

INTERFOTO PICTURE LIBRARY LTD V STILETTO VISUAL PROGRAMMES LTD

FACTS

Stiletto needed photographs for an advertising campaign for a client. It contacted Interfoto, with whom it had no previous dealings, and asked if it had any suitable photographs. Interfoto sent some photographs to Stiletto with a delivery note and specified that the photography had to be returned by 19 March 1998. The delivery note included a condition that if the photographs were returned late a fee of \$5.00 per day plus UAT would be charged.

Stiletto returned the photographs on 2 April 1999 and were charged \$3,783.50 by Interfoto. Stiletto refused to pay and Interfoto issued legal proceedings.

ISSUE

Was the condition about late return of the photographs a term of the contract between the parties?

FINDING

When a term of a contract is particularly onerous or unusual and would not be usually known to the bound party then it will only be enforceable if the term was brought to the attention of the bound party.

QUOTE

Dillon CJ said:

“Condition 2 of the plaintiff’s conditions is in my judgment a very onerous clause. The defendants could not conceivably have known, if their attention was not drawn to the clause, that the plaintiffs were proposing to charge a ‘holding fee’ for the retention of the transparencies at such a very high and exorbitant rate.

At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now.

In the intervening years the printed conditions have tended to become more and more complicated and more and more one sided in favour of the party who is imposing them, but the other parties, if they note that there are printed all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance.

In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties attention to the printed conditions or they would not be part of the contract. It is in my judgement a logical development of the common law into modern conditions that it should be held, as it was in Thornton v Shoe Parking

Ltd, that if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.”

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IMPACT

If a particularly harsh or unusual term, which is different to normal industry practice, is included in a contract the party seeking to rely on the clause should ensure that the other party is aware of the clause. Otherwise there is a risk that the clause is unenforceable.

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