Carlill v. Carbolic Smoke Ball Co.

[1891-4] All ER 127 (C.A.)

On Nov. 13, 1891, the following advertisement was published by the defendants in the "Pall Mall Gazette":

> "£ 100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £ 1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter. During the last epidemic of influenza many thousand Carbolic Smoke Balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the Carbolic Smoke Ball. One Carbolic Smoke Ball will last a family several months, making it the cheapest remedy in the world at the price – 10s. post free. The ball can be refilled at a cost of 5s. Address: Carbolic Smoke Ball Co., 27, Princes Street, Hanover Square, London, W."

The plaintiff, believing in the accuracy of the statements appearing in the advertisement with regard to the efficacy of the smoke ball in cases of influenza, or as a preventive of that disease, purchased one and used it three times every day, as directed by the instructions, for several weeks, from the middle of November, 1891, until Jan. 17, 1892, at which latter date she had an attack of influenza. Thereupon her husband wrote a letter for her to the defendants, stating what had occurred, and asking for the £100 promised by the defendants in the advertisement. The payment of that sum was refused by the defendants, and the present action was brought for its recovery.

At the trial before Hawkins J. and a special jury the facts were not disputed, and the arguments of counsel on each side on the points of law involved in the case were heard by the learned judge on further consideration. It was denied on the part of the defendants that there was any contract between them and the plaintiff; and, alternatively, that, if there were any, it was void as a wagering contract. Hawkins J., gave judgment for the plaintiff and the defendants appealed.

BOWEN, L.J. - We were asked by counsel for the defendants to say that this document was a contract too vague to be enforced. The first observation that arises is that the document is not a contract at all. It is an offer made to the public. The terms of the offer, counsel says, are too vague to be treated as a definite offer, the acceptance of which would constitute a binding contract. He relies on his construction of the document, in accordance with which he says there is

no limit of time fixed for catching influenza, and that it cannot seriously be meant to promise to pay money to a person who catches influenza at any time after the inhaling of the smoke ball. He says also that, if you look at this document you will find great vagueness in the limitation of the persons with whom the contract was intended to be made – that it does not follow that they do not include persons who may have used the smoke ball before the advertisement was issued, and that at all events, it is a contract with the world in general. He further says, that it is an unreasonable thing to suppose it to be a contract, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense, and there is no such provision here made for the checking. He says that all that shows that this is rather in the nature of a puff or a proclamation than a promise or an offer intended to mature into a contract when accepted.

Counsel says that the terms are incapable of being consolidated into a contract. But he seems to think that the strength of the position he desires to adopt is rather that the vagueness of the document shows that no contract at all was intended. It seems to me that in order to arrive at this contract we must read it in its plain meaning as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it upon the points which the defendant's counsel has brought to our attention? It was intended unquestionably to have some effect, and I think the effect which it was intended to have was that by means of the use of the carbolic smoke ball the sale of the carbolic smoke ball should be increased. It was designed to make people buy the ball. But it was also designed to make them use it, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the usage of it should be increased.

The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts influenza, and the defendants say that "contracts" there does not apply only to persons who contract influenza after the publication of the advertisement, but that it might include persons who had contracted influenza before. I cannot so read it. It is written in colloquial and popular language. I think that the expression is equivalent to this, that £ 100 will be paid to any person who shall contract influenza after having used the carbolic smoke ball three times daily for two weeks. It seems to me that would be the way in which the public would read it. A plain person who read this advertisement would read it in this plain way, that if anybody after the advertisement was published used three times daily for two weeks the carbolic smoke ball and then caught cold he would be entitled to the reward.

Counsel says: "Within what time is this protection to endure? Is it to go on for ever or what is to be the limit of time?" I confess that I think myself that there are two constructions of this document, each of them contains good sense, and each of them seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last

during the epidemic. If so, it was during the epidemic that the plaintiff contracted the disease. I think more probably it means that it is to be a protection while it is in use. That seems to me the way in which an ordinary person would understand an ordinary advertisement about medicine and especially about a specific against influenza. It could not be supposed that after you had left off using it you would still be protected for ever as if there was a stamp set upon your forehead that you were never to catch influenza because you had used the carbolic smoke ball. I think it means during the use. It seems to me that the language of the advertisement lends itself to that construction. It says: "During the last epidemic of influenza many thousand Carbolic Smoke Balls were sold, and in no ascertained case was the disease contracted by those using the Carbolic Smoke Ball."

The advertisement concludes with saying that one smoke ball will last a family several months – which means that it is to be continually used – and that the ball can be refilled at a cost of 5s. I, therefore, have no hesitation in saying that I think on the plain construction of this advertisement the protection was to ensure during the time that the carbolic smoke ball was being used. Lindley, L.J., thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point, but it is not necessary for me to develop it, because as I read the contract it covered the exact moment during which the disease here was contracted.

Was the £ 100 reward intended to be paid? It not only says the reward will be paid, but it says: "We have lodged £ 1,000 to meet it." Therefore, it cannot be said that it was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon, but counsel for the defendants says that there was no check on the persons who might claim to have used the ball and become entitled to the reward, and that it would be an insensate thing to promise £ 100 to a person who used the smoke ball unless you could check his using it. The answer to that seems to me to be that, if a person chooses to make these extravagant promises, he probably does so because it pays him to make them, and if he has made them the extravagance of the promises is no reason in law why he should not be bound by them.

It is said it is made to all the world, i.e., to anybody. It is not a contract made with all the world. There is the fallacy of that argument. It is an offer made to all the world, and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the conditions? It is an offer to become liable to anyone, who before it is retracted performs the conditions. Although the offer is made to all the world the contract is made with that limited portion of the public who come forward and perform the conditions on the faith of the advertisement. This case is not like those cases in which you offer to negotiate, or you issue an advertisement that you have got a stock of books to sell or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate, offers to receive offers, offers "to chaffer", as a learned judge in one of the cases has said: per Willes J., in *Spencer* v. *Harding* [(1870) L.R. 5 CP 561]. If this is an offer

to be bound on a condition, then there is a contract the moment the acceptor fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century. It cannot be put better than in Willes, J.'s judgment in *Spencer* v. *Harding*, where he says (at p. 563): "There never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on 'and we undertake to sell to the highest bidder', the reward cases would have applied, and there would have been a good contract in respect of the persons."

As soon as the highest bidder presents himself – says Willes, J., in effect – the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the offer. One cannot doubt that as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless you do that, the two minds may be apart, and there is not that consensus which is necessary according to the English law to constitute a contract. But the mode of notifying acceptance is for the benefit of the person who makes the offer as well as for the opposite party, and so the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so. I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates that a particular mode of acceptance is sufficient to make the bargain binding, it is only necessary for the person to whom the offer is made to follow the indicated method of acceptance. And if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, and the offer is one which in its character dispenses with notification of the acceptance, then according to the intimation of the very person proposing the contract, performance of the condition is a sufficient acceptance without notification. That seems to me to be the principle which lies at the bottom of the acceptance cases, of which an instance is the well-known judgment of Mellish, L.J., in *Harris* v. *Nickerson* [(1873) L.R. 8 Q.B. 286], and Lord Blackburn's opinion in the House of Lords in *Brogden* v. *Metropolitan Rail. Co.* [(1877) 2 AC 666 at 691]. It seems to me that that is exactly the line which he takes.

If that is the law, how are you to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract the answer from the character of the business which is being done. And in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the conditions, but that, if he

performs the conditions at once, notification is dispensed with. It seems to me, also, that no other view could be taken from the point of view of common sense. If I advertise to the world that my dog is lost and that anybody who brings him to a particular place will be paid some money, are all the police or other persons whose business is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Of course they look for the dog, and as soon as they find the dog, they have performed the condition. The very essence of the transaction is that the dog should be found. It is not necessary under such circumstances, it seems to me, that in order to make the contract binding, there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it. A person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. In his offer he impliedly indicates that he does not require notification of the acceptance of the offer.

In the present case the promise was put forward, I think, with the intention that it should be acted upon, and it was acted upon. It seems to me that there was ample consideration for the promise, and that, therefore, the plaintiff is entitled to recover the reward.

Lindley and A.L. Smith, LL.J., delivered judgment to the same effect.