VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

CIVIL CLAIMS LIST VCAT REFERENCE NO. C3829/2013

CATCHWORDS

APPLICANT	John Paul Vico
RESPONDENT	Care Park Pty Ltd (ACN: 083 921 215)
WHERE HELD	VCAT, Melbourne
BEFORE	Member S. Wilson
HEARING TYPE	Civil Claims Hearing
DATE OF HEARING	4 March 2014
DATE OF ORDER	2 May 2014
CITATION	Vico v Car Park Pty Ltd (Civil Claims) [2014] VCAT 565

ORDER

1 The sum of $88 described by CP as liquidated damages in CP's infringement notice 83624222 was not liquidated damages but rather that sum was a penalty and it is unenforceable by CP.

2 John Vico is hereby relieved of the obligation to pay CP the sum of $88.

MEMBER S. WILSON

APPEARANCES:

For Applicant	In person
For Respondents	Ms Torrisi

REASONS

INTRODUCTION

1 A matter of general importance has been raised in this application, namely, whether a stipulated sum of $88 being the amount described as liquidated damages for non-payment of a parking ticket is a penalty in circumstances where the maximum charge for the two-hour parking ticket was $15.

2 John Paul Vico, the applicant in this proceeding, did not pay a $15 fee for parking. Care Park Pty Ltd ("CP") purported to levy a sum of $88 for that non-payment. John Vico refused to pay the $88 contending that the amount of $88 was a penalty and was therefore unenforceable by CP. He commenced this proceeding for an order relieving him of the obligation to pay the sum of $88. He relied on the provisions of the *Australian Consumer Law* ("ACL").

3 For the reasons that follow, I am of the view that the sum of $88 was a penalty and I uphold John Vico's challenge to it.

A SHORT HISTORY OF THE DISPUTE

4 The factual setting of this dispute is largely agreed.

5 On 8 September 2012 John Vico drove his car into the car park operated by CP at Northbank Central, Melbourne ("the car park") on Flinders Street, with access to it from Spencer Street and Norval Place.

6 CP charged the public a parking fee of $5 for car parking at the car park that did not exceed one hour. CP charged the public $10 for car parking at the car park that did not exceed two hours. CP charged the public $15 for car parking at the car park for between two and 12 hours.

7 According to John Vico, he drove into the car park on 8 September 2012 at 1326 hours. He said he was not then carrying $15 in coins and the ticketing machine was coin operated. So he parked his car in the car park, then left the car park and walked for over three blocks at which point he visited a convenience store and obtained coins for the ticketing machine. He said that by the time he returned to the car park and reached his car, CP had already attached an infringement notice to the windscreen of his car.

8 The infringement notice stated on the reverse that John Vico was required to pay liquidated damages of $88 but that if he paid by 14 days he was entitled to pay $66 rather than $88. The infringement notice also stated that if he failed to pay either sum CP reserved the right to issue legal proceedings against him.

9 John Vico did not pay either sum. CP sent him a document dated 13 May 2013 telling him that the contract between him and CP provided for liquidated damages of $88 and legal costs, both of which were then

overdue. CP demanded payment of $88. John Vico did not pay in response to that notice.

10 On 22 July 2013 CP served upon John Vico a document that it called "final demand for payment". In it CP demanded payment of $88 together with legal costs (although none were specified). Again, John Vico did not pay CP.

11 Instead, on 1 August 2013 John Vico commenced a proceeding in this Tribunal seeking relief under the ACL.

THE EVIDENCE – JOHN VICO'S VERSION

12 John Vico gave viva voce evidence before the Tribunal. He said that he parked his car in the car park around 1.30 pm on 8 September 2012. He said that upon entering the car park he did not see (and therefore did not read) any sign that mentioned the consequences of failing to pay the correct car-parking amount. He said he read a sign that set out car parking rates. He said that the sign stated that a person using the car park would be charged $5 for the first hour, $10 for the second hour and $15 for any parking of a car in the car park lasting between two and 12 hours.

13 He said that the ticketing machines at the car park were coin operated. He said that when he entered the car park he discovered that he was not carrying the necessary amount of coins ($15) in order to park for between two and 12 hours, that being the period of his intended stay. He said he parked his car then exited the car park on foot and walked for three blocks in search of a convenience store so that he could get $15 in coins in order to pay for the ticket. He said he was gone from the car park for only a short time and that upon his return he discovered that an infringement notice had been affixed to the windscreen of his car.

14 Ticket number 83624222 was put into evidence. It showed the date, time and place of its issue, the amount of the infringement ($88), the vehicle to which it applied, the preferred method of payment and a bar code at the bottom of the face page. The reverse of the ticket stated - "This Payment Notice was issued as a consequence of your breach of Contractual Terms and Conditions. You are required to pay liquidated damages of $88. However, if you pay on or before the due date (14 days from issue) then a reduced amount of $66 will be accepted. If you do not pay within 14 days, Care Park reserves the right to issue legal proceedings against you without further notice."

15 John Vico gave evidence that the term and conditions allegedly breached were not displayed prior to his obtaining the ticket. He said those terms and conditions were only visible to a driver exiting the car park. He said that he had purchased his ticket well prior to his learning of the terms and conditions pursuant to which CP purported to impose the infringement fee of $88. He said he did not see or know of the existence of the so-called liquidated damages sum prior to his parking at the car park.

16 John Vico interspersed his evidence with submissions to the effect that he considered the amount of $88 to be a penalty and therefore unenforceable.

THE EVIDENCE – CP'S VERSION

17 Yolanda Torrisi gave evidence for CP. She told the Tribunal she was the customer and public relations manager of CP and occupied that role in September 2012 when the parking infringement occurred.

18 Yolanda Torrisi gave evidence concerning the turnover of car-parking in bays at the car park. She said the car park was open 24 hours a day on weekends and it was open between 5 am and midnight on weekdays.

19 She said that CP could lose more than the hourly revenue if a person parked in a bay in the car park and stayed in that bay for longer that the duration for which the user had paid to park. She said on average each bay was turned over every half hour thereby generating two sets of $5 tickets per hour making an amount of revenue of $120 per 12-hour period. She said that when customers purchased two-hour tickets, CP usually turned over the bay in the lesser time of an hour and a half for which CP generated revenue of $10 per 90 minutes or $80 per 12-hour period. She said that customers often stayed longer than between two and three hours resulting in greater revenue than the nominal fee of $15 per 12 hours or $30 in a 24-hour period. She gave evidence that CP lost $10 for each 12-hour period when a person failed to pay for parking at the car park.

20 She stated that the amount of $88 selected as liquidated damages was the reasonable estimate of loss caused when a person did not pay the parking fee when parking at the car park. She did not give any explanation of the arithmetic by which that figure was arrived at. She said that the sum of $88 represented a reasonable estimate of the loss caused to CP when a person failed to pay for parking.

21 John Vico did not challenge, contradict or put into evidence a different set of amounts than those on which Yolanda Torrisi relied. Nor did he seek to show that CP could have mitigated the financial impact upon it by removing infringing vehicles from the car park thereby freeing car parking bays for other car park users. I have kept in mind that John Vico has at all times bore the burden of proving that the sum of $88 is a penalty.

22 I do not- accept the evidence of Yolanda Torrisi in relation to the financial impact to CP in terms of lost revenue occasioned to CP when a person failed to pay for parking at the car park. She did not produce any working sheets to support her evidence of average amounts of CP's car parking takings nor did she seek to call actuarial evidence by which the sum of $88 was supprted.

THE ISSUES

23 Two issues were agitated before me, one being more a point of law and the other a point of mixed fact and law. The first was whether the amount of

$88, described as liquidated damages, was in truth a penalty and was therefore unenforceable. The other was whether the notice of the liquidated damages was incorporated into the car-parking contract at all.

24 In view of the emphasis placed by the parties on the first issue I shall address it first. Of course, a finding that the sum of $88 is not a penalty will warrant my considering the second issue of whether the car-parking contract between John Vico and CP included the term relied on by CP.

WHETHER THE SUM OF $88 WAS A PENALTY

25 I find that the sum of $88 was in fact and in law a penalty. I say that for the reasons that follow.

26 The history of the law relating to penalties is long and has its roots deep in the common law of damages for breach of contract. It is desirable that I set out some of the more salient features of it.

27 For centuries, Anglo Australian jurisprudence has recognized that parties to a contract are free to stipulate that an amount will be payable as the agreed sum representing the loss suffered by the innocent party in case of breach of contract by the other. In more formal contracts that is usually described as a liquidated damages clause. For a useful consideration of the broad ambit of the application of liquidated damages clauses, the book by N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8th Australian edition) is a helpful reference point.

28 Very early expositions of the rule focused on the way the amount was not recoverable if it was in reality a means of securing payment. Two older English cases provide illustrations.

29 In the early 1700s, Lord Macclesfield LC held in *Peachy v Duke of Somerset* 2 W & TLC 100, 1108 that equity granted relief against penalties where the penalty was designed only to secure money or where it was designed to secure the performance of a collateral object. A similar approach was taken in *Sloman v Walter* (1783) 1 Bro CC 418; 28 ER 1213.

30 In the 1869 House of Lords case of *Thompson v Hudson* (1869) LR 4 HL1, 28 Lord Westbury held that a "penalty is a punishment, an infliction, for not doing or for doing something: but if a man submits to receive, at a future time and on the default of his debtor, that which he is now entitled to receive, it is impossible to understand how that can be regarded as a penalty."

31 Over subsequent decades, common law courts were more willing to permit the parties to agree in their contract that a particular sum of money would be payable where one of the parties defaulted. However, the courts allowed that state of affairs only so long as the specific sum was not a "penalty" properly so called. The courts recognized that an agreement that a specific amount would be payable upon default made commercial sense because the party in whose favour the provision operated thereby obviated the need to

prove the precise amount that flowed from the breach: *Robophone Facilities Ltd v Blank* [1966] 1WLR 1428 (Diplock LJ).

32 Clauses of that kind came to be known as "liquidated damages clauses".

33 Courts have since construed liquidated damages clauses as being enforceable even if the amount provided for in the clause resulted in the recovery of a sum that exceeded the actual loss sustained – even if the amount payable was in truth a windfall: *Bartercard Ltd v Myallhurst Pty Ltd* [2000] QCA 445.

34 By the late 1880s the rule against penalties was formulated in the following terms - "if a larger sum is to be paid upon default, it is a penalty: a stipulation to pay on default a sum not larger than the total amount is not a penalty". That was said by Brett LJ in *The Protector Loan Co v Grice* (1880) 5 QBD 592, 596. For reasons set out below, a sum is nowadays not a penalty merely by reference to the amount involved.

35 In *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 400 the High Court of Australia authoritatively pronounced its support for the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co v New Garage and Motor Co Ltd* [1915] AC 79 in relation to determining whether or not a sum was a penalty. Later decisions of the High Court have likewise embraced Lord Dunedin's speech in such cases as *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514, *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 and *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71.

36 A litany of cases at intermediate appellate level have considered the principles governing the law relating to penalties, including decisions of the Court of Appeal of the Supreme Court of Victoria in *Cameron v UBS AG* [2000] VSCA 222, *Yarra Capital Group Pty Ltd v Sklash Pty Ltd* [2006] VSCA 109, *Zacharidis v Allforks Australia Pty Ltd* [2009] VSCA 258, *Talacko v Talacko* [2011] VSCA 71, *Ange v First East Auction Holdings Pty Ltd* [2011] VSCA 335 and *Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64.

37 Before considering whether the sum of $88 in this case was or was not a penalty in fact and in law, it is necessary to say something about the elements of a penalty as described by Lord Dunedin in *Dunlop's case*. As Lord Davey stated in *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo Castaneda* [1905] AC 6,15, in ascertaining whether a sum is a penalty the search is "not of words or of forms of speech, but of substance and of things".

38 Relevantly paraphrased, Lord Dunedin in *Dunlop* expressed observations in the following terms –

- though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, the expression used is not conclusive and the court must

find out whether the payment stipulation is in truth a penalty or liquidated damages;

- the essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage;
- the question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged at the time of the making of the contract, not as at the time of the breach;
- to assist this task of construction various tests have been suggested -
    - it will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach;
    - it will be held to be a penalty if the breach consists only in not paying a sum and the sum stipulated is a sum greater than the sum which ought to have been paid;
    - there is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage;
- but on the other hand it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make a precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

39 Based on the foregoing distillation of Lord Dunedin's speech, two issues are of particular present concern in this case. The first is Lord Dunedin's characterization of a penalty if the stipulated sum is greater than the sum that ought to have been paid. The second is Lord Dunedin's characterization of a sum being a penalty if the sum stipulated is of an extravagant and unconscionable amount compared with the greatest loss that could conceivably be proved to have followed from the breach.

40 Neither party disputed the onus being on John Vico of proving that the sum of $88 was a penalty: *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504, 527.

41 Taking the first of the concerns above, a sum is likely to be characterized as a penalty if the stipulated sum (the $88) is greater than the sum that ought to have been paid (the $15). Self evidently, the sum of $88 is significantly greater than the sum of $15.

42 But the second matter to which Lord Dunedin averted is more complex. It calls for comparative examination. Taking the stipulated sum, the court

examines whether it is "extravagant and unconscionable in amount" when compared against the "greatest loss" that could conceivably be proved to have followed from the breach.

43 Arithmetically, $88 is more than five times $15. As Robson AJA stated when sitting as a member of the Court of Appeal in *Birdanco Pty Ltd v Money* [2012] VSCA 64 at [87], it is not enough that the sum fixed by the contract should be lacking in proportion. It must be 'out of all proportion'. A court can only make a determination on whether the stipulated sum is "out of all proportion" when the court construes the alleged penalty amount, judging it upon the terms and inherent circumstances of the contract at the time of the making of the contract: *Birdanco Pty Ltd v Money* at [87].

44 This analysis requires me to compare the sums of $15 and $88 and to consider whether the stipulated sum of $88 is the "greatest loss" that CP could suffer following from the non-payment of the $15 two-hour parking ticket.

45 Even accepting the generality and imprecision of Yolanda Torrisi's evidence about revenue loss occasioned to CP by persons who did not pay for their car parking, certain aspects of her evidence can be applied here.

46 She gave evidence that each car parking bay was used many times each day thereby generating income for CP.

47 Accepting that evidence as I do, I nevertheless take the view that CP's contention about its loss is overstated.

48 The stipulated sum must be a genuine pre-estimate of loss if it is to escape classification as a penalty. But that loss cannot exceed CP's "greatest loss" that followed the breach, according to Lord Dunedin in *Dunlop's case* (applied by Robson AJA in *Birdanco v Money).* The real question is whether the $88 levied by CP is both factually and legally supportable for being the greatest loss that followed from John Vico's breach of his $15 car-parking contract.

49 To my mind, it was not.

50 In my view the $88 levied by CP is an ambit sum and bears no relationship or proportionality to the non-payment of $15.

51 The stipulated sum of $88, when compared to the sum of $15 was "out of all proportion", it was "extravagant and unconscionable", it was "in the nature of a punishment" and it was not "a genuine pre-estimate of loss".

52 When a customer purchased a two-hour car parking ticket he acquired a licence authorizing him to leave his vehicle in the car park for the duration of the licence. If he parked at the car park without a licence or if, after having acquired a ticket (and thereby a licence) he stayed beyond the duration permitted by the licence he became a trespasser at the suit of CP. But what were CP's damages for that breach? For his breach of contract John Vico became liable to compensate CP for such damages as would put

CP in the position it would have been in had the contract been performed according to its terms.

53 Here, there is no evidence that John Vico parked his vehicle at the car park for any particular duration. The time of entry of John Vico's vehicle was given in evidence but its exit time was not. The evidence is silent on point. By the same token, had the evidence revealed that John Vico's vehicle was left standing for a matter of days, for example, I should have expected to hear some evidence of the steps taken by CP to mitigate the loss of revenue it contended John Vico caused it. Beyond the arithmetical evidence given above by Ms Torrisi, there is a lacuna in CP's evidence about its loss. I am not prepared to infer evidence of amounts of financial loss in the absence of direct evidence on point.

54 I am willing to accept that a car park uses as many of its car parking bays as it can each hour of each day the car park is open for business. Against that I recognize that not every bay is used each minute the car park is open for business. A flaw of logic pervaded Yolanda Torrisi's evidence of CP's loss. She seemed to assume that each bay of the car park was used at all times on every day that the car park was open. That assertion is difficult to accept. But even if the assertion were true, CP did not tender any financial evidence to support that assertion such as reports of daily or monthly takings, amounts each bay produced by way of revenue and so on.

55 I am not willing to proceed in reliance upon the revenue averages about which Yolanda Torrisi gave evidence. They are too vague and too general to be of evidentiary utility.

56 In any event, on basic principles of the law of damages for breach of contract, if a person fails to pay a two-hour car parking spot, the loss sustained by the car parking entity is the revenue it could have derived from a person parking there and who did in fact pay the proper amount for the equivalent amount of time. On any view that was $15 and not $88.

57 Further, nowhere in the evidence was proof adduced of any financial basis for the sum of $88. That amount is not a multiple of $15 nor is it linked to $5 nor even is it connected to the amount of $10. Its genesis was wholly unexplained. It had no forensic veracity. As far as I can tell it was a sum CP fastened on by CP with no legal or factual providence.

58 That fortifies me in the conclusion that the sum of $88 was a penalty.

59 I agree with John Vico's basis for bringing this proceeding on the first ground, namely that the $88 was a penalty. The sum of $88 purported charged by CP was a penalty and was therefore unenforceable.

60 That disposes of the proceeding and renders unnecessary a consideration of the second point of whether the notice was incorporated into the contract.

MEMBER S. WILSON