*63 University Of Edinburgh v Onifade

Sheriff Court Of Lothian And Borders At Edinburgh

24 December 2004

2005 S.L.T. (Sh Ct) 63

Sheriff Principal I D Macphail, QC

24 December 2004

Contract — Formation — Offer and acceptance — Notice on property referring to "fine" for parking — Driver parking car on property without permit — Whether driver accepting offer to park on payment without permit of amount specified.

The pursuers sought payment of £870 with interest and expenses from the defender after he parked on their property on numerous occasions although he was not the holder of a parking permit. A notice was displayed on the pursuers' property to the effect that persons parking without a permit would be liable to a fine of £30 per day. The defender accepted that if the pursuers were entitled to charge him £30 a day, the sum sued for was the total amount of charges for which he would be liable, but maintained that this charge was a penalty which the pursuers had no power to impose. The sheriff rejected that argument and granted decree as craved. The defender appealed by stated case. The sheriff principal considered the case stated by the sheriff was too broad and substituted two questions: (1) did the sheriff err in law by concluding that there was no distinction between a charge and a fine, and (2) did he err in law by failing to state whether or not parking charges described as fines in an offer document would amount to a misrepresentation of the offeror's position.

Held, (1) that it was clear that in the notice the pursuers were not purporting to assert any power to exact a monetary penalty after conviction of a criminal offence, or to impose a penalty of any kind, and the meaning of "fine" in this context was obviously "fee", which was one of the meanings given in standard dictionaries (p 64E-F); (2) that the pursuers' notice made it plain that their position was that anyone who parked on their property without a permit would have to pay them a fee of £30 per day on that account and the defender, by parking his vehicle on their property without a permit, made it plain that he accepted that position (p 64G-H); (3) that the issue raised in the second question would not be considered as it was not ventilated before the sheriff and, in any event, the description of the charge as a fine was accurate (p 64K-L); and question one *answered* in the negative, question two *not answered* , and appeal *refused* .

Action for payment

The University of Edinburgh raised an action for payment against Daniel Onifade for £870. The sheriff granted decree as craved. The defenders appealed to the sheriff principal (I D Macphail, QC).

On 24 December 2004 the sheriff principal *refused* the appeal.

THE SHERIFF PRINCIPAL (I D MACPHAIL, QC).—

[1] This is an appeal by the defender in an action for payment which has been brought as a summary cause. The pursuers are the University of Edinburgh. They sue the defender for payment of £870 with interest and expenses. The sheriff has found that on numerous occasions between 7 June 2001 and March 2004 the defender parked a vehicle on property belonging to the pursuers although he was not the holder of a parking permit. On each occasion there was displayed on the property a notice in the following terms:

> "UNIVERSITY OF EDINBURGH
>
> "PRIVATE PROPERTY.
>
> "PARKING BY PERMIT ONLY...
>
> "PERSONS PARKING WITHOUT A PERMIT WILL BE LIABLE TO A FINE OF £30 PER DAY...

"PARKING REGULATIONS APPLY

"VEHICLES ARE PARKED AT OWNERS RISK".

The defender was aware of the terms of the notice. He accepts that if the pursuers are entitled to charge him £30 per day, the sum sued for is the total amount of the charges for which he would be liable. He has refused to pay. Before the sheriff he maintained that the charge of £30 per day was a penalty which the pursuers had no power to impose. The sheriff rejected that argument and granted decree as craved.

[2] The defender lodged a note of appeal in which he stated:

> "The points of law upon which the appeal is to proceed are:
>
> "(1) The learned sheriff erred in law by concluding that there was no distinction between a fine and a charge, whereas the Oxford Dictionary of Law defines a fine as a sum of money an offender is ordered to pay on conviction, it may be fixed or at large. The Oxford English Dictionary describes a fine as money paid as penalty for an offence and a charge as a price demanded for service or goods.
>
> "(2) Since the pursuers are relying on the principles set out in the law of contract, the learned sheriff erred in law by failing to state whether or not parking charges described as a fine(s) in an offer document would amount to a misrepresentation of the position of the offeror."

[3] The sheriff thereafter stated a case which poses for the opinion of this court the following question: "The question respectfully stated for the opinion of the sheriff principal is whether in the whole circumstances the pursuers were entitled to recover the sums sued for?" In my opinion this question is too broadly stated. It appears to invite a general inquiry into the *64 entitlement of the pursuers to exact charges such as the sums sued for. What the Summary Cause Rules 2002 require, however, is that the stated case should contain "appropriate questions of law" (rule 25.1(3)(b)). That means, in my view, that the questions stated must be appropriate to "the point [or points] of law upon which the appeal is to proceed" which have been specified by the appellant in his note of appeal, as required by rule 25.1(1)(b). The questions should accordingly be so stated as to require the court's opinion on these points. I shall therefore decline to answer the question stated and substitute two other questions which raise the issues specified:

"1. Did I err in law by concluding that there was no distinction between a fine and a charge? 2. Did I err in law by failing to state whether or not parking charges described as fines in an offer document would amount to a misrepresentation of the position of the offeror?"

[4] Addressing me on the first question, the defender stated that the pursuers' notices in the terms quoted above had replaced notices which had referred to a "fee" of £10 per day for parking without a permit. He had had no objection to being required to pay a "fee", and he had offered to pay £10 per day for each of the days in respect of which the pursuers were now seeking £30. He said he would have had no case if the pursuers in the present notices had referred to a "fee" of £30; but they did not have power to penalise him by imposing a "fine". Their intention to penalise, rather than to charge a fee, was apparent from the terms of their parking tickets, which referred to a "penalty charge". The pursuers' solicitor maintained that the description of the charge was a matter of form, not substance. It was illogical for the defender to accept a charge of £10 but not £30. It was somewhat incredible that the defender had continued to park on the pursuers' property for a total of 31 occasions, on each of which he had received a parking ticket, without appreciating that the pursuers had been seeking to charge him £30 per day. He had entered into an implied contract with the pursuers: Gloag on Contract (2nd ed), p 286.

[5] I answer the first question in the negative. It is clear that in the notice stating that persons parking without a permit would be liable to a fine of £30 per day the pursuers were not purporting to assert any power to exact a monetary penalty after conviction of a criminal offence, or to impose a penalty of any kind. The defender's argument appears to me to be disingenuous. The meaning of "fine" in this context is obviously "fee". That is one of the meanings of "fine" given in standard dictionaries: "a fee paid for any privilege" (Shorter Oxford English Dictionary); "a fee paid on some particular occasion"

(Chambers Twentieth Century Dictionary). As the sheriff points out, a familiar example of the use of "fine" in this sense occurs where a lending library requires a borrower returning an overdue book to pay a "fine".

[6] The defender maintained that while the borrower of the book from the library had agreed to abide by the library's rules, he had not undertaken to pay the charges sought by the pursuers. There had been no contract between them, because there had been no adequately communicated offer to him by the pursuers. In my opinion, however, the legal relationship between the parties may be simply stated. The pursuers' notice made it plain that their position was that anyone who parked on their property without a permit would have to pay them a fee of £30 per day on that account. The defender, by parking his vehicle on their property without a permit, made it plain that he accepted that position. He signified his acceptance by his conduct in so doing. It is nothing to the purpose for him to maintain that he did not intend to pay because he considered that the pursuers were not entitled to make the charge specified. "The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other." (Gloag on Contract (2nd ed), p 7, approved by Lord Reid in *McCutcheon v David MacBrayne Ltd, 1964 SC (HL) 28 at p 35; 1964 SLT 66 at p 67*.) On each occasion the pursuers were reasonably entitled to conclude that the defender, by parking without a permit in the knowledge of the terms of the notice, had accepted liability for the payment to them of £30. His position was essentially no different from that of a person who boards a bus or hires a taxi: he thereby undertakes to pay the fare to his destination, even though he may think that the bus company or the taxi driver is not entitled to require it.

[7] As to the second question, the parties were unable to agree that the issue it seeks to raise had been argued before the sheriff. The sheriff writes in the stated case: "So far as the second point is concerned, all I would say about this is that the defender did not found on the fact that he was induced by misrepresentation into doing something which he otherwise would not have done." In this court the sheriff's narrative of what took place before him at a summary cause proof is taken to be correct unless, perhaps, the parties are agreed that in some respect it is erroneous (T G Norman (Timber) Ltd v Warwick, Edinburgh Sheriff Court, 10 January 2003, unreported, at para 8). I therefore accept the sheriff's account, and I decline to answer the second question because the issue it seeks to raise was not ventilated before him. As a general rule an appeal court does not entertain arguments that could have been advanced in the lower court. In any event I consider, for the reasons already stated, that the description of the charge as a fine was accurate.

[8] In the result I have decided that the appeal must be refused. Parties were agreed that expenses should follow success. I have therefore found the defender liable to the pursuers in the expenses of the appeal. The pursuers opted for taxation in terms of rule 23A instead of assessment by the sheriff clerk. Accordingly the procedure will now follow the course prescribed by that rule.

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Representation

Solicitors for Pursuers and Respondents, Lindsays WS — Party for the Defender and Appellant.

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