1933

CADBURY BROTHERS, LD. v. SINCLAIR.

Finlay J

as having the same meaning as it had before the recent alteration in the sub-rule—namely, "the assessable unit." That that would have been held to be its meaning before the Act of 1926 seems to be reasonably clear. I cannot suppose that the minor and consequential alteration of the law which was made in 1926 operated so as to make any difference in the meaning of the term. If the Legislature had intended that part of the premises occupied should be differently regarded from the rest of the premises for the purposes of the proviso, I think they would have said so in express words.

On these grounds I come to the conclusion that the proviso has reference to the assessable unit itself, with the result that this appeal succeeds and is allowed.

Appeal allowed.

Solicitors for appellants: *Timbrell, Deighton & Nichols, for A. Whittaker, Bournville.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. R.

1934

Feb. 16, 19, 20.

L'ESTRANGE *v.* F. GRAUCOB, LIMITED.

Sale of Goods—Contract in writing signed by Parties for sale of Automatic Slot Machine—Clause in small print excluding "any express or implied condition, statement, or warranty, statutory or otherwise"—No misrepresentation by Seller as to terms of Contract—Machine out of order—Action by Buyer against Seller for Breach of Implied Warranty of Fitness—Competence of Action.

The buyer of an automatic slot machine signed and handed to the sellers an order form containing in ordinary print and writing the essential terms of the contract, and in small print certain special terms one of which was "any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded." The sellers thereupon signed and handed to the buyer a printed order confirmation assenting to the terms in the order form. The machine was delivered by the sellers to the buyer, who paid to the sellers an instalment of the price. The machine did not work satisfactorily, and the buyer brought an action against the sellers in the county court claiming (inter alia) damages for breach of an implied warranty that

1934

L'ESTRANGE v. F. GRAUCOB, LD.

the machine was fit for the purpose for which it was sold. The sellers pleaded (inter alia) that the contract expressly provided for the exclusion of all implied warranties. The buyer replied that at the time when she signed the order form she had not read it and knew nothing of its contents, and that the clause excluding warranties could not easily be read owing to the smallness of the print. There was no evidence of any misrepresentation by the sellers to the buyer as to the terms of the contract:—

Held, by the Divisional Court (Scrutton and Maugham L.JJ.), reversing on this point the judgment of the county court judge, that as the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents; and that the action failed and the sellers were entitled to judgment.

Parker v. *South Eastern Ry. Co.* (1877) 2 C. P. D. 416, 421, observations approved and applied.

Wallis, Son & Wells v. *Pratt & Haynes* [1911] A. C. 394 and *Andrews Brothers (Bournemouth), Ld.* v. *Singer & Co.* [1934] 1 K. B. 17 referred to.

Richardson, Spence & Co. v. *Rowntree* [1894] A. C. 217, and the other railway ticket cases, distinguished.

APPEAL from the Carnarvonshire County Court held at Llandudno.

The plaintiff, Miss Harriet Mary L'Estrange, was the owner of premises in Great Ormes Road, Llandudno, where she resided and carried on the business of a café. The defendants, Messrs. F. Graucob, Ld., of City Road, London, E.C., were manufacturers and sellers of automatic slot machines.

On February 7, 1933, two of the defendants' representatives, a Mr. Page, their sales supervisor, and a Mr. Berse, one of their travellers, called upon the plaintiff and asked her to buy an automatic slot machine for cigarettes. A meeting was arranged at the house of the plaintiff's stepmother between these representatives of the defendants on the one part, and the plaintiff, her stepmother, and a Mr. Pratt who assisted the plaintiff in her business on the other part. The plaintiff decided to buy from the defendants an automatic cigarette machine of the description mentioned below. Mr. Page then produced a form printed on brown paper, headed "Sales Agreement," in which there were blanks for the particulars of any given transaction. The

1934

L'ESTRANGE v. F. GRAUCOB, LD.

blanks on the form were then filled up with the particulars of the plaintiff's purchase and the form was signed by the plaintiff.

The document when completed was, so far as material, in the following terms: "Sales Agreement. Date Feb. 7, 1933. To F. Graucob, Ltd., ... Please forward me as soon as possible: One Six Column Junior Ilam Automatic Machine . . . . which I agree to purchase from you on the terms stated below . . . . and to pay for the same in the following manner: Instalments 8*l.* 15*s.* 0*d.* down. 18 payments of 3*l.* 19*s.* 11*d.*" Then after some other formal matter came certain clauses in small print which, so far as material, were as follows: "I agree to take delivery of the machine upon receiving notice that it is ready for delivery, and to make the first monthly payment 30 days after the date following that of the posting of such notice and all subsequent payments on the corresponding date of each succeeding month. . . . . If any payment shall not have been received by you within a fortnight after it has become due, all the remaining payments shall fall due for immediate payment, and I agree to pay interest on these remaining payments at the rate of ten per cent. per annum as from the date of their so falling due. In consideration of your undertaking to put in hand at once work on this machine I agree not to countermand this order. . . . . This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded. . . . . (sgd.) H. M. L'Estrange." Then followed printed questions relating to the purchaser and her business and premises with blank spaces for the answers which were filled in in manuscript appropriately to this case.

On the same date the plaintiff handed to Mr. Page her cheque for 4*l.* on account of the price of the machine.

On February 9, 1933, the defendants, having received the above mentioned document, sent to the plaintiff an "order confirmation" of that date signed by them; a "guarantee"

for eighteen months for the free fixing, maintenance, and insurance of the machine; and an invoice.

On March 28, 1933, the machine was delivered at the plaintiff's premises, and on March 29 a mechanic of the defendants came and installed it there, the plaintiff handing to him on behalf of the defendants a further sum of 4*l.* 15*s.* in respect of the price, and 6*s.* for packing, making together 5*l.* 1*s.*

The machine did not work satisfactorily, and after a few days it became jammed and unworkable. On April 7, 1933, the plaintiff wrote to the defendants that it had failed and was still out of order, and a mechanic was sent to put it right. On April 27, she again wrote that it was far from reliable; and on April 28 a mechanic again attended to it, and the plaintiff then signed a form that it was working to her satisfaction. On May 4, she wrote that the machine had been of no use for a month, and asked for another month in which to pay her first instalment, but added that since the last overhaul the machine had worked satisfactorily. On May 8, her patience being exhausted, she wrote that she had decided to forfeit her deposit, and requested the defendants to remove the machine; and on May 11 she ceased to make use of the machine. The defendants, however, declined to terminate the transaction.

On May 25, 1933, the plaintiff brought the present action against the defendants in the county court, her claim being for 9*l.* 1*s.*, made up of the above sums of 4*l.* and 5*l.* 1*s.*, as money received by the defendants to the use of the plaintiff, having been paid by the plaintiff to the defendants as part of the consideration for the delivery of the machine pursuant to a contract in the terms of the above documents, which consideration wholly failed by reason that the machine was unfit for the purpose for which it was intended to be used.

On June 9, 1933, the defendants delivered their defence by which they denied that the machine was delivered in a condition unfit for the purpose for which it was intended; and further denied that the sum claimed by the plaintiff

1934

L'ESTRANGE v. F. GRAUCOB, LD.

was payable to her: and by way of counterclaim the defendants sought to recover from the plaintiff 71*l.* 18*s.* 6*d.* as the balance of the price of the machine.

On June 19, 1933, the plaintiff delivered an amended claim which added a count for breach of an implied warranty on the sale of the machine that it was reasonably fit for the purpose for which it was sold; but which still claimed only 9*l.* 1*s.*

When the action came on for trial the plaintiff applied for and obtained leave to put her claim for 9*l.* 1*s.* in three alternative ways: (1.) repayment as on a total failure of consideration; (2.) return of money for breach of implied conditions going to the root of the contract that the machine was reasonably fit for the purposes for which it was required; and (3.) damages for breach of an implied warranty that the machine was reasonably fit for those purposes.

To these alternative claims the defendants at the trial set up the following respective defences: (1.) no total failure of consideration; (2.) no implied conditions, as the property in the machine had passed to the plaintiff, the defendants relying, as to this point, upon the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (*c*); (3.) no action on implied warranty, as the agreement signed by the plaintiff expressly provided for the exclusion of all implied warranties.

In reply to the last of these defences the plaintiff contended: (1.) that she was induced to sign the document under the impression that it was an order form; and (2.) that at the time when she signed it she knew nothing of the conditions on which the defendants relied.

Evidence was given on behalf of the plaintiff by herself and by Mr. Pratt. The plaintiff said that she did not read the brown document and that the defendants did not read it to her or tell her to read it, that she never read the words in small type and did not remember that the agents had ever called her attention to them, that she signed the document and did so intentionally, that though she signed the document she had no clear idea of what she was signing, that she thought that the document was an order form or

1934

L'ESTRANGE v. F. GRAUCOB LD.

a form by which she was giving her consent to the purchase of a machine, that two days after the arrival of the machine it ceased to work and that it could not afterwards be made to work continuously, and that on May 11 she ceased to use the machine and decided to ask the defendants to take it back and to forfeit her deposit. Mr. Pratt gave evidence corroborating that of the plaintiff.

Evidence was given on behalf of the defendants by Mr. Page and Mr. Berse. Mr. Page said that the interview on February 7, 1933, lasted for over two hours, that he sat near the plaintiff and read to her the whole of the brown paper document including the small print, that the plaintiff asked no question about the small print, that he pointed out to her that the total price was not stated in figures in the document, that the plaintiff signed the document at a desk while he was sitting by her, and that he also read to her the guarantee. Mr. Berse gave evidence substantially to the same effect, and stated further that the blanks in the brown document were filled up in accordance with the answers given by the plaintiff.

On August 17, 1933, the county court judge gave judgment. After stating the pleas and contentions of the parties and the substance of the evidence on both sides he went on to say that he found as a fact that when the defendants' two canvassers left the plaintiff after the interview of February 7, 1933, she had no knowledge of the contents of the document which she had signed except the amount of the purchase price and the monthly instalment and the arrangement about putting up the machine. He also found as a fact that there must have been some defect in the mechanism of the machine which rendered it so frequently unworkable that it was not reasonably fit for the purpose for which it was required. In his view there was an implied warranty that the machine should be reasonably fit for that purpose, and he found as a fact that that warranty was broken. On behalf of the defendants it was contended that that warranty was excluded by the conditions printed in small type in the conditions of sale, and reliance was placed upon the rule

1934

L'ESTRANGE v. F. GRAUCOB, LD.

laid down in *Parker* v. *South Eastern Ry. Co.* (1) That rule, however, was subject to certain exceptions, and the question was whether this case came within it. The conditions here were printed in very small type, and when the issue was whether the person signing the document knew of the conditions it became material to ask whether the type was of a reasonable size. In all such cases three questions must be answered according to the directions of Lord Herschell L.C. in *Richardson, Spence & Co.* v. *Rowntree* (2)—namely: (1.) Did the plaintiff know that there was writing or printing on the document? (2.) Did she know that the writing or printing contained conditions relating to the terms of the contract? (3.) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? In the present case he (the judge) found as facts that the answer to the first of these questions was in the affirmative, and the answers to the second and third of them in the negative. On these grounds, therefore, he held that the defendants were not entitled to rely upon the clause which excluded implied warranties from the contract. He estimated the damages to which the plaintiff was entitled for breach of the implied warranty at 70*l.* He gave judgment for the plaintiff on the claim for 70*l.*; and for the defendants on the counterclaim for 71*l.* 18*s.* 6*d.*, the balance of the price.

The defendants gave notice of appeal dated September 14, 1933, from so much of the judgment of the county court judge as adjudged that the plaintiff should recover from the defendants the sum of 70*l.* damages.

A. T. Denning and *D. E. Evans* for the defendants, appellants.

Gordon Alchin for the plaintiff, respondent.

SCRUTTON L.J. In this case the plaintiff commenced proceedings against the defendants in the county court,

(1) 2 C. P. D. 416, 421. (2) [1894] A. C. 217, 219.

her claim being for 9*l.* 1*s.* as money received by the defendants to the use of the plaintiff as part of the consideration for the delivery of an automatic slot machine pursuant to a contract in writing dated February 7, 1933, which consideration was alleged to have wholly failed by reason of the fact that the machine was delivered in a condition unfit for the purpose for which it was intended. The only document which corresponds to the contract there mentioned is a long document on brown paper headed "Sales Agreement." By their defence the defendants denied that the machine was delivered in a condition unfit for the purpose intended, and denied that the sum claimed was payable to the plaintiff; and they counterclaimed for the balance of the price of the machine. Just before the trial the plaintiff amended her claim by adding a count for breach of an implied warranty that the machine was reasonably fit for the purpose for which it was sold; though she still claimed only 9*l.* 1*s.* There the pleadings stopped. At the trial, as the judge has stated in his judgment, the plaintiff's claim was put in three different ways: total failure of consideration; breach of implied conditions going to the root of the contract; and breach of warranty. The defendants pleaded: no total failure of consideration; no implied conditions; and that no action would lie for breach of implied warranty, as the agreement expressly provided for the exclusion of all implied warranties. To this last defence the plaintiff contended that she was induced to sign the contract by the misrepresentation that it was an order form, and that at the time when she signed she knew nothing of the conditions.

The county court judge has given judgment for the plaintiff for 70*l.*, though there is no claim by the plaintiff for that sum; and he has given judgment for the defendants on the counterclaim for 71*l.* 18*s.* 6*d.*, the balance of the price.

As to the defence that no action would lie for breach of implied warranty, the defendants relied upon the following clause in the contract: "This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition,

1934

L'ESTRANGE v. F. GRAUCOB, LD.

Scrutton L.J.

statement, or warranty, statutory or otherwise not stated herein is hereby excluded." A clause of that sort has been before the Courts for some time. The first reported case in which it made its appearance seems to be *Wallis, Son & Wells* v. *Pratt & Haynes* (1), where the exclusion clause mentioned only " warranty " and it was held that it did not exclude conditions. In the more recent case of *Andrews Brothers (Bournemouth), Ld.* v. *Singer & Co.* (2), where the draftsman had put into the contract of sale a clause which excluded only implied conditions, warranties and liabilities, it was held that the clause did not apply to an express term describing the article, and did not exempt the seller from liability where he delivered an article of a different description. The clause here in question would seem to have been intended to go further than any of the previous clauses and to include all terms denoting collateral stipulations, in order to avoid the result of these decisions.

The main question raised in the present case is whether that clause formed part of the contract. If it did, it clearly excluded any condition or warranty.

In the course of the argument in the county court reference was made to the railway passenger and cloak-room ticket cases, such as *Richardson, Spence & Co.* v. *Rowntree.* (3) In that case Lord Herschell L.C. laid down the law applicable to these cases and stated the three questions which should there be left to the jury. In the present case the learned judge asked himself the three questions appropriate to these cases, and in answering them has found as facts : (i.) that the plaintiff knew that there was printed material on the document which she signed, (ii.) that she did not know that the document contained conditions relating to the contract, and (iii.) that the defendants did not do what was reasonably sufficient to bring these conditions to the notice of the plaintiff.

The present case is not a ticket case, and it is distinguishable from the ticket cases. In *Parker* v. *South Eastern Ry. Co.* (4) Mellish L.J. laid down in a few sentences the law which is

(1) [1911] A. C. 394.
(2) [1934] 1 K. B. 17.
(3) [1894] A. C. 217.
(4) 2 C. P. D. 416.

applicable to this case. He there said (1): "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents." Having said that, he goes on to deal with the ticket cases, where there is no signature to the contractual document, the document being simply handed by the one party to the other (1): "The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents." In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The plaintiff contended at the trial that she was induced by misrepresentation to sign the contract without knowing its terms, and that on that ground they are not binding upon her. The learned judge in his judgment makes no mention of that contention of the plaintiff, and he pronounces no finding as to the alleged misrepresentation. There is a further difficulty. Fraud is not mentioned in the pleadings, and I strongly object to deal with allegations of fraud where fraud is not expressly pleaded. I have read the evidence with care, and it contains no material upon which fraud

(1) 2 C. P. D. 421.

1934

L'ESTRANGE v. F. GRAUCOB, LD.

Scrutton L.J.

could be found. The plaintiff no doubt alleged that the defendants' agent represented to her that the document which was given her to be signed was an order form, but according to the defendants' evidence no such statement was made to her by the agent. Moreover, whether the plaintiff was or was not told that the document was an order form, it was in fact an order form, and an order form is a contractual document. It may be either an acceptance or a proposal which may be accepted, but it always contains some contractual terms. There is no evidence that the plaintiff was induced to sign the contract by misrepresentation.

In this case the plaintiff has signed a document headed "Sales Agreement," which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them.

The county court judge has given judgment for the defendants on the counterclaim for the balance of the price, 71*l.* 18*s.* 6*d.* I do not see how he could have done that unless he found that the contract included the clause in small print providing that, if any instalment of the price should not be duly paid, all the remaining instalments should fall due for immediate payment. That judgment on the counterclaim must stand. As to the claim, judgment was given for the plaintiff for 70*l.* for breach of an implied warranty, though only 9*l.* 1*s.* was claimed. Such a judgment could not have been given even in the High Court without an amendment of the claim. But even if there had been an amendment, the further difficulty would have remained that the signed document contained a clause excluding any implied condition or warranty. If the view which I have expressed as to the effect of a signed document is correct, the plaintiff has no ground of claim, and the judgment in her favour cannot stand. In my opinion, the judgment for

the plaintiff on the claim should be set aside and judgment entered for the defendants on the claim; and the judgment for the defendants on the counterclaim should stand.

MAUGHAM L.J. I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations.

The material question is whether or not there was a contract in writing between the plaintiff and the defendants in the terms contained in the brown paper document. In the case of a formal contract between seller and buyer, such as a deed, there is a presumption which puts it beyond doubt that the parties intended that the document should contain the terms of their contract. The brown paper document is not a formal instrument of that character, yet, in my opinion, having been signed it may well constitute a contract in writing. A reference to any of the text-books dealing with the law of contract will provide many cases of the verbal acceptance of a written offer, in which the Courts have held that the written offer and the acceptance, even though only verbal, together constituted a contract in writing, which could not be altered by extraneous evidence. The rule may not operate equitably in all cases, but it is unquestionably binding in law.

In the present case on February 7, 1933, an order form, for such I consider the brown paper document to be, was signed by the plaintiff. It was an elaborate form containing a number of clauses, and among them certain terms and conditions in regrettably small print but quite legible. The plaintiff having signed that document gave it to a canvasser of the defendants, who took it away. It had been filled up in ink by the canvasser before she signed it. Another document called an order confirmation dated February 9, 1933, was sent to her by the defendants. In my opinion the contract was concluded not when the brown order form was signed by the plaintiff but when the order confirmation was signed by the defendants. If the document signed by the plaintiff was a part of a contract in writing, it is impossible

1934

L'ESTRANGE v. F. GRAUCOB, LD.

Maugham L.J.

to pick out certain clauses from it and ignore them as not binding on the plaintiff.

In a case of this nature it is possible that the document signed by a contracting party may not be the contract, but merely a memorandum in writing of a preceding verbal contract between the parties, and if in this case it appeared that the document in question was only a memorandum of a previous contract which had not contained the clause excluding all conditions and warranties, the plaintiff might have relied upon the case of *Roe* v. *Naylor* (*No.* 2) (1) and contended successfully that, as the clause was not a part of the contract, she was not bound by it. In my judgment, however, such a view as that is excluded here, because on the facts there was no preceding verbal agreement between the parties.

I deal with this case on the footing that when the order confirmation was signed by the defendants confirming the order form which had been signed by the plaintiff, there was then a signed contract in writing between the parties. If that is so, then, subject to certain contingencies, there is no doubt that it was wholly immaterial whether the plaintiff read the small print or not. There can be no dispute as to the soundness in law of the statement of Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (2), which has been read by my learned brother, to the effect that where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents. That is true in any case in which the agreement is held to be an agreement in writing.

There are, however, two possibilities to be kept in view. The first is that it might be proved that the document, though signed by the plaintiff, was signed in circumstances which made it not her act. That is known as the case of Non est factum. I do not think it is necessary to add anything to what Scrutton L.J. has already said about that. The written document admittedly related to the purchase of the machine by the plaintiff. Even if she was told that

(1) (1919) 87 L. J. (K. B.) 958. (2) 2 C. P. D. 416, 421.

it was an order form, she could not be heard to say that it did not affect her because she did not know its contents.

Another possibility is that the plaintiff might have been induced to sign the document by misrepresentation. She contended that she was so induced to sign the document inasmuch as (i.) she was assured that it was an order form, (ii.) that at the time when she signed it she knew nothing of the conditions which it contained. The second of these contentions is unavailing by reason of the fact that the document was in writing signed by the plaintiff. As to the first contention it is true that the document was an order form. But further, if the statement that it was an order form could be treated as a representation that it contained no clause expressly excluding all conditions and warranties, the answer would be that there is no evidence to prove that that statement was made by or on behalf of the defendants.

In this case it is, in my view, an irrelevant circumstance that the plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms. I may add, however, that I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print. I also think that the order confirmation form should have contained an express statement to the effect that it was exclusive of all conditions and warranties.

I agree that the appeal should be allowed.

Appeal allowed. Judgment entered for defendants on claim as well as on counterclaim.

Solicitor for defendants, appellants: *Herbert A. Phillips.*

Solicitors for plaintiff, respondent: *Theo. Goddard & Co., for Chamberlain, Johnson & Parke, Llandudno.*

J. R.