CASE NOTES

PENNY v. GRAND CENTRAL CAR PARK PTY. LTD.[1]

Contract—Clause exempting liability for loss or damage—Car delivery to unauthorised person—Liable if wrongly delivered.

A claim check was handed to the appellant when he left his vehicle in the respondent's car park. He did not bother to read the conditions on the card. The first of these exempted the respondents its servants and agents from liability 'for the loss of the motor vehicle . . . or any damage thereto . . . howsoever any such loss or damage be caused whether by the negligence or otherwise of any person acting with or without the authority of the proprietors or their servants or agents.' The fourth condition read that the respondents, their servants or agents 'may deliver the motor vehicle to any person producing this card or offering such other evidence of ownership or authority or entitlement to receive the motor vehicle as the proprietors or their servants or agents in their sole discretion deem satisfactory'. An unknown man without a claim check subsequently came to the car park and told the attendant that the owner had asked him to collect the car. This he was allowed to do. The car was stolen and damaged beyond repair. The action was based on conversion by the defendants for failure to redeliver the bailed article.

This fact situation offered the Supreme Court another opportunity to interpret an exempting condition stringently and against the interests of the party relying upon it as has been done, *e.g.* by the deletion of unreasonable terms, the withdrawal of protection from third parties, and the construction of ambiguities. The trial judge had found for the defendants, holding that the first clause protected the proprietors, and that there was no fundamental breach of contract preventing reliance upon that clause. The Full Court, by a majority, reversed that decision.[2]

An initial problem was whether the conditions were included in the contract itself. On this point all the judges concurred. The bailment of the car was not completed before the ticket was handed over: the ticket and its conditions could not be excluded on the ground that the contract was complete before notification of the conditions was given.[3] The nature of the document and common practice in the trade were such that special conditions were to be expected. Notice had, moreover, been given in the form of bold print on the card and warning notices on the walls of the car park. The terms were held to be included: such notice was held to be reasonable and sufficient to bring the terms and conditions to the notice of the other party: *Parker v. S.E. Railway Co.*,[4] and more recently *McCutcheon v. David McBrayne*.[5] It should be noted that in the later decision of

1 [1965] V.R. 323. Supreme Court of Victoria; O'Bryan, Hudson and Adam JJ.
2 O'Bryan J. dissenting.
3 For a full discussion of this point, *vide Olley v. Marlborough Court* [1949] 1 K.B. 532.
4 (1877) 2 C.P.D. 416.
5 [1964] 1 W.L.R. 125.

the High Court of Australia, in *The Council of the City of Sydney v. West*,[6] Barwick C.J. and Taylor J., in a joint judgment, indicated that proprietors of such businesses could not assume the automatic inclusion of exempting clauses in the contract. The abandonment of prominent notices and warnings at the time of delivery of the ticket could well eliminate in its initial stages, a defence based on those conditions.

The majority of the court confined the application of the blanket exemption conditions in Clause 1. They said that the reconciliation of the terms as a whole and the avoidance of Clause 4 becoming redundant necessitated reading Clause 1 as subject to Clause 4. It was admitted that Smith, the attendant, had been negligent. His testimony was unavailable[7] and therefore a defence could not be based on Clause 4 since there was no evidence adduced to show that he had been satisfied by the stranger's assertion.[8] Had it stood, alone Clause 1 would have exempted liability for negligent misdelivery but the majority read down the general conditions to give full effect to the particular provisions. Exempting words were to be construed *contra preferentem: Davis v. Pearce Parking Station.*[9] In the light of these considerations, Clause 1 implied that the proprietors would not be exempt from liability for negligent misdelivery, and negligence in this respect had already been admitted. This style of interpretation does appear to be crabbed and ultra-technical.

O'Bryan J. took a more lenient view. The claim check was a commercial document in which precise drafting should not be expected and overlapping would occur. Clause 4 was not meant to modify the general clause. The words 'any loss or damage' carried their ordinary grammatical meaning and the clause operated to exempt the respondents.

This approach of O'Bryan J. necessitated consideration of the question of fundamental breach of contract. Such a breach will exclude the operation of exempting conditions: *Alexander v. Railway Executive.*[10] A fundamental breach occurs when performance of a contract assumes a totally different character from that contemplated.[11] Gross negligence *per se* is insufficient. O'Bryan J. noted that later cases[12] seem to require a deliberate disregard of one of the prime obligations of the contract and held that the servant's conduct although negligent did not amount to a basic violation of the contract.

The remainder of the court, though not finding it necessary to discuss fundamental breach to reach their decision, did venture interesting opinions. Hudson J.[13] pointed out that the High Court in the *Davis case*[14]

6 39 A.L.J.R. 323, 324.

7 It is understood that Smith died before the case came to trial. *Quaere* if such an event does not make the defence undeservedly vulnerable. *Quaere* also, had any record of why cars were delivered to non-owners been kept, whether this would have been admissible evidence.

8 Argument by counsel for the appellant that evidence of ownership should impliedly be reasonable and not fanciful found no favour with the court. *Vide* the judgment of Hudson J. at p. 334.

9 91 C.L.R. 642, 649.

10 [1951] 2 K.B. 882.

11 *J. Spurling Ltd. v. Bradshaw*, [1956] 1 W.L.R. 461.

12 *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.* [1959] A.C. 576; *Karsales Ltd. v. Wallis* [1956] 1 W.L.R. 936.

13 [1965] V.R. 323, 335.

14 *Supra* n. 9.

did not waive the claim that negligent misdelivery amounted to fundamental breach where 'permitting' the plaintiff's car to be taken by an unauthorized person was involved. That issue was avoided by saying that on the facts of the case no real 'permission' was given. The question, then, is not open and shut. Hudson J. also noted that negligent misdelivery by a bailee acting honestly in intended performance of a contract does not lead to loss of protection of an exemption clause: *Hollins v. Davy*.[15] This case indicates that deliberate or reckless behaviour is needed to constitute fundamental breach—more stringent requirements than the tentative attitude in the earlier *Davis* case.

Adam J. considered that the onus of proof lay upon the person seeking to exclude the operation of exemption clauses, and he cited *Hunt and Winterbotham Ltd. v. B.R.S. Ltd.*[16] as his authority. He was of the opinion that in the instant case the appellant had not discharged the onus of affirmatively establishing that the employee was *not* satisfied with the assertion of the stranger. The earlier view on the onus of proof was to the contrary.[17] The *Hunt and Winterbotham* ruling states that where fundamental breach is not specifically pleaded it is impossible to say that the defendant is obliged to prove the absence of such a breach. It is also stated that if fundamental breach is entered in the pleadings the defendant and not the plaintiff *may* have to carry the onus, aided possibly by prior discovery of documents. This would seem to be a non-commital attitude. It is trite law to switch the burden merely because the issue was raised in reply and not in the statement of claim. A careless plaintiff would be at an advantage. The trend of decisions indicates that conduct has to be more and more blatantly contrary to the basic obligations of the contract before being accepted by the court, as a fundamental breach demonstrating judicial dissatisfaction with too frequent usage of the principle. Locating the burden of proof with the plaintiff in all circumstances would not only make for coherent law but negate the need for requiring a greater stringency of actual facts. The practical difficulties of proving the facts would compensate for leniency in the requirements of conduct sufficient to support the plea. Defendants are already handicapped in this area of the law by strict interpretation of exemption clauses. Nevertheless if the argument is not based on fundamental breach as such, but upon a claim that the exemption clause is only effective when damage or loss occurs in the course of performance of the contract and not outside it (as would usually be the case in the fundamental breach situation), the burden of proof will be with the defendant.[18] The plaintiff's contention is accepted as a matter of construction. The defendant must adduce facts to show that the loss in question did in fact occur during the performance of the contract.

Above all, this case indicates the dangers of loose drafting and generalities which lend themselves to being read subject to particularizations. Greater precision and accuracy could foreclose the outflanking procedures being

[15] [1963] 1 Q.B. 844. [16] [1962] 1 Q.B. 617.
[17] *Woolmer v. Delmer Price Ltd.* [1955] 1 Q.B. 291.
[18] *Sze Hai Tong Bank Ltd. case* [1959] A.C. 576.

adopted in the courts. In the clauses under consideration, greater care may have led to a different result. The addition to Clause 4 of a sentence, that any handing over of the vehicle to a person claiming the same will be conclusive evidence of the fact that the proprietors their servants or agents are satisfied by evidence produced, could have allowed a defence, based on that condition alone. The reading of Clause 1 as subject to the more specific circumstances in other clauses could have been avoided by the insertion of a sentence thus: 'The enumeration of particular circumstances in any of the following clauses shall not affect the generality of this clause.'

The courts are not powerless when confronted by blanket clauses, the techniques adopted by the majority in this case indicate one aspect of that power to avoid exemption clauses. More precise drafting would have made that task more difficult.

A. C. ARCHIBALD

WELLER & CO. AND ANOTHER v. FOOT AND MOUTH DISEASE RESEARCH INSTITUTE[1]

Negligence—Duty of care to whom?—Financial loss—Escape of virus—No proprietary interest in anything which could be damaged by escape. Rylands v. Fletcher—Liability of land-owner to auctioneer for loss of business.

This matter came before the court as a special case stated, under Rules of the Supreme Court, Order xxxiv, rule 1, for the opinion of the court on certain questions of law. The defendants carried out research on their premises into foot and mouth disease in cattle, and they were apparently responsible for the escape of some virus. As a result, there was an outbreak of foot and mouth disease in the area, and the Minister of Agriculture ordered two markets to be closed. This caused the plaintiffs, who were two firms of auctioneers, to suffer a loss of profits on a total of six market days, for which they sought to recover. However, Widgery J. found that the defendants owed no duty of care to the plaintiffs, hence they had no remedy in negligence. A claim under the doctrine of *Rylands v. Fletcher*[2] was also unsuccessful, because the plaintiffs had no interest in any land to which the virus escaped.

In deciding the case, the Court assumed the facts most favourable to the plaintiffs: that there had been negligence on the part of the defendants; that this resulted in an escape of the virus, which had caused financial loss to the plaintiffs; and that this financial loss was reasonably foreseeable. This latter point is particularly relevant: the effect of this assumption was to exclude the possibility of deciding the case on the grounds of remoteness of damage.

The loss to the plaintiffs was pecuniary. They suffered no physical harm to themselves or to any of their property—although the danger was of a kind that could have caused physical harm. The Court examined the

1 [1965] 3 W.L.R. 1082. Queen's Bench Division; Widgery J.
2 (1868) L.R. 3 H.L. 330.