Written Contracts: What The Big Print Giveth The Fine Print Taketh Away

- **Stewart Nankervis,**
Minter Ellison Morris Fletcher,
Solicitors, Melbourne.

The use of fine print in contractual documents, particularly standard form contracts, is widespread in the construction industry. It is not uncommon for contractors and sub-contractors to use standard purchase order forms, for instance, to access materials for the works to be carried out.

Traditionally, even the most barely legible of contractual terms and conditions have been accepted as being incorporated into the contract document on the basis that "the hard-headed decisions of business people" should not be substituted for a more "lawyerly conscience." [1]

Indeed contract is a form of private law making in which, for the most part, the parties establish their own rules. Certain constraints do exist nevertheless. As long ago as 1957, Lord Denning M.R. remarked:

> "We do not allow printed forms to be made a trap for the unwary".[2]

TRADITIONAL COMMON LAW APPROACH

It is important to make reference to a dichotomy that commonly arises in the interpretation of contractual documents; that being the importance of the signature of the parties to the document in question. Different factual and legal considerations arise from the absence or otherwise of such formalities.

1. Signed Documents

Traditionally, if a party signed or willingly accepted a document containing contractual terms, that party would invariably be bound by the document, irrespective of whether or not it had been read.

Thus, in *L'Estrange v F. Graucob,*[3] a plaintiff signed and acknowledged a printed order form which contained a fine print clause excluding liability should the machine prove unsuitable or defective.

The Court subsequently held that the plaintiff, having put her signature to the document and not having been induced by any fraud or misrepresentation, could not suggest that she was not bound by the terms of the document because she had not read them.

Moreover, at common law, the parol evidence rule invariably operated to render inadmissible matters which might otherwise have cast doubt on the authority of such agreements. In essence, the rule excludes the use of evidence of extrinsic matters to add to or subtract from, or in any manner to vary or qualify, a written contract.

2. Unsigned Documents

In cases where a contractual document has been received by a party but not signed, a different rule applies. Knowledge of the written contents of the document is not presumed. Generally, the common law places an onus on the party seeking to enforce the contract to show that terms or conditions incorporated into that contract were brought reasonably to the notice of the other party.[4]

Thus, the critical issue is whether the proponent of the document has done all that could be reasonably expected of him to bring to the notice of the recipient the existence of the document, the existence of special conditions, and the nature of those conditions.

One factor invariably considered is whether the document would ordinarily be understood as containing the terms in question.[5] If a regular customer is involved, and common terms are used, this can often be inferred.[6]

Another important requirement of reasonable notice is that the actual text of the limiting terms must be made available to the party who is bound by them. It will not usually be enough, for example, to state that the terms in question are available for inspection on request.[7]

CONTEMPORARY APPROACH

1. Signed Documents

(a) Common Law

The authority of *L'Estrange v F. Graucob* is far from unchallenged. In *MacRobertson Miller Airline Services v Commissioner of State Taxation (W.A)*[8] Jacobs J. suggested that if an unreasonable clause is included in terms that are not read and are not likely to be read, that term should not be accepted, irrespective of whether or not the document containing the terms has been signed.

Indeed, the present Chief Justice, Sir Anthony Mason, has cast doubt on the *L'Estrange* decision:

> "Although the principle for which the decision stands has been said to reflect an estoppel, it is not a true example of estoppel because the party who proffers the document does not rely on the signature as an acknowledgement of the conditions and act on it to his detriment. That party knows or has reason to know that the other party has not read and assented to the specific condition. Nor does the principle rest on reliance. Instead, it seems to be based on the importance of a formal signature and the need to exclude an enquiry into the reality of assent. The

requirements of fairness and justice may well call for its re-examination.[9]

It is this concept of fairness and good conscience, as expressed in the emerging principle of unconscionability, that is of particular significance.

Prima facie, a finding of unconscionability on equitable grounds will arise in circumstances where there exists between contracting parties a serious inequality of bargaining power, such that the stronger party takes advantage of the weaker party's position.[10]

In such a form, the principle will ordinarily be of little assistance to commercially competent business people. However, the concept of unconscionability should not be construed too narrowly, and in particular, should not be confined to circumstances of unequal bargaining power where one party is under a special disability in dealing with the other.

The decision of Nathan J. of the Victorian Supreme Court in *George T. Collings (Aus) Pty Ltd v H.F. Stevenson (Aus) Pty Ltd*[11] is illustrative of this trend. The issue before His Honour concerned the validity of a standard form sole agency agreement negotiated between two commercially experienced parties of more or less equal bargaining strengths. The agreement was entitled "Exclusive Sole Agency Agreement", yet contained, in fine print, a clause creating a general agency at the expiration of the sole agency period.

His Honour held, inter alia, that it was unconscionable to imbed into a pro forma contract a term inconsistent with its stated purpose, especially a term submerged in the fine print of the contract.[12]

(b) Statute Law

Section 51AB of the *Trade Practices Act* 1974 states that a corporation engaged in trade or commence, shall not, in supplying or possibly supplying goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Where there has been unconscionable conduct, damages are not available, although injunctions and ancillary orders are available under Section 87 of the Act. These include the power to declare a contract void or to refuse to enforce such contracts.

In sub-section 51AB (2) the Act sets out criteria to be considered by the Court in assessing whether a corporation has engaged in unconscionable conduct including, inter alia, whether the consumer was able to understand any document relating to the supply of goods or services. The Trade Practices Commission has stated that in the context of industry - wide take it or leave it standard form contracts, unconscionable conduct may arise in the particular circumstances if:

(a) The terms of the contract are onerous and their onerous nature is disguised by using fine print, unnecessarily difficult language, or deceptive layout; and

(b) The customer is asked to sign the form without being given an opportunity to consider or to object to such terms, or is given an explanation in summary form which omits mention of onerous provisions.[13]

It is important to note however, that sub-sections 51AB (5) and (6) provide a significant limitation to the operation of this Section. They operate to limit the definition of goods or services to those of a kind ordinarily acquired for personal, domestic or household use or consumption. Moreover, a reference to the supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

Moreover, Section 52 of the *Trade Practices Act*, which deals with misleading or deceptive conduct, or conduct that is likely to mislead or deceive, may play an indirect role in relation to fine print contracts. It is possible that if a document has been signed but not read or, if read, not comprehended, there may still be a Section 52 claim if the party has been induced to sign by representations which are misleading or deceptive.

The decision of His Honour Justice Burchett in *Dibble & Anor v Aidan Nominees Pty. Ltd. & Anor*[14] suggests that if one makes a misrepresentation that induces a party to contract, the misrepresenter cannot avoid liability for it by introducing some qualification in the final agreement when the substance of the misrepresentation is not withdrawn. Thus, in the case referred to, the agent's small print disclaimer was held to be no defence to a breach of Section 52.

The *Trade Practices Act* of course, applies to corporations or persons engaged in trade or commerce between States. However, in relation to intra-state trade or commerce, equivalent sections to those mentioned above exist in the relevant State *Fair Trading Acts* (see, in particular, Section llA).

2. Unsigned Documents

(a) Common law

Reference should be made to the contra preferentum rule of construction. It operates indiscriminately on all contracts, irrespective of whether or not there is equality of bargaining power between the parties.

The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made.[15]

It is therefore incumbent on the party seeking to enforce the contract to ensure that any terms and conditions of that document have been brought to the notice of the other party. Where the terms inserted are unusual or particularly onerous, the enforcing party may be required to take special steps to bring them to the attention of the other party.

In *Interfoto Picture Library v Stiletto Visual Programmes*,[16] a customer had opened a jiffy bag containing photographic transparencies that had been ordered by telephone. On opening the bag, he would necessarily have seen an attached delivery note and could not have possibly failed to observe that there were terms in smaller print on its face.

The delivery note did not require his signature and he did not read the document and did not discover a term imposing

extremely high charges for failure to return the transparencies. It was held by the Court of Appeal that, to the extent that the terms set out in the document were quite usual, the customer was bound by them although he had not bothered to read them.

He was not, however, bound by the unusual terms because the plaintiffs did not do what was necessary to bring these unusual clauses fairly to the customer's attention.

Stephen Kapnoullas and Bruce Clarke, in a recent article published in the Melbourne University Law Review,[17] also make reference to an emerging trend in Canada based on the concept of "reasonableness". The authors refer to the case of *Tilden Rent-a-Car Company v Clendening*,[18] in which the Ontario Court of Appeal commented that:

> "In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know .... that the other party is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances ... the parties seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove fraud or misrepresentation".

(b) Statute Law

The legislative provisions referred to above are of equal relevance to unsigned documents incorporating terms and conditions in fine print.

Consumers in New South Wales may also have recourse to the *Contracts Review Act* (NSW) which commenced operation on 24 April, 1980.

It empowers the Court, if it finds the contract to have been "unjust" at the time it was entered into, to grant various grounds of relief. The Court may refuse to enforce the contract wholly or partly, may declare the whole or part of the contract void, or may vary the contract.

The Act, in Section 9, specifies a number of matters to be considered in determining whether a contract, or a provision thereof, is unjust. Section 9 (2) (g) states as relevant:

> "Where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed".

In considering the physical form of the contract, attention can be expected to be directed to the size, prominence and illegibility of the print and any unjust provisions of the contract, and the language in which it was expressed.

It is important to note, however, that by virtue of Section 6 of the Act, relief pursuant to the Act is restricted to what are commonly termed traditional consumers - that is, consumers of goods, services or land for personal, domestic or household use only. Excluded from seeking relief are the Crown, public or local authorities, corporations and, of course, the unincorporated business person.

Finally, uniform consumer credit legislation operates throughout Australia which requires that documents made pursuant to the *Credit Acts* shall be readily legible. Stringent criteria are listed in the Credit Regulations in relation to the requirements for print and type and reproduction of print or type in documents.

The aim of these provisions is to eliminate small print contracts, although in fact credit providers still use such standard form contracts and they will rarely be perused in any detail by the prospective debtor.

Once again, the ambit of the Acts are somewhat prescribed in that for such credit contracts to be regulated, the debtor must be a natural person. The Federal Court of Australia in *Brownbill & Ors v Esanda Finance Corporation Limited*[19] held that a contract under which the borrower was a company alone was not caught by the *Credit Act*.

CONCLUSION

It will be seen from the above then that while at common law the Courts have made every attempt to recognise the freedom of parties to contract upon their own terms and in their own form, general rules do still exist prescribing at least minimum legibility requirements for contracts.

Brief reference to recent legislative initiatives indicate that these requirements will become more stringent in the future. While the use of fine print in contractual documents will remain, every effort should be made by the contracting parties to bring to notice all relevant terms and conditions of the documents in question.

FOOTNOTES

1. See *Austotel Pty Ltd & Anor v Franklins Self Serve Pty Ltd* 1989 16 NSWLR 582.
2. *Neuchatel Asphalt Company Limited v Barnett* 1957 1 WLR 356, 360.
3. 1934 2 KB 394.
4. *Parker v The South Eastern Railway Company* 1877 2 CPD 416.
5. *Causer v Browne* 1952 VLR 1.
6. *Balmain New Ferry Company Limited v Robertson* 1901 4 CLR.
7. *Oceanic Sunline Special Shipping Company Incorporated v Fay* 165 CLR 197.
8. 1975 133 CLR 125, 142.
9. Mason, A and Gageler, S, "The Contract" in Finn P.D (Ed), Essays on Contract (1987) 1.
10. See *Commercial Bank of Australia Limited v Amadio* 1983 151 CLR 447.
11. 1991 ATPR 41 - 104.
12. Supra, at 52, 622.
13. The Trade Practices Commission, Unconscionable Conduct (March 1987), page 6.
14. 1986 ATPR 40-693.
15. *Wilson v Darling Island Stevedoring & Literidge Company Limited* 95 CLR 43.
16. 1987 2 WLR 615.
17. 1993 MULR Volume 19 "Fine Print in Contracts: From Invisible Ink Cases to Red Ink Rules", page 92, 95.
18. (1978) 83, DLR 400.
19. 1991 ASC 228. ❑