

## Boone v. Eyre

A 1777 case that is famous for a number of reasons. First it was decided by one of the law's great liberalizers (in the old fashioned sense of the word), Lord Mansfield. Second, the case is obliquely about slaves and the same judge had struck a very serious blow against slavery five years earlier in the case of ***R v Knowles, ex parte Somerset*** (1772) 20 State Tr 1 (often called Somerset's case), which had nonetheless left slavery intact in British Colonies<sup>1</sup>.

All of the above gave the case a resonance that has lasted to this day; but it is a genuinely important case in the evolution of contract law. The plaintiff sold the defendant a plantation on the island of Dominica complete with slaves. For that he received a lump sum payment of £500.00 and was supposed to receive an annuity for life of \$160.00 per annum. The Defendant refused to pay the annuity claiming in his defence that he had gotten the slaves he bargained for because it turned out that the Plaintiff didn't own them.

Lord Mansfield said, in part,

**"... where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent".**

In plainer English he is saying that where the breach goes to the whole thing contracted for the the aggrieved party need not perform his/her part of the bargain. But if the breach only goes to part of what was contracted for, and can be compensated for in damages then the aggrieved party must perform his part of the bargain and seek damages for what he did not get. Here, if the Defendant had been allowed to avoid paying the annuity he would have gotten the plantation for a lot less than it was worth - such that he would have been overcompensated for the slaves that he did not receive. In decided this case as he did Lord Mansfield laid the foundation for what would become the doctrine of substantial performance in contract law, which is to say, if you have received a substantial part of what you bargained for, then you are not relieved of your obligation to perform but must seek damages for any deficiency in the other party's performance. In Boone, Mansfield held that whether a breach was of a 'condition precedent', that would therefore relieve the other party of performance, depended on whether the breach went to the heart of what had been bargained for. Here is how his contribution was described in a much later case,

**Up to 1773, whether a condition was precedent or not depended on the verbal niceties of the phrases used. Lord Mansfield in *Boone v Eyre* swept away those arid technicalities [condition precedent giving rise to breach, and whether an undertaking is a condition precedent, depending on the niceties of the particular phrases used in the written contract -**

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<sup>1</sup> Yes, we will cover Sommerset's case

**where the covenant goes to the whole of the consideration it is said to be a condition precedent. Where it goes to part, the breach may be paid for by damages].<sup>2</sup>**

So now to Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha

We are still with the perennial if not intractable issue of, under what circumstances, is the party not in breach, relieved of further obligation under the contract.

In Hong Kong Fir, the issue was whether the unseaworthiness of a leased ship amounted to a repudiation of the contract so as to relieve the other party of performance. The problem was the crew, who were kind of incompetent and as a result the ship got delayed for months at a time.

There are two ways of looking at this:-

#### First Way

Decide whether 'seaworthiness' is a condition, in which case a breach of the promise of seaworthiness would relieve the other party of performance (continued payment for the ship) or a warranty, in which case breach would not relieve the other party of performance (continued payment for the ship) but would permit the party not in breach to sue for damages arising from the unseaworthiness of the ship.

*There are problems with this approach, longstanding as it is.*

- 1. Breach of a 'condition' might have trivial economic consequences and yet relieve the other party of the whole of his performance obligation.*
- 2. Often the parties do not clearly specify whether or not a term of a contract is a warranty or a condition. Human nature being what it is, often the negotiating parties do not want to dwell on the almost infinite number of ways things might go wrong and instead focus on what each is to do if things go right, as everyone is keen to say they will.*
- 3. The theory invites ex post facto analysis. If the consequences of the breach are very serious the temptation will be to find the term breached a 'condition' and if the consequences of breach are trivial, a warranty.*

#### Second Way

*Decide whether the consequences of the breach are such that the party has lost substantially what was contracted for, in which case that party is relieved from further performance; or, alternatively if the party not in breach has gotten the major part of*

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<sup>2</sup> From Lord Diplock's judgment in the 1962 case Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha

*what was contracted for then performance must continue and the only remedy is in damages.*

*In Hong Kong Fir, the second way wins out, and the second way is the modern way.*

Thornton v. Shoe Lane Parking Ltd.Eng.C.A. 1970

This parking lot ticket case is another of those midstream cases where you can look back and see what the law was and forward to see what the law will become. The plaintiff drove his car into the parking lot where, displayed outside, there was a notice that said 'All cars parked at owners risk'. He was issued a ticket by a machine which had small print on it that sought to exclude the defendant parking lot company for any injury to a customer, howsoever, whatsoever. The Plaintiff did not read the print. When he returned to retrieve his car he was severely injured in the parking lot.

The old cases included a line of authority that held that the customer had an opportunity to not go through with the contract upon inspecting the ticket and that if he/she did not return the ticket and seek his/her money back then he/she would be bound by the exclusions on the ticket. **What do you think of that legal reasoning? What does Lord Denning think of it?** But note how carefully he sidesteps that old line of authority. He doesn't repudiate what may be long-standing precedent; he avoids it by noting that in Thornton there is no ticket agent to take the ticket back and return the Plaintiff's money and so there is no rational basis for concluding that the contract is other than complete at the point that the ticket is issued. Thus the Plaintiff is not bound by the exclusions on the ticket that were not squarely brought to his attention before he pushed the button and received the ticket. **Why does it make no difference to this analysis that no money is due until he returns to collect his car?**

**In an imaginary case, suppose there is a comprehensive list of exclusionary terms on a notice fixed to the wall at the street entrance to the parking lot so as to be clearly in the drivers line of sight as he enters the parking lot in his car and before he has punched the button to get his ticket (which action also lifts the barrier permitting him to drive further into the parking lot). The liability exclusions on the notice are repeated on the back of the ticket. In light of Tilden Rent-A-Car Co. v. Clendenning (further copy attached for your convenience) do you think this arrangement will suffice to successfully exclude liability by the parking lot company? If so, why? If not, why not?**

Now to Mayer v. Big White Ski Resort and Eric Bobert

Here is a case where the Defendant Company did it right. Before anybody got to collect their Season's Pass at Big White they had to stand in line to receive a document that contained the exclusions of liability. This, each potential seasons-pass holder was to read and return.

Paraphrasing, 'Didn't read it. Didn't know it was important' said the Plaintiff who subsequently suffered injury. 'Too bad' said the court. 'By way of notice, the Defendant

must lead the horse to water, but it cannot be held accountable if the (Plaintiff) horse declines to drink.'

This decision was upheld in the Court of Appeal.

A copy of both cases are attached.

### Now to the Campbell Cases

Don't worry about Campbell #1, which is about whether there is such a want of evidence in favour of the Plaintiff that the case can be dismissed on a preliminary motion. The judge finds there is enough evidence to proceed to hearing.

### Campbell #2

The former wife took the former husband to court. She said that she only signed the 'marital agreement' because she feared her husband who had assaulted twice in the course of their marriage, that she was in poor mental health and she feared what he might do if she didn't sign and she only signed to try to save the marriage.

She asserted duress, economic duress, undue influence, unconscionability, and inequality of bargaining power ( an ill-defined result masquerading as another stand alone basis for declining to enforce the agreement).

She lost. Why did she lose in your opinion and what does it tell us about what facts must be present in order that a claimant succeed on one of these grounds. Or, to put it another way, what would have to be different in order for her to succeed.

In cases of duress, undue influence and unconscionability (*d, ui & u*) the courts tend to talk round and round the point exchanging one abstract term for another by way of explanation of the first. It is as if, we all know roughly what we mean but cannot put it into formal language and therefore language, especially written language, is not as useful as it ought to be in describing the case law. But remember the common law is inductive - from the particular to the general and not, at least initially, the other way around. So in the stages of development of a legal principle, the courts struggle to describe in abstract terms what they are doing and why they are doing it. There is nothing wrong with this. The court's fundamental obligation is to decide the case of *Brown v. Green* in the manner most consistent with *Smith v. Jones*. But, you say, unless you can describe what principle, driven by the facts of the case, was established in *Smith v. Jones*, how can you know whether it is relevant to the facts in *Brown v. Green*, such that it (*Smith v. Jones*) is a relevant precedent. There are two answers to this:-

1. The factual circumstances are sufficiently similar and there being no obvious point of distinction, we think the result in the first case ought to apply in the second case. This

is classic common law reasoning and it works - the fact that you cannot describe the principle you are enforcing doesn't matter as much as your struggle for consistency. In the end, over time, and enough cases, an articulation of the principle will be expressed.

2. We know more about everything than we can say or write. The fact that we cannot put a thing into words does not mean we don't use it and understand it. The brain has it's own language, infinitely richer than English or any other spoken and written language. The challenge of a law driven culture is to articulate accurately the basis for a legal judgment. Then people can use the law to predict how things will go, and not just describe how things they have gone. Law itself is an adaption to our irremediable ignorance about the future.

In this area of the law (*d, ui & u* cases) judges are struggling to articulate the principles that drive their decisions and in the mean time they will keep doing what is essential - decide each case in the manner that seems most consistent with previously decided cases.

Here is how I suggest you analyze these kind of cases:

1. Something has gone wrong because the bargain is so at odds with what seems fair of fair market value;
2. Is one of the parties unable to look out for themselves for an acute reason or a chronic reason
3. If the answer to 2. is yes; is that the cause of the bargain that was made
4. Decide which label fits best: Duress, Undue Influence, Unconscionability

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