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Abstract
[extract] This well-established principle of contract law [the Rule in L'Estrange v F Graucob Ltd] is a simple one, yet its application to particular facts and circumstances is not always straightforward, as was demonstrated in the proceedings which culminated in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd. There, the High Court allowed an appeal from a decision of the Court of Appeal of New South Wales that a carrier could not rely upon an exemption of liability clause contained in a document signed by the consignor's agent because the carrier had not done what was reasonably sufficient to give the agent notice of the clause.

The central question on appeal to the High Court was whether a party who had signed a contractual document was bound by its terms in circumstances where that party had not read its contents.

Keywords
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd, L'Estrange v F Graucob Ltd, contract law

CASE NOTE

REVISITING THE RULE IN *L'ESTRANGE v F GRAUCOB LTD*

By Phillip G Sharp[*]

What has come to be known as the rule in *L'Estrange v F Graucob Ltd*[1] was expressed 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 document or not.[2]

This well-established principle of contract law is a simple one, yet its application to particular facts and circumstances is not always straightforward, as was demonstrated in the proceedings which culminated in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*.[3] There, the High Court allowed an appeal from a decision of the Court of Appeal of New South Wales that a carrier could not rely upon an exemption of liability clause contained in a document signed by the consignor's agent because the carrier had not done what was reasonably sufficient to give the agent notice of the clause.

The central question on appeal to the High Court was whether a party who had signed a contractual document was bound by its terms in circumstances where that party had not read its contents.

I Facts

Richard Thomson Pty Ltd (Thomson), acting as the agent of Alphapharm Pty Ltd (Alphapharm), entered into a freight and storage agreement with Toll (FGCT) Pty Ltd (formerly Finemores). The latter operated a transport company, comprising a fleet of refrigerated vans as well as a refrigerated storage facility in Sydney.

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1 [1934] 2 KB 394.

2 [1934] 2 KB 394 at 403.

3 (2004) 79 ALJR 129; 211 ALR 342 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

Alphapharm had purchased a large quantity of flu vaccine from Ebos Group Limited (Ebos) and planned to sell and distribute it throughout Australia. The vaccine, which was perishable unless stored between 2 and 8 degrees Celsius, was imported by Ebos from the United Kingdom. It was agreed, as between Ebos and Alphapharm, that risk would pass to Alphapharm upon the vaccine's arrival in Australia and that title would remain with Ebos until payment for the vaccine was received.

The storage and freight agreement between Finemores and Thomson was formed by a series of written communications.

On 20 January 1999, Thomson sent a letter to Finemores by fax requesting refrigerated transport for the vaccine as well as details of its insurance arrangements. Finemores replied by fax on 12 February 1999, attaching a quotation of its freight rates. The fax relevantly stated:

> Following acceptance to our quotation, it would be very much appreciated if you would complete the Credit Application and sign the Freight Rate Schedule accepting our Rates and Conditions and fax back to our office at your earliest convenience.

Mr Gardiner-Garden, an employee of Thomson, signed the Freight Rate Schedule.

On 17 February 1999, Mr Gardiner-Garden signed the 'Application for Credit' referred to in Finemores' fax above. That document required an applicant to provide details of, among other things, its trading name and postal address, its accountant, credit references and details of its parent company (if applicable). Immediately above the space for signature were the words: 'Please read "Conditions of Contract" (Overleaf) prior to signing'. On the reverse side of the Application for Credit were a number of 'Conditions of Contract'. Clause 6 excluded Finemores' liability for any loss, injury or damage suffered by the Customer in respect of any goods being carried or stored on its behalf. Pursuant to cl 8, Thomson agreed to indemnify Finemores in respect of any demand or claim brought by or on behalf of Thomson's associates (which included Alphapharm) arising out of cartage by Finemores. Clause 9 provided that it was the Customer's responsibility to arrange insurance to cover its risks associated with cartage.

Mr Gardiner-Garden did not read the Conditions of Contract overleaf before signing the Application for Credit.

Upon Alphapharm's instructions, Thomson directed Finemores to deliver shipments of the vaccine to Queensland Medical Laboraties in Brisbane and to Commonwealth

Serum Laboratories in Sydney. Temperature monitors revealed that Finemores did not maintain the consignments within the requisite temperature range during transport. Both shipments were rejected.

II The District Court proceedings

Alphapharm and Ebos commenced proceedings against Finemores in the District Court of New South Wales, claiming damages under s 52 of the *Trade Practices Act 1974* (Cth), in negligence and for breach of bailment. Finemores cross-claimed against Thomson on the ground that it was entitled to be indemnified in respect of those damages. Finemores claimed that the exemption and indemnity clauses on the reverse side of the Application for Credit formed part of the contract between it and Thomson.

The trial judge dismissed the s 52 claim but found that Finemores had breached its duty of care as bailee of the goods. The trial judge accepted that the test for determining whether the Conditions of Contract on the back of the Application for Credit formed part of the contract was whether Finemores did what was reasonably sufficient to give Thomson notice of them. All that was done to give Mr Gardiner-Garden notice of the Conditions of Contract was the sentence above the signature which stated: 'Please read "Conditions of Contract" (overleaf) prior to signing'. His Honour was of the view that there was nothing in the Application for Credit document itself, in the surrounding circumstances or in anything that Finemores had said or done that should have alerted Thomson to the fact that the Application for Credit contained conditions which radically affected the contract. As Finemores had not given Thomson reasonably sufficient notice of the existence of the Conditions of Contract on the back of the Application for Credit, the trial judge concluded that they did not form part of the freight and storage agreement. His Honour dismissed Finemores' cross-claim against Thomson and awarded damages of $683,061.86 to Alphapharm and Ebos.

III The Court of Appeal's decision

Finemores appealed to the Court of Appeal, submitting that the trial judge had erred in finding, contrary to *L'Estrange v F Graucob Ltd*, that Finemores was required to give Thomson notice of the existence of the Conditions of Contract despite their inclusion in a signed contractual document.

The Court of Appeal held that it was open to the trial judge in the circumstances to find that the exemption clauses did not form part of the contract because Finemores did not do what was reasonably sufficient to give Thomson notice of their existence.

Young CJ in Eq rejected the 'artificial finality' of Finemores' submission that the fact of signature led to the automatic incorporation of all the conditions printed on a contract. His Honour referred to two unreported decisions[4] which, in his view, modified the rule in *L'Estrange v F Graucob Ltd* so that in some cases, it was relevant to examine the circumstances in which a signed document was executed.[5] According to his Honour, if a contractual document contained an extraneous term which a reasonable person would not expect to find there, it was appropriate to consider whether the party seeking to rely upon that term did what was reasonably sufficient to give notice of its existence to the other party. Young CJ in Eq was of the view that the more onerous the term, the greater the notice that was required. For example, his Honour drew a distinction between exclusion clauses and agreements to indemnify the other party, but did not offer any guidance as to what would be a sufficient amount of notice.[6]

Bryson J, with whom Sheller JA agreed, articulated a different approach but his Honour's conclusion was, in substance, the same as Young CJ in Eq. Rather than asking whether a term said to be incorporated by signature was extraneous to the contract and had been reasonably notified to the other party, Bryson J thought that the relevant question was whether the signed document itself was intended to be part of the agreement reached.[7] His Honour said that this was a question of fact which must be decided before the principle in *L'Estrange v F Graucob Ltd* can be applied. The party who alleges that the document is part of the contractual arrangement made by the parties must prove that the document was intended by both parties to form part of their contractual arrangements.[8]

Bryson J acknowledged that the evidence supporting a finding that the parties intended the Conditions of Contract to form part of the cartage agreement was of 'considerable force'. His Honour referred to the fact that the parties were engaged in commerce, had dealt with each other at arms-length and were not dependent on each other for guidance. His Honour also noted that the signing of the Application for Credit was not hurried.[9] In those circumstances, Bryson J considered that a signature

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4 *Grogan v Robin Meredith Plant Hire* [1996] TLR 93; *Mouritz v Hegedus* [1999] WASCA 1061.
5 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2003) 56 NSWLR 662 at 671 [60].
6 (2003) 56 NSWLR 662 at 672 [68].
7 (2003) 56 NSWLR 662 at 677 [101].
8 (2003) 56 NSWLR 662 at 678 [104].
9 (2003) 56 NSWLR 662 at 687 [136].

by a business executive upon a written document containing a request that he read the conditions overleaf, was an objectively strong token of acceptance of the conditions, whether or not they were actually read.[10]

Despite strong reservations, Bryson J considered there was 'ample basis' for the trial judge's decision. In its fax to Thomson of 12 February 1999, Finemores stated that all the cartage was subject to conditions and enclosed a page of conditions. The conditions on the back of the Application for Credit however were not enclosed and at no stage did Finemores mention the possibility of further conditions. The Application for Credit did not clearly indicate that the Conditions of Contract were to be part of the contractual arrangement. Bryson J thought that a reasonable person would not expect that an Application for Credit would contain conditions such as the agreement to indemnify contained in cl 8. His Honour relied on the fact that Finemores did not point out to Mr Gardiner-Garden that the Application for Credit contained conditions that would affect the freight and storage agreement.

IV The High Court's decision

Finemores successfully appealed to the High Court which held that the terms and conditions on the Application for Credit formed part of the cartage agreement and were binding upon Thomson.

The Court repeated familiar and orthodox principles of contractual interpretation, confirming that the rights and liabilities of parties to a contract are to be determined objectively, rather than by reference to the subjective beliefs and understandings of the parties.[11] The meaning of contractual terms is to be determined by what a reasonable person would have understood them to mean, taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction.[12]

The legal effect of signing a contract was explained by the Court as follows:

> It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to

10 (2003) 56 NSWLR 662 at 688 [139].

11 (2004) 79 ALJR 129 at 136 [40]; 211 ALR 342 at 351-352.

12 (2004) 79 ALJR 129 at 136 [40]; 211 ALR 342 at 351-352.

> take the chance of being bound by those contents, as Latham CJ put it, whatever they might be.[13]

The Court rejected the proposition accepted by both the trial judge and the Court of Appeal that in order for the Conditions of Contract to form part of the contract, it was necessary for Finemores to show that it had done what was reasonably sufficient to give Thomson notice of them. Such a proposition, the Court said, was a 'serious qualification to the general principle concerning the effect of signing a contract without reading it'.[14] The Court said:

> The general rule, which applies in the present case, is 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.[15]

The Court recognised that even if a document is signed, there may be cases in which it is material to know whether a person who has signed it was given sufficient notice of its contents. Such cases would include claims of misrepresentation or *non est factum*, or cases in which there was an issue as to whether a document was intended to affect legal relations.[16] There could also be circumstances in which a party would not reasonably understand another party's signature to a document as a manifestation of intent to enter into legal relations or of assent to its terms.[17] The fact of signature upon a document did not preclude resort to surrounding circumstances to determine whether the document was intended to create contractual relations.

V Commentary

Prior to the High Court's decision in *Toll* the rule in *L'Estrange v F Graucob Ltd* had been approved by Latham CJ in *Wilton v Farnworth,*[18] Brennan J in *Oceanic Sun Line Special Shipping Co Inc v Fay*[19] and by Dawson J in *Taylor v Johnson*.[20] Two Victorian decisions appeared to accept a qualification to the rule in the case of exclusion of

13 (2004) 79 ALJR 129 at 137 [45]; 211 ALR 342 at 353.
14 (2004) 79 ALJR 129 at 139 [53]; 211 ALR 342 at 355.
15 (2004) 79 ALJR 129 at 140 [57]; 211 ALR 342 at 356.
16 (2004) 79 ALJR 129 at 140 [57]; 211 ALR 342 at 356.
17 (2004) 79 ALJR 129 at 141 [63]; 211 ALR 342 at 358.
18 (1948) 76 CLR 646 at 649.
19 (1988) 165 CLR 197 at 228.
20 (1983) 151 CLR 422 at 445-446.

liability clauses. In *Hill (DJ) and Co Pty Ltd v Walter H Wright Pty Ltd*,[21] signed delivery dockets which were known to contain contractual terms were held not to form part of the contract of carriage, as they were handed over, and signed, after the contracts had been concluded. In *Le Mans Grand Prix Circuits Pty Ltd v Illiadis*,[22] the Court of Appeal of Victoria determined that the operator of a go-cart track could not rely upon an exclusion of liability clause contained in a document which had been signed, but not read, by the respondent, because the operator failed to prove that the respondent knew that the document was contractual. The document was clearly contractual but the majority relied on the fact that no fee was charged for entry, that there was no commercial relationship between the parties, and that the appellant gave the respondent no notice that a contractual arrangement would exist between them to conclude that no contract existed. Perhaps the better view of these decisions is that they are merely authority for the proposition that a party seeking to rely on the terms of a signed document has to demonstrate that the other party knows that the document contained contractual terms or formed part of the relevant contract.

The High Court's decision in *Toll* has removed any uncertainty about the status of the rule in *L'Estrange v F Graucob Ltd* under the Australian common law.[23] It cannot be doubted now that if a contractual document has been signed, then absent some vitiating factor such as fraud, misrepresentation or a plea of *non est factum*, the signor will be bound by its terms regardless of whether he or she has read them, or has knowledge of them. The rationale for the rule, as the Court explained, is to protect parties to the contract, as well as third parties, who rely on the presence of a signature to assume the legal efficacy of the contract. The rationale is based upon the legal fiction that a signature on a contract indicates that the signor has read and approved its contents, or is willing to chance being bound by them, whatever they might be.[24] The use of a signature to indicate assent to the terms contained therein is a universally recognised and accepted practice. To undermine the assumption upon which this practice is based, would, the Court said, 'cause serious mischief'.[25]

The rule in *L'Estrange v F Graucob Ltd* has been criticized on the basis that it may operate harshly in circumstances where a signature does not actually evidence

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21 [1971] VR 749 (Winneke CJ, Starke and Anderson JJ).

22 [1998] 4 VR 661 (Winneke P and Tadgell JA, Batt JA dissenting).

23 See B Clarke and S Kapnoullas, 'When is a Signed Document Contractual? Taking the "Fun" out of the "Funfair"' (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 39.

24 (2004) 79 ALJR 129 at 137 [45]; 211 ALR 342.

25 (2004) 79 ALJR 129 at 138 [47]; 211 ALR 342 at 354.

consent to be bound.[26] Greig and Davis state that the rule is reasonable when applied to a contract in which the signor has had an opportunity of reading the document, but if the signor has had no real opportunity of examining the document, and the other party is aware of this fact, then how can it assume that the signor has consented to the terms of the document?[27] In an article, Sir Anthony Mason and Stephen Gageler said that the requirements of fairness and justice may well call for a re-examination of the rule in *L'Estrange v F Graucob Ltd*.[28] Although the Court eschewed any direct reference to criticism of the rule, it did weigh into the debate by citing Professor Atiyah[29] who said:

> The usual explanation for holding a signature to be conclusively binding is that it must be taken to show that the party signing has agreed to the contents of the document; but another possible explanation is that the other party can be treated as having relied upon the signature. [30]

It is far from certain whether a party can rely upon a signature as evidence of assent to be bound, let alone enforce the contract, in circumstances where it knows that the other party did not read, or had no real opportunity of examining the contract. Such conduct may well be unconscionable under the *Contracts Review Act 1980* (NSW), the *Trade Practices Act 1974* (Cth) or the State Fair Trading Acts. The effect of such legislation is perhaps often overlooked by those who criticise the rule. The Court made the point that given the existence of such legislation, there was no reason to depart from strict legal principle in cases in which such legislation did not apply or was not invoked.[31]

Although the status of the rule in rule in *L'Estrange v F Graucob Ltd* is clear, its application in future cases will remain uncertain. The difficulty lies in determining whether a signed document is contractual. As Bryson J correctly pointed out, this is a threshold question of fact which must be decided before applying the rule. In *L'Estrange v F Graucob Ltd* itself, the existence of a contract was not in issue; there was no question as to whether the sales agreement signed by the purchaser was a contractual document or not. The existence of a signature upon a document that is not contractual will not bind a signor to the terms contained therein. Examples of non-

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26 Spencer, 'Signature, Consent and the Rule in *L'Estrange v F Graucob Ltd*', [1973] *Cambridge Law Journal* 104.

27 Greig and Davis, *The Law of Contract*, (1987) at 611-612.

28 'The Contract', published in P D Finn (ed), *Essays on Contract*, 1987 at 11-12.

29 (2004) 79 ALJR 129 at 137-138 [46]; 211 ALR 342 at 353.

30 'Form and Substance in Legal Reasoning: The Case of Contract', MacCormick and Birks (eds), *The Legal Mind: Essays for Tony Honoré* (1986), Ch 2, 19 at 34.

31 (2004) 79 ALJR 129 at 138 [48]; 211 ALR 342 at 354.

contractual documents include receipts, vouchers or memorandums of a pre-existing contract. Aside from these clear examples, determining whether a signed document is contractual is not always susceptible of a clear and predictable answer. Greig and Davis state that a document will be a contractual document if:

a) it is of a type generally understood in the community as being contractual; or
b) if the recipient is aware that it is a contractual document, or that it contains terms.[32]

Macdonald considers that a contractual document is one which is actually recognised as containing terms by the signor or which a reasonable person would expect to contain terms taking account of the nature and purpose of the document and the circumstances of its use between the parties.[33]

The question whether a signed document was contractual was at issue in *Grogan v Meredith Plant Hire and Triact Civil Engineering Ltd*.[34] There, the English Court of Appeal held that a signature on a time sheet did not incorporate terms contained in another document that the time sheet referred to. The parties had entered into a contract for hire. Incorporation of fresh terms referred to on the time sheet would have varied the contract. The time sheet was not seen as a contractual document but as 'an essentially administrative and accounting document, raised in the execution of an existing contract' and no clauses were incorporated from it. A person would not reasonably expect a time sheet to contain terms giving rise to contractual rights and liabilities.

In *Toll*, the question whether the Application for Credit was a contractual document, and formed part of the contractual relationship between Finemores and Thomson, was framed as a question whether the document was intended to affect the legal relations between the parties. In answering this question in the affirmative, the High Court placed considerable weight upon an acknowledgment made by counsel for Thomson that Mr Gardiner-Garden signed the Application for Credit with the intention of affecting the legal relations between Thomson and Finemores.[35] It is unclear whether the Court of Appeal also had the advantage of such a valuable admission, but given that Court's reasoning, one could assume that it did not. Also relevant to the High Court's finding that the credit application was a contractual

32 Greig and Davis, *The Law of Contract*, (1987) at 614.
33 Macdonald, *Exemption Clauses and Unfair Terms*, (1999) at 7.
34 [1996] TLR 93.
35 (2004) 79 ALJR 129 at 136 [38]; 211 ALR 342.

document was the fact that it was an application by Thomson to become an account customer of Finemores and was intended to cover all future dealings with it. The application had been referred to in Finemores' fax of 12 February 1999. The Court also referred to the absence of evidence at first instance to support a finding that credit applications in the transport industry do not normally contain general terms of contract.[36]

It was not submitted, nor could it be accepted, that the Application for Credit was totally non-contractual in the sense of a receipt or voucher. It would have been apparent to a reasonable person that the document contained contractual conditions, albeit overleaf, because it said so above the space for signature. Upon being filled out, the document amounted to an offer to obtain credit on behalf of Thomson (acting for Alphapharm) which was open to acceptance by Finemores. The transaction itself formed a necessary part of the broader freight and storage agreement. Finemores' request that 'it would be very much appreciated' if Thomson filled out the Application for Credit was not couched in obligatory terms; the request would not suggest to a reasonable person that completion of the Application for Credit was a necessary precondition of the cartage agreement. But given the nature of the transaction, Thomson probably understood this to be the case. At the very least, a reasonable person in Thomson's position would have understood that if the Application for Credit was not completed, then Finemores would not agree to transport Thomson's goods unless an alternative method of payment was arranged.

Notwithstanding that the credit application was signed with the intention of affecting the legal relations between Thomson and Finemores, and that it contained conditions which would be expected to be found in a cartage agreement, it is difficult not to feel some sympathy for Thomson for two reasons. First, the Conditions of Contract were not attached to the Freight Rate Schedule referred to in the fax of 12 February 1999. That fax, it may be recalled, requested Finemores to sign the Freight Rate Schedule 'accepting our Rates and Conditions'. Some conditions were attached, but the Conditions of Contract were not. It is arguable that the Conditions of Contract, being different to those contained in the Freight Rate Schedule, should have been brought to Thomson's attention. Secondly, a reasonable person could be forgiven for assuming that a credit application would contain terms relevant only to the application itself, and not to matters such as liability for risk that pertain to the broader transaction of which it forms a part. Nevertheless, as Bryson J observed, the parties were engaged in commerce, had dealt with each other at arms length, and were not dependent upon each other for guidance. And there was no attempt to conceal the Conditions of

36 (2004) 79 ALJR 129 at 141 [64]; 211 ALR 342.

Contract; Mr Gardiner-Garden was requested to read them overleaf before signing the credit application.

The Court's reasoning clarifies that reasonable notice is not required to incorporate what might be considered an onerous or extraneous term into a document that is signed and known to have contractual effect. But it may still be necessary to ask whether the contractual nature and effect of a signed document was reasonably brought to the attention of the signor. Such an inquiry is relevant if there is a question as to whether the signor knew that the document he or she signed was contractual and would affect his or her legal relations. If vitiating circumstances do not exist, and remedial legislation not invoked, can this rule admit no exceptions? If, for example, the reverse of the credit application contained an onerous clause that was wholly irrelevant to the cartage agreement, would Thomson be bound by such a clause? The Court appeared to place weight on the fact that the parties were substantial corporate entities. One may speculate to what extent this factor influenced the result. Would the Court's decision have been any different if an individual with no ready means of access to legal advice had signed the credit application? In any case, the lesson of *Toll* is abundantly clear; persons entering into contracts must read them before signing.