SUMMARY OF SUPREME COURT JUDGMENT

ParkingEye Ltd v Beavis
Cavendish Square Holding BV v El Makdessi
[2015] UKSC 67

Introduction

This is a summary of the landmark decision handed down this morning (Wednesday, 4th November 2015) by the Supreme Court in the conjoined appeals of *Beavis* and *Cavendish.*

Jonathan Kirk QC and Thomas Samuels of Gough Square Chambers successfully appeared on behalf of the respondent, ParkingEye Ltd, in the *Beavis* appeal.

Background

Both appeals concerned the common law of penalties. In addition, *Beavis* considered the application of the Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations").

Beavis arose from a consumer contract for city centre parking. Mr Beavis entered a car park managed by ParkingEye which displayed signs that two hours free parking was available on terms. In the event of overstay or failure to comply with the relevant terms a charge of £85 would be levied by ParkingEye (reduced to £50 in the event of prompt payment). Mr Beavis overstayed the two hour period by 56 minutes but alleged that the £85 charge was a penalty and/or that the term imposing it was unfair under the Regulations.

Cavendish related to a contract for the sale to Cavendish of shares in an advertising and marketing company founded by Mr El Makdessi. The contract included a covenant preventing Mr El Makdessi from engaging in defined prohibited activities in specified regions of the Middle East, the purpose of which was to protect goodwill in the company. In the event of breach, the contract provided that Mr El Makdessi would forfeit his right to the final staged payment and, at the option of Cavendish, obliged him to sell his remaining shares in the company to them. Mr El Makdessi breached the covenant and those default provisions were enforced at a cost to him of approximately $44m. His defence was that both were penalties at common law.

Mr Beavis appealed against the Court of Appeal's decision dismissing his appeal from the County Court ([2015] EWCA Civ 402) and Cavendish appealed against the Court of Appeal's conclusion that the default provisions were penalties ([2013] EWCA Civ 1539).

The decision

The Court (Lords Neuberger, Mance, Clarke, Sumption, Carnwarth, Toulson and Hodge SCJJ) gave four reasoned judgments, with the lead speech delivered jointly by Lord Neuberger and Lord Sumption.

Penalty clauses

All seven members of the panel agreed as to the proper test for a penalty at common law and therefore concluded that neither the terms in *Beavis* or *Cavendish* were penal. Lord Hodge's speech concentrated particularly upon the common law position in Scotland.

The Court declined to either extend or abrogate the rule but concluded that the dichotomy between a "penalty" and a "genuine pre-estimate of loss" was incorrect, it having been derived from a mis-reading of the decision in *Dunlop* over the last century (para 22).

The correct question is whether the clause is "extravagant" and "unconscionable" (which will usually amount to the same thing (para 31)) in light of any legitimate interest to be protected. Punishing a contract-breaker, in and of itself, can never be a legitimate interest (para 32). The circumstances in which the contract was made are likely to be relevant, although different views were expressed on the point (paras 35, 152 and 243). Further, the law of penalties applies only to breach (para 42).

The new test was variously stated as follows:

> *"…whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter."*
> (Lord Neuberger and Lord Sumption, para 32 (with whom Lord Clarke and Lord Carnwarth agreed))

> *"…whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable."*
> (Lord Mance, para 152)

> *"…whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract."*
> (Lord Hodge, para 255 (endorsed by Lord Toulson, para 293))

The analysis is more ambiguous on whether the rule against penalties should apply to clauses withholding payment or requiring the transfer of property on breach, such as those under consideration in *Cavendish*. Lord Neuberger and Lord Sumption preferred the analysis that the clauses in *Cavendish* were primary obligations but, in any event, ultimately concluded that they were not penal (paras 74, 82 and 88). Lord Mance and Lord Hodge, however, expressly concluded that there was no principled reason to restrict the rule in relation to those two categories of term (paras 170 and 226-33).

The Regulations[1]

On this issue the majority concluded that the term imposing the £85 charge was not unfair under the Regulations.

The panel agreed that the proper analysis of the Regulations was to be found in the CJEU decision of *Aziz v Caixa d'Estalvis de Catalunya* [2013] 3 CMLR 89. The relevant analysis is as follows (paras 104–5):

- The test of "significant imbalance" and "good faith" leaves a significant element of judgment to the national court;

- The Regulations are concerned with provisions derogating from the legal position of the consumer under national law;

- Whether such a provision is unfair depends upon whether the imbalance is contrary to the requirements of good faith; in particular, in light of the likelihood that the consumer would have agreed to the term in individual negotiations;

- The national court must take account of, inter alia, the nature of the goods or services provided, including the significance and practical effect of the term, and whether it was appropriate and proportionate to the attainment of objectives pursued.

[1] Now Part 2 of the Consumer Rights Act 2015 for contracts made on or after 1/10/15.

Applying that analysis, the majority concluded that the term was not unfair because although it may be said that there was "a significant imbalance" between the term and the position under national law (i.e. an £85 charge versus minimal damages for trespass), it was not contrary to the requirement of good faith.

ParkingEye had:

> *"…a legitimate interest in imposing a liability on Mr Beavis in excess of the damages that would have been recoverable at common law. ParkingEye had an interest in inducing him to observe the two-hour time limit in order to enable customers of the retail outlets and other members of the public to use the available parking space."*
> (Lord Neuberger and Lord Sumption, para 107)

In considering whether the reasonable consumer would have agreed to such a term in negotiations, the majority found support from the fact that there was clear signage notifying consumers of the term, in light of which they continued to use the car park (paras 108 & 209). Any arguments about the harshness of the operation of the term were mitigated by the existence of an appeals process and a grace period for minor overstayers.

By contrast, Lord Toulson, dissenting, felt that an assumption that the hypothetical customer would have agreed to the term could not fairly be made (para 310). Accordingly, he concluded that the term was unfair and would have allowed the appeal in *Beavis* on that ground.