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Neutral Citation Number: [1987] EWCA Civ 6
Case No. 480669

IN THE THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE LAMBETH COUNTY COURT
(HIS HONOUR JUDGE HOLROYD)

Royal Courts of Justice
12th November 1987

B e f o r e :

LORD JUSTICE DILLON
and
LORD JUSTICE BINGHAM

INTERFOTO PICTURE LIBRARY LIMITED — **(Plaintiff) Respondent**

v.

STILETTO VISUAL PROGRAMMES LIMITED — **(Defendant) Appellant**

(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2).

MR. S. LENNARD (instructed by Messrs. Andrew Moore & Co.) appeared on behalf of the (Plaintiff) Respondent.
MR. NICHOLAS YELL (instructed by Messrs. Steven Fisher & Co.) appeared on behalf of the (Defendant) Appellant.

HTML VERSION OF JUDGMENT

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LORD JUSTICE DILLON: The defendants appeal against a decision of the late Judge Holroyd Q.C. given in the Lambeth County Court at the trial of this action on the 11th March, 1987 whereby the judge awarded the plaintiffs judgment against the defendants in the sum of £3,783.50 with interest and costs. The judge described the case as an interesting case, and in that I agree with him.

The plaintiffs run a library of photographic transparencies. The defendants are engaged in advertising. On the 5th March, 1984 Mr. Beeching, a director of the defendants, wanting photographs for a presentation for a client, telephoned the plaintiffs, whom the defendants had never dealt with before. He spoke to a Miss Fraser of the plaintiffs and asked her whether the plaintiffs had any photographs of the 1950s which might be suitable for the defendants' presentation. Miss Fraser said that she would research his request, and a little later on the same day she sent round by hand to the defendants 47 transparencies packed in a jiffy bag. Also packed in the bag, among the transparencies, was a delivery note which she had typed out, and to which I shall have to refer later.

Having received the transparencies, Mr. Beeching telephoned the plaintiffs at about 3.10 on the afternoon of the 5th March, and told Miss Fraser, according to a contemporary note which the judge accepted, that he was very impressed with the plaintiffs' fast service, that one or two of the transparencies could be of interest, and that he would get back to the plaintiffs.

Unfortunately he did not get back on to the plaintiffs and the transparencies seem to have been put on one side and overlooked by the defendants. The plaintiffs tried to telephone Mr. Beeching on the 20th and again on the 23rd March, but only spoke to his secretary. In the upshot the transparencies, which the defendants did not use for their presentation, were not returned to the plaintiffs until the 2nd April.

The plaintiffs thereupon sent an invoice to the defendants for £3,783.50 as a holding charge for the transparencies. The invoice was rejected by the defendants, and accordingly in May 1984 the plaintiffs started this action claiming the £3,733.50, the amount of the invoice. That is the sum for which the judge awarded the plaintiffs judgment by his order now under appeal.

The plaintiffs' claim is based on conditions printed on their delivery note, which I have briefly mentioned, and must now describe in greater detail.

It is addressed to Mr. Beeching of the defendants at the defendants' address and in the body of it the 47 transparencies are listed by number. In the top right-hand corner the date of dispatch is given as the 5th March, 1984 and the date for return is clearly specified as the 19th March. Across the bottom, under the heading "Conditions" fairly prominently printed in capitals, there are set out nine conditions, printed in four columns. Of these the important one is No.2 in the first column, which reads as follows:

> "2. All transparencies must be returned to us within 14 days from the date of posting/delivery/ collection. A holding fee of £5.00 plus VAT per day will be charged for each transparency which is retained by you longer than the said period of 14 days save where a copyright licence is granted or we agree a longer period in writing with you."

Condition 8 provides:

> "8. When sent by post/delivered/collected the above conditions are understood to have been accepted unless the package is returned to us immediately by registered mail or by hand containing all the transparencies whole and undefaced and these conditions shall apply to all transparencies submitted to you whether or not you have completed a request form."

The conditions purport to be merely the conditions of the bailment of transparencies to a customer. If the customer wishes to make use of transparencies so submitted to him, a fresh contract has to be

agreed with the plaintiffs, but, as that did not happen so far as the defendants are concerned, it is unnecessary to consider that aspect further.

The sum of £3,783.50 is calculated by the plaintiffs in strict accordance with condition 2 as the fee for the retention of 47 transparencies from the 19th March to the 2nd April, 1984. It is of course important to the plaintiffs to get their transparencies back reasonably quickly, if they are not wanted, since if a transparency is out with one customer it cannot be offered to another customer, should occasion arise. It has to be said, however, that the holding fee charged by the plaintiffs by condition 2 is extremely high, and in my view exorbitant. The judge held that on a quantum meruit a reasonable charge would have been £3.50 per transparency per week, and not £5 per day, and he had evidence before him of the terms charged by some ten other photographic libraries, most of which charged less than 23.50 per week and only one of which charged more (£4 per transparency per week). It would seem therefore that the defendants would have had a strong case for saying that condition 2 was void and unenforceable as a penalty clause; but that point was not taken in the court below or in the notice of appeal.

The primary point taken in the court below was that condition 2 was not part of the contract between the parties because the delivery note was never supplied to the defendants at all. That the judge rejected on the facts; he found that the delivery note was supplied in the same jiffy bag with the transparencies, and that finding is not challenged in this court. He made no finding however that Mr. Beeching or any other representative of the defendants read condition 2 or any of the other printed conditions, and it is overwhelmingly probable that they did not.

An alternative argument for the defendants, in this court as below, was to the effect that any contract between the parties was made before the defendants knew of the existence of the delivery note viz. either in the course of the preliminary telephone conversation between Mr. Beeching and Miss Fraser, or when the jiffy bag containing the transparencies was received in the defendants' premises but before the bag was opened. I regard these submissions as unrealistic and unarguable. The original telephone call was merely a preliminary enquiry and did not give rise to any contract. But the contract came into existence when the plaintiffs sent the transparencies to the defendants and the defendants, after opening the bag, accepted them by Mr. Beeching's phone call to the plaintiffs at 3.10 on the 5th March. The question is whether condition 2 was a term of that contract.

There was never any oral discussion of terms between the parties before the contract was made. In particular there was no discussion whatever of terms in the original telephone conversation when Mr. Beeching made his preliminary enquiry. The question is therefore whether condition 2 was sufficiently brought to the defendants' attention to make it a term of the contract which was only concluded after the defendants had received, and must have known that they had received the transparencies and the delivery note.

This sort of question was posed, in relation to printed conditions, in the ticket cases, such Parker v. South Eastern Railway L.R.2 C.P.D. 416, in the last century. At that stage the printed conditions were looked at as a whole and the question considered by the courts was whether the printed conditions as a whole had been sufficiently drawn to a customer's attention to make the whole set of conditions part of the contract; if so the customer was bound by the printed conditions even though he never read them.

More recently the question has been discussed whether it is enough to look at a set of printed conditions as a whole. When for instance one condition in a set is particularly onerous does something special need to be done to draw customers' attention to that particular condition? In an obiter dictum in J. Spurling Ltd. v. Bradshaw [1956] 1 W.L.R.461 at page 466 (cited in Chitty on Contracts 25th Ed. Vol. 1 at page 408) Lord Justice Denning stated that "Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient".

Then in Thornton v. Shoe Lane Parking Ltd. (1971) 2.Q.B. 163 both Lord Denning M.R. and Lord Justice Megaw held as one of their grounds of decision, as I read their judgments, that where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party. Lord Denning at pages 169H-170D re-stated and applied what he had said in the Spurling case,

and held that the court should not hold any man bound by such a condition unless it was drawn to his attention in the most explicit way. Lord Justice Megaw deals with the point at pages 172F-173E where he says:

> "I 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 Lord Justice 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."

Counsel for the plaintiffs submits that Thornton v. Shoe Lane Parking was a case of an exemption clause and that what their Lordships said must be read as limited to exemption clauses and in particular exemption clauses which would deprive the party on whom they are imposed of statutory rights. But what their Lordships said was said by way of interpretation and application of the general statement of the law by Lord Justice Hellish in Parker v. South Eastern Railway and the logic of it is applicable to any particularly onerous clause in a printed set of conditions of the one contracting party which would not be generally known to the other party.

Condition 2 of these plaintiffs' conditions is in my judgment a very onerous clause. The defendants could not conceivably have known, if their attention was not drawn to the caluse, that the plaintiffs were proposing to charge a "holding fee" for the retention of the transparencies at such a very high and exorbitant rate.

At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now. In the intervening years the printed conditions have tended to become more and more complicated and

more and more one-sided in favour of the party who is imposing them, but the other parties, if they notice that there are printed conditions at all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance. In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in Thornton v. Shoe Lane Parking, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.

In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note. Consequently condition 2 never, in my judgment, became part of the contract between the parties.

I would therefore allow this appeal and reduce the amount of the judgment which the judge awarded against the defendants to the amount which he would have awarded on a quantum meruit on his alternative findings, i.e. the reasonable charge of £3.50 per transparency per week for the retention of the transparencies beyond a reasonable period, which he fixed at 14 days from the date of their receipt by the defendants.

LORD JUSTICE BINGHAM: In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them.

English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.

The well known cases on sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature.

In the leading case of Parker v. The South Eastern Railway Company [1877] 2 C.P.D. 416 Lord Justice Baggallay plainly thought on the facts that the plaintiffs were right, Lord Justice Bramwell that they were wrong; Lord Justice Mellish thought that there had been a misdirection and there should be a re-trial, a view in which the other members of the court concurred. The judgments deserve to be re-read. Lord Justice Mellish said (at page 422):

> "Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the

> party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread."

At page 423 he added:

> "The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them; I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability."

Lord Justice Baggallay's analytical approach was somewhat similar (at page 425-6):

> "Now as regards each of the plaintiffs, if at the time when he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he became bound by them. I think also that he would be equally bound if he was aware or had good reason to believe that there were upon the ticket statements intended to affect the relative rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any such, or from making himself acquainted with their purport. But I do not think that in the absence of any such knowledge or information, or good reason for belief, he was under any obligation to examine the ticket with the view of ascertaining whether there were any such statements or conditions upon it."

Both these Lords Justices were, as it seems to me, distinguishing the case in which it would be fair to hold a party bound from the case in which it would not. But this approach is made more explicit in the strongly-worded judgment of Lord Justice Bramwell (at page 427):

> "The plaintiffs have sworn that they did not know that the printing was the contract, and we must act as though that was true and we believed it, at least as far as entering the verdict for the defendants is concerned. Does this make any difference? The plaintiffs knew of the printed matter. Both admit they knew it concerned them in some way, though they said they did not know what it was; yet neither pretends that he knew or believed it was not the contract. Neither pretends he thought it had nothing to do with the business in hand; that he thought it was an advertisement or other matter unconnected with his deposit of a parcel at the defendants' cloak-room. They admit that, for anything they knew or believed, it might be, only they did not know or believe it was, the contract. Their evidence is very much that they did not think, or, thinking, did not care about it. Now they claim to charge the company, and to have the benefit of their own indifference. Is this just? Is it reasonable? Is it the way in which any other business is allowed to be conducted? Is it even allowed to a man to 'think', 'judge', 'guess', 'chance' a matter, without informing himself when he can, and then when his 'thought', 'judgment', 'guess' or 'chance' turns out wrong or unsuccessful, claim to impose a burthen or duty on another which he could not have done had he informed himself as he might?"

He continued in the same vein at page 428:

> "Has not the giver of the paper a right to suppose that the receiver is content to deal on the terms in the paper? What more can be done? Must he say, 'Read that'? As I have said, he does so in effect when he puts it into the other's hands. The truth is, people are content to take these things on trust. They know that there is a form which is always used - they are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. If they did, then dealing would soon be stopped. Besides, unreasonable practices would be known. The very fact of not looking at the paper shews that this confidence exists. It is asked: What if there was some unreasonable condition, as for instance to forfeit £1000 if the goods were not removed in forty-eight hours? Would the depositor be bound? I might content myself by asking: Would he be, if he were told 'our conditions are on this ticket', and he did not read them. In my judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read - no condition not relevant to the matter in hand. I am on opinion, therefore, that the plaintiffs, having notice of the printing, were in the same situation as though the porter had said, 'Read that, it concerns the matter in hand'; that if the plaintiffs did not read it, they were as much bound as if they had read it and had not objected."

This is not a simple contractual analysis whether an offer has been made and accepted.

In Hood v. Anchor Line (Henderson Brothers) Ltd. [1918] AC 837, an appeal from the Court of Session, the question was whether a steamship company had effectively protected itself against liability for injury to a passenger. Lord Finlay L.C. at 842 posed the simple question: "What more could have been done to bring the conditions to the notice of the passenger?" Viscount Haldane approached the matter in a more general way (at page 843):

> "There is a large and varied class of cases where the legal duty of a member of society to his neighbour cannot be laid down a priori or without examining the special circumstances of the situation. The duty in these instances is ascertained by a standard which depends, not on mere general principles fashioned by the jurist, for no such general principles can provide for all the concrete details of which account must be taken, but on the opinion of reasonable men who have considered the whole of the circumstances in the particular instance and can be relied on to say how, according to accepted standards of conduct, a reasonable man ought to behave in these circumstances towards the neighbour towards whom he is bound by the necessities of the community to act with forbearance and consideration."

And (at page 845) he added:

> "It is true that Mr. May did not look at the envelope closely or refer to the condition. He took the contract away and put it in a safe, and ultimately gave it to the appellant, who did not read it either. But I am of opinion that the real question was not whether they did read it, but whether they can be heard to say that they did not read it. If it had been merely a case of inviting people to put a penny into an automatic machine and get a ticket for a brief journey, I might think differently. In such a transaction men cannot naturally be expected to pause to look whether they are obtaining all the rights which the law gives them in the absence of a special stipulation. But when it is a case of taking a ticket for a voyage of some days, with arrangements to be made, among other things, as to cabins and luggage, I think ordinary people do look to see what bargain they are getting, and should be taken as bound to have done so and as precluded from saying that they did not know."

Lord Dunedin (at page 846-7) said:

> "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."

These authoritative passages appear to base the law very firmly on consideration of what is fair in all the circumstances.

J. Spurling v. Bradshaw [1956] 1 WLR 461 concerned an exemption clause in a warehousing contract. The case is now remembered for the observations of Lord Justice Denning at page 466:

> "This brings me to the question whether this clause was part of the contract. Mr. Sofer urged us to hold that the warehousemen did not do what was reasonably sufficient to give notice of the conditions within Parker v. South Eastern Railway Co. I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

Here, therefore, is made explicit what Lord Justice Bramwell had perhaps foreshadowed, that what would be good notice of one condition would not be notice of another. The reason is that the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given.

McCutcheon v. David Macbrayne Ltd. [1964] 1 WLR 125 is a case out of the common run because the document containing the contractual exemption was neither issued nor signed. The interest of the case for present purposes lies in two passages in the speeches of Lord Reid and Lord Pearce. Lord Reid (at page 128) said:

> "If it could be said that when making the contract Mr. McSporran knew that the respondents always required a risk note to be signed and knew that the purser was simply forgetting to put it before him for signature, then it might be said that neither he nor his principal could take advantage of the error of the other party of which he was aware. But counsel frankly admitted that he could not put his case as high as that."

Lord Pearce (at page 138) expressed a similar opinion:

> "This is not a case where there was any bad faith on the part of the pursuer or his agent. Had the pursuer's agent snatched at an offer that he knew was not intended, or deliberately taken advantage of the defenders' omission to proffer their usual printed form for his signature, the situation would be different and other considerations would apply."

Here again, as it seems to me, one finds reference to a concept of fair dealing that has very little to do with a conventional analysis of offer and acceptance.

Lastly I would mention Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163. Lord Denning M.R. (at page 169-170) said:

> "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 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 WLR 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."

The judgment of Lord Justice Megaw (at pages 172-173) was to similar effect:

> "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] AC 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.) I 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." The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned.

Turning to the present case, I am satisfied for reasons which Lord Justice Dillon has given that no contract was made on the telephone when the defendants made their initial request. I am equally satisfied that no contract was made on delivery of the transparencies to the defendants before the opening of the jiffy bag in which they were contained. Once the jiffy bag was opened and the

transparencies taken out with the delivery note, it is in my judgment an inescapable inference that the defendants would have recognised the delivery note as a document of a kind likely to contain contractual terms and would have seen that there were conditions printed in small but visible lettering on the face of the document. To the extent that the conditions so displayed were common form or usual terms regularly encountered in this business, I do not think the defendants could successfully contend that they were not incorporated into the contract.

The crucial question in the case is whether the plaintiffs can be said fairly and reasonably to have brought condition 2 to the notice of the defendants^ The judge made no finding on the point, but I think that it is open to this court to draw an inference from the primary findings which he did make. In my opinion the plaintiffs did not do so. They delivered 47 transparencies, which was a number the defendants had not specifically asked for. Condition 2 contained a daily rate per transparency after the initial period of 14 days many times greater than was usual or (so far as the evidence shows) heard of. For these 47 transparencies there was to be a charge for each day of delay of £235 plus VAT. The result would be that a venial period of delay, as here, would lead to an inordinate liability. The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention. I would accordingly allow the defendants' appeal and substitute for the judge's award the sum which he assessed upon the alternative basis of quantum meruit.

In reaching the conclusion I have expressed I would not wish to be taken as deciding that condition 2 was not challengeable as a disguised penalty clause. This point was not argued before the judge nor raised in the notice of appeal. It was accordingly not argued before us. I have accordingly felt bound to assume, somewhat reluctantly, that condition 2 would be enforceable if fully and fairly brought to the defendants' attention.

(Order: Appeal allowed with costs. County Court costs to be on Scale 1. Of payment in court 2493.70 to be paid out to plaintiff; the balance to be paid out to the defendant.)

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