is not justified. On social justification, Beavis submits that this is not a relevant consideration for the Supreme Court. This is a matter for Parliament who should only be informed of this after there has been a proper inquiry into parking charges, viable alternatives, traffic flows and whether private sector car parking management businesses manipulate the period of free stay to maximise revenue. In one intervention, Lord Mance asked if there had been any studies conducted about length of stays and overstays and he was told not.

What does the intervener say?
In the Court of Appeal, the Consumer's Association intervened and made written submissions broadly supporting the case of the motorist. In the Supreme Court the Consumer's Association also intervened and was represented at the hearing by Mr Christopher Butcher QC. Their oral submissions lasted an hour.

The Consumer's Association issues the well-known subscriber magazine Which? Lord Mance said he subscribed to it but no-one took issue at the hearing that this amounted to apparent bias. In addition to this commercial activity, the Consumer's Association has also been given statutory powers as an enforcer under part 8 of the Enterprise Act 2002. When the Consumer Rights Act 2015 (CRA 2015) comes into force, the Consumer's Association will also be a designated regulator for unfair contract terms (paragraph 8(1)(k) of Schedule 3 and section 70 of the CRA 2015). The CRA 2015 gives the Consumer's Association powers to apply for an injunction in relation to any contract terms that it considers to be unfair or not transparent (Schedule 3 paragraph 3).

In its written case drafted by Julia Smith, the Consumer's Association submit that the £85 charge does cause a significant imbalance between the parties to the detriment of Mr Beavis. It says that ParkingEye suffers no direct financial loss if a driver overstays and that 2 hours parking in a town centre such as Chelmsford is unlikely to be worth as much as £20per hour. It says a flat £85 charge is too blunt and that a scale of charges which increased according to the length of the overstay could be one that ensured consumers did not pay a disproportionately high charge for unintentionally overstaying. The Consumer's Association submits that the scheme for the disclosure of driver data in PoFA is irrelevant in determining if the parking charges are unfair or not. The Consumer's Association submit that the Court of Appeal was wrong to rely upon the social purpose of making free parking available for a limited period for the benefit of shops at the Chelmsford site as justifying the disproportionate £85 penalty.

In oral submissions Mr Butcher QC made a number of additional points which, in view of their importance, are set out more fully than the submissions of the other parties who, in the main, re-iterated the submissions they had made in the courts below and in their written cases.

- ParkingEye had no interest in the land and suffered no direct financial loss (noting that the parking contract with Mr Beavis was made as principal and not as agent for the landowner),
- ParkingEye's contract (with Mr Beavis) was not very difficult to construe,
- Parking Eye cannot say the £85 charge is a genuine pre-estimate of its loss,
- You ignore the interests of the landowner when considering the £85 charge,
- It isn't Parking Eye's interest that the £85 charge allows them to protect and you can't look at Parking Eye's losses under its contract with the site owner when assessing this £85 charge,
- The Consumer's Association's general position in relation to the law on penalties is that there should be neither modification still less abolition of the rule on penalties because:
    - the law is long established,
    - Parliament could have intervened to replace it and it has not,
    - in its core area of payments due on breach it is not uncertain,
    - countless agreements have been structured based upon it,
    - there have been no significant judicial calls for its abolition, and
    - any question of abolition should be the product of an extensive consultation which is not possible and not achieved in this case.
- There should be no question of fundamental change or abolition of the penalties rule in the area of consumer contracts. If there is to be any modification of the penalties rule it should be retained in the consumer sphere:
    - It provides significant protection to consumers against one type of clause which can be particularly onerous.
    - Whilst issues of inequalities of bargaining power might not have been part of the reasoning behind the original law, there are judicial acknowledgements that its affect in addressing the undesirable consequences of addressing the consequences of inequality of bargaining power is 1 of the reasons for its retention.
    - This is implicit in the judgment of Lord Denning in *Bridge v. Campbell Discount Co Ltd* **[1962] AC 600** (where he refers to whether the consumer has really agreed the charge), its explicit in the judgment of the High Court of Australia in *AMEV UDC Finance Ltd v. Austin* **(1986) 162 CLR 170** and approved by the Privy Council in *Philips Hong Kong Ltd v. The Attorney General of Hong Kong* **[1993] 61 BLR.**

- The law of penalties has been salutary with very few difficulties thrown up.
- The fact that there are some other statutory protections for some who are in weaker bargaining positions does not eliminate the need for the protection of the law provided by penalties.

- The UTCCR 1999 only applies to individuals and doesn't cover small businesses. Recital 12 to the EEC Directive on unfair contract terms (93/13/EEC) which led to these regulations is a minimum harmonization measure and envisaged that member states could have more stringent levels of protection. There is clear benefit to the consumer in having the common law of penalties **as well as** that on unfair contract terms. For example, if a contract was individually negotiated, the UTCCR 1999 would not apply but the common law of penalties would.
- In a world of Google and Amazon, often consumers have no real choice.
- The existence of the UTCCR 1999 is not a valid reason to dispense with the common law rule on penalties.
- The Consumer Protection from Unfair Trading Regulations 2008 has as their aim transparency and eliminating inaccuracy. Their existence is irrelevant to the law on penalties.
- No doubt at all that the £85 charge is an unlawful penalty charge. Predominant purpose of the charge here was to deter. Lord Dunedin in *Dunlop* said the touchstone for a penalty clause was that the essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party.
- The commercial justification test has gone wrong. It has never been doubted that if you can say the predominant purpose of a clause is to deter that it is a penalty. The modern test is Colman J's formula in *Lordsvale Finance v. Bank of Zambia* **[1996] 3 WLR 688** where he says an increment over the pre-estimate of loss might not be a penalty provided that its **predominant purpose** was not to deter the party in breach. This test was approved by Mance LJ in *Cine Bes Filmcilik v. UIP* [**2003] EWCA Civ 1669.** This is the same whether the land owner or Parking Eye seeks to charge this. Moore-Bick LJ fell into error in the Court of Appeal by not applying these authorities that he laid out which should have led him to the opposite conclusion to that which he reached. HHJ Moloney QC found that the predominant purpose of the £85 charge was to deter and there was no challenge to that ruling in the Court of Appeal.
- You would be in different territory if you were considering a graduated parking fee scheme.
- Parking Eye's terms go beyond protecting their financial interest and overstep the mark. An average or overall charge for overstaying has no place in the authorities on penalties. Mr Beavis doesn't know about ParkingEye's arrangement with the land owner. You disregard this and only look at the contract between ParkingEye and Mr Beavis in determining if it is a penalty.
- Lord Halbury's *ex tempore* judgment in *Clydebank Engineering v. Don Jose Ramos* **[1905] AC 6** has been refined and made more precise by Lord Dunedin in *Dunlop*. Penalty clause is not whether a term is "unconscionable and extravagant" but it either falls where a sum stipulated is *in terrorem* or a sum by way of liquidated damages.
- *Beavis* falls clearly within the primary test of Lord Dunedin and you don't need to look at the sub-ordinate tests to see if this is a genuine pre-estimate of loss. On no view has ParkingEye suffered a loss of £85. ParkingEye has suffered no direct financial loss from Mr Beavis' breach. Even if you could look at ParkingEye's indirect losses as Moore-Bick LJ thought you could, ParkingEye makes a profit out of this.
- The way the Court of Appeal reached their conclusion was novel and highly unsatisfactory. This approach was not open to it. It opens considerable uncertainty into the law. What is likely to be the commercial or social justification for a clause is a matter on which there is likely to be much differences of view in the circumstances of a particular case. This approach can potentially permit considerable hardship to be imposed on particular consumers in pursuance of supposedly wider interests where significant amounts may be imposed on consumers who may be very ill-equipped to pay them.
- The basic state pension is £115per week: judge the amount of ParkingEye's £85 charge by that comparison. This scheme seeks to impose the costs on a small minority of overstayers for the benefit of a number of other interested persons especially the retailers who want shoppers to come. This is done without regard to an over-stayer's circumstances or his ability to pay.
- Commercial justification exception has no application to consumer contracts. It doesn't evolve from the authorities. If it applied it wouldn't explain a number of cases. What are recognized

commercial justifications and which are not? The commercial justification for ParkingEye's scheme with the landowner is irrelevant to the construing Mr Beavis' contract with it.

- A "convenience" justification moves you to an area of unevidenced vagueness which is almost impossible to quantify.
- The PoFA scheme does not give any approval. PoFA assumes that the existing law of penalties is applicable. PoFA does not provide for any modification of the law of penalties in the parking sphere. PoFA recognizes that charges may be imposed contractually. PoFA schedule 4 paragraph 5(1)(a) **assumes** that a charge is **enforceable** from the driver. PoFA just gives an extra remedy against the keeper. PoFA doesn't say what charging structure you should use at all. There are 2 possible models (1) contractual charge, or (2) remedy in trespass.
- On UTCCR 1999 you look at all the terms of the contract in making the assessment. ParkingEye gives very little indeed. The scheme applies 24hours a day even when the shops are closed. Parking Eye is not responsible for the car park surface, loss/damage to vehicles or user's safety. Looking at the bargain as whole a consumer doesn't get very much.
- A "significant imbalance" is created by the imposition of a charge which greatly exceeds the highest market rates and is imposed even though a breach doesn't cause any direct loss to Parking Eye. It is not counterbalanced by any obligations of Parking Eye – even the 2 hours is at their absolute discretion. You look at what would be the position if the penal term was not there.
- It is neither in the 1993 Directive nor the UTCCR 1999 nor the CPUTs that matters such as benefit to the community are relevant in deciding whether there is a significant imbalance or not.
- "Contrary to requirement of good faith" does not mean there has to be bad faith. Lord Millett in *First National* said:

  > "*It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion*."

- This is the same test as in used by the CJEU in *Aziz* **[2013] CMLR 5**. By those tests ParkingEye's charge is unfair. A term is not in good faith when it exploits known tendencies from consumers: OFT v. *Ashbourn* **[2011] EWHC 1237 (Ch)** (a case about gyms). Judged by those standards this charge was unfair. A consumer with a lawyer would have insisted as a minimum:
  - there was a term making it clear when I park the car,
  - that there is a grace period,
  - a graduated level of charges, and
  - whether he is actually paying for ParkingEye's profits.
- Clear that ParkingEye was taking advantage of known patterns of consumer behavior. This charging structure is not designed to deal with the real long term overstayer because it's a specific amount of £85. If you really wanted to exploit it you would stay indefinitely. One reason people incur parking charges is that they misjudge how long things are going to take and come back to their cars late.
- The fact that local authorities levy similar fines doesn't mean that you assume that consumers would agree to such a clause if they were freely negotiating a contract which exploits a known weakness in consumer behavior.

What does ParkingEye say?

Parking Eye's oral submissions took up only 1 hour although its written case at 20 pages was 50% longer than that of Beavis of the intervener. ParkingEye says that the correct test for a penalty is whether, taking into account all the circumstances at the time of entering into the contract, the term was extravagant and unconscionable. It says that on this basis its term is not a penalty and that the Court of Appeal reached the right conclusion. On unfair contract terms, it says that HHJ Moloney QC reached the right conclusion at trial when he found that the term was a "*simple and familiar provision…of which very clear notice was given to the consumer in advance*."

ParkingEye says that effective management of car parking space is important to landowners and shop keepers. It is in their commercial interests that there is a reasonable turnover of potential customers and that a car park full of cars driven by commuters may result in potential shoppers going elsewhere. It says that by PoFA Parliament encourage civil car parking enforcement and that the parking charge in this case was found by the trial judge to be neither disproportionate nor extravagant. The PoFA scheme is supplemented with the regulations 5/6 of the CPUT Regulations 2008: Parking operators must not mislead motorists and must provide them with all material information in a form that is not unclear, unintelligible, ambiguous or untimely.

On penalties, Parking Eye refers back to *Clydebank Engineering & Shipbuilding v. Yzquierdo* **[1905] AC 6,** where the Lord Halsbury set out the flexibility of the test:

> *"It is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case."*

The cases where commercial justification justified a terms that was not a genuine pre-estimate of loss, were commercial ones and wholly different to the *Beavis* situation. The test of deterrence is overly rigid and a deterrent term may be justifiable. *Dunlop* re-iterates the position that there is nothing unreasonable in the parties fixing by agreement a sum to be paid for future breaches of their agreement. *Dunlop* ought to be re-considered and the test is better framed using the more flexible language in *Clydebank*.

The test of whether a term is meets the requirement of good faith under the UTCCR 1999 was correctly set out by Lord Bingham in *First National.* Deterrent car parking charges have been encouraged by Parliament in PoFA. Parking Eye levied the charge in good faith. There is no significant imbalance to the overall consumer benefit because (s)he gets 2 hours free town centre car parking, close proximity to the shops, avoids inconvenience of looking for a parking space elsewhere and has a greater chance of finding a space in a Parking Eye car park because of its car park management regime.

There is not "disproportionate compensation" payable to ParkingEye as defined in the UTCCR 1999. Parliament has provided in PoFA that parking charges may constitute a legitimate deterrent. It is wrong to look at an analogy with the law of trespass. Trial judges are well used to weighing up relevant factors to reach a view on proportionality. An £85 chares is enough to ensure that the majority of motorists are careful to leave within the allotted 2 hours and is within the equivalent range of parking fines levied by local authorities.

What interventions did the justices make? What points seem to be troubling them?
It was noticeable that over the first 2 days the majority of the interventions came from Lord Mance and Lord Toulson. Their interventions took different approaches. It was clear that Lord Toulson's interventions were influenced to a great degree to the time when he was at the Law Commission which produced its report on unfair contract terms (Cm 6464, February 2015). Beavis's printed case made reference to a decision in another consumer case handed down in November 2014 (*Plevin v Paragon Personal Finance*) in the Supreme Court where Lord Sumption had written the sole pro-consumer judgment. In relation to *Beavis*, there were many interventions from Lord Sumption. Lord Neuberger also pressed the parties as to the characterization of the charge in *Beavis* and in the end invited written submissions from all parties on this. The other justices also intervened to make points but not to the same extent. Several justices queried what "unconscionable" and "extravagant" meant and castigated this language as being Edwardian.

Lord Neuberger said that one of the reasons these cases were here is for the Supreme Court to rule on what the law should be and not what it has previously been understood to be.

What further written submissions did the President ask for?
At the beginning of the 3rd day, Lord Neuberger started with a series of questions directed at Mr Beavis's counsel. He dealt with those as best he could. However towards the close of arguments on the final day, Lord Neuberger was still troubled by this and invited all 4 parties and the intervener to submit some further written submissions. These have to be filed at court and served on the other side by 5pm on Thursday 30 July 2015.

Lord Neuberger wants these submissions to deal with the **characterization** of the arrangement. He said he didn't want to be too specific but that it seemed to him that the characterization of the arrangement is important in order for the Supreme Court to decide whether the £85 charge is capable of being characterized as:

- a penalty rather than a payment,
- a contractual payment, or
- a licence after 2 hours.

Lord Neuberger said he didn't want to limit the parties to various ways which the arrangements have been characterized in oral argument. He said he didn't want to encourage any replies but that it would be unfair to shut them out because there may be something unexpected. He said any such replies should be filed and served by Monday 3 August 2015.

What should lawyers do next?

At the end of the hearing Lord Neuberger gave no indication as to when judgment will appear. It may appear towards the end of 2015 but is more likely to appear in early 2016. It seems likely that the court will accede to submissions and rule that consumer contracts are to be treated differently. It is not clear whether the court will accept, in a consumer context, that an £85 charge is either a genuine pre-estimate of loss or does not represent an unfair contract term. Those advising on consumer law or charges payable (not just in car parking but in any other sphere such as utilities, telecoms, insurance or financial services) may be affected by the ruling when it appears.

For commercial contracts, there is the possibility that the rule in *Dunlop* will be over-ruled after 100 years. Alternatively, the Supreme Court may decide that the rule is so well-known and entrenched that it is better left alone. A third way could be for the Supreme Court to re-explain penalty clauses in a modern commercial context using language or terminology that is more accessible, contemporary or easily understood.

Obviously those advising on disputed parking claims, these should all be put on hold pending the ruling in this case. The lengthy joint report on unfair contract terms from the Law Commissions of England & Wales and Scotland has only recently been delivered to Parliament. It remains to be seen what it will do about further amending the law on unfair contract terms. It is apparent from that report and submissions in this case, that small businesses may not be getting sufficient protection.

After the hearing Henry Hickman, partner in the litigation group at Harcus Sinclair LLP and the instructing solicitor for the appellant Barry Beavis had this to say:

> "*We look forward to receiving the judgment from the court in due course and to getting some much needed clarity in this area."*

Interviewed by David Bowden of David Bowden Law (www.DavidBowdenLaw.com).

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.