Fine Print in Contracts : Can You Rely On It?

by

Bruce Clarke and Steve Kapnoullas

(Serial No. 90)

ISBN 0 85590 715 0

FACULTY OF BUSINESS WORKING PAPERS

This series of Working Papers has been established to encourage the dissemination of research and work in progress undertaken by the staff and postgraduate students of the Faculty of Business, Swinburne University of Technology. Each paper is refereed before publication. Comments are welcome and should be directed to the author(s) of the relevant paper.

Enquiries concerning the Faculty of Business Working Papers should be directed to:

The Editor
Working Papers
Faculty of Business
Swinburne University of Technology
PO Box 218
Hawthorn Vic 3122

Additional copies of this paper are available at cost upon request.

Fine Print in Contracts : Can You Rely on it?

Standard form contracts (contracts of adhesion) abound in the marketplace. The growth of such a phenomenon is easy to explain. From the perspective of the modern marketplace standard form contracts facilitate the flow of goods and services and are viewed by many as an adjunct to mass marketing. As one American commentator has remarked:

> "Adhesion contracts were brought into being by the advances in science which raised techniques of production to a level that led to hitherto unparalleled possibilities for manufacturing goods and producing services to large segments of the population to whom these were formerly unobtainable. The possibilities are contingent on mass production and mass marketing under which old forms of contract based on individual bargaining and individual consent become altogether inadequate and above all, time consuming, since mass marketing is predicated on mass contracting..."[1]

The practice, although quite understandable from the viewpoint of the mass supplier of goods or services in the marketplace, can be contentious. The use of standard form contracts in consumer

---

[1] Bolgar, "The Contract of Adhesion : A Comparison of Theory and Practice" (1972) 20 Amer J Comp L 53 referred to in Burgess, "Consumer Adhesion Contracts and Unfair Terms : A Critique of Current Theory and a Suggestion" (1986) 5 Anglo-Am L Rev 255. See also Beale, "Inequality of Bargaining Power" (1986) 6 Oxford J Legal Studies 123 and Thal, "The Inequality of Bargaining Power Doctrine : The Problem of Defining Contractual Unfairness", (1988) 8 Oxford J Legal Studies 17.

transactions, in particular, presents problems. Such contracts can be an instrument of abuse, in the sense of containing harsh or oppressive terms. In many cases the consumer, signing or accepting the document, does not fully understand or comprehend the precise nature of the contractual terms and, even if such knowledge was possessed, would have no real opportunity to negotiate over those terms.

The dichotomy between the fair and the unreasonable standard form contract was clearly explained by Lord Diplock in *Schroeder Music Co Ltd v Macaulay*:[2]

> Standard forms of contracts are of two kinds. The first, of very ancient origin, are those which set out the terms upon which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they related, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.
>
> The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the

---

2 [1974] 3 All ER 616, at 624.

> parties to it, or approved by any organisation representing the interest of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it'.
>
> To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power.

The purpose of this article is to briefly analyse how the law of contract deals with disputes concerning standard form contracts, whether signed by the parties or not, and how recent statutory reforms have modified the common law approach. Particular emphasis will be placed on recent case law.

Traditional Contract Law Theory

The emergence of the standard form contract has been encouraged by traditional theories of freedom of contract and the objective view of contract law.[3] The courts saw their primary function to give effect to what the parties had agreed. A party to a written agreement was to be taken to have consented to be bound, in case of dispute, by the interpretation which a court might place on the language of the instrument. By and large the law was in general concerned with objective appearance rather than with actual intention[4] . The primary justification given by the courts in support

---

3 See, for example, the discussion in Starke, Seddon and Ellinghaus, Cheshire & Fifoot's Law of Contract, Butterworths, 1992, Ch 1.

4 Sir Anthony Mason and Gageler, "The Contract" in Finn (ed) Essays in Contract, 1987, Law Book Co, 1.

of such an approach was the need to ensure the integrity of business transactions[5] .

Thus, if a party signed or accepted without objection a document containing contractual terms that party would invariably be bound by the document, irrespective of whether or not it had been read. The highwater mark of this approach was reached in 1934 with the decision delivered in *L'Estrange v Graucob*.[6] In that case the plaintiff bought an automatic slot machine for use in her cafe. The plaintiff signed a printed order form, the fine print of which contained a clause excluding liability should the machine prove unsuitable or defective. The plaintiff did not read the order form, although she acknowledged awareness that there was printed material on the form. The court found against the plaintiff:

> In this case the plaintiff has signed a document headed 'sales agreement', which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation cannot be heard to say that she is not bound by the terms of the document because she has not read them.[7]

Strict adherence to this doctrine was a source of alarm to some observers of the law.

> Rational planning and risk assumption would not be served by enforcing the part of a contract written in lemon juice which could only be read over the heat of a candle when the one signing had not been informed of the secret. Some

---

5 *Life Ins Co v Phillips* (1925) 36 CLR 60, at 77.
6 [1934] 2 KB 394.
7 Scrutton LJ at 414.

> business forms and the ways they are used are almost this bad. There is some danger that a judge, temporarily bereft of his common sense, could apply the duty-to-read slogan to what really is close to an invisible ink case and enforce the document as written.[8]

Fortunately, such concerns have largely proved to be unfounded. Even the judges in *L'Estrange v Graucob* acknowledged that there are limits to the duty-to-read before signing or accepting a contract. The court accepted that the advantages of certainty in contractual relations cannot prevail against the harm and injustice that result from fraud or misrepresentation.

In cases where the standard form contract has been received by a party, but not signed, a different set of rules applies. Broadly, the party relying on the terms must establish that all that was reasonable (or reasonably necessary) in the circumstances of the case was done to bring the terms to the notice of the other party. [9] In relatively recent times some matters taken into account pursuant to these rules have evolved in favour of receiving parties. These rules are particularly relevant in determining the enforceability of standard form contracts. One factor invariably taken into account is whether the document containing the terms would ordinarily be understood as containing such terms.[10] Another important matter is whether the term inserted in the

---

8 S Macaulay, "Private Legislation and the Duty to Read", [1966] 19 Vand LR 1051, 1056.

9 *Parker v The South Eastern Railway Co* (1877) 2 CPD 416.

10 *Chapelton v Barry Urban District Council* [1940] 1 KB 532; *Causer v Browne* [1952] VLR 1. See also Clarke, "Notice of Contractual Terms" [1976] Cambridge Law Journal 51; Coote, "Incorporating Exemption Clauses" (1972) 35 Mod Law Rev 179; MacDonald, "Incorporation of Contract Terms by a 'Consistent Course of Dealing"', (1988) 8 Legal Studies 48; and Swanton, "Incorporation of Contractual Terms by a Course of Dealing", (1988) 1 JCL 223.

contract is unusual or particularly onerous, in which case the party seeking to enforce it may be required to take special steps to bring it to the attention of the other party.[11]

Jacobs J in *MacRobertson Miller Airline Services v Commission of State Taxation (WA)*[12] suggested that if an unreasonable term is included in terms which are not read, and are not likely to be read, there is no acceptance of that term. This view appears to have been advocated by his Honour, irrespective of whether the contract containing the terms had been signed or not. It can thus be seen that the authority of *L'Estrange v Graucob* was clearly being challenged.

In Canada, an exception to the rule developed in *L'Estrange v Graucob*, based on the concept of 'reasonableness', is progressively emerging. For instance, in *Tilden Rent-A-Car Co v Clendenning*,[13] the plaintiff had comprehensively insured a motor vehicle pursuant to a policy which contained a provision, in fine and faint print, excluding liability should the driver involved in an accident have consumed any intoxicating liquor 'whatever be the quantity'. The Ontario Court of Appeal held that the clause could not be relied upon. Dubin JA 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 on 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

---

11 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 and *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461.

12 (1975) 133 CLR 125, at 142.

13 (1978) 83 DLR (3d) 400.

> 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 knowledge of such terms to prove either fraud, misrepresentation or *non est factum.*[14]

By way of further example reference should be made to the decision of the Californian Supreme Court in *Steven v The Fidelity and Casualty Co of New York.*[15] In that case the defendant, a life insurance company, issued policies from a vending machine at airports. Owing to the cancellation of his scheduled flight the deceased, the plaintiff's husband, was obliged to use a substitute flight. The insurers argued that Steven was not riding as a passenger as defined under the policy. The trail judge accepted this contention.

On appeal this finding was reversed. The Supreme Court of California took the view that the insurer should have plainly and clearly brought the limitation to Steven's notice. As the headnote states, a life insurer issuing policies on a mass basis is obliged to give clear notice of non-coverage in a situation where the public would reasonably expect coverage.

Finally, it should be noted that Australian courts seem to be in the process of recognising an expanded jurisdiction in equity to grant relief on the basis of 'unconscionability' where the circumstances

---

14 At 408-9. Note that in Australia, s 37 of the Insurance Contracts Act 1984 (C'wth) now deals with notification of unusual terms in contracts of insurance.

15 27 Cal Reptr 172 (1962).

are such that it would be 'unfair and harsh' for the other party to insist on performance. Traditionally this doctrine has recognised that certain classes of people could not be held to contracts they signed or accepted, despite their careless failure to read and protect themselves. This rule protected such people as illiterates, those of limited mental ability or minors.

The doctrine has recently been resurrected. In the well known case *Commercial Bank of Australia Ltd v Amadio* [16] the High Court of Australia set aside a guarantee given to the bank by the plaintiffs. The guarantee was designed to secure the debts incurred by the plaintiffs' son, who was considerably overdrawn. The plaintiffs were quite elderly and of Italian descent, possessing little grasp of the English language. They obtained no independent legal advice, and were under the impression that their son's business was quite prosperous. Deane J stated that this equitable jurisdiction:

> ...is long established as extending generally to circumstances in which (i) a party to the transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) the disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances...[17]

---

16 (1983) 57 ALJR 358. See also *National Australia Bank Limited v Nobile & Anor* (1988) ATPR 40-856 and *Nolan v Westpac Banking Corporation* (1989) ATPR 40-982 and the discussion in Sneddon "Unfair Conduct in Taking Guarantees and the Role of Independent Advice" (1990) UNSW Law Journal 302 and O'Donovan, "Guarantees : Vitiating Factors and Independent Legal Advice", (1992) 66 LIJ 51.

17 At 369. It is beyond the scope of this article to discuss the impact of *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 in the area of unconscionability. Amongst the plethora of literature dealing with that topic readers are referred to Bagot, "Equitable Estoppel and Contractual Obligations in the Light of Waltons v Maher", (1988) 62 ALJ 926; Clark, "The

Statutory Reform

Apart from developments brought about by the courts, there have been other forces at work which impact upon the use of the standard form contracts. Statutory reform has taken place in areas in which the common law of contract has failed adequately to protect a party who is economically weaker from the greater bargaining power of another.[18] Divisions 2 and 2A of the Trade Practices Act 1974 (Cth), which remove the effect of exclusion clauses in relation to the quality and description of goods and services, is a good example.

Section 52 of the Trade Practices Act, which deals with misleading or deceptive conduct or conduct which is likely to mislead or deceive, has had a significant impact in the contractual area. A detailed analysis of the section is not possible because of space constraints.[19] However, a few case examples serve to illustrate its importance.

In the context of advertising it has been held that qualifications referred to in fine print may not be effective to negate a false or

---

Swordbearer has Arrived : Promissory Estoppel and Waltons Stores (Interstate) Ltd v Maher", (1989) 9 University of Tasmania Law Review 68; Stoljar, "Estoppel and Contract Theory", (1990) 3 JCL 1 at 16; Parkinson, "Equitable Estoppel : Developments after Waltons Stores (Interstate) Ltd v Maher, (1990) 3 JCL 50; and Sutton, "A Denning Come to Judgment : Recent Judicial Adventures in the Law of Contract", (1989) 15 Uni of Qld Law Journal 131.

18 Sir Anthony Mason and Gageler, op cit, note 4, p.27.

19 Readers are referred to the excellent article by His Honour Mr Justice French, "A Lawyer's Guide to Misleading or Deceptive Conduct", (1989) 63 ALJ 250. See also Pengilley, "Section 52 of the Trade Practices Act: A Plaintiff's New Exocet", (1987) 15 ABLR 247 and Healy and Terry, Misleading and Deceptive Conduct, CCH, 1991.

misleading impression.[20] For example in *Henderson v Pioneer Homes Pty Ltd*[21] Smithers J commented:

> If a document is addressed to simple or ordinary people and contains a firm, prominent and simple assertion which all can understand the impression created thereby is not to be washed away by implications said to be lurking in statements positive rather than negative in form, in a legend in the advertisement, the alleged full import of which is not stated. The sort of reader in contemplation is hardly likely to think that what is stated so plainly and attractively in lines one and two is being cancelled by implications to be gathered from the **small print.** (emphasis added)[22]

In *Dibble & Anor v Aidan Nominees Pty Ltd & Anor*[23] the applicants, a husband and wife, signed a lease agreement with Aidan Nominees (Aidan). The Dibbles were experienced in the fish and chips business, but were described by the trial judge, Muirhead J, as 'pretty trusting folks to whom legal documents meant little'.[24] They were assured by Aidan that they would have the sole right to sell fish and chips at the food market involved. After a quick examination of the lease documents the Dibbles signed it on the assumption that it gave effect to the verbal statements referred to. However, the document expressly reserved to the lessor, Aidan, the capacity to grant various rights to others to sell foods (including chips).

The Dibbles knew that they were selling opposite an already established stallholder who sold chips, but were assured by Aidan

---

20 See H Jordan, "The Asterisk in Advertising", TPLB, Vol 6, 1990 at 42.
21 (1980) ATPR 40-159.
22 At 42,247.
23 (1986) ATPR 40-693.
24 At 47,614.

that this stallholder would stop selling chips as soon as the Dibbles commenced business. The established stallholder did not stop selling chips and this affected the takings of the applicants' business, which were disappointing.

At common law the parol evidence rule would have created potential obstacles in relation to the oral representations. Furthermore, although it was not argued that Aidan's representations constituted a collateral contract, there would be difficulty in enforcing any alleged collateral contract on the grounds of its inconsistency with the main contract.[25] The Dibbles, however, successfully claimed that there was a breach of s 52 in that the oral representations by Aidan constituted misleading or deceptive conduct. Mr Justice Muirhead retraced the prior authorities and noted that s 52 is aimed to protect the 'astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated men and women of various ages pursuing a variety of vocations'.[26]

The significance of the decision is that if a document has been signed, but either not comprehended or in fact unread, there may still be a s 52 claim if a party has been induced to sign it by representations which are misleading or deceptive.

---

25 *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133 (HC). Discussed by Phillips and Carter, "The Demise of Hoyt's Pty Ltd v Spencer", (1990) 2 JCL181.

26 At 47,619. See Clarke, "The Death of the Reasonable Man", (1991) 65 LIJ 294.

By way of further example reference should be made to *Henjo Investments Pty Ltd & Ors v Collins Marrickville Pty Ltd*.[27] In that case the purchaser of a licensed restaurant alleged that it had been induced to enter into a contract to buy the restaurant by virtue of a representation, inter alia, that its seating capacity was 128. In fact, although the restaurant could physically hold that number of people, it was licensed to hold only 84 persons. Wilcox J held, at first instance, that the respondents' failure to mention this restriction constituted misleading or deceptive conduct and the Full Federal Court affirmed his decision on appeal. Furthermore, although there were clauses in the agreement signed by the purchaser attempting to negate the effect of pre-contractual representations, these were held to be ineffective as they could not operate to exclude the operation of s 52. As Wilcox J said:

> If in fact the misleading conduct of the respondent has induced an applicant to enter into an agreement that inducement is not negated because in the agreement itself, the applicant says to the contrary.[28]

The final point to note with respect to s 52 is that it is well established that breach of the section is not dependent on proof of intent. As Muirhead J remarked in *Henderson v Pioneer Homes Pty Ltd*, an 'applicant need not prove an intent to deceive merely the fact of deception'.[29]

---

27 (1987) 72 ALR 601. On appeal (1988) 79 ALR 83.

28 At 613.

29 At 47,619 referring to the decision of the High Court in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 216.

Although the operation of s 52 is wide it would not, in the absence of misleading or deceptive conduct, release a party from a bargain which was unconscionable. A more recent trend is the introduction of statutory provisions having a more general application to unfair contracts, such as s 52A of the Trade Practices Act, mirror provisions in some State Fair Trading Acts and in New South Wales the Contracts Review Act 1980. These provisions enable courts to grant relief to 'consumers' from unfair terms and from the oppressive operation of contracts.[30] Section 52A(1) provides that a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Sub-section (2) provides that in determining whether there has been a contravention of sub-s (1) the court may have regard to:

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

---

30 Discussed by Goldring, "Certainty in Contracts, Unconscionability and the Trade Practices Act : The Effect of Section 52A", (1988) 11 Syd Law Rev 514 and Taperell, "Unconscionable Conduct and Small Business : Possible Extension of S 52A of the Trade Practices Act 1974", (1990) ABLR 370. In his article Taperell refers to the recommendations in 1990 of the Beddall Committee on Small Business in Australia that section 52A be extended to include small business transactions, including retail/commercial tenancy agreements, where a small business is disadvantaged. Taperell goes on to say that this has been a long standing debate.

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

It should be noted that sub-s (5) limits the operation of these provisions to 'consumer' type transactions by defining goods or services as being of 'a kind ordinarily acquired for personal domestic or household use or consumption'.

Provisions such as these conform with and expand upon the present tendency of the courts to give the established equitable grounds wider operation These developments have further underlined the decline of freedom of contract as a paramount principle in the field of contract law.[31]

Recent case law

The general shift in judicial attitude away from the sanctity of contract doctrine can be evidenced by two recent cases dealing with contracts containing 'fine print'. In both cases the parties seeking to

---

31 Sir Anthony Mason and Gageler, note 4, p.28.

avoid the contracts had not read the written contents, and both contained what could be described as onerous or unusual terms. The first case, *Interfoto Picture Library v Stilletto Visual Programmes Ltd*,[32] is a decision of the Court to Appeal in England. Whilst the case did not involve a 'typical' standard form contract, the court canvassed issues relevant to the use of such documents. *George Collings (Aust) Pty Ltd v H R Stevenson (Aust) Pty Ltd*,[33] on the other hand, a decision of Nathan J of the Victorian Supreme Court, squarely raised the issue of the enforceability of a signed standard form document.[34]

The *Interfoto* case

The facts of the case are reasonably straightforward. The defendant was an advertising agency which required photographs for a presentation to a client. The plaintiff ran a transparency library. The defendant telephoned the plaintiff, with whom it had not previously dealt, enquiring whether the plaintiff had any suitable photographs. The plaintiff forwarded forty seven transparencies, packed in a bag, together with a delivery note.

The delivery note stated the date of dispatch, 5 March 1984, and the date of return was clearly specified as being fourteen days later, 19 March. At the bottom under the heading 'Conditions' there were printed nine conditions, the important one in the instant case

---

32 (1988) 1 All ER 348. For an excellent analysis of the *Interfoto* case, see MacDonald, "The Duty to Give Notice of Unusual Contract Terms", (1988) Journal of Business Law 375. Also the note by Baxt in (1989) 63 ALJ 429.

33 (1991) ATPR 41-104.

34 Significantly, neither case involves exclusion clauses the use of which is regulated in consumer transactions by the Trade Practices Act 1974 and in Victoria by the Goods (Sales and Leases) Act 1981.

being condition number 2. It provided for all transparencies to be returned within 14 days, otherwise a holding fee of £5 per day plus VAT would be payable for each transparency.

The defendant put the transparencies aside, and forgot to return them until 2 April. The plaintiff claimed the sum of £3783.50, in accordance with condition 2, for retention of the transparencies from 19 March to 2 April.

In the court below evidence was given that most photographic libraries charged less than £3.50 per week for retention of transparencies. Surprisingly it was not argued that condition 2 constituted a penalty.[35] Rather, the focus was on whether it formed part of the contract between the parties. The trial judge found that it did and entered judgment for the plaintiff. His decision on this point was reversed by the Court of Appeal.

Although this was not a case involving exclusion clauses, their Lordships hearing the appeal drew heavily on case law in that area, particularly *Parker v S E Railway Co* and *Thornton v Shoe Lane Parking Ltd.* As the delivery note was an unsigned document, the question arose as to whether reasonable notice had been given in relation to condition 2. In *Thornton's* case,[36] Lord Denning dealt

---

35 At 358 Bingham LJ said, 'In reaching the conclusion I have expressed I would not wish to be taken as deciding that condition 2 was not challengeable as a disguised penalty clause. This point was not argued before the judge nor raised in the notice of appeal. It was accordingly not argued before us. I have accordingly felt bound to assume, somewhat reluctantly, that condition 2 would be enforceable if fully and fairly brought to the defendant's attention'.

36 Op cit, note 11.

with a clause exempting a car park proprietor from liability f(personal injury. In the course of his judgment, His Lordship said:

> I do not pause to enquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466. In order to give sufficient notice, it would need to be painted in red ink with a red hand pointing to it, or something equally startling.[37]

In the Court of Appeal, Bingham LJ relied heavily on Lord Denning's approach. The defendant should have realised that the delivery note contained contractual conditions, but only those which one might usually or reasonably expect. The crucial question was whether the plaintiff could be said to have fairly and reasonably brought condition 2 to the notice of the defendant. His Lordship concluded that the defendant was not relieved of liability because it did not read the conditions, but because the plaintiff did not do what was necessary to draw the unreasonable and extortionate clause to the defendant's attention. Similarly, Dillon LJ said:[38]

> It is, in my judgment, a logical development of the common law into modern conditions that it should be held, as it was in *Thornton v Shoe Lane Parking Ltd*, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.

---

37 At pp.169-70.
38 At 352.

The defendant's appeal was, accordingly, allowed, although it was ordered to pay £3.50 per week per transparency on a quantum meruit basis for retention of the transparencies beyond a reasonable period.

Some of the implications of the *Interfoto* case will be examined later, but it should be reiterated that, unlike *L'Estrange v Graucob* the case did not deal with a signed document. Furthermore, condition 2 was viewed as being onerous and unusual so that in a 'semantic' sense it could be argued that *Interfoto* did not concern a standard form document (in the sense that the plaintiff's contract was not commonly used).[39] It is now appropriate to discuss the *George Collings* case, which involved both a signed document and one which was commonly used in the real estate industry but which, like the *Interfoto* case, contained some onerous clauses.

The George Collings Case

The issue before the court essentially concerned the validity of a standard form sole agency agreement published by the Real Estate and Stock Institute of Victoria (RESI). Submerged in the fine print of the standard form agreement was a clause creating a general or open agency at the expiration of the sole agency period, unless the vendor notified the agent in writing to the contrary. The clause provided that the sole agent remained an agent for the sale for an indeterminate period with the right to receive a commission in the event of an able purchaser, within the terms of the appointment,

---

39 See MacDonald, op cit, note 32 at p.379 who says, "A clause can be unusual without being onerous or unreasonable, and vice versa; but Dillon CJ clearly regarded the clause before him as both."

being introduced at any time to the vendor by the agent. In this case, the plaintiff real estate agent, almost three months after the expiration of the RESI sole agency agreement entered into with the defendant vendor, produced a willing and able purchaser for the vendor's commercial site. The vendor declined to sell. The agent sued for unpaid commission. The defendant resisted the claim on a number of grounds, including (i) the general agency clause was 'unconscionable', (ii) the signature on the contract had been induced by a misrepresentation and (iii) a fiduciary duty had been breached.

His Honour Nathan J, of the Victorian Supreme Court, initially noted the prima facie obligation to comply with the terms of a written and signed agreement (citing *L'Estrange v Graucob*), an obligation which would 'at a superficial glance appear to be more onerous where the signatory ... was a knowledgeable and competent person in the field of commerce to which the contract related'.[40] Nevertheless, Nathan J went on to decide that the obligation did not prevail for reasons discussed below.

Unconscionability at Equity

Primarily, Nathan J relied upon the principle of 'unconscionability' in dismissing the action. Although his Honour observed that 'a court will not set aside a harsh bargain, freely entered into, unless the terms can be seen objectively to offend good conscience and equity', he reasoned that in this case the obligation creating a general indeterminate agency was unconscionable.[41] One reason

---

40 At 52,621.
41 At 52,623.

given was that the clause creating such a right was 'submerged in the fine print of the contract'.[42]

More importantly, Nathan J found that it is unconscionable to embed in a proforma contact a term inconsistent with its stated purpose. In this case the agreement was entitled in bold print 'Exclusive Sole Agency Agreement'. Given that the agreement also created a general indeterminate agency it was 'incorrectly and unfairly entitled'.[43] There were also provisions in the agreement implying that this was a sole agency agreement only and that it would come to an end after the defined period lapsed. This was reinforced by a reference in a marginal note to the availability of a non-exclusive agency agreement from RESI should it be required, implying that if such an arrangement was desired, a further agreement would have to be entered into.

Nathan J also concluded that it is unconscionable to impose upon a vendor a contingent liability to pay commission for an indeterminate period. A vendor who has not had the obligation to terminate the general agency by written notice brought to his or her attention would unknowingly be liable to pay a commission say five or ten years later. This was held to be 'an unwarranted extension of the contractual arrangements'.[44]

His Honour also supported his conclusion by two further observations. Both concerned the actual conduct of the agent's

---

42 At 52,622.
43 Ibid.
44 Ibid.

representatives. First, the agent repeatedly returned to the vendor in order to extend the periods of its sole agency. In fact the standard form contract was presented to the vendor for signing on three separate occasions. 'By doing so it either believed it needed the agreements to safeguard the position or was not prepared to rely upon the open agency created by the first or any other of the agreements'.[45] Secondly, when the vendor had asked the agent whether the agreement contained any more 'onerous terms' than those explained verbally and was assured that there were none, the vendor 'was, in effect, told there was no need to read it'.[46]

Unconscionability under Statute

Nathan J then turned to the statutory provisions dealing with 'unconscionability' : s 52A of the Trade Practices Act and s 11A of the Fair Trading Act. These provisions, previously referred to, prohibit unconscionable conduct undertaken in connection with the supply or possible supply of goods or services to a person. The sections only cover the conduct of persons who acquire goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption'.[47] It must be said that his Honour did not fully address this issue, simply concluding he was satisfied the provision of real estate services under an agency agreement 'does amount to the provision of services within the meaning of the Act'.[48] Naturally, there will be many transactions engaged in where both parties are businesses which can properly be described as involving consumer or domestic type goods or services, and this

---

45 Ibid.
46 At 52,624.
47 Sub-s 5.
48 At 52,623.

case may well be one. Nevertheless, with respect to Nathan J, this issue required further consideration, although as his Honour was prepared to hold the transaction unconscionable in equity it did not affect the ultimate outcome.

In determining whether conduct is unconscionable under the Acts, the criteria resorted to by the courts in applying the equitable doctrine still clearly have application. To a large extent these have been encompassed in the criteria specified by the Acts, so that his Honour was able to rely on his findings outlined above. Nevertheless, Nathan J also extended his analysis to find that the agent had extracted an agreement by virtue of its superior bargaining strength - on the basis that the vendor was relying upon the agent to be utterly frank and honest - and on the further ground that the term granting a general agency of indeterminate duration was not reasonably necessary for the protection of the legitimate interests of the agent.

Misrepresentation/Negligence

The vendor also brought a claim based on misrepresentation and negligence The claim was based on the failure of the agent to answer the specific enquiry made by the vendor as to the liability to pay commission, the failure to mention the creation of a general agency and the positive assertion by the agent that there were no further 'onerous provisions' when the question was specifically posed by the vendor. Whilst the first ground involved a 'culpable omission', the positive representations by the agent that the only commission due was that payable under the exclusive agency agreement and the assurance that there were no further onerous

provisions were held to be relevant and pertinent misrepresentations of fact.

Nathan J took the view that if these representations were 'made ignorantly' they amounted to negligent mis-statements of fact in circumstances where the vendor had made it known it relied upon the agent's advice and statements,[49] relying on a line of authority commencing with *Hedley Byrne & Co Ltd v Heller Partners Ltd*[50] and ending with *L Shaddock & Associates Pty Ltd & Anor v Parramatta City Council.*[51] It is interesting to note that it does not appear to have been argued before Nathan J that the agent's conduct constituted misleading or deceptive conduct under s 52 of the Trade Practices Act, bearing in mind that, as mentioned earlier, a breach of that section is not predicated on fault.

Breach of Fiduciary Duty

Nathan J had little difficulty in concluding that a fiduciary duty exists when the relationship is that of principal and agent. 'Fundamental to a fiduciary relationship is the obligation for both parties to act upon the basis of mutual trust and confidence and the duty of disclosure is vital to this'.[52] The agent in this case was obliged to exhibit utmost good faith, frankness and candour to the vendor in asserting a right as a general agent. It was not given. The vendor was looking to repose faith and trust in the agent, who was aware of the fact. When asked for information which could have influenced the vendor's decision to enter into the agency

---

49 At 52,626.
50 (1964) AC 65.
51 (1981) 150 CLR 225.
52 At 52,625.

agreement, and upon which they knew the vendor would rely, it failed to provide adequate information.

Implications of Interfoto and George Collings

The enforceability of many standard form contracts is now open to question. As Dr Pengilley concludes, when referring to the *George Collings* case, 'the most respectable standard contracts can be open to attack'.[53] It is now generally acknowledged that in certain circumstances failing to object to the provisions of a standard form document, or indeed signing such a document, no longer necessarily means that the contract is binding. The authority of *L'Estrange v Graucob* is now being undermined by recent statutory provisions, such as ss 52 and 52A of the Trade Practices Act and by a shift in judicial attitude, particularly in respect to unconscionability.

The *Interfoto* case confirms that it is not generally sufficient to argue that a person receiving a document was aware of the general nature of the document and that it contained written clauses. The concept of reasonable notice is undergoing change, especially in relation to unusual or onerous terms such as those relied on in the *Interfoto* case. The location and size of the print are important aspects to consider in determining the enforceability of such provisions, and in many instances it will not be adequate to simply hand over a document, or even obtain a customer's signature. Actual assent may be required.[54]

---

53 "Unconscionable Conduct", (1991) 7 TPLB 25.

54 See Sir Anthony Mason and Gageler, op cit, note 4 at p.12.

Businesspersons will almost certainly view these developments with concern, even alarm, as may traditional advocates of the objective approach of contract law. A word of comfort, however, can be found in the dicta of Kirby P in the recent case *Austotel Ltd v Franklins Ltd.*[55] Kirby P, in dealing with a dispute between businesspersons who had the benefit of legal advice, said this:

> We are not dealing here with ordinary individuals invoking the protection of equity from the unconscionable operation of a rigid rule of common law. Nor are we dealing with parties which were unequal in bargaining power. Nor were the parties lacking in advice either of a legal character or of technical expertise ... At least in circumstances such as the present, courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of businesspeople.[56]

Although his Honour's judgment related to different circumstances from those examined in this article, they reaffirm the approach of the House of Lords in the *Photo Productions* case[57] that clauses in contracts freely negotiated by businesspeople of equal bargaining strength should be considered prima facie reasonable.[58] The dichotomy, referred to in *Schroeder v Macaulay*, between standard form documents which contain reasonable terms and those which are 'take it or leave it contracts' appears to still apply.

Nevertheless, it is significant to note that in the *George Collings* case the finding of unconscionability on equitable grounds was not, on the surface, derived from circumstances of unequal bargaining

---

55 (1989) 16 NSWLR 582.

56 At 585. See also *Halton Pty Ltd v Stewart Bras Drilling Contractors Pty Ltd* (1992) ATPR 41-158.

57 *Photo Productions Ltd v Securicor Transport Ltd* (1980) 1 All ER 556.

58 See MacDonald, op cit, note 32, p.384.

power where one party was under a special disability in dealing with the other party. At the very least it can be said that in this case the plaintiff was represented by a commercially competent person. This certainly distinguishes the case from many which have preceded it. The case reinforces the view expressed by Davies J in *National Bank v Nobile* that the concept of unconscionability should not be construed too narrowly, and should encompass an injustice brought about by fraud or oppression, misrepresentations both active and passive, or events which result in injustice arising accidentally. In the words of Nathan J, 'this opinion properly reflects the current law in Australia'.[59]

Factors now being considered by the courts include the fairness (in all the circumstances) of the arrangement, the bargaining power of the parties, the comprehension[60] of the party in relation to the contract[61], and the presence, or absence, of independent advice.[62]

---

59 At 52,622.

60 Whilst plain English may not be essential, it may be desirable. In *Stag Line Ltd v Tyne Shiprepair Group Ltd (The Zinnia)* (1984) 2 Lloyd's Rep 211, Straughton J, when determining whether an agreement was enforceable under the English Unfair Contract Terms Act (1977), commented at p.222: 'I would have been tempted to hold that all the conditions are unfair or unreasonable for two reasons : first they are in such small print that one can barely read them; secondly the draftsmanship is so convoluted and prolix that one almost needs an LLB to understand them'. See the discussion by Adams and Brownswood, "The Unfair Contract Terms Act : A Decade of Discretion" (1988) 104 LQR 94. More recently in *Bridge Wholesale Acceptance Australia Ltd v GVS Associates Pty Ltd* (1991) ASC 56-105, a case where the 'defence of unjustness' under the Contracts Review Act (NSW) was raised, the court found 'the guarantee is not unusual in that no attempt has been made to express its provisions in plain English and each of its operative provisions consists of one long sentence. It is closely printed. The significance of a number of provisions would be unintelligible to a lay person'. See Pengilley, "Fine Print May be Unenforceable", (1992) 7 TPLB 73.

61 Pengilley, op cit, note 53, p.25.

62 This has proved to be a particularly significant factor with respect to the enforceability of many guarantees. See Sneddon, "Unfair Conduct in Taking Guarantees and the Role of Independent Advice", and O'Donovan, "Guarantees : Vitiating Factors and Independent Legal Advice", op cit, note 16.

Insofar as statutory unconscionability is concerned the *George Collings* case confirms the views expressed by the Trade Practices Commission in an excellent guide to the operation of s 52A.[63] The guide gives special mention to standard form contracts.

> Use of an industry-wide take it or leave it standard form of contract may lead to unconscionable conduct if, in the particular circumstances,
>
> * the terms of the contract are onerous and their onerous nature is disguised by using fine print, unnecessarily difficult language, or deceptive layout; and
> * 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.[64]

As long ago as 1957 Lord Denning remarked, "We do not allow printed forms to be made a trap for the unwary."[65] Recent statutory innovations and case law can be seen as an endorsement of this view.

---

63 Unconscionable Conduct, The Trade Practices Commission, March 1987.

64 Ibid, p.6.

65 *Neuchatel Asphalt Co Ltd v Barnett* (1957) 1 WLR 356 at 360. See also *Jacques v Lloyd D George & Partners Ltd* (1968) 1 WLR 625, the facts of which are similar to the *George Collings* case.

SWINBURNE INSTITUTE OF TECHNOLOGY

FACULTY OF BUSINESS

STAFF PAPERS PUBLISHED TO DATE

No 7	1981	'A Note on Customs Unions Theory : The Viner Controversy RIP' by D J Thomas
No 8	1981	'Disequilibrium and the Expectations-Augmented Phillips Curve' by M Grant
No 9	1981	'A View of Ideological Pressures in the Context of Managerial Power' by M Brown
No 10	1981	'Short Term Prediction of Student Numbers in the Victorian Secondary Education System' by M G Nicholls
No 11	1982	'The Legal Protection of Geographical Trade Names : Prognosis for a Case of Champagne' by B R Clarke
No 12	1984	'Corporate Planning Practice in Major American and Australian Manufacturing Companies' by N Capon, C Christodoulou, J U Farley and J Hulbert
No 13	1984	'A Modified Markovian Direct Control Model in Fixed Time Incorporating a New Objective Function Specification' by M G Nicholls
No 14	1984	'Government Intervention in the Labour Market - A Case Study of the Referral and Placement Activity of the Commonwealth Employment Service in a Major Metropolitan Area' by J B Wielgosz
No 15	1984	'Big Business in the US and Australia : A Comparative Study' by N Capon, C Christodoulou, J U Farley and J M Hulbert
No 16	1984	'Modelling the Demand for Tertiary Education - An Exploratory Analysis based on a Modified Human-capital Approach' by M G Nicholls

No 17	1984	'Formal Corporate Planning Practices of Major Australian Manufacturing Companies' by C Christodoulou
No 18	1984	'The Australian Short Run Demand for Money Function - Further Theoretical Considerations and Empirical Evidence using Bayesian Techniques' by E J Wilson
No 19	1984	'Alternative Job Search and Job Finding Methods : Their Influence on Duration of Job Search and Job Satisfaction' by J B Wielgosz and S Carpenter
No 20	1985	'A Comprehensive Study of Strategic Planning in Australian Subsidiary and Non-Subsidiary Companies' by C Christodoulou and P T Fitzroy
No 21	1985	'Towards an Optimal Taxation Structure in Australia' by D Thomas
No 22	1985	'A Suggested Theoretical Basis for the Interpretation of the Effects of Income on the Demand for Tertiary Education' by M G Nicholls
No 23	1985	'Austrian Economics and Australian Patents' by B Oakman
No 24	1985	'Ensuring a Future for your Organisation' by C Christodoulou
No 25	1985	'The Long Search : A Pursuit of Organizational Understanding from the Perspective of "System" Thinkers' by M Brown
No 26	1985	'Managing the Introduction of New Technology' by J Newton
No 27	1986	'Positive Economic Analysis and the Task of State Enterprise Efficiency and Control' by P Xavier

No 28	1986	'Profitability of Horizontal Takeovers in the Australian Industrial Equity Market : 1978 to 1982' by M A Johns and N A Sinclair
No 29	1986	'A Comparative Examination of Subsidiary and Non-Subsidiary Strategies' by C Christodoulou
No 30	1986	'Solving Linearly Constrained Nonlinear Programming Problems' by F Ghotb
No 31	1986	'An Economic Appraisal of Recent Reforms in Public Enterprise Pricing Policy in Victoria' by P Xavier
No 32	1987	'Australian Manufacturing Companies and Academic Institutions : A Comparative Analysis of Strategic Planning' by N H Kelly and R N Shaw
No 33	1987	'Centralisation of Information and Exchange with Special Reference to the South Australian Winegrape Industry' by C Hunt, P Tiernan and E Wilson
No 34	1987	'The Impact of Home Office Culture on Subsidiary Strategic Planning' by C Christodoulou
No 35	1987	'A Comparison between Guarantees Standby Credits and Performance Bonds by A Johns
No 36	1987	'The Effects of Uncertainty and Incomplete Information in a Foreign Exchange Market Subject to Noisy Rational Expectations' by E J Wilson
No 37	1987	'Inflation Accounting for Australian Public Enterprises - Economic Rationale and Financial Implications' by B Graham and P Xavier
No 38	1987	'Financial Targets and Dividend Requirements for Commonwealth Government Business Enterprises - Are they Appropriate and how should they be Determined and Measured?' by B Graham and P Xavier

No 39	1988	'Whither Co-operative Federalism? An Analysis of the Commonwealth Government's Plan for Reform of Companies, Securities and Futures Legislation' by P J Pascoe
No 40	1988	'An Analysis of the Pricing of Section 23 Expert Reports' by A Johns
No 41	1988	'Food Laws : Reviewing the Regulatory Framework' by S Edmonds
No 42	1988	'Share Prices and Divestiture' by J Barker
No 43	1988	'Marketing Education in Malaysia : Implications for Australian Tertiary Institutions' by C T Selvarajah
No 44	1988	'Forecasting the Demand for Tertiary Education using Econometric and Markovian Models' by M G Nicholls
No 45	1988	'Power Pays - An Analysis of the Relationship between Managerial Power and Interdepartmental Relations' by M Brown
No 46	1988	'Workers Participation - Concepts, Issues and Prospects : An Australian Perspective' by C T Selvarajah and S Petzall
No 47	1988	'Performance Indicators for Telecommunications and Price-Cap Regulation' by P Xavier
No 48	1989	'Multinational Enterprises and Host Nation Response' by C Selvarajah
No 49	1989	'Women in Management' by C T Selvarajah and S Petzall
No 50	1989	'The Cultural, Political and Legal Environment of International Business' by C T Selvarajah

No 51	1989	'Australia's Human Capital and Labour Markets - Their Role in Achieving a More Competitive Economy' by M S De Lorenzo
No 52	1989	'A Comparative Analysis of the Strategy and Structure of United States and Australian Corporations' by N Capon, C Christodoulou, J U Farley and J M Hulbert
No 53	1989	'Strategies during Market Transition - A Study of Detergent Marketing in Australia 1930s to 1960s' by D Ch'ng
No 54	1989	'Some Legal and Economic Aspects of Third World Debt' by L Kloot
No 55	1989	'Access to Corporate Documents - Section 265B of The Code' by S Kapnoullas
No 56	1989	'Minding Everybody's Business : Performance Indicators for Australia Post' by P Xavier
No 57	1989	'Some Legal Aspects of Electronic Funds Transfer' by L Kloot
No 58	1989	'Japanese Worth Ethics' by C T Selvarajah and S Petzall
No 59	1989	'Strategy, Policy and Operational Planning' by C T Selvarajah
No 60	1989	'Technology' by C T Selvarajah
No 61	1989	'The Development of a National EFT System Network in Australia' by A Richardson
No 62	1989	'International Marketing Research : A Review' by D Ch'ng
No 63	1989	'An Exploration of the Relationship between Training System Effectiveness and the Environmental Variables' by C T Selvarajah

No 64	1990	'Interest Rates, Their Changes and the Australian All Ordinaries Index - An Empirical Results (with some theoretical justification)' by D L Dowe
No 65	1990	'Current Monetary Policy : A Review of Current Literature' by M L Freebairn
No 66	1990	'Performance Indicators for Public Telecommunications Operators : Will They Serve to Improve Performance?' by P Xavier
No 67	1990	'Mosaic mac-b : A Comprehensive Framework for Marketing Planning' by D Ch'ng
No 68	1990	'The Death of the Reasonable Man' by B R Clarke
No 69	1990	'The Implications of the Development of a National EFT System Network in Australia' by L Kloot and A Richardson
No 70	1990	'Victoria's Government Business Enterprise Debt : The Scope for Reduction' by P Xavier
No 71	1990	'Training System Effectiveness' by C T Selvarajah
No 72	1990	'Relationship of Size of Organisation to Training System Effectiveness' by C T Selvarajah
No 73	1990	'The Relationship of the Structural Variable, Industry Type, to Training System Performance Criteria' by C T Selvarajah
No 74	1991	'Preliminary Study of Export Success in the Australian Scientific Instruments Industry' by Ling Ping Wang
No 75	1991	'Management Accounting Systems : Can They Exist in Local Government in Victoria?' by L Kloot

No 76	1991	'A Content Analysis of Advertisements in the Chinese Times, 1902-1914' by D Ch'ng
No 77	1991	'Endogenous Money Supply and Monetary Policy : An Interpretation of Recent Literature' by G Messinis
No 78	1991	'Improving Accounting Research Performance Based upon Consulting Activities' by B McDonald and H Paterson
No 79	1991	'A Critical Analysis of DB2's Support for Automated Integrity Check' by G Menon
No 80	1991	'Measuring the Business Value of IS Investments : A Pilot Survey of Industry Attitudes and Practices' by P Simmons
No 81	1991	'Present Status of Marketing Research in Malaysia' by D Ch'ng
No 82	1992	'Australian Government Policy on Higher Education : Impact on Accounting Education' by J Wells
No 83	1992	'Employers and the Public Employment Service - A Case for Mandatory Vacancy Notification' by J Wielgosz
No 84	1992	'The Community Service Obligations of Victorian Government Business Enterprises' by P Xavier
No 85	1992	'Measuring Australia Post's Economic Performance' by P Xavier
No 86	1992	'Management Training Employment Outcomes and Equal Opportunities Towards the Year 2000' by B Lasky
No 87	1992	'The Exercise of Intellectual Property Rights and Abuse of Dominant Market Position in the European Economic Community' by S Edmonds

No 88	1992	'Control of Information Technology Costs by Allocating Costs to Users' by L Kloot
No 89	1992	'Seeking Effective Management Education' by C Christodoulou
No 90	1992	'Fine Print in Contracts : Can You Rely on it?' by B Clarke and S Kapnoullas