When is a Signed Document Contractual? Taking the 'Fun' out of the 'Funfair'

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Introduction

> 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.[1]

This often cited *dicta* of Scrutton LJ in *L'Estrange v Graucob* is premised on the traditional theories of freedom of contract and the objective view of contract law.[2] Under these approaches the courts' primary function was perceived as being to give effect to what the parties had agreed. A party to a written agreement was taken to have consented to be bound, in a disputed case, by the interpretation which a court might place on the language of the instrument.

By and large the law was concerned with objective appearance, rather than actual intention.[3] The primary justification given by the courts in support of such an approach was the need to ensure the integrity of business transactions.[4] Thus if a party signed a document containing contractual terms that party would be bound by the document, irrespective of whether or not it had been read.

The rule in *L'Estrange v Graucob* has been subject to criticism. Lord Denning, who successfully argued the case for the defendant, subsequently wrote that *L'Estrange v*

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1 *L'Estrange v Graucob* [1934] 2 KB 394 at 403 per Scrutton LJ.

2 Nevertheless, the law recognises some exceptions including *non est factum*, misrepresentation and, in limited circumstances, mistake. In addition, the expanded doctrine of 'unconscionability' has also emerged as an exception to the rule in *L'Estrange v Graucob* by recognising the undesirability of enforcing a contract (even if it has been signed) in circumstances where to do so would be manifestly unfair: see *Commercial Bank of Australia Ltd. v Amadio* (1983) 151 CLR 447. This issue is discussed briefly later in this article.

3 A Mason & S J Gageler in 'The Contract' in P D Finn, *Essays on Contract*, 3rd edn Law Book Co 1987 at 1.

4 See *Life Insurance Co. of Australia Ltd. v Phillips* (1925) 36 CLR 60.

Graucob (together with *Thompson v London, Midland and Scottish Railway Co.*[5]), represented a 'bleak winter' for the law of contract.[6] The former Chief Justice of the High Court, Sir Anthony Mason, in a joint article with S J Gageler, has commented:

> 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 acknowledgment 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 conditions. 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 inquiry into the reality of assent. The requirements of fairness and justice may well call for its re-examination.[7]

One of the difficulties with *L'Estrange v Graucob* is determining whether a document, or transaction, is contractual. For example, Stephen Graw, in his text, states that a document will be contractual in nature:

(a) if it is of a kind which members of the public generally regard as contractual; or
(b) if the person who receives it knows either that it is contractual or that it contains terms that govern his or her dealings with the profferens.[8]

The primary purpose of this article is to analyse the recent decision of the Victorian Court of Appeal in *Le Mans Grand Prix Circuits Pty Ltd v Iliadis (Le Mans)*[9]. The case is interesting because the court split 2-1 on whether the document, signed by the plaintiff, or the transaction that he entered into, was contractual. In so doing, the court had to consider the applicability of the rule in *L'Estrange v Graucob*.

Le Mans Grand Prix Circuits Pty Ltd v Iliadis

The Facts

The plaintiff was injured whilst driving a go-kart at the defendant's racetrack. The plaintiff was attending a promotional function by a local radio station, 3MP, which had booked the defendant's racetrack for a 'corporate function' night for staff members, family and friends. The plaintiff, being an invited guest, did not pay a fee for his attendance at the track.

In evidence, the plaintiff said that he was asked to "sign a particular form so that you can register your name to be able to do a lap of the go-kart race and once I did that I was qualified to drive the faster vehicle."[10] The plaintiff signed the form without reading it. He stated that he was rushed into signing it because there were a number of people

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5 [1930] 1 KB 41.
6 In *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* (1983) 1 QB 284 at 296-7.
7 *Supra* n 3 at 11-12.
8 S Graw, *An Introduction to the Law of Contract*, 3rd edn Law Book Co 1998 at 181.
9 [1998] 4 VR 661.
10 *Ibid* at 662.

waiting and the operators of the track told him to hurry up and sign the document so that he could get out on to the track.

The plaintiff also swore that he treated the form as a "marketing, or probably, registration type form".[11] Expanding on this, he said he thought that his personal details were required for the purpose of issuing him with a licence and, as well, for marketing or promotional purposes. Significantly, in this context, the document that the plaintiff signed commenced with the words 'TO HELP WITH OUR ADVERTISING'.[12] This part of the form was in capital letters and printed in red, the rest being in black.

The plaintiff's friend, Miss Bianchi, who was an employee of 3MP, gave similar evidence. She confirmed being rushed into signing the document. When asked what the form was for, she replied, "I guess – we were there as a group, and it was organised by 3MP who I work for. Everyone in the group signed a form to get our licences. You have to get a licence before you can drive."[13]

The plaintiff's vehicle overturned because of what he alleged was a defect in the track. He sued for breach of contract, negligence and breach of s 52 of the *Trade Practices Act* 1974 (Cth). However, it appears that at the trial the only claim pursued was negligence.

Apart from denying negligence the defendant sought to rely on an exemption clause in the document which the plaintiff had signed. The trial Judge found that the defendant had been negligent on the basis that it had allowed the plaintiff to engage in go-kart racing, an inherently dangerous pastime, without "sufficient education, instruction, experience and testing." On the issue of the exemption clause the trial Judge had concluded:

> Reliance was placed on a disclaimer which was apparently signed by the plaintiff ... The disclaimer itself is in such broad terms that I quite frankly do not understand unless it purports to be a blanket disposal of any legal responsibility at all, what it actually does mean.
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> I am well aware in what the High Court has said in the *Darlington Futures* case ... nevertheless I do not believe that our law ever has been that it is permissible to sign away all responsibility for mishaps which are foreseeable so that a person can be indemnified or exonerated if you wish from liability for a serious negligence.[14]

The defendant appealed. The principal issues for determination by the court were whether the exemption clause formed part of the contract, and if it did, the interpretation of the document. It should be noted that neither party to the appeal sought to uphold the trial Judge's view that it has never been permissible to sign away liability for serious negligence. With respect, there is no doubt that the trial Judge was incorrect in stating this opinion, as it clearly conflicts with what the High Court said in *Darlington Futures Ltd v Delco Australia Pty Ltd.*[15]

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11 *Le Mans Grand Prix Circuits Pty Ltd v Iliadis*, *supra* n 9 at 663.
12 The full text of the document is set out at 669 of the court's judgment.
13 *Supra* n 11.
14 *Ibid* at 664.
15 (1986) 161 CLR 500.

The Majority Judgment in the Court of Appeal

The focus of the majority judgment, Tadgell JA (with whom Winneke P agreed), was on whether the document signed by the plaintiff was contractual, or alternatively if the parties were in a contractual relationship. It is with this issue, rather than the interpretation of the document, that this article concentrates.

Tadgell JA, after reciting the facts and background to the appeal, referred to the ticket cases where it was held that reasonable notice was required before an exemption clause could be relied upon.[16] His Honour then went on to deal with the defendant's argument that signing a document denotes an acknowledgment of the document and a consent to the written contents.

After briefly examining the basis of the rule in *L'Estrange v Graucob*, Tadgell JA noted that it has been subject to criticism. His Honour referred to Greig and Davis[17] who argue that if the signing party has reasonable grounds for believing that the document is not contractual a court should not hold the party bound by its contents. The same authors suggest that the rule might also not apply in a situation where there is no practical opportunity for a party to read the document before signing.[18]

Tadgell JA also referred to the views of Mason and Gageler, as summarised in the introduction to this article, and to the criticism of the rule in *L'Estrange v Graucob* by Spencer,[19] who argues that a defence should be available to a person based on the fact "that he simply did not agree to the term in question".[20]

Tadgell JA determined that it was not necessary to examine in detail the universal validity or desirability of the 'objective theory of contract' because of his finding that there was no contractual relationship between the parties in this case.[21] "The [plaintiff's] attendance at the [defendant's] track, and his participation in go-kart racing were not obviously in pursuance or in the course of a commercial dealing or relationship with the [plaintiff]."[22]

In support of this conclusion his Honour observed that there was no evidence that the plaintiff had paid a fee (it will be recalled that 3MP booked the racetrack). Nor were participants given any notice or indication that any contractual relationship was to exist between them and the racetrack, only a licence to drive.[23]

His Honour referred to the plaintiff's lack of opportunity to read the form, the highlighted part of the document ('TO HELP WITH OUR ADVERTISING') and the lack of explanation from the defendant's employees regarding the document, and concluded:

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16 Reference is also made by his Honour, at 666, to *Causer v Browne* [1952] VR 1.
17 D W Greig & J L R Davis, *The Law of Contract*, Law Book Co Sydney 1987 at 605.
18 *Ibid* at 611.
19 J R Spencer, 'Signature, Consent and the Rule in *L'Estrange v Graucob*' [1973] *CLJ* 104.
20 *Ibid* at 105.
21 *Supra* n 11 at 667.
22 *Ibid.*
23 *Ibid* at 668.

> Nor is there any satisfactory evidence that the [plaintiff] or any other participant was asked to read the form or to treat it as anything more than a registration or application form for the purpose of obtaining a so-called licence to drive a go-kart. It might be thought that the information which the person signing was asked to provide in the form – name, address, telephone number and date of birth and date of signing – was consistent with that. It is not easy to see – at least in the absence of explanation – why a statement of the date of birth was otherwise relevant.[24]

In the light of this finding his Honour did not need to consider the interpretation of the exemption clause. In essence, his Honour found that the document which the plaintiff had signed was not contractual, bearing in mind the facts surrounding the obtaining of the plaintiff's signature.

Dissenting Judgment of Batt JA

A large part of Batt JA's judgment was concerned with the interpretation to be given to the signed document in this case. This aspect of the case will not be discussed in detail because, as already mentioned, this article is more concerned with the effect a party's signature has on a document. Batt JA found that 3MP was not an agent of the plaintiff, or any other person attending the track. However, his Honour concluded that this did not mean that there was no contract between the plaintiff and the defendant.[25] In fact, he found that a contract did exist, as evidenced by the signed document [referred to as Ex.1]:

> The circumstances referred to earlier show, in my judgment, that the [plaintiff's] completion and signature of Ex.1 was the price or quid pro quo for the [defendant's] consent, licence and permission ... which he needed. The known circumstances attending the signing of Ex.1, then, are eloquent of contract. That Ex.1 is contractual is confirmed by its layout and by the expressions used in it. The body of the document commences with a contractual expression par excellence, 'in consideration of'. Thereafter every clause, perhaps every line, contains legal terms of art, which I do not trouble to rehearse here. Therefore, in the absence of evidence proving the existence of a more extensive contract between the [plaintiff] and [defendant], Ex.1 constitutes, in my view, a unilateral contract, that is, promises by the [plaintiff] made binding by the [defendant's] act or acts of consent, licence and permission occurring after the signing of Ex.1.[26]

The plaintiff's evidence concerning his interpretation of the document was rejected by Batt JA as inadmissible opinion evidence.[27] With reference to the top of the form, which stated 'TO HELP WITH OUR ADVERTISING', his Honour was of the view that many retail documents seek similar information without detracting from the contractual nature of the document.[28]

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24 *Ibid.*
25 *Ibid* at 670.
26 *Ibid* at 671.
27 *Ibid.*
28 *Ibid.*

Batt JA distinguished *D. J. Hill & Co. Pty. Ltd. v Walter H Wright Pty. Ltd.*[29] and *Rinaldi & Patroni Pty. Ltd. v Precision Mouldings Pty. Ltd.*[30] on the basis that the documents in those cases (delivery dockets and cart notes) were not contractual. Furthermore, the signing of the documents took place after the contracts had been concluded.

The plaintiff also argued that no contract existed between him and the defendant on the ground that the defendant had failed to perform all of the acts expressed as constituting consideration in the document he had signed, in particular, the failure to 'hire' the 'go-kart' to him. Clearly the 'hire' was to 3MP. His Honour dismissed this argument on the grounds that the 'hire' to 3MP for delivery to its staff and their friends for their use constituted consideration.[31]

Batt JA then proceeded to deal with the exceptions to the rule in *L'Estrange v Graucob* and found that there was no evidence of fraud or misrepresentation by the defendant. His Honour also noted the academic and judicial criticism of the rule in *L'Estrange v Graucob* but concluded that Mason and Gageler had simply stated that the requirements of fairness and justice may well call for re-examination of the principle. He observed that Dr. Finn (as he then was) in the same text[32] appeared to accept the correctness of the statement of Scrutton LJ. Batt JA also referred to the judgments of Dawson J in *Taylor v Johnson*[33] and Brennan J in *Oceanic Sun Line Special Shipping Co. Inc. v Fay*[34] as accepting the principle espoused in *L'Estrange v Graucob*. Clearly, Batt JA supports the retention of the rule.

The plaintiff also attempted to argue that where a clause is onerous or unusual then actual notice is required. Reference was made to *Interfoto Picture Library Ltd. v Stiletto Visual Programme Ltd.*[35] Batt JA distinguished that case on the basis that the delivery note was unsigned, whereas here "signing affords the person who signs the opportunity to become aware of the contents of the document."[36]

Finally, Batt JA dealt with the interpretation of the exemption clause and concluded:

> ... I do not consider that *Darlington Futures* and other decisions of the High Court, at any rate, warrant some different approach, perhaps relying upon the now rejected doctrine of fundamental breach, in the case of a contract with a consumer or other non-commercial contract. For the rationale in the Australian cases is that exemption clauses in commercial contracts are to have applied to them ordinary principles of construction, admittedly with clear regard being paid to their context and their nature and object.[37]

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29 [1971] VR 749.
30 [1986] WAR 131.
31 *Supra* n 11 at 672.
32 *Supra* n 3 at 133.
33 (1983) 151 CLR 422.
34 (1988) 165 CLR 197 at 228.
35 [1989] QB 433.
36 *Supra* n 11 at 674.
37 *Ibid* at 676.

Analysis

A major difficulty with *Le Mans* is that the court's view of the status of the rule in *L'Estrange v Graucob* is not clear. Batt JA leaves us in little doubt that he supports the *dicta* of Scrutton LJ. However, Tadgell JA's judgment is somewhat equivocal. His Honour refers to criticism of the rule and one is left with the impression by the general tenor of his Honour's judgment that he has some sympathy with this criticism. Ultimately, however, Tadgell JA did not need to address the issue as he found that the plaintiff and defendant were not in a contractual relationship.

There is another aspect of Tadgell JA's judgment which merits discussion. His Honour said:

> Counsel for the [defendant] was disposed to concede in his reply that contractual documents containing an onerous exemptive provision must be brought to the notice of the party against whom they are to be enforced, and contended that in this case the provision in question was so brought. Assuming, without deciding, that the term on which the [defendant] sought to rely is onerous in the relevant sense, and that the concession was well made (as to which see, for example, the judgment of Bramwell LJ in *Parker v South Eastern Railway Co.* at 428, the judgment of Jacobs J referred to above and *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989] QB 433) ...[38]

This *obiter* appears to be a guarded acceptance of the view that something extra must be done to bring *onerous* provisions to the notice of parties who are presented with a document to sign. The mere provision of an opportunity to read the document may not be enough. Such an approach clearly constitutes a departure from the rule in *L'Estrange v Graucob,* but one which has been flirted with in the past. In *MacRobertson Miller Airline Services v Commissioner of State Taxation (W.A.)*[39] 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. Similar approaches have also been adopted in foreign jurisdictions. In a Canadian case, *Tilden Rent-A-Car Co. v Clendenning*,[40] Dubin JA in the Ontario Court of Appeal commented:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely upon the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party 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

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38 *Ibid* at 667.

39 (1975) 133 CLR 125 at 142.

40 (1978) 83 DLR (3d) 400.

knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.[41]

Despite these observations, it must be said that on this issue the law in Australia remains uncertain. As noted in the judgment of Batt JA, referred to earlier, there is substantial authority to suggest that the rule in *L'Estrange v Graucob* still prevails, and that knowledge of the written contents of a document will be presumed if it is signed by a party. It is only where a contractual document has been received by a party and *not* signed that a different rule applies, namely, that the party relying on the document's terms must establish that reasonable or sufficient notice of those terms was given to the other party. This approach is supported by Batt JA in this case, who referred to the *Interfoto* case but distinguished it on the basis that the document involved in that case was unsigned.

Whilst there may be some doubt as to whether the failure to bring onerous clauses to the notice of a party prior to signing a document avoids the rule in *L'Estrange v Graucob*, an acknowledged exception to the rule is the existence of a 'misrepresentation'. In *Le Mans* it is interesting that both Tadgell JA and Batt JA concluded that there was no misrepresentation by the defendant in relation to the document which the plaintiff had signed. Yet in evidence the plaintiff said that he was advised that his signature was required so that he could drive a faster vehicle. Unfortunately, because of the paucity of evidence the authors are unable to comment further, except perhaps to say that this aspect could have been examined in more depth by the court, bearing in mind cases like *Curtis v Chemical Cleaning & Dyeing Co.*[42]

Furthermore, the failure to pursue the alleged breach of s 52 of the *Trade Practices Act* also seems surprising. Obtaining the signature of a party to a contract on the basis of misleading statements or promises has consistently been adjudged as constituting misleading conduct in breach of s 52, as in *Dibble v Aidan Nominees Pty. Ltd.*[43] and *Lezam Pty. Ltd. v Seabridge Australia Pty. Ltd.*[44] Misleading a person into signing a document on the basis that it is an application form for a licence or a 'marketing' document when in fact it purports to be a contractual document containing exemption clauses would, if established as a fact, appear to be a breach of s 52.

There are two further issues that were not even argued before either the trial Judge or the Appeal Court in *Le Mans*, namely, the applicability of the implied terms of the *Trade Practices Act* and the doctrine of 'unconscionability'. Section 74 of the *Trade Practices Act* provides, inter alia, that in a contract for supply by a corporation of services to a 'consumer'[45] there is an implied warranty that the services will be rendered with due care and skill. In this case the defendant was a corporation. 'Services' is defined in s 4(1)(a)(ii) as including "the provision of, or of the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction", which would appear

41 *Ibid* at 408-9.
42 [1951] 1 KB 805.
43 (1986) ATPR 40-693.
44 (1992) ATPR 41-171.
45 In this context a 'consumer' is a person who acquires services at a price which does not exceed $40,000, or if the price exceeds $40,000 the services are of a kind which are ordinarily acquired for personal, domestic or household use or consumption: s 4B(1)(b).

to cover the use of a go-kart track. Significantly, s 68 of the Act renders the use of exemption clauses in 'consumer' type contracts void.

Section 74 was not pleaded by the plaintiff and was not considered. However, in the authors' view this would have presented enormous obstacles for the defendant, because if the judgment of Batt JA is accepted as correct, that is to say, that there was a contract for hire of the go-kart, then the *Trade Practices Act* would apply and the exemption clause would be void. If on the other hand the judgment of Tadgell JA represents the correct view there would be no contract and the exemption clause would be inapplicable.

As noted earlier,[46] the doctrine of 'unconscionability' has emerged as another clear exception to the rule in *L'Estrange v Graucob*. A court will set aside a harsh bargain, even if freely entered into, if the terms can be seen objectively to offend good conscience and equity. This equitable doctrine now has statutory backing in the form of Part IVA of the *Trade Practices Act*. In particular, s 51AB of the Act prohibits unconscionable conduct in connection with the supply or possible supply of goods or services to persons who acquire "goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption."[47]

The Victorian Supreme Court case of *George T. Collings (Aust.) Pty. Ltd. v H.F. Stevenson (Aust.) Pty. Ltd.*[48] lends some support to the argument that documents of the type signed by the plaintiff in *Le Mans* are unconscionable. Without going into the facts in detail, in the *George Collings* case a signed agreement was set aside on the grounds that the document was "incorrectly and unfairly entitled"[49] and because onerous provisions had been "submerged in the fine print of the contract". It will be recalled that in *Le Mans* the bold red print highlighted at the start of the document signed by the plaintiff suggested that it was a 'marketing' document, when in fact it purported to be contractual and contained an 'onerous' exemption clause. Whilst not necessarily suggesting that the document was 'unconscionable' in this case, as the plaintiff was not under any apparent disability,[50] it would at least seem to have been an argument worth raising.

Conclusion

Le Mans highlights the importance of the legislative provisions incorporated in the *Trade Practices Act*, and parallel State legislation, which are designed to counter the use of exemption clauses in 'consumer' contracts. Furthermore, the attention given to *L'Estrange v Graucob* in the case underlines the tension between the need for certainty as compared to fairness in contractual transactions.

Spencer has argued in relation to *L'Estrange v Graucob:*

> The truth is that whatever may have been Graucob Ltd.'s intentions disreputable companies put harsh clauses in minute print in order to 'put one

46 *Supra* n 2.
47 Section 51AB(5).
48 (1991) ATPR 41-104.
49 *Ibid* at 52,622.
50 The same thing could be said about the plaintiff in the *George Collings* case, which is the reason why the decision in that case is open to some criticism.

> over' people like Miss L'Estrange. Then why should people in her position not be allowed to deny their apparent consent to the clause because the company either knew or ought to have known that their mind did not go with their apparent consent?[51]

In *Pondcil v Tropical Reef Shipyard Pty. Ltd.*[52] Cooper J referred to the 'reasonable objective expectation test' in relation to the question of incorporation of an exemption clause in the context of prior dealings. However, the *Le Mans* case shows the difficulty of such a test. Batt JA refers to the fact of signature and the contents of the document, whereas the judgment of Tadgell JA examines the circumstances surrounding the signing of the document and concludes that the parties were not in a contractual relationship. Ultimately, in the authors' view the question that must be asked is similar to that posed by Graw at the beginning of this article: Would the person signing the document expect it to contain contractual terms? In the *Le Mans* case we believe the answer given by Tadgell JA was correct because the circumstances attending the signing of the document did not indicate the existence of a contract. However, the fact that the court was split illustrates the inherent difficulty of determining the outcome of this type of dispute.

Whilst there is no doubt that the significance of the rule in *L'Estrange v Graucob* has generally been diminished in Australia by the use of s 52 of the *Trade Practices Act* and the doctrine of 'unconscionability', in cases like *Le Mans* where such laws were not raised, or at least not pursued, the status of the rule remains an important issue.

It must be said, however, that such cases will be rare. In this day and age, the bottom line is that even when a contractual transaction has been entered into, if it involves a 'consumer' acquiring goods or services, the 'consumer' is protected against the unfair use of exemption clauses by the other party, and has non-excludable rights guaranteeing the quality and standard of the goods or services pursuant to Div 2 of Pt V of the Trade Practices Act and equivalent State legislation. The existence of these rights is perhaps still not widely appreciated.

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51 *Supra* n 19 at 116. Although Tadgell JA refers to Spencer's criticism it is unfortunate that his Honour does not give any clear indication as to whether he endorsed the authors' view. Tadgell JA felt there was no need to do so because of his ultimate finding that there was no contractual relationship between the parties.

52 (1994) ATPR Digest 46-134.