## BY THEIR FRUITS SHALL YE KNOW THEM

A SUCCESSFUL refusal to pay a parking charge notice in the Lewes county court has provided a fascinating insight into the effect *Cavendish Square Holding BV v Talal el Makdessi; ParkingEye Ltd. v Beavis* [2015] UKSC 67, [2016] A.C. 1172 (noted by Morgan [2016] C.L.J. 11–14) (hereinafter *ParkingEye*) has had on what Lord Steyn once called "the real life of our lower courts". *One Parking Solution Ltd. v W*, 5 February 2020 (hereinafter *One Parking*) was a remarkable small claims proceeding, not least in that DDJ Harvey handed down a 68-paragraph, reserved judgment explaining his decision in the context of the law of parking charges as it is experienced in such proceedings. This judgment is not available in the usual ways but the authors will happily provide a copy of the transcript, in which the name of the defendant, who is anxious to avoid personal publicity although her case has drawn national media notice, is redacted as "Ms W".

Unlike Mr. Beavis in *ParkingEye*, Ms W incurred a parking charge unintentionally in a way many others have done. Whilst driving, she received what she recognised to be an important business call and took the first reasonable opportunity to stop to legally give the call the attention it deserved. She brought her car to rest on the claimant's car park but did not turn off her engine nor leave her car, and drove away after almost 12 minutes as soon as her call was finished. She was issued with a parking charge in a common format demanding £100, reducible to £60 for early payment. Ms W refused to pay, arguing she had not "parked", had not entered into a "contract", and had in any event not exceeded an applicable grace period.

In what appears to be a disaster for the claimant, the court not only accepted that Ms W had not parked, but also found that the claimant had insufficient authority over the land to manage car parking there. This in itself was enough to dismiss the claim, but not only did DDJ Harvey do this in the strongest conceivable terms, he also required further investigation into the truth of some of the evidence given on behalf of the claimant. DDJ Harvey then proceeded to do all that he possibly could to satisfy the defendant in costs.

Having found that the defendant had not parked, it seems that the court's position was that there was no contract. DDJ Harvey nonetheless felt compelled by what he believed to be his "statutory quasi inquisitorial duty" under the Consumer Rights Act 2015, s. 71 to comment unfavourably on the fairness of the term levying the parking charge. He found that, properly construed, the parking notice allowed a 15-minute "period of grace", which he considered reasonable. In contrast, but in accordance with other county court decisions, he considered that the attempt to impose a further

"administration charge" amounting to 82 per cent of the penalty charge was unfair. The shortcomings of the typical contractual notice relied on in parking cases which, although this issue played an unclear part in his decision in the case, gave great general concern to DDJ Harvey. This note, however, will focus on the remarkable legal aspect in which this case is, as the very experienced DDJ was anxious to bring to wide attention, typical of "the thousands of 'high temperature' parking cases" with which the county courts are now "deluged" as a "knock-on effect" of the over 8 million charges now estimated to be being issued annually, a 500 per cent growth over the last decade.

DDJ Harvey strongly objected that the main part of claimant's argument, submitted as a witness statement by a paralegal, "did not address the real issues" but was rather a formulaic "cut and paste" reference to the Supreme Court's restatement of the penalty rule in *ParkingEye*. One's initial surprise on being told that a reference of this elevated sort has become familiar "*ad nauseam*" in small claims proceedings is easily dispelled. The point the claimant strove to make was "that the sums sought for the [parking charge notice] 'were not extravagant or unconscionable'". One can readily see why widespread dwelling on this in a general way, even if in *One Parking* the contrary was not even raised in defence, would be preferred to the hazards of attempting to justify the often manifestly questionable substance of these sorts of charges, a fortiori when contested. DDJ Harvey was of the opinion that these, it seems ritual, arguments are "calculated more to be *in terrorem* of defendants than to assist the Court". In this case, the defendant's alleged "unreasonable behaviour" in having the claim against her tested in court led to her facing a demand, not for £60 or £100, but, by adding the administration charge and costs, £1,027! However, although *en passant* DDJ Harvey surmised that £1,027 indeed was extravagant and unreasonable, it is submitted that he was unfortunately wrong if he thought that the size of the initial charge in this case could not easily be justified by reference to the reasoning of the Supreme Court in *ParkingEye*.

Though parking charges have become very controversial, we believe that it would be readily possible to achieve democratic endorsement of a general policy of levying such charges. As part of this, it would be uncontroversial to charge a motorist who, objectively judged, deliberately overstayed. But Ms W's case and the other "high temperature" cases are not like this. They involve inevitable, trivial and prima facie excusable breaches which extensive, sophisticated surveillance is used to detect and in respect of which substantial charges and costs are pursued unsympathetically or even ruthlessly. The charges form a major or even the entire part of the parking companies' revenues. These charges rightly give rise to public concern or outrage, repeatedly given voluble expression by Government and Parliament, despite the fact that the current parking charge system flows from recent primary legislation and can operate only with the active support

of Government agencies, particularly the Driver and Vehicle Licensing Agency which plays an essential role in identifying the keepers of vehicles.

How can a major judgment of the Supreme Court have come to be used in routine, facile attempts to justify these charges? It is regretfully submitted that it is because *ParkingEye*, particularly the judgment of Lords Neuberger and Sumption, does indeed justify them. The main reason *ParkingEye* is so congenial to these claimants has its origins a long way away from "the real life of our lower courts". The basic thrust of *ParkingEye*, approved in a number of commentators, including Dr Rowan in this journal ([2019] 78(1) C.L.J. 148), is, though the phrase itself is not mentioned in the judgment, promotion of the "performance interest". The court accepted that ParkingEye Ltd.'s method of managing car parks rested on the direct deterrence of breach, the necessity of which in itself constituted a "legitimate interest". This allowed the company to levy penalty charges devised under the new penalty rule in a way wholly unrelated to the compensation of loss caused by breach – ParkingEye Ltd. did not even attempt to claim a loss – but rationalised as directly intended to deter.

By dispensing with the balance between the parties' interests that is inherent in quantification on the basis of compensation of loss, the Supreme Court did what Lord Westbury L.C. famously said courts should not do and "deliver[ed] over defendants to [claimants] bound hand and foot" (*Isenberg v East India House Estate Co.* (1863) 46 E.R. 637, 641), thereby endorsing parking companies doing exactly what they have done. Their business model depending on the inevitability of trivial breach, parking companies have made every effort to levy charges on all breaches, regardless of their seriousness, and so produce the situation we now are in. Liquidated damages, of which parking charges are taken to be an instance, are subject to assessments of proportionality, but what is the standard if considerations of loss are made irrelevant by acceptance of direct deterrence itself as a legitimate interest? The charge has to hurt if it is to deter breach, regardless of whether any loss was sustained. This is why the consumer finds these charges to be incomprehensible and objectionable. Not even realising that it was doing something which had never before been done in the common law of contract, the Supreme Court authorised directly seeking prevention of breach as a final remedy, dispensing with the vital role inadequacy of damages formerly had in establishing a legitimate interest. The essentially superior wisdom of the former law on penalties and the respect for compensation of loss on which it was based could not be more graphically illustrated than it has been by the lengths to which DDJ Harvey was driven in order to dismiss the claimant's unworthy action and cast doubt on very many similar actions.

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