CASE NOTES AND COMMENT

THE HIGH COURT DECISION IN *TOLL (FCGT) PTY LTD V ALPHAPHARM PTY LTD & ORS*[1]

Guy Cumes[*]

INTRODUCTION

The question as to whether and how the conduct of the parties constitutes a contract goes to the heart of contract law. The principle of *L'Estrange v F Graucob Ltd*[2] provides clarity to the law by attaching central importance to a party's signature as an act evincing an intention to be bound by a contract. Yet although the principle is easily stated, its application in practice has caused considerable disagreement about its scope, exceptions and relationship with other principles in contract such as the requirement of reasonable and sufficient notice of exclusion clauses.

The NSW Court of Appeal in *Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd*[3] affirmed that whilst signature is an important expression of an intention to enter into contractual relations, it is not, in itself, conclusive. Rather, the existence of the contract and its terms are to be ascertained by examining all the circumstances of the case and particularly whether a party was properly informed of the contents of the contract, including any exclusion clauses, at the time of signing.

This approach to the interpretation of signed contracts was at the core of the appeal to the High Court which in a unanimous

---

1 (2004) 219 CLR 165.

* Lecturer, School of Humanities and Social Science, Charles Sturt University.

2 [1934] 2 KB 394

3 (2003) 56 NSWLR 662. Throughout this casenote this, and the High Court decision, is referred to by its full title or '*Toll*' as appropriate

verdict[4] set aside the orders of the Court of Appeal and confirmed the application of the principle in *L'Estrange v F Graucob Ltd*.

This case note commences with a brief review of the facts and decision in *L'Estrange v F Graucob Ltd.* The facts in *Toll* are noted, followed by an overview of the High Court decision.

THE PRINCIPLE OF LAW IN L'ESTRANGE V F GRAUCOB LTD

In *L'Estrange v F Graucob Ltd* a buyer of an automatic slot machine signed a written document which contained a clause that provided that "any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded." [5] The buyer did not read the document or this clause and accordingly knew nothing of its contents. There was no evidence of misrepresentation by the vendor which induced the buyer either as to the terms of the contract or to sign it. The machine did not work satisfactorily and the buyer brought an action for damages for breach of an implied warranty that the machine was fit for the purpose for which it was sold.

At first instance, judgement was given for the plaintiff buyer on the ground that although she knew that there was writing on the document she signed, she did not know that the writing contained conditions relating to the terms of the contract and the defendants had not done what was reasonably sufficient to give her notice of those conditions.[6] That the case should have been approached this way was said to follow from *Richardson, Spence & Co v Rowntree* per Lord Herschell LC .[7]

---

[4] Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

[5] A clause in these terms in modern consumer transactions is now void and unenforceable. See for example s 64(1) *Sale of Goods Act 1923* (NSW), s 40M *Fair Trading Act 1987* (NSW) and s 68 *Trade Practices Act 1974* (Cwth).

[6] L'Estrange v F.Graucob Ltd [1934] 2 KB 394, 400.

[7] [1894] AC 217, 219. The Kings Bench Division report of *L'Estrange v F Graucob Ltd* commences with a statement of the facts, the pleadings and evidence presented, the argument of the parties, and the decision at first instance. It notes (p 399) that the trial judge found that the contract between the parties contained an implied warranty. Both at first instance

It was held on appeal that the buyer was bound by the contract and it was "wholly immaterial" that she had not read it or did not know its terms. Scrutton LJ held that *Richardson, Spence & Co v Rowntree* was a "railway passenger and cloak-room ticket case"[8] and as such, the present case was distinguishable from it. He decided that the case was instead governed by the principle stated by Mellish LJ in *Parker v South Eastern Ry Co*[9] and was distinguishable in general terms from ticket cases where there is no signature.[10] He said that in cases where there is a written but unsigned document, "it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions" but "these cases have no application when the document has been signed."[11]

Maugham LJ agreed with Scrutton LJ though with "regret".[12] He found on the facts of the case that the agreement was one in writing, and the signing of it by the plaintiff brought into effect a signed contract between the plaintiff and the defendant. He considered that the only exceptions[13] to this may be where a document was signed in circumstances that make it not the

---

and on appeal the defendants argued the implied warranty was excluded by the printed conditions of the contract and that the rule in *Parker v South Eastern Railway Co* (1877) 2 CPD 416 applied. The report then notes (p 400):

> That rule was subject to certain exceptions … In all such cases three questions must be answered according to the directions of Lord Herschell LC in *Richardson, Spence & Co v Rowntree* – namely (1) Did the plaintiff know that there was writing or printing on the document? (2) Did she know that the writing or printing contained conditions relating to the terms of the contract? (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?

8 L'Estrange v F Graucob Ltd, above n 2, 402.

9 (1877) 2 CPD 416.

10 L'Estrange v F Graucob Ltd, above n 2.

11 Ibid 403.

12 Ibid 405.

13 Ibid 406–407. Apart from these exceptions Maugham LJ (at p. 406) also noted a third circumstance in which a party may not be bound which was noted by the High Court in *Toll* at 185, namely if the document signed was not a contract but merely a memorandum of a previous contract which did not include the relevant term.

plaintiff's act (*non est factum)* or that the plaintiff was induced to sign by misrepresentation.[14]

The principle of law of *L'Estrange v F Graucob Ltd* is stated by Scrutton LJ as follows:

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation the party signing it is bound, and it is wholly immaterial whether he has read the material or not.[15]

Scrutton LJ based this analysis on the earlier statement of the principle by Mellish LJ in *Parker v South Eastern Railway Co* (1877) 2CPD 416. He said:

> In *Parker v South Eastern Railway Co,* 2CPD 416, Mellish LJ laid down in a few sentences the law which is applicable to this case. He there said (421): 'In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving is signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents'.[16]

THE FACTS IN *TOLL (FCGT) PTY LTD V ALPHAPHARM PTY LTD*[17]

The case arose out of damage to perishable goods, Fluvirin, during its storage and transport by Finemores.[18] Alphapharm was a subsidiary distributor of the Fluvirin in Australia on behalf of Ebos who had the principal distribution agreement with the UK exporter, Medeva Pharma Ltd. Ebos in turn had a separate

---

[14] The meaning of misrepresentation for these purposes was considered by Denning LJ in *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805. Speaking with respect to documents containing exemption clauses Denning LJ said (at 808): "In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption…"

[15] L'Estrange v F Graucob Ltd, above n 2, 403.

[16] Ibid 402–403.

[17] The facts involve several parties and cross claims. This outline is taken from both the Court of Appeal and High Court judgments. The facts before the Court of Appeal were not in issue in the High Court.

[18] Finemores GCT Pty Limited was the former entity of Toll (FGCT) Pty Limited.

agreement with Richard Thomson Pty Ltd (hereafter 'RT'), a general wholesaler of medical supplies, to collect, store and obtain regulatory approval for the Fluvirin sent to Australia. RT dealt with Alphapharm and subsequently, Finemores, when it needed additional cold storage facilities.[19] The Fluvirin was destroyed because it had not been stored within proper temperature ranges by Finemores. Alphapharm and Ebos obtained damages against Finemores who, in turn brought proceedings against RT seeking to rely on an exclusion or indemnity clause in their contract to exclude their liability.[20]

In establishing the contractual arrangements between them, RT and Finemores exchanged several communications, principally by fax. On 12 February 1999 Finemores sent a four page fax to RT. It asked RT to "complete the Credit Application and sign the Freight Rate Schedule…". The fourth page was unheaded. It contained eight points of conditions and concluded with space for a signature introduced by "Freight Rate Schedule and Conditions accepted by: Signature".

The fax also stated that "…all cartage is subject to the conditions as stated on the reverse side of our consignment note, a copy of which is attached." In fact no copy of a Consignment Note was attached to the fax although Finemores had such a document at the time and it contained conditions on its reverse side. It was not argued before the High Court that the conditions on the consignment note formed part of any relevant contract between the parties.

---

[19] See the Court of Appeal decision in *Toll* at 681, and the High Court decision in *Toll* at 169-170. The High Court described the relationship between the parties in the following terms: RT suggested, and Alphapharm accepted, that the services of Finemores be used to collect Fluvirin vaccine, store it, and transport it from their Sydney warehouse to Alphapharm's customers. RT gave Finemores all the necessary information and instructions for this to be done. This included agreement between them on storage and transportation charges and directions as to delivery. Alphapharm did not have any direct dealings with Finemores about these matters. Finemores' warehouse became Alphapharm's Sydney warehouse for the purposes of cl 5.1 of the sub-distribution agreement between Ebos and Alphapharm. The High Court concluded that RT acted as Alphapharm's agent in its transactions with Finemores. This "agency issue" is not addressed in this casenote – see 189–194 for the court's analysis of it.

[20] See the Court of Appeal decision in *Toll* at 666 and 685.

The High Court said that the reference in the letter to a "Credit Application" was "of central importance". It noted that the "Credit Application", in the form of an "Application for Credit", was given to Mr Gardiner-Garden, the operations manager of RT when he visited Finemores' premises for a meeting with Mr Cheney on 17 February 1999. It was at this time, and at Mr Cheney's request, that Mr Gardiner-Garden signed and dated the "Application for Credit" as well as the Freight Rate Schedule and left both documents with Mr Cheney.[21] The words "Please read 'Conditions of Contract' (Overleaf) prior to signing" were written immediately above the place where Mr Gardiner-Garden signed on the Application for Credit.

The High Court noted that there was evidence which showed that the 15 "Conditions of Contract" were generally in a form that was in common use in the refrigerated transport industry.[22] Mr Gardiner-Garden gave evidence that he did not read the "Conditions of Contract" and that they were not mentioned in conversation by him or by Mr Cheney. The High Court noted however that there was nothing to prevent him from reading them, from seeking advice about them, or comparing them with the terms and conditions adopted by Finemores' competitors. Within this context the court said the legal significance of Mr Gardiner-Garden's evidence was in dispute.

The High Court closely noted the form, content and effect of the Application for Credit, and the transactions between the parties. The Application for Credit was a form with printing on the front and back. It identified RT as the applicant, and the customer, and gave information about RT including credit references. As such it was an application by RT to open an account with Finemores and was intended to cover future dealings, not only this particular transaction.[23] Finemore's Credit Department wrote to RT by letter dated 24 February 1999 welcoming them "as an account customer". They assigned RT an "account number", confirmed

---

21 This finding of the High Court contrasts with the comment by Bryson J in the Court of Appeal that there was no clear evidence of the date when the Freight Rate Schedule was signed by a representative of RT – see the Court of Appeal decision in *Toll* at 684.

22 The High Court in *Toll* rejected (at 187) as being contrary to the evidence the notion that the Application for Credit and the conditions on it departed from general practice in the transport industry.

23 See also the High Court decision in *Toll* at 187.

trading terms, enclosed another copy of the Conditions of Contract, and concluded, the court noted, "by saying that they looked forward to a long and mutually beneficial association". Before this however, Finemores had acted on the basis of acceptance of the application, and had already notified RT of its account number. On 18, 19 and 21 February 1999 Finemores transported Fluvirin from the airport to its warehouse and sent four invoices to RT for storage and handling, each of which referred to RT's customer number. It was the conduct of Finemores in collecting the first shipment of vaccine, storing it and the sending an invoice for it on 18 February that, according to the High Court, brought the contract between themselves and RT into existence, and this occurred before the first loss.[24]

According to the High Court, the principal question posed by these facts was whether an exclusion clause (cl 6) or, alternatively, an indemnity clause (cl 8) formed part of the contract between the parties and, if so, who was bound by them.[25] The court referred to this as "the terms of contract issue".[26] The court prefaced its consideration of the facts with the following comment:

> Each of the four parties to the case is a substantial commercial organisation, capable of looking after its own interests. This hardly seems an auspicious setting for an argument that a party who signs a contractual document is not bound by its terms because its representative did not read the document.[27]

---

[24] The first damage of the fluvirin and rejection by the customers of Alphapharm and Ebos was on 5 March 1999 – see the High Court decision in *Toll* at 176.

[25] The principal issue was the application of especially cl 6 of the conditions of contract on the reverse side of the Application for Credit – see the High Court decision in *Toll* at 177.

[26] See the High Court decision in *Toll* at 177. The second issue for the court, "the agency issue", was whether Alphapharm was bound by cl 6. This issue is not examined in this article. See footnote 19.

[27] Ibid 176

THE TERMS OF CONTRACT ISSUE: THE PRINCIPLE IN *L'ESTRANGE V F GRAUCOB LTD*

The court stated that the point at issue on the appeal concerned the nature of the legal relations created between the parties as opposed to whether legal relations were created at all.[28] It noted:

> It is not in dispute that Mr Gardiner-Garden was authorised by Richard Thomson to sign the Application for Credit, and that when he signed that document he did so intending that it would affect the legal relations between Richard Thomson and Finemores. So much was acknowledged in the course of argument in this Court. Counsel for Richard Thomson said that there was no suggestion that the document that was signed was not intended to create legal relations.[29]

Adopting its recent decision in *Pacific Carriers Ltd v BNP Paribas*,[30] the court confirmed that rights and liabilities of the parties to a contract are determined by the principle of objectivity, which it explained as follows:

> It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe…. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[31]

The court then examined authorities on the importance which the law attaches to the signature or execution of a contractual document. It noted the "significant distinction" drawn by Mellish LJ in *Parker v South Eastern Railway Co*,[32] between an action which is brought on a written agreement which is signed by the defendant, and an action brought on an agreement reduced into

---

[28] The issue for the court was the "identification of the terms on which Finemores and Richard Thomson contracted" – see the High Court decision in *Toll* at 178.

[29] High Court decision in *Toll* at 178-9. This admission was critical for the court's approach and decision, and assisted it to distinguish the case from *Grogan v Robin Meredith Plant Hire* – see the High Court decision in *Toll* at 187.

[30] (2004) 218 CLR 451.

[31] High Court decision in *Toll* at 179.

[32] (1877) 2 CPD 416, 421.

writing but which is not signed,[33] and found approval for this difference in approach in the statements of Latham CJ in *Wilton v Farnworth*[34] and Brennan J in *Oceanic Sun line Special Shipping Company v Fay*.[35]

The court noted that the effect of signing a document which is known and intended to affect legal relations is that it:

> ordinarily conveys a representation to a reasonable reader of the document … that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents … whatever they might be … (T)hat representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it.[36]

This analysis of the authorities, the court observed, accorded with the principle in *L'Estrange v F Graucob Ltd.* The importance of the principle is the protection of innocent persons who rely upon the signature[37] in a wide variety of situations which are not limited to contractual documents. The court said:

> Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.[38]

It noted that legislation has been enacted to allow courts to ameliorate any hardship caused by the strict application of legal principle to contractual relations. It considered that, "as a result, there is no reason to depart from principle, and every reason to

---

33 The High Court noted Mellish LJ's explanation in terms noted by Scrutton LJ in *L'Estrange v F Graucob Ltd* – see the High Court decision in *Toll* at 180. It also noted that there must be evidence independently of the agreement itself to prove that the defendant has assented to it, only where the agreement is not signed.

34 (1948) 76 CLR 646, 649.

35 (1988) 165 CLR 197, 228.

36 High Court decision in *Toll* at 180-181.

37 Ibid 181, noting *Petelin v Cullin* (1975) 132 CLR 355

38 Ibid 182.

adhere to it, in cases where such legislation does not apply, or is not invoked."[39]

Accordingly, in determining the nature of the legal relations created by cl 6 the High Court stated that attention has to be given:

> both to the significance attached by the law to the presence of the signature and also to the absence of any grounds, such as a plea of non est factum, which at common law would render the contract void and of any grounds, such as misrepresentation, which might attract equitable relief, or which might elicit curial dispensation under a statutory regime.[40]

Applying this "settled principle" to the present case, the court concluded that "the terms and conditions on the reverse of the Application for Credit formed part of the contract governing the storage and transportation of the goods".[41]

THE ERROR OF THE PRIMARY JUDGE AND THE COURT OF APPEAL: A QUESTION OF FUNDAMENTAL LEGAL POLICY

The reasoning of the primary judge and the Court of Appeal was, according to the High Court, based on 2 premises. The "major premise" was that "in order for th(e)se terms and conditions to be made part of the contract, it was necessary for Finemores to establish that it had done what was reasonably sufficient to give Richard Thomson notice of (them)."[42] The minor premise was that Finemores had not done this. The court said that the appeal could be disposed of by disagreeing with the minor premise. It found it "difficult to imagine" what more Finemores could have done in order to give notice of the terms and conditions than requiring RT's representative to sign a document, and place his signature immediately below a request that he had read the conditions on the reverse side of the document before doing so.

---

[39] Ibid 183.

[40] Ibid 183, and see ibid 189.

[41] And see ibid 189.

[42] Ibid 183.

However the court considered the major premise to be of "wider importance" because "(i)f correct, it involves a serious qualification to the general principle concerning the effect of signing a contract without reading it"[43]. The court opined that this premise and the proposition for which it stands derives from cases "such as ticket cases, in which one party has endeavoured to incorporate in a contract terms and conditions appearing in a notice or an unsigned document." The court cautioned however that "(w)hen an attempt is made to introduce the concept of sufficient notice into the field of signed contracts, there is a danger of subverting fundamental principle based on sound legal policy". It concluded that although:

> (n)o one suggests that the fact that a document has been signed is for all purposes conclusive as to its legal effect...where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake, or any other vitiating element, the fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms.[44]

The court then noted the distinction drawn by Scrutton LJ in *L'Estrange v F Graucob Ltd* between cases that are based on a written agreement which is signed by the defendant, and "the railway passenger and cloak-room ticket cases" where "there is no signature to the contractual document, the document being simply handed by the one party to the other."[45] It also noted the three circumstances in which a party may not be bound to a signed document referred by Maugham LJ[46] and stated:

> *L'Estrange v Graucob* explicitly rejected an attempt to import the principles relating to ticket cases into the area of signed contracts. It was not argued, either in this Court or in the Court of Appeal, that *L'Estrange v Graucob* should not be followed.[47]

---

43 Ibid 183–4.

44 Ibid 184.

45 See supra

46 See supra. Scrutton LJ, in the statement attributed as the "principle in *L'Estrange v F. Graucob Ltd*" cites two circumstances, namely fraud and misrepresentation (noted in the High Court decision in *Toll* at 181).

47 High Court decision in *Toll*, 185.

Accordingly the court concluded that there is a "general rule" that:

> where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.[48]

The court found that the error of the primary judge and the Court of Appeal was to transpose the reasoning of the ticket cases into the area of signed contracts contrary to the decision of *L'Estrange v F Graucob Ltd*.[49] The court rejected that there was any misrepresentation or other vitiating element in the present case to warrant the application of the qualification of the *L'Estrange v F Graucob Ltd* principle.[50]

CONCLUSION

At issue for the High Court in this appeal was the centrality to be accorded to the principle in *L'Estrange v F Graucob Ltd* to fundamental legal doctrine in contract law.

The court found that when Mr Gardiner-Garden signed the Application for Credit on 17 February he made a representation to Finemores that he had read and approved the contents of the document or was willing to be bound by them. This was because he intended that his signature would affect the legal relations between RT and Finemores and it was executed immediately below a request that he had read the conditions on the reverse side of the document before signing. This conclusion was reinforced by the absence of any misrepresentation or other vitiating element arising from Finemores' conduct.

The fact that Mr Gardiner-Garden signed the document without reading it did not, in these circumstances, put Finemores in the position of having to show that due notice was given of the terms of the document. His signature was a representation that RT was

---

[48] Ibid.

[49] The primary authorities relied on in the lower courts to reach their conclusion were distinguished – see ibid 186–7, 188–9.

[50] See ibid 187–188.

to be bound by those terms, and it was immaterial that he had not read the document. As RT was Alphapharm's agent, the signature also bound Alphapharm to the terms and conditions of the contract.[51]

These core facts, as interpreted by the High Court, demonstrate a classic example of the application of the rule in *L'Estrange v F Graucob Ltd,* the authority of which is enhanced by the decision. The court's approach and its findings as to the proper construction of the contract is a clear and emphatic disavowal of the approach of the Court of Appeal. The court has made it absolutely clear that parties who sign contracts in the absence of evidence of vitiating factors cannot expect that the courts will impugn the contract simply because of the existence of indemnity or exemption clauses in the contract of which they had no direct notice. The parties must exercise appropriate circumspection when entering into and executing contracts and cannot avoid this responsibility by seeking the courts intervention in a contract that they have freely signed.

---

[51] And particularly cl 6. See above n 19.