BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No.21 of 1997

BETWEEN:

FURNITURELIMITED

(Appellant)

AND

MARGARET CLARKE

(Respondent)

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. ColinWilliams, Justice of Appeal, and the Hon. Frederick Waterman, Justice of Appeal

2004: January 16

Mr. C.E. Lashley Q.C. for the Appellant

The Respondent in person

DECISION

SIMMONS CJ: The point which has beenraised on this appeal is a short one. Itturns on the construction of a hire purchase agreement and requires adetermination as to whether a sum claimed by the appellant (the company) is a penaltyor liquidated damages.

[2] On28 May 1996 the respondent (the hirer) executed the company's standard formhire purchase agreement in respect of a 'combination wardrobe'. The agreement sets out on its face the "rentand period of hire" as follows:

CashPrice of Goods $595.00

Insurance 15.00

Total 610.00

Add:Charges (on balance of cash price) 208.00

HirePurchase Price 818.00

Less:Initial Cash Instalment 90.00

Balanceof Hire 728.00

Periodof Hire…14 months from the date hereof"

Then at the foot of the agreement is this rubber-stamped notation:

'In the event of non-paymentof an account all legal and/or debt collecting expenses will be paid by thedebtor.'

So, the hirer having paid down $90.00 agreed to pay the balance of$728.00 by 56 weekly instalments of $13.00. It is not disputed that she defaulted in her weekly payments and wastherefore in breach of the agreement.

[3] The company sued in the District "A" Magistrate's Court to recover the balance dueand owing. The particulars of claim read as follows:

Balance on account $728.00

Less payments 320.00

408.00

Plus debt collecting expenses 61.20

469.20

[4] The learned Magistrate disallowed the claim for $61.20 and entered judgment for thecompany in the sum of $408.00 together with costs. It was the opinion of the learned Magistratethat the sum of $61.20 was “a finance charge”. Her reasons for decision are instructive. She wrote, inter alia:

“The plaintiff made aclaim for debt collecting charges in addition to the sum outstanding on theagreement. The additional charge wascomputed at 15% of the amount outstanding. The plaintiff explained these charges as financial charges which areinclusive of certain company expenses and bank overdraft. The company sought to add to its hirepurchase agreement certain clauses which required the hirer in the event ofnon-payment of the hire rent (to pay) all legal and debt collecting expenses…”

[5] Theissues as the learned Magistrate saw them were two. Were “these additional terms to the hirepurchase agreement within the provisions of the Hire Purchase Act, Cap.328?” And, “were they liquidated damagesor a penalty?” She held that the termswere outside the Hire Purchase Act andwere in the nature of a penalty. Incoming to the latter conclusion, the learned Magistrate found that “the mark-upand hire purchase charges are intended to cover the normal incidentals flowingfrom a hire purchase agreement “and these incidentals include company expensesand bank overdraft facilities.”

The Issue on Appeal

[6] Nofull argument was addressed to us as to whether “the additional charges werewithin the scope of the Hire Purchase Act “and we do not decide the point inthis appeal. The sole issue for ourdetermination is whether the sum of $61.20 is a penalty or liquidateddamages. Mr. Lashley Q.C., for thecompany, contends for a construction that the sum is liquidated damages. He relies on Dunlop Pneumatic Tyre CompanyLimited v. New Garage and Motor Company Limited [1915] AC 79, theleading authority on this branch of the law.

Inthat case the respondent had covenanted to pay the appellant the sum of £5 “asand by way of liquidated damages and not as a penalty” for every tyre, cover ortube sold or offered in breach of a Price Maintenance Agreement between theparties under which the respondent had bound itself not to sell or offer goodsbelow the appellant’s current list prices. The respondent committed a breach of the agreement by selling a tyrecover below the current list price. TheHouse of Lords held that the sum fixed by the parties was a genuinepre-estimate of the damage which might ensue and was not a penalty.

[7] Inthe course of this speech, at pages 86 to 88, Lord Dunedin enumeratedpropositions deducible from previous cases as follows:

“1. Though the parties to a contract who use thewords “penalty” or “liquidated damages” may prima facie be supposed to meanwhat they say, yet the expression used is not conclusive. The Court must find out whether the paymentstipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passimin nearly every case.

2. The essence of a penalty is a payment ofmoney stipulated as in terrorem of the offending party; the essence ofliquidated damages is a genuine covenanted pre-estimate of damage. (Clydebank Engineering and Shipbuilding Co.v. Don Jose Ramos Yzquierdo y Castaneda)

3. The question whether a sum stipulated is apenalty or liquidated damages is a question of construction to be decided uponthe terms and inherent circumstances of each particular contract, judged of asat the time of the making of the contract, not as at the time of the breach. (Public Works Commissioner v. Hills andWebster v. Bosanquet)

4. To assist this task of construction varioustests have been suggested, which if applicable to the case under considerationmay prove helpful, or even conclusive. Such are:

(a) Itwill be held to be penalty if the sum stipulated for is extravagant andunconscionable in amount in comparison with the greatest loss that couldconceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in Clydebank Case)

(b) Itwill be held to be a penalty if the breach consists only in not paying a sum ofmoney, and the sum stipulated is a sum greater than the sum which ought to havebeen paid. (Kemble v. Farren)….

(c) There is a presumption (but no more) that it ispenalty when “a single lump sum is made payable by way of compensation, on theoccurrence of one or more or all of several events, some of which may occasionserious and others but trifling damage”. (LordWatson in Lord Elphinstone v. Monkland Iron and Coal Co.)

On the other hand:

(d) Itis no obstacle to the sum stipulated being a genuine pre-estimate of damage,that the consequences of the breach are such as to make precise pre-estimationalmost an impossibility. On thecontrary, that is just the situation when it is probable that pre-estimateddamage was the true bargain between the parties.” (Clydebank Case, Lord Halsbury; Webster v. Bosanquet, Lord Mersey.”

Construingthe Agreement

[8] Inso far as the issue in this appeal calls for a construction of the terms andinherent circumstances of the Hire Purchase agreement, we turn

next to theagreement itself. Counsel's submissionis that the company's claim for the amount of $61.20 is provided for in Clause15 of the agreement and the rubber-stamped notation on the schedule to theagreement. Clause 15 is poorlydrafted. It provides:

"15. In the event of non-payment all Legal – anddebt collecting CHARGES – and expenses will be paid by the debtor."

[9] Damages for breach of contract aredesigned to compensate for the damage and loss occasioned by the breach. They are recoverable (i) when they are such as may fairly and reasonably be consideredarising naturally, i.e. according to the usual course of things from thebreach, or (ii) when they are such asmay reasonably be supposed to have been in the contemplation of both parties atthe time they made the contract' – per Alderson B. in Hadley v. Baxendale (1854) 9Exch.341 at 354. See therefinements of these rules in Victoria Laundry (Windsor) Ltd. v. NewmanIndustries Ltd [1949] 2 K.B.528 and Koufos v. C. Czarnikow Ltd [1969] A.C. 350.

[10] Inaccordance with the doctrine of freedom of contract, the parties to a contractmay provide in that contract that an agreed sum for damages may become payablein the event of a breach. Such aprovision does not derogate from the principle that the function of damages isto compensate for the actual loss suffered by the innocent party. But it is always a matter of construction ofthe contract to decide whether such a fixed and agreed sum is a genuine attemptto liquidate and reduce to a certainty prospective and uncertain damages orwhether it is a sum held over a party interrorem.

[11] DiplockLJ in Robophone Facilities Ltd v. Blank [1966] 1 WLR 1428 capturesthe essence of agreed damages clauses neatly at page 1447. His Lordship said:

"Nevertheless thecourts would be doing an ill turn to those whom the rule about "penaltyclauses" is designed to protect if they were to apply it so as to make itimpracticable for parties to agree at the time when they enter into a contractupon a fair and easily ascertainable sum to become payable by one party toanother as compensation for the loss which the latter will sustain as aconsequence of its breach. It is goodbusiness sense that parties to a contract should know what will be thefinancial consequences to them of a breach on their part, for circumstances mayarise when further performance of the contract may involve them in loss. And the more difficult it is likely to be toprove and assess the loss which a party will suffer in the event of a breach,the greater the advantages to both parties of fixing by the terms of thecontract itself an easily ascertainable sum to be paid in that event. Not only does it enable the parties to knowin advance what their position will be if a breach occurs and so avoidlitigation at all, but if litigation cannot be avoided, it eliminates what maybe the very heavy legal costs of proving the loss actually sustained whichwould have to be paid by the unsuccessful party. The court should not be astute to descry a"penalty clause" in every provision of a contract which stipulates a sum to bepayable by one party to the other in the event of a breach by the former."

[12] Twoother English cases on hire purchase are relevant. In Cooden Engineering Co Ltd v. Stanford [1953]1 Q.B.86, the Court of Appeal held that, where there was a breach ofcontract, the issue of liquidated damages and penalties was pertinent and fellto be considered. In that case, a hirepurchase agreement relating to a 1935 Ford motor car provided for terminationif the debtor failed to make a payment on the day when it fell due. In such an event the whole of the unpaidbalance of the hire purchase price became payable. When the hirer fell into arrears, the companyterminated the agreement, re-took possession of the car and sued for the unpaidbalance. The relevant clause in theagreement provided that in the event of breach the full balance remaining"together with all costs, charges and expenses whatsoever which the ownersmight incur in exercising their powers should at once become payable." The Court of Appeal construed this clause asa penalty. Somervell LJ held thatalthough it could not be said that the amount exceeded the greatest loss thatcould possibly follow on breach, applying paragraph 4(a) of LordDunedin's propositions in Dunlop, it was nevertheless a penalclause.

[13] TheHouse of Lords spoke definitively on these matters in Bridge v. Campbell Discount Co.Ltd [1962] AC 600. There, aclause in a hire purchase agreement provided that if the agreement wasterminated before the goods (a motor vehicle) became the property of the hirer,the hirer should pay by way of agreed compensation for depreciation "suchfurther sums as may be necessary to make the rentals paid and payable equal totwo-thirds of the hire purchase price". The company claimed an amount of approximately £206. It was held that the clause imposed a penaltyand was not a genuine pre-estimate of damages. In the opinion of their Lordships, the clause for agreed compensationdid not represent a genuine pre-estimate of loss since the sum payable fordepreciation in the value of the car decreased over time rather than increased.

[14] LordDenning, at p.628, construed the minimum payment as "not so muchcompensation for depreciation but rather compensation for loss of the futureinstalments which the hire purchase company expected to receive but which theyhad no right to receive." He describedit as "a penal sum which they exact because the hiring is terminated beforetwo-thirds have been paid".

The Evidence

[15] Themanner of calculation of the amount of $61.20 was given in the evidence of thecompany's managing director. She said, inter alia:

"I am claiming $61.20 debt collecting and financial charges. We have worked it out at 15%.

When a business is run various expenses areincurred. We give a person a specifiedweeks to clear the account. We evaluateour expenses and charge them financial charges.

The card shows when the record of payment.

This, the card prepared after the client tookhire purchase. The agreement was made on28th May 1996. She shouldhave completed payment of the agreement in July 1997.

We took into consideration our costs up to July1997. When a client does not pay withinthe time the contract expires. We have ahire purchase department and legal department in the store itself. We make phone calls to the person, sendletters to the person, seven (7) days' notice and a final notice before we takelegal action.

We also borrow money from the bank. The bank charges us the complete costs of13%. We also pay staff, rent,electricity, management fees and total costs of running the operation whichcomes to nearly 30%."

Mr.Ian Storey also gave evidence. He is achartered accountant and had been the company's auditor for about 8 years. His evidence was that, in 1996, the bankcharges of the company amounted to 21%; its operating costs were about 20%; themark-up on the hire purchase price was between 15 and 27%. He testified that, if an account is not paidoff on time, "there are legal and administrative costs." However, he did not quantify these costs.

Conclusion

[16] Itis clear to us that the sum represented an element of charge that was includedin the company's mark-up on the goods. The managing director herself saw it as including both debt collecting andfinance charges. Yet it was claimedpurely as "debt collecting charges". Wedo not know what quantum is truly attributable to debt collection and whatquantum represents finance charges. Its computation is altogether tooimprecise. To allow the company torecover it would be to permit double compensation. We are fortified in this view upon anexamination of the arithmetic of the agreement. The total cash price is shown as $610.00 whereas the hire purchase priceis stated as $818.00. The difference of$208 is expressed on the face of the agreement as "Charges (on balance of Cash Price)" (our emphasis). What are these"charges"? They are not detailed.

[17] Inour opinion, clause 15 of the agreement provides a formula for the company'sattempt to recover sums which could well exceed the greatest loss flowing frombreach of the agreement. The wording ofthe clause is vague. The clause seeks tosecure performance of the contract by the imposition of an open-ended,arbitrary amount in whose computation the hirer has no say. There is no pre-determined, agreed andquantifiable amount; no genuine forecast of the probable loss. The clause sought to provide for a greatermeasure of compensation than the ordinary law of damages. We agree with thelearned Magistrate that the sum of $61.20 was a penalty and is irrecoverable.

Disposal

[18] Theappeal is dismissed. The respondent willhave her costs of the appeal to be agreed or taxed.

Chief Justice

Justice of Appeal Justiceof Appeal