

# Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

**Court:** High Court of Australia

**Judges:** Gleeson CJ, Gummow, Hayne, Callinan, and Heydon JJ

**Date decided:** 11 November 2004

## Facts

This case concerned transportation and storage of a flu vaccine, imported from the UK for distributors Ebos and its subsidiary Richard Thomson. Alphapharm was a sub-distributor with exclusive rights in Australia. In 1998, Richard Thomson collected the flu vaccine from the airport and stored it in Sydney, where it was then collected by Alphapharm for further distribution. In 1999, however, Richard Thomson engaged Finemores to collect and store the vaccine, and organised to have Finemores also later distribute the vaccine to Alphapharm's customers on Alphapharm's behalf.

The vaccines were valuable and temperatures sensitive, but small and light, so shipping and handling formed only a small part of the commercial situation.<sup>1</sup>

Finemores wrote a letter to Richard Thomson, explaining that they did not insure the goods and that “it would be very much appreciated if you would complete the Credit Application and sign the Freight Rate Schedule accepting our Rates and Conditions and fax back to our office at your earliest convenience.”<sup>2</sup> The application for credit was marked “Please read ‘Conditions of Contract’ (Overleaf) prior to signing.” immediately above the box for signing. The application for credit and the freight rate schedule were signed on behalf of Richard Thomson by Mr Gardiner-Garden without reading the terms and conditions, and the terms were not mentioned in conversation.

It is significant that the terms and conditions in this case were standard and were not surprising:

There were fifteen “Conditions of Contract”. There was evidence which showed that they were generally in a form that was in common use in the refrigerated transport industry. This is not surprising. There was nothing to suggest that the contractual terms on which Finemores might be willing to deal with Richard Thomson would be likely to be significantly different from those available to Richard Thomson from Finemores' competitors. Mr Gardiner-Garden did not read the Conditions of Contract, but there was nothing to prevent him from doing so. For that matter there was nothing to prevent him from seeking advice about them, or comparing them with the terms and conditions adopted by Finemores' competitors.<sup>3</sup>

Finemores appealed from the NSW Supreme Court, arguing that it was not liable to Alphapharm for damage to the vaccine on the basis of the terms of its agreement with Richard Thomson - either Richard Thomson was an agent for Alphapharm, in which case Alphapharm would be prevented from recovering, or Richard Thomson was under an obligation to indemnify Finemores for any losses. Richard Thomson denied both that it was an agent for Alphapharm and that the terms on the back of the application for credit were incorporated into the contract. This note only deals with formation, and does not consider the agency issue.

## Reasons (full court)

The High Court began by noting that

Each of the four parties to the case is a substantial commercial organisation, capable of looking after its own interests. This hardly seems an auspicious setting for an argument that a party who signs a contractual document is not bound by its terms because its representative did not read the document.<sup>4)</sup>

The High Court, preferring an objective approach to contractual interpretation, then approved of the statement of Mason J (as he then was) in [Codelfa Construction Pty Ltd v State Rail Authority of NSW \(1982\) 149 CLR 337](#) that

“We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.”<sup>5)</sup>

The High Court chose to view this case as a simple freedom of contract issue:

Any suggestion that the agreement between Richard Thomson and Finemores was vitiated by misrepresentation would be untenable. Mr Gardiner-Garden signed a document which invited him to read the terms and conditions on the reverse before signing. He was not rushed or tricked into signing the document. He chose to sign it without reading it. He could have read it had he wished. Finemores did not set out to conceal from him the terms and conditions on the document, or to encourage him not to read them. Finemores had no way of knowing that he did not read the document. No case of mistake or non est factum is advanced.<sup>6)</sup> [...] It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.<sup>7)</sup>

Citing from [Pacific Carriers Ltd v BNP Paribas \(2004\) 218 CLR 451](#), [Taylor v Johnson \(1983\) 151 CLR 422](#), [Parker v South Eastern Railway Co \(1877\) 2 CPD 416](#), [Wilton v Farnworth \(1948\) 76 CLR 646](#), [Oceanic Sun Line Special Shipping Co Inc v Fay \(1988\) 165 CLR 197](#), the High Court reaffirmed its preference of the objective view of contract, and reaffirmed “the well-known principle” stated by Scrutton LJ in [L'Estrange v F Graucob Ltd \[1934\] 2 KB 394](#) that

”[w]hen 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”<sup>8)</sup>

In justifying the “importance which, for a very long time, the common law has assigned to the act of signing”<sup>9)</sup>, their Honours quoted [P S Atiyah](#)'s observation that

“The usual explanation for holding a signature to be conclusively binding is that it must be taken to show that the party signing has agreed to the contents of the document; but another possible explanation is that the other party can be treated as having relied upon the signature. It thus may be a mistake to ask, as H L A Hart once asked, whether the signature is merely conclusive evidence of agreement, or whether it is itself a criterion of agreement.”<sup>10)</sup>

Their Honours continued,

“Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.”<sup>11)</sup>

The High Court held that the rule should continue to apply:

In most common law jurisdictions, and throughout Australia, legislation has been enacted in recent years to confer on courts a capacity to ameliorate in individual cases hardship caused by the strict application of legal principle to contractual relations. As a result, there is no reason to depart from principle, and every reason to adhere to it, in cases where such legislation does not apply, or is not invoked. <sup>12)</sup>

Their Honours concluded that

“To speak of the operation of the law of contract with respect to the signature of the document containing cl 6 requires attention both to the significance attached by the law to the presence of the signature and also to the absence of any grounds, such as a plea of non est factum, which at common law would render the contract void and of any grounds, such as misrepresentation, which might attract equitable relief, or which might elicit curial dispensation under a statutory regime. This illustrates the cogency of the statement of H L A Hart that usually it is not possible to define a legal concept such as “contract” merely by specifying certain necessary and sufficient conditions for its application because: “any set of conditions may be adequate in some cases but not in others and such concepts can only be explained with the aid of a list of

exceptions or negative examples showing where the concept may not be applied or may only be applied in a weakened form.”<sup>13)</sup>

Accordingly, the terms on the back of the application for credit were incorporated in the contract.<sup>14)</sup>

The Court noted that there is no reason that the principle espoused by the ticket cases should be limited to exclusion clauses.<sup>15)</sup> Dealing with the proposition “that a person who signs a contractual document without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms”<sup>16)</sup>, the High Court said

It appears from the reasoning of the primary judge and the Court of Appeal that the proposition was given a narrower focus, and was limited to exclusion clauses, or, perhaps, exclusion clauses which are regarded by a court as unusual and onerous. The present happens to be a case about exclusion clauses, but there is no apparent reason why the principle, if it exists, should apply only to them. Nor is the criterion by which a court might declare a contractual provision to be unusual or onerous always easy to identify. The origin of the proposition, clearly enough, is in the principles that apply to cases, such as ticket cases, in which one party has endeavoured to incorporate in a contract terms and conditions appearing in a notice or an unsigned document. When an attempt is made to introduce the concept of sufficient notice into the field of signed contracts, there is a danger of subverting fundamental principle based on sound legal policy. There are circumstances in which it is material to ask whether a person who has signed a document was given reasonable notice of what was in it. Cases where misrepresentation is alleged, or where mistake is claimed, provide examples. No one suggests that the fact that a document has been signed is for all purposes conclusive as to its legal effect. At the same time, where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake, or any other vitiating element, the fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms. Furthermore, it may be asked, where would this leave a third party into whose hands the document might come?<sup>17)</sup>

The High Court supported the principle in [L'Estrange v F Graucob Ltd \[1934\] 2 KB 394](#) that the principle from the ticket cases should not be extended to signed contracts:

If there is a claim of misrepresentation, or non est factum, or if there is an issue as to whether a document was intended to affect legal relations or whether, on the other hand, it was tendered as a mere memorandum of a pre-existing contract, or a receipt, or if there is a claim for equitable or statutory relief, then even in the case of a signed document it may be material to know whether a person who has signed it was given sufficient notice of its contents. The general rule, which applies in the present case, is that where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.<sup>18)</sup>

Importantly, in this case, it was clear that the High Court felt that notice of the terms sought to be incorporated had adequately been given:

What more Finemores could have done to give Richard Thomson notice of the terms and conditions than requiring their representative to sign a document, and to place his signature immediately below a request that he read the conditions on the reverse side of the document before signing, is difficult to imagine.<sup>19)</sup>

The High Court also stressed that the terms on the back of the application for credit were not unusual or surprising, nor were they misrepresented:

The evidence was against any conclusion that the conditions were abnormal. There was no evidence to support a finding that applications for credit in the transport industry do not normally contain general terms of contract. Such evidence as there was on the matter was to the effect that the terms in question were not abnormal. [...] Any suggestion of misrepresentation had been dismissed by the primary judge, and had no basis in fact. Mr Gardiner-Garden was not subjected to any pressure, and there was no element of concealment. There was no evidence that he was induced to sign the document by anything other than the request that he sign it. If the case had been one of misrepresentation, then it would have fallen within the qualification expressed in *L'Estrange v Graucob*; but it was not.<sup>20)</sup>

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<sup>1)</sup> [9].  
<sup>2)</sup> [13.]  
<sup>3)</sup> 173, [19].  
<sup>4)</sup> 176, [29].  
<sup>5)</sup> [Codelfa Construction Pty Ltd v State Rail Authority of NSW \(1982\) 149 CLR 337](#), 352.  
<sup>6)</sup> 179 [39].  
<sup>7)</sup> 179 [40].  
<sup>8)</sup> [L'Estrange v F Graucob Ltd \[1934\] 2 KB 394](#), 403.  
<sup>9)</sup>, <sup>11)</sup> 182, [47].  
<sup>10)</sup> 181, [41], quoting MacCormick and Birks (eds), *The Legal Mind: Essays for Tony Honore* (1986), Ch 2, 19, at p 35.  
<sup>12)</sup> 182-3, [48]  
<sup>13)</sup> 183 [49], citing [Hart, "The Ascription of Responsibility and Rights", \(1949\) 49 Proceedings of the Aristotelian Society 171](#), at p 174.  
<sup>14)</sup> 183 [50].  
<sup>15)</sup>, <sup>17)</sup> 184 [54].  
<sup>16)</sup> 184 [53].  
<sup>18)</sup> 185, [57].  
<sup>19)</sup> 183, [52]; see also 186, [59].  
<sup>20)</sup> 187-8, [64].

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## **PERSONAL COMMENTS ON THIS CASE FROM A RESIDENT WHO BELIEVES THAT “IT AIN’T OVER UNTIL THE FAT LADY SINGS”.**

*Whilst this case demonstrates that a contract once signed by a party must be honoured by that party, other possible aspects of contract law need to be considered.*

*Note in the words above (now quoted) that if there is fraud or misrepresentation, then relief is available.*

“The well-known principle” stated by Scrutton LJ in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 that “[w]hen 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”.

*Also worthy of remembering is the opinion stated below:*

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*“[F]or a number of reasons, some to do with the work of legislatures, some to do with judicial law making, and some to do with the temper and spirit of the times, **we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract.**”*

the Hon. Mr. Justice AM Gleeson AC, ‘Individualised Justice – The Holy Grail’ (1995) 69 *Australian Law Journal* 421, 428.

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*Then there are the five conditions established in the BP Refinery case. (a):*

- the implied term must be reasonable and equitable;
- it must be necessary to give business efficacy to the contract so that no term will be implied if a contract is effective without it;
- it must also be so obvious as to go without saying;
- it must be capable of clear expression;
- it must not contradict any express term. (b)

<sup>(a)</sup> *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (‘BP Refinery’).

<sup>(b)</sup> *BP Refinery* (1977) 180 CLR 266, 283.

*This lists conditions expected to be in common law contracts. They show clear expectations that, inter alia, reasonability, clarity and non-contradictions are paramount in a contract.*

*Then finally, this extract from the case above should not go unnoticed:*

“References to the common intention of the parties to a contract are to be understood as referring to **what a reasonable person would understand** by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction”.<sup>(c)</sup>

<sup>(c)</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. 179 (40)