Thornton v Shoe Lane Parking Ltd

Overview | **[1971] 2 QB 163**, | [1971] 1 All ER 686, | [1971] 2 WLR 585, | [1971] RTR 79, | [1971] 1 Lloyd's Rep 289, | 115 Sol Jo 75

THORNTON v. SHOE LANE PARKING LTD. [1967 T. No. 1206] [1971] 2 Q.B. 163

[COURT OF APPEAL]

Lord Denning M.R.; Megaw L.J. and Sir Gordon Willmer

1970 Dec. 17, 18

Contract — Exceptions clause — Car parking — Automatic ticket machine — Garage not accepting liability for injury — Reference to conditions in small print on ticket — Conditions displayed on premises — Injury to customer — Whether exemption clause operative

The plaintiff drove his car into a new automatic car park. He had not been there before. A notice on the outside gave the charges and stated that all cars were "parked at owner's risk." A traffic light on the entrance lane showed red and a machine produced a ticket when the car had drawn up beside it. The plaintiff took the ticket and, the light having turned green, he drove on into the garage where his car was parked by mechanical means. On the plaintiff's return to collect the car there was an accident and he was severely injured. The plaintiff claimed damages from the defendant garage. The defendants contended, inter alia, that the ticket incorporated a condition exempting them from liability.

The ticket stated the car's time of arrival and that it was to be presented when the car was claimed. In the bottom left hand corner in small print it was said to be "issued subject to conditions … displayed on the premises." On a pillar opposite the ticket machine a set of eight printed "conditions" was displayed in a panel. In the second condition it was stated that the garage would not be liable for any injury to the customer occurring when his car was on the premises. Mocatta J. held that the defendants were half to blame for the plaintiff's accident and awarded him £3,637 damages.

On appeal by the defendants:-

Held, dismissing the appeal, that since the plaintiff did not know of the exemption condition and the defendants had not done what was reasonably sufficient to bring it to his notice it did not exempt them from liability.

---------- *[1971] 2 Q.B. 163 at 164*

Dicta of Mellish L.J. in *Parker v. South Eastern Railway Co.* (1877) 2 C.P.D. 416, 423, 424, C.A. applied.

Per curiam. The nature of the intended exemption condition is a factor to be taken into account in deciding as to the reasonableness of what has been done to bring it to the notice of the other party (post, pp. **170A-D**, **172F -**

173B, **174E**).

Per Lord Denning M.R. The offer was contained in the notice at the entrance and was accepted when the plaintiff drove into the garage. The concluded contract could not be altered by anything printed on the ticket (post, p. **169G**). Decision of Mocatta J. affirmed.

The following cases are referred to in the judgments:

Chapelton v. Barry Urban District Council [1940] 1 K.B. 532; [1940] 1 All E.R. 356, C.A.

Hood v. Anchor Line (Henderson Brothers) Ltd. [1918] A.C. 837, H.L.(E.).

McCutcheon v. David MacBrayne Ltd. [1964] 1 W.L.R. 125; [1964] 1 All E.R. 430, H.L.(Sc.).

Mendelssohn v. Normand Ltd. [1970] 1 Q.B. 177; [1969] 3 W.L.R. 139; [1969] 2 All E.R. 1215, C.A.

Olley v. Marlborough Court Ltd. [1949] 1 K.B. 532; [1949] 1 All E.R. 127, C.A.

Parker v. South Eastern Railway Co. (1877) 2 C.P.D. 416, C.A.

Richardson, Spence & Co. v. Rowntree [1894] A.C. 217, H.L.(E.).

Spurling (J.) Ltd. v. Bradshaw [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121, C.A.

Thompson v. London, Midland and Scottish Railway Co. [1930] 1 K.B. 41, C.A.

Watkins v. Rymill (1883) 10 Q.B.D. 178, D.C.

The following additional cases were referred to in argument:

Ashby v. Tolhurst [1937] 2 K.B. 242; [1937] 2 All E.R. 837, C.A.

Harris v. Great Western Railway Co. (1876) 1 Q.B.D. 515.

Henson v. London and North Eastern Railway Co. [1946] 1 All E.R. 653, C.A.

Sugar v. London, Midland and Scottish Railway Co. [1941] 1 All E.R. 172.

Taylor v. Glasgow Corpn., 1952 S.C. 440; 1952 S.L.T. 399.

APPEAL from Mocatta J.

The defendants, Shoe Lane Parking Ltd., appealed against the judgment of Mocatta J. on June 18, 1970, giving judgment for the plaintiff, Francis Charles William Thornton, for £3,637 6*s.* 11*d.* with nine-tenths of his costs on his claim by writ of May 12, 1967, for damages for personal injuries caused by the defendants' breach of statutory duty under the Occupiers' Liability Act 1957 and/or negligence on May 19, 1964, at Shoe Lane, London.

The grounds of appeal were: (1) that the judge should have directed himself that the ticket issued by the defendants to the plaintiff was a contractual document; (2) that he ought to have found as a fact that the plaintiff knew that the ticket contained upon it a reference to the defendants' conditions and that he had read that reference; (3) that he ought to

---------- ***[1971] 2 Q.B. 163 at 165***

have held that the defendants gave the plaintiff reasonable notice of the defendants' conditions (if that question was material).

The facts are stated in the judgment of Lord Denning M.R.

E. A. Machin for the defendants. Were the conditions of issue, to which reference was made on the ticket, part of the contract? The contract was made when the driver, having received the ticket, went past the light and deposited the car.

The judge was wrong in that (1) he failed to direct himself in accordance with the decision in *Mendelssohn v. Normand Ltd*. [1970] 1 Q.B. 177; (2) if he was right in holding that he was not bound by that decision, he failed to direct himself that the plaintiff was bound by the conditions because there was writing on the ticket; (3) if he was right in directing himself that the sole test was whether the ticket was delivered in a manner which gave notice of the conditions he ought on the facts to have held that the defendants gave such reasonable notice by proffering the ticket in all the circumstances of the case; (4) he was wrong in failing to find as a fact that the plaintiff did not read the relevant words of the ticket.

The Law. On first principles the question in all ticket cases is whether the ticket is or is not a contractual document. A contractual document is one which both parties intend to affect their rights under the contract. The person proffering the condition intends it to be a contractual document and the question is whether the party receiving it receives it as a contractual document. A condition cannot be annexed by reference if no reasonable person would regard it as part of the contract. Many conditions more onerous than this one have been recognised as having contractual effect. A contractual document must form an integral part of the contract.

It is not easy to fit the ticket cases into the classical concept of offer and acceptance. The actual issue of the ticket may be immaterial, but the ticket must pass at or about the time of the contract.

The judgments of the Court of Appeal in *Mendelssohn v. Normand Ltd*. [1970] 1 Q.B. 177 would have been wholly unnecessary if the ticket containing the conditions had not been a contractual document. Mocatta J. distinguished that case. It is not significant that the conditions there were printed on the ticket. The principle is that the ease or difficulty of ascertaining the conditions is irrelevant. As long as one has accepted in the contract the fact that it is subject to conditions it is immaterial that the conditions may not be read until afterwards. The customer does not worry about the conditions. The authorities show that the fact that it may be difficult to discover or read the conditions is nihil ad rem.

In *Ashby v. Tolhurst* [1937] 2 K.B. 242, where it is conceded that there was a bailment, the car park ticket containing conditions was regarded as a contractual document. Everyone in that case assumed it was a contractual document. Baggally L.J. in *Parker v. South Eastern Railway Co*. (1877) 2 C.P.D. 416, 425-426, put the principle in cases of tickets containing or referring to conditions in the same way as Lord Reid did in *McCutcheon v. David MacBrayne Ltd*. [1964] 1 W.L.R. 125, 127-128: the other contracting party is bound either if he knew the ticket or document was proffered with the intent to bind or a reasonable person in his position

---------- ***[1971] 2 Q.B. 163 at 166***

would so imply. Lord Hodson, at p. 129, similarly approved of Baggally L.J.'s observations; and see Lord Devlin at pp. 133-136. In Parker's case, 2 C.P.D. 416, 421, *Harris v. Great Western Railway Co*. (1876) 1 Q.B.D. 515 was held to have been rightly decided. Blackburn J.'s judgment in the latter case at pp. 525-526, makes it clear that although the plaintiff believed

there were some conditions on the ticket, he did not know what they were and never gave them a thought. Lord Hanworth M.R. stated the principle in *Thompson v. London, Midland & Scottish Railway Co*. [1930] 1 K.B. 41, 47, 50; and see *per* Lawrence L.J. at pp. 52, 53 which is in line with what Lord Reid said in *McCutcheon's case* [1964] 1 W.L.R. 125, 127-128.

In summary, the judge ought to have followed the approach in *Mendelssohn v. Normand Ltd*. [1970] 1 Q.B. 177 and there is no relevant distinction between the facts of the two cases. He applied the third of Mellish L.J.'s three tests in *Parker v. South Eastern Railway Co*., 2 C.P.D. 416, 423 without applying his mind to the second. He should have come to the conclusion that the plaintiff had the necessary degree of knowledge. He found Thornton an unsatisfactory witness who knew there was writing and on the evidence must have read the conditions. As to the authority of Parker's case, 2 C.P.D. 416, see *Richardson, Spence & Co. v. Rowntree* [1894] A.C. 217 and *Hood v. Anchor Line (Henderson Brothers) Ltd*. [1918] A.C. 837. The question is whether the plaintiff knew or ought to have known that the ticket contained conditions.

John Newey Q.C. and **M. A. B. Burke-Gaffney** for the plaintiff. It is trite law that a contract is normally made by offer and acceptance. The same law applies to car parks. If a car park puts up a notice with a scale of charges, that is the offer. If parking is to be at the car owner's risk and that is so stated in the offer and clearly communicated to the motorist, he accepts it by driving in; or, if there is a barrier, when it is opened. If, as in the present case, the ticket machine seeks to introduce conditions, an exclusion of liability at that stage is too late. If a person buys a bar of chocolate by a machine and after inserting his coin the bar of chocolate comes out with a condition on the wrapper purporting to exclude liability for faults, it would have no effect. There may be cases where the public have come to know that conditions are incorporated into the contract, e.g., bills of lading. The existence of the conditions can be said to have become crystallised. Baggally L.J. in *Parker's case*, 2 C.P.D. 416, 424, envisaged this crystallisation taking place.

In *Sugar v. London, Midland & Scottish Railway Co*. [1941] 1 All E.R. 172 the reference to conditions on the back of the ticket had been obliterated by the date stamp and the plaintiff succeeded; and see also *Henson v. London & North Eastern Railway Co*. [1946] 1 All E.R. 653 and *Taylor v. Glasgow Corpn*., 1952 S.C. 440. *Chapelton v. Barry Urban District Council* [1940] 1 K.B. 532 is an example of the court taking the view that the ticket did not come within a crystallised situation and it was treated as a mere receipt.

There is no uniformity of conditions in car parks. An offer must be communicated in such a form that its terms are known. *Mendelssohn v. Normand Ltd*. [1970] 1 Q.B. 177 is a case like *Harris v. Great Western Railway Co*. (1876) 1 Q.B.D. 515. Lord Devlin in *McCutcheon v. David*

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MacBrayne [1964] 1 W.L.R. 125, 136 emphasised that the question in "ticket cases" was whether or not the ticket was accepted as a contractual document. There, as here, it was not so accepted. The ticket was issued here by an automatic machine and in such cases the conditions must be drawn to the attention of the recipient before the money is put into the machine or the machine is operated.

The exempting conditions relied upon by the defendants here are very stringent: see *J. Spurling*

Ltd. v. Bradshaw [1956] 1 W.L.R. 461. Of course, if the plaintiff knew of all the conditions, he would be bound by them. Mocatta J. was right.

Machin in reply. As to the time when the contract was made, there is no objection from a temporal point of view to the ticket being a contractual document. Mellish L.J. in *Parker v. South Eastern Railway Co*., 2 C.P.D. 416, 423, 424 was setting out a principle of substantive law; estoppel by representation would apply. A person taking a ticket containing conditions is to be taken as taking the ticket with knowledge of the conditions. If the recipient of a ticket knows or ought as a reasonable man to know that the ticket contains conditions which are intended to be part of the contract, he is bound by them: see *per* Lord Reid in *McCutcheon v. David MacBrayne Ltd*. [1964] 1 W.L.R. 125, 128. This case falls within the second principle of Lord Devlin at p. 136: the ticket was accepted as a contractual document and the plaintiff "is bound by the conditions which are printed on it or incorporated in it by sufficient reference to some other document."

LORD DENNING M.R. In 1964 Mr. Thornton, the plaintiff, who was a free-lance trumpeter of the highest quality, had an engagement with the B.B.C. at Farringdon Hall. He drove to the City in his motor car and went to park it at a multistorey automatic car park. It had only been open a few months. He had never gone there before. There was a notice on the outside headed "Shoe Lane Parking." It gave the parking charges: "5*s.* for two hours; 7*s.* 6*d.* for three hours," and so forth; and at the bottom: "All Cars Parked At Owner's Risk." Mr. Thornton drove up to the entrance. There was not a man in attendance. There was a traffic light which showed red. As he drove in and got to the appropriate place, the traffic light turned green and a ticket was pushed out from the machine. Mr. Thornton took it. He drove on into the garage. The motor car was taken up by mechanical means to a floor above. Mr. Thornton left it there and went off to keep his appointment with the B.B.C. Three hours later Mr. Thornton came back. He went to the office and paid the charge for the time the car was there. His car was brought down from the upper floor. He went to put his belongings into the boot of the car. But unfortunately there was an accident. Mr. Thornton was severely injured. The judge has found it was half his own fault, but half the fault of Shoe Lane Parking Ltd., the defendants. The judge awarded him £3,637 6*s.* 11*d.*

On this appeal the garage company do not contest the judge's findings about the accident. They acknowledge that they were at fault, but they claim that they are protected by some exempting conditions. They rely on the ticket which was issued to Mr. Thornton by the machine. They say that it was a contractual document and that it incorporated a condition

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which exempts them from liability to him. The ticket was headed "Shoe Lane Parking." Just below there was a "box" in which was automatically recorded the time when the car went into the garage. There was a notice alongside: "Please present this ticket to cashier to claim your car." Just below the time, there was some small print in the left hand corner which said: "This ticket is issued subject to the conditions of issue as displayed on the premises." That is all.

Mr. Thornton says he looked at the ticket to see the time on it, and put it in his pocket. He could see there was printing on the ticket, but he did not read it. He only read the time. He did not read the words which said that the ticket was issued subject to the conditions as displayed on the premises.

If Mr. Thornton had read those words on the ticket and had looked round the premises to see where the conditions were displayed, he would have had to have driven his car on into the garage and walked round. Then he would have found, on a pillar opposite the ticket machine, a set of printed conditions in a panel. He would also have found, in the paying office (to be visited where coming back for the car) two more panels containing the printed conditions. If he had the time to read the conditions - it would take him a very considerable time - he would read:

> "CONDITIONS
>
> The following are the conditions upon which alone motor vehicles are accepted for parking:-
>
> 1. The customer agrees to pay the charges of Shoe Lane Parking Developments Ltd. …
>
> 2. The customer is deemed to be fully insured at all times against all risks (including, without prejudice to the generality of the foregoing, fire, damage and theft, whether due to the negligence of others or not) and the company shall not be responsible or liable for any loss or misdelivery of or damage of whatever kind to the customer's motor vehicle, or any articles carried therein or thereon or of or to any accessories carried thereon or therein *or injury to the customer or any other person occurring when the customer's motor vehicle is in the parking building howsoever that loss, misdelivery, damage or injury shall be caused*; and it is agreed and understood that the customer's motor vehicle is parked and permitted by the company to be parked in the parking building in accordance with this licence entirely at the customer's risk. …"

There is a lot more. I have only read about one-tenth of the conditions. The important thing to notice is that the company seek by this condition to exempt themselves from liability, not only for damage to the car, but also for injury to the customer howsoever caused. The condition talks about insurance. It is well known that the customer is usually insured against damage to the car. But he is not insured against damage to himself. If the condition is incorporated into the contract of parking, it means that Mr. Thornton will be unable to recover any damages for his personal injuries which were caused by the negligence of the company.

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We have been referred to the ticket cases of former times from *Parker v. South Eastern Railway Co*. (1877) 2 C.P.D. 416 to *McCutcheon v. David MacBrayne Ltd*. [1964] 1 W.L.R. 125. They were concerned with railways, steamships and cloakrooms where booking clerks issued tickets to customers who took them away without reading them. In those cases the issue of the ticket was regarded as an offer by the company. If the customer took it and retained it without objection, his act was regarded as an acceptance of the offer: see *Watkins v. Rymill* (1833) 10 Q.B.D. 178, 188 and *Thompson v. London, Midland and Scottish Railway Co*. [1930] 1 K.B. 41, 47. These cases were based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.

None of those cases has any application to a ticket which is issued by an automatic machine. The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot.

The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made: see *Olley v. Marlborough Court Ltd*. [1949] 1 K.B. 532. The ticket is no more than a voucher or receipt for the money that has been paid (as in the deckchair case, *Chapelton v. Barry Urban District Council* [1940] 1 K.B. 532) on terms which have been offered and accepted before the ticket is issued.

In the present case the offer was contained in the notice at the entrance giving the charges for garaging and saying "at owner's risk," i.e., at the risk of the owner so far as damage to the car was concerned. The offer was accepted when Mr. Thornton drove up to the entrance and, by the movement of his car, turned the light from red to green, and the ticket was thrust at him. The contract was then concluded, and it could not be altered by any words printed on the ticket itself. In particular, it could not be altered so as to exempt the company from liability for personal injury due to their negligence.

Assuming, however, that an automatic machine is a booking clerk in disguise - so that the old fashioned ticket cases still apply to it. We then have to go back to the three questions put by Mellish L.J. in *Parker v. South Eastern Railway Co*., 2 C.P.D. 416, 423, subject to this qualification: Mellish L.J. used the word "conditions" in the plural, whereas it would be more apt to use the word "condition" in the singular, as indeed the

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lord justice himself did on the next page. After all, the only condition that matters for this purpose is the exempting condition. It is no use telling the customer that the ticket is issued subject to some "conditions" or other, without more: for he may reasonably regard "conditions" in general as merely regulatory, and not as taking away his rights, unless the exempting condition is drawn specifically to his attention. (Alternatively, if the plural "conditions" is used, it would be better prefaced with the word "exempting," because the exempting conditions are the only conditions that matter for this purpose.) Telescoping the three questions, they come to this: the customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or, if the company did what was reasonably sufficient to give him notice of it.

Mr. Machin admitted here that the company did not do what was reasonably sufficient to give Mr. Thornton notice of the exempting condition. That admission was properly made. I do not pause to inquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in *J. Spurling Ltd. v. Bradshaw* [1956] 1 W.L.R. 461, 466. In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it - or something equally startling.

But, although reasonable notice of it was not given, Mr. Machin said that this case came within the second question propounded by Mellish L.J., namely that Mr. Thornton "knew or believed that the writing contained conditions." There was no finding to that effect. The burden was on the company to prove it, and they did not do so. Certainly there was no evidence that Mr. Thornton knew of this exempting condition. He is not, therefore, bound by it.

Mr. Machin relied on a case in this court last year - *Mendelssohn v. Normand Ltd*. [1970] 1 Q.B. 177. Mr. Mendelssohn parked his car in the Cumberland Garage at Marble Arch, and was given a ticket which contained an exempting condition. There was no discussion as to whether the condition formed part of the contract. It was conceded that it did. That is shown by the report in the Law Reports at p. 180. Yet the garage company were not entitled to rely on the exempting condition for the reasons there given.

That case does not touch the present, where the whole question is whether the exempting condition formed part of the contract. I do not think it did. Mr. Thornton did not know of the condition, and the company did not do what was reasonably sufficient to give him notice of it.

I do not think the garage company can escape liability by reason of the exemption condition. I would, therefore, dismiss the appeal.

MEGAW L.J. For myself, I would reserve a final view on the question at what precise moment of time the contract was concluded.

In relation to the main arguments that have been put before us, I would refer to the opening paragraph of the speech of Lord Dunedin in *Hood v. Anchor Line (Henderson Bros.) Ltd*. [1918] A.C. 837, 846:

---------- ***[1971] 2 Q.B. 163 at 171***

> "My Lords, this is a class of case in which of citing of authorities there is no end, and yet it is, I think, quite possible to say 'Hear the conclusion of the whole matter.' The case of *Parker v. South Eastern Railway Co*., 2 C.P.D. 416which has been approved in every case since its date, really stereotyped the question which the tribunal, be it jury or judge, must put to itself when such a question arises."

I shall come back to the question as it was formulated by Lord Dunedin.

That case was a ticket case. It related to a ticket for a trans-Atlantic voyage taken by Mr. Hood, which contained on its face conditions limiting liability. The company issuing the ticket had taken great care both on the ticket itself and on the accompanying documents to call attention to the limiting conditions. An accident happened when the ship was sunk off the coast of Ireland. Mr. Hood suffered serious injury. His contract was held to be subject to the limiting conditions. It was accepted that the shipping company had been unable to prove that Mr. Hood had actually read, or was aware of, any of the warnings that the shipping company had tried to convey to him as to the limiting conditions. In that case Lord Finlay L.C., giving the leading judgment, said [1918] A.C. 837, 842 in relation to *Parker v. South Eastern Railway Co*., 2 C.P.D. 416and *Richardson, Spence & Co. v. Rowntree* [1894] A.C. 217:

> "The second and third of these cases" - that is the two cases I have just mentioned - "show that if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket the person taking the ticket would be bound by such conditions."

Viscount Haldane said, at p. 844:

> "I agree that the appellant here was entitled to ask that all that was reasonably necessary as matter of ordinary practice should have been done to bring to his notice the fact that the contract tendered to him when he paid his passage money excluded the right which the general law would give him, unless the contract did exclude it, to full damage if he was injured by the negligence of those who contracted to carry him on their steamer. Whether all that was reasonably necessary to give him this notice was done is, however, a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties."

Later in his speech Viscount Haldane said: "In *Parker v. South Eastern Railway Co*. the only question was whether the question had been properly put to the jury."

The essence of the decision in *Parker v. South Eastern Railway Co*., 2 C.P.D. 416was analysed by Lord Hodson in *McCutcheon v. David MacBrayne Ltd*. [1964] 1 W.L.R. 125, 129 as follows:

> "That case, affirmed in *Hood v. Anchor Line (Henderson Brothers) Ltd*. [1918] A.C. 837, established that the appropriate questions for the jury in a ticket case were: (1) Did the passenger know that there was printing on the railway ticket? (2) Did he know that the ticket contained or referred to conditions? and (3) Did the railway company

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> do what was reasonable in the way of notifying prospective passengers of the existence of conditions and where their terms might be considered?"

Now take those questions in relation to the present case. First, did the plaintiff know that there was printing on the ticket? Mocatta J. has answered that question, being a question of fact, with the answer Yes. Therefore one moves on to the second question: did he know that the ticket contained or referred to conditions? Mocatta J. made no express finding on that point. In my view there is the clearest implication from the way in which he stated and dealt with the third question that his finding on the second question was to answer it No. But even if I should be wrong in that view of the implication of the judgment, it would not do the defendants any good, because the onus is on them to establish the existence of this term in the contract, and they have not got the necessary finding, express or by implication, of an affirmative answer to the second question. Mr. Machin has gallantly striven to suggest that the judge's finding of fact, that the plaintiff did not read the words on the ticket referring to the conditions, was a wrong finding. But the judge saw and heard the witnesses, and I see no reason whatever to challenge or doubt his conclusion of fact on that matter.

So I come to the third of the three questions. That question, if I may return to the speech of Lord Dunedin in *Hood v. Anchor Line (Henderson Brothers) Ltd*. [1918] A.C. 837, 846, 847 was posed by him in this way:

> "Accordingly it is in each case a question of circumstance whether the sort of restriction that is expressed in any writing (which, of course, includes printed matter) is a thing that is usual, and whether, being usual, it has been fairly brought before the notice of the accepting party."

That, though it is more fully stated by Lord Dunedin, is essentially the same question, I think, as was formulated by Mellish L.J. in Parker's case, 2 C.P.D. 416, 424 at the very end of his judgment, where he said that the question which ought to have been left to the jury was: whether the railway company did what was reasonably sufficient to give the plaintiff notice of *the condition*. (I emphasise the use by Mellish L.J. of the definite article and of the word "condition" in the singular.) agree with Lord Denning M.R. that the question here is of the particular condition on which the defendants seek to rely, and not of the conditions in general.

When the conditions sought to be attached all constitute, in Lord Dunedin's words [1918] A.C. 846, 847, "the sort of restriction … that is usual," it may not be necessary for a defendant to prove more than that the intention to attach *some* conditions has been fairly brought to the notice of the other party. But at least where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition *of that particular nature* was fairly brought to the notice of the other party. How much is required as being, in the words of Mellish L.J., 2 C.P.D. 416, 424, "reasonably sufficient to give the plaintiff

notice of the condition," depends upon the nature of the restrictive condition.

In the present case what has to be sought in answer to the third question is whether the defendant company did what was reasonable fairly to bring to the notice of the plaintiff, at or before the time when the contract was made, the existence of this particular condition. This condition is that part of the clause - a few words embedded in a lengthy clause - which Lord Denning M.R. has read, by which, in the midst of provisions as to damage to property, the defendants sought to exempt themselves from liability for any personal injury suffered by the customer while he was on their premises. Be it noted that such a condition is one which involves the abrogation of the right given to a person such as the plaintiff by statute, the Occupiers Liability Act 1957. True, it is open under that statute for the occupier of property by a contractual term to exclude that liability. In my view, however, before it can be said that a condition of that sort, restrictive of statutory rights, has been fairly brought to the notice of a party to a contract there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury, was sought to be included. I certainly would not accept that the position has been reached today in which it is to be assumed as a matter of general knowledge, custom, practice, or whatever is the phrase that is chosen to describe it, that when one is invited to go upon the property of another for such purposes as garaging a car, a contractual term is normally included that if one suffers any injury on those premises as a result of negligence on the part of the occupiers of the premises they shall not be liable.

Even if I were wrong in the view which I take that the third question has to be posed in relation to this particular term, it would still not avail the defendants here. In my view the judge was wholly right on the evidence in the conclusion which he reached that the defendants have not taken proper or adequate steps fairly to bring to the notice of the plaintiff at or before the time when the contract was made that any special conditions were sought to be imposed.

I think it is a highly relevant factor in considering whether proper steps were taken fairly to bring that matter to the notice of the plaintiff that the first attempt to bring to his notice the intended inclusion of those conditions was at a time when as a matter of hard reality it would have been practically impossible for him to withdraw from his intended entry upon the premises for the purpose of leaving his car there. It does not take much imagination to picture the indignation of the defendants if their potential customers, having taken their tickets and observed the reference therein to contractual conditions which, they said, could be seen in notices on the premises, were one after the other to get out of their cars, leaving the cars blocking the entrances to the garage, in order to search for, find and peruse the notices! Yet unless the defendants genuinely intended that potential customers should do just that, it would be fiction, if not farce, to treat those customers as persons who have been given a fair opportunity,

before the contracts are made, of discovering the conditions by which they are to be bound.

I agree that this appeal should be dismissed.

SIR GORDON WILLMER. I have reached the same conclusion, and there is very little for me to

add. It seems to me that the really distinguishing feature of this case is the fact that the ticket on which reliance is placed was issued out of an automatic machine. I think it is right to say - at any rate, it is the fact so far as the cases that have been called to our attention are concerned - that in all the previous so-called "ticket cases" the ticket has been proffered by a human hand, and there has always been at least the notional opportunity for the customer to say - if he did not like the conditions - "I do not like your conditions: I will not have this ticket." But in the case of a ticket which is proffered by an automatic machine there is something quite irrevocable about the process. There can be no locus poenitentiae. I do not propose to say any more upon the difficult question which has been raised as to the precise moment when a contract was concluded in this case; but at least it seems to me that any attempt to introduce conditions after the irrevocable step has been taken of causing the machine to operate must be doomed to failure. It may be that those who operate garages of this nature, as well as those who install other types of automatic machines, should give their attention to this problem. But it seems to me that the judge below was on the right track when he said, towards the end of his judgment, that in this sort of case, if you do desire to impose upon your customers stringent conditions such as these, the least you can do is to post a prominent notice at the entrance to the premises, warning your customers that there are conditions which will apply. So far as the rest of the case is concerned, I agree with what has been said by my Lords and do not wish to add anything further.

Appeal dismissed with costs.

A. H. B.

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