

Legislative Technique

Credit or Theft: The Lambie Case

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On 2nd April 1979 Shiralee Ann Lambie was convicted at Bedford Crown Court of obtaining, with the use of a Barclaycard, a pecuniary advantage by deception, contrary to s 16(1) of the Theft Act 1968.

What Miss Lambie did was grossly exceed the limit on her Barclaycard. So gross was the excess, and so unlikely was it that she could repay the money out of the resources available to her, that her conduct was treated by the Crown Court and the appellate courts as dishonest. Dishonest or not, did it fall within the wording of the statute? Restated in terms limiting it to her case, this provides that the offence is committed where a woman by any deliberate or reckless deception by conduct as to fact obtains for herself a pecuniary advantage.

The House of Lords unanimously upheld Miss Lambie's conviction on a sample count. They ruled that by her conduct she had induced the deception that she was an agent of the Barclaycard company, authorised by them to enter into contracts on their behalf with shopkeepers prepared to honour Barclaycards. Can such a ruling be justified, and if it must be accepted as law what does it entail?

A Barclaycard Agent?

As with any other well-run credit card system, the relationships between the Barclaycard company and those with whom it does business are regulated by carefully-drawn contracts. With each retailer or other trader who is prepared to honour Barclaycards, the company enters into an agreement in common form. It calls this a Merchant Member Agreement. By it the trader agrees to honour Barclaycards in payment for goods and services, and not to charge card holders more than normal prices. If the price exceeds the floor limit, the trader agrees to telephone Barclaycard for clearance. On presentation of the sales vouchers, the company undertakes to reimburse the trader, deducting an agreed percentage by way of commission. And so on. The Merchant Member Agreement fully defines the legal relations between Barclaycard and its trading customers.

The same is true of the legal relations between Barclaycard and its card holders. Here again a common-form agreement is entered into. The card holder agrees to pay off at least the minimum sum due each month. He contracts to stay within the credit limit. And so on.

Nowhere in either of the two common-form agreements is there any express reference to a relationship of agency between Barclaycard and the card holder. Is such a relationship to be taken as implied? On first principles, a relationship of agency depends on the intention of the parties to place themselves in the respective positions of principal and agent. Without such an intention there can be no agency, for agency is purely contractual.

Of course agency, not having been present to the minds of the parties, may be inferred by law. But this is done only where the factual situation the parties have placed themselves in is explicable on no other hypothesis. There must be some unexplained facts or other loose ends that are otherwise not accounted for. Implied agency is based on presumed intention, and there must be facts on which to base the presumption.

Are there such facts in the case of Barclaycard users? None are apparent. The common-form agreements are thoroughly worked out by expert company lawyers. As one would expect, they deal with every aspect of the commercial relationships in question. So what facts did the House of Lords have in mind in *Lambie*? This is difficult to discover. Before arriving at such a finding, and reversing a Court of Appeal decision to the contrary, one would expect their Lordships to enter upon a minute examination of the contractual position. After all, their ruling affects many millions of commercial transactions annually.

Nothing of the sort occurred. Only one speech was delivered, the other four learned Lords concurring in the remarks of Lord Roskill. All Lord Roskill said on the agency point (which by itself sealed Miss Lambie's fate) was that her presentation of the Barclaycard to Mothercare (the trader in question) was 'a representation of actual authority to make the contract with, in this case, Mothercare on the bank's behalf that the bank will honour the voucher on presentation'. Lord Roskill added these remarkable words: 'On that view, the existence and terms of the agreement between the bank and Mothercare [the Merchant Member Agreement] are irrelevant, as is the fact that Mothercare, because of that agreement, would look to the bank for payment'. ([1981] 2 All ER 776 at 781.)

It must be said, with the utmost respect, that this dictum turns the doctrine of implied agency on its head. Instead of inferring an agency agreement because there is no express agreement that accounts for the facts, Lord Roskill disregards an express agreement in order to infer an agency the parties certainly did not have in mind.

The law of contract

What are the consequences of *Lambie* for the law of contract? We have a situation where the various parties have precisely regulated their commercial relationships by written agreements but the House of Lords has ruled that an additional implied agency contract exists. What are its terms? All we know is that it contains a term authorising the card holder to commit the bank to an obligation to which it is in any case fully committed by the Merchant Member Agreement, namely that it will honour the voucher for goods or services bought using a Barclaycard. It is a jejune form of implied agency that goes no further than what is already provided for by express contract. Can the card holder commit the credit company to any other obligations under the *Lambie* agency?

To answer this question we need to look more closely at the legal attributes of a three-party credit card transaction. These can only be what the parties have provided for by their express or implied agreements. The relationships and obligations are wholly contractual. We have examined the Merchant Member Agreement and the card holder's agreement (which is normally what the Consumer Credit Act 1974 calls a credit-token agreement - see section 9(2)). There remains the agreement covering the individual transaction, for example Miss Lambie's purchase of goods from Mothercare.

It is apparently considered in some quarters that the shopkeeper's agreement to accept payment by credit card constitutes a novation. Miss Lambie, on this view, first made an ordinary contract of sale of goods with Mothercare. A few minutes later, by a novation, this was converted to a contract by which Miss Lambie was released from her obligation to pay the price and the already-existing obligation by Barclaycard to do this was substituted. It is submitted that this view is incorrect. For one thing it ignores the common case where the parties agree before the goods are even selected that payment will be made by credit card. For another, it leaves the buyer's remedy for defective goods in the air.

It seems that the true position is this. There is only one contract made at the time of the individual transaction. Mothercare accepts Barclaycards, so there can be no presumption that payment is to be made by cash. In every transaction the method of payment is one of the terms to be agreed. If payment by Barclaycard is agreed, the contract is still one of sale of goods. Mothercare contracted to sell goods to Miss Lambie and look for payment to Barclaycard. Whether they would have been entitled to sue Miss Lambie if Barclaycard failed to pay is not clear. Either Barclaycard were merely Miss Lambie's agents, so that their failure would have left her own obligation to pay Mothercare intact, or Mothercare gave up any claim on her and relied

solely on the Merchant Member Agreement. The former seems more likely in commercial terms. (But then in commercial terms the point is academic, and is likely to remain so until one day some credit card company becomes insolvent.)

So we find that in terms of contract law the likeliest conclusion is that, far from Miss Lambie being the agent of the Barclaycard company, the company was in fact her agent. Of one thing we may be sure. The Barclaycard company would not wish its thousands of card holders, purporting to act under the Lambie agency, to vary in any way the careful terms of the Merchant Member Agreement. Nor would the other credit card companies, in relation to their own corresponding agreements. It seems they need have no fear. The Lambie agency is a shadowy thing, devised for one purpose only. Nothing more is likely to be heard of it outside the criminal courts.

Conclusion

Whether this is the way to run the criminal law may be doubted. There has been trouble before when doctrines of contract impeded a satisfactory result in a criminal case. In *Fisher v Bell* [1961] 1 QB 394 a shopkeeper was charged with offering a flick knife for sale, contrary to section 1(1) of the Restriction of Offensive Weapons Act 1959. He had placed the knife in his window, but as every contract student knows this does not constitute an offer for sale. The Divisional Court reluctantly found for the accused. In *Commissioner of Metropolitan Police v Charles* [1977] AC 177 the House of Lords began on the path that led to Lambie by the dubious finding that use of a cheque card involved an implied agency. (See the criticisms of this decision in [1980] Crim LR 725.)

The student of legislative method returns to the wording of the statute. It may be thought to cover too many diverse factual situations in too few words. To enable the House of Lords to uphold a conviction where the merits were all one way, it required them to find conduct by Miss Lambie which deceived the Mothercare assistant 'as to fact'. In truth what Miss Lambie was doing was dishonestly piling up debts Barclaycard were already committed to discharge. She did not deceive the assistant. Barclaycard had not got round to cancelling her credit card. It was not yet even on the stop list. The assistant relied on the Merchant Member Agreement, and was concerned with nothing else. Her confidence was justified. Barclaycard complied with the agreement and honoured the voucher. There was in fact no deception.

By this decision principles of criminal law are further entangled. So too are those of contract law, in a field where correct analysis is particularly difficult. Moreover the statutory regulation of consumer credit is obscured. Was Miss Lambie's agreement with Mothercare a regulated consumer credit agreement? Not if the Barclaycard company was the principal, for only contracts with individuals are protected.