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Commercial notes

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Reading the fine print

Two recent decisions of the High Court, *Toll* and *Equuscorp,* are timely reminders for anyone entering into a contract to 'read the small print'. The decisions represent both a warning and a comfort to agencies. On the one hand, the cases suggest a 'hard line' will be taken in relation to any claim by a party that they did not read or did not understand the importance of a document that they signed. At the same time, they provide some comfort to parties that they can rely on their written and executed agreements – even where prior oral discussions may have been inconsistent with the arrangements ultimately set down in the final document.

The decision in *Toll* also addresses some interesting issues concerning agency – in particular, it confirms that where a party enters into a contract on behalf of another party, that other party will be bound by the terms of that contract. It also highlights the possibility of an otherwise 'innocent' act of an employee having significant consequences. Agencies should therefore ensure that their personnel, as well as any agents, consultants and contractors, are aware of the 'limits' of their authority. Agencies should also have in place arrangements to monitor compliance.

Toll (FGCT) Pty Limited v Alphapharm Pty Limited

[2004] HCA 52 (11 November 2004)

Facts

The case concerned batches of Fluvirin, a flu vaccine, that had been damaged as a result of not being stored at the correct temperature. While the case involved a number of different parties, the facts were simplified because very little of the evidence was in dispute. The High Court also delivered a unanimous verdict.

In summary, Ebos Group Limited (Ebos), a New Zealand company, was the distributor in the South Pacific for Fluvirin. Ebos appointed Alphapharm Pty Ltd (Alphapharm) to be its Australian distributor. Broadly speaking, the arrangements between Ebos and Alphapharm involved Ebos delivering amounts of the vaccine to Alphapharm, who then sold and distributed it throughout Australia. Delivery of the vaccine to Alphapharm was arranged by Richard Thomson Pty Limited (RT), a general wholesaler of medical supplies and a wholly owned subsidiary of Ebos.

The arrangement entered into was for the 1998 'flu season' and was continued into the next year. In February 1999, RT reached agreement with

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This issue

Finemores (a company that was subsequently acquired by Toll – for ease of reference, all courts continued to refer to the party as 'Finemores') for the vaccine to be delivered into the Finemores warehouse. To save costs, RT suggested to Alphapharm that Alphapharm also use Finemores for storage and distribution of the vaccine to Alphapharm's customers. Alphapharm agreed with this suggestion and RT made the necessary arrangements with Finemores.

Discussions and correspondence occurred between Finemores and RT personnel concerning these arrangements – setting freight rates, loading of pallets etc. On 17 February 1999, RT's operations manager, Mr Gardiner-Garden, met with the transport manager for Finemores, Mr Cheney. At that meeting, an 'Application for Credit' was signed by Mr Gardiner-Garden on behalf of RT. The application for credit required certain information to be provided concerning the 'Customer' – presumably to enable Finemores to determine whether the Customer would be provided with credit. The application also noted that any storage or transport of goods would be subject to Finemores' standard Conditions of Contract. Immediately above the place for signature appeared the following:

> Please read 'Conditions of Contract' (Overleaf) prior to signing.

Mr Gardiner-Garden gave evidence that he did not read the Conditions of Contract and that they were not mentioned in the course of the discussion between himself and Mr Cheney.

The Conditions of Contract contained the following provisions:

Mr Gardiner-Garden gave evidence that he did not read the Conditions of Contract.

— a warranty that the Customer was entering into the contract on its own account and as agent for the 'Customer's Associates' (defined to include the owner, sender or receiver of the goods) (clause 5)

— a very broad exclusion of liability in favour of Finemores in relation to any loss suffered by the Customer or the Customer's Associates (clause 6)

— an indemnity from the Customer in relation to any claim brought by the Customer or any of the Customer's Associates (clause 8)

— acknowledgement that it is the Customer's responsibility to arrange insurance to cover both its and the Customer's Associates' risks (clause 9).

In March 1999, Alphapharm received orders from Queensland and NSW for vaccine. RT arranged for Finemores to transport the vaccine and deliver it to Alphapharm's customer. In both cases, at some point during storage or transport, the vaccine became too cold and was rejected by the customer.

The claim

Alphapharm sued Finemores in negligence, among other things. It appears that all parties agreed that Finemores had been negligent in allowing the vaccine to be stored at too low a temperature. Finemores' defence was that Alphapharm was precluded from suing in negligence by clause 6 of the Conditions of Contract. Finemores also counterclaimed against RT, on the basis that in the event Alphapharm was not bound by clause 6, RT was required to indemnify Finemores under clause 8. There were other claims and cross-claims, but these are not relevant for present purposes.

At first instance

The primary judge found that there was no contract between Alphapharm and Finemores, therefore there was nothing to prevent Alphapharm making its claim against Finemores. In relation to the cross-claim by Finemores against RT, the primary judge found that the exclusion clause and the indemnity provision did not form part of the 'contract' between RT and Finemores and therefore RT was not bound to indemnify Finemores.

Finemores appealed to the NSW Court of Appeal.

NSW Court of Appeal

The Court of Appeal looked first at the contract between RT and Finemores. Both Young CJ in Eq and Bryson J referred to statements made by Mellish LJ in *Parker v South Eastern Railway Co* (1877) 2 CPD 416 at 421:

> In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents.

However, the Court of Appeal decided that this was not the 'ordinary case', and confirmed the primary judge's decision that the exclusion clause and the indemnity did not form part of the contract between Finemores and RT.

In particular, the reasoning put forward by the Court of Appeal focused on the fact that the exclusion and indemnity clauses were included on the back of a document that was titled 'Agreement for Credit', and a 'reasonable' person would not expect to find such conditions on the back of such a document. The Court of Appeal took the view that, because of this, Finemores needed to have done what was 'reasonably sufficient' to give RT notice of the existence or content of the conditions if it wanted to rely on them. The Court found that Finemores had not done so and that therefore these provisions did not form part of the contract between Finemores and RT.

The High Court took a much stricter view than the lower courts as to what was 'relevant' or admissible to the issues at hand.

Bryson J also noted that the agreement for credit was one of a number of documents setting out or otherwise dealing with the basis upon which Finemores would transport the vaccine, not all of which were consistent. In this situation, Bryson J suggests that just because a document is signed, it does not mean that the parties intended that it form part of the 'contract' between them.

It was not strictly necessary for the Court of Appeal to decide whether there was a contract between Alphapharm and Finemores – as the same reasoning would preclude the exclusion clause from being part of any such contract. However, the Court of Appeal addressed this issue, deciding that there was no contract between Alphapharm and Finemores – that is, RT had not been acting as Alphapharm's agent when it entered into the agreement with Finemores for the delivery of the vaccine to Alphapharm's customers. Therefore Alphapharm was not bound by clause 6.

Finemores appealed to the High Court.

The High Court's decision

The High Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) upheld Finemores' appeal. In doing so the Court took a much stricter view than the lower courts on what was 'relevant' or admissible to the issues at hand – whether or not there was a contract and what were the terms and

conditions of that contract. The Court was also less than complimentary concerning the lawyers involved in the preparation and submission of 'irrelevant' material concerning subjective understandings of the parties [35].

The Court quoted Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352:

> 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.

The Court noted that it was not in dispute that Mr Gardiner-Garden was authorised to sign the application for credit on behalf of RT and that, when he signed that document, he did so intending that it would affect the legal relations between RT and Finemores. The Court noted that the document 'invited' Mr Gardiner-Garden to read the terms and conditions on the reverse before signing and that he chose to sign it without reading it. It was not as though Finemores had set out to conceal the terms and conditions on the document, or to encourage Mr Gardiner-Garden not to read them [39].

The Court referred to one of its recent decisions, *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045; 208 ALR 213 which stated at [40]:

> 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 ... 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.

The Court noted that the document 'invited' Mr Gardiner-Garden to read the terms and condition on the reverse before signing and that he chose to sign it without reading it.

The Court went on to say:

> It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents ... whatever they might be. That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it. [45]
>
> 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. [48]

The Court then looked at the decisions of the primary judge and the Court of Appeal, which it summarised as being premised on the following propositions:

— in order for the exclusion clause and the indemnity to be made part of the contract between Finemores and RT, it was necessary for Finemores to establish that it had done what was reasonably sufficient to give RT notice of the terms and conditions; and

— Finemores had not done what was reasonably sufficient to give RT such notice [51].

The High Court noted that it would be sufficient for it to disagree with the second proposition for it to find for Finemores – asking what more could Finemores be expected to do than include above the signature block a direction to read conditions overleaf.

However, the Court also addressed the first proposition, noting that the lower courts appeared to have based their decisions on the fact that the relevant clauses are exclusion clauses, or possibly onerous or unusual exclusion clauses. The Court disagreed with this approach, stating 'there is no apparent reason why the principle, if it exists, should apply only to them' [54]. The Court also stressed the difference between signed and unsigned documents – the importance of which the Court felt the primary judge in particular had failed to take due account.

The Court did not consider the fact that the conditions were on the back of an 'application for credit' was important, noting that the conditions were common in the transport industry and that it was also common for an application for credit to include the general terms of contract. The Court also noted that all parties understood the particular requirements in relation to insurance of the goods.

The Court decided that the printed conditions on the application for credit applied to the contract for storage and transportation between RT and Finemores.

The Court then turned its mind to the issue of agency – had RT also entered into the contract with Finemores as agent for Alphapharm? The Court stated at [70]:

> '(I)n any ordinary case the question whether one person authorized another to do an act or series of acts on his behalf is best answered by considering for whose benefit or in whose interest it was intended it should be done.' [*Press v Mathers* [1927] VLR 326 at 332 per Dixon AJ]. Such a consideration may not be conclusive, but it is a useful practical starting point.

The Court noted that Finemores was not aware of the relationship between Ebos and Alphapharm and could not know about the arrangements concerning ownership and risk between Ebos, RT and Alphapharm, stating at [72]:

> The commercial purpose of ... the Conditions of Contract, and the provisions concerning the "Customer's Associates", is clear. It was to cover exactly the kind of situation that existed in the present case ... Its conditions were expressed to bind all who had an interest in the goods, and it required the customer to warrant that it had authority to act as their agent as well as on its own behalf.

The commercial purpose of … the Conditions of Contract, and the provisions concerning the 'Customer's Associates', is clear. It was to cover exactly the kind of situation that existed in the present case.

The Court did not accept the contention accepted in the lower courts that RT was agent for Ebos but not for Alphapharm, suggesting that the lower courts may have felt this way because RT was a subsidiary of Ebos and was being paid an administration fee by Ebos. The Court found this distinction 'unconvincing' [78] – it was clear Alphapharm required transport services, it decided to use Finemores' warehousing and transport services and it left it to RT to make arrangements with Finemores. RT had 'accepted' Finemores' standard terms and conditions, which, in the context and noting Alphapharm had not placed any 'restrictions' on RT, was within the scope of the authority given to RT by Alphapharm.

The Court therefore found that Alphapharm was bound by the Conditions of Contract and the exclusion clause prevented Alphapharm from having any claim against RT. In this context, the indemnity from RT to Finemores was no longer relevant.

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd

[2004] HCA 55 (16 November 2004)

Facts

Less than a week after reaching its decision in *Toll*, the High Court again had cause to consider the issue of signed, written contracts and whether they are binding on the parties that signed them.

The *Equus* cases (of which there were six heard together) involved a complex investment structure, under which, in very broad terms, 'loans' were made by one company (Rural Finance) to investors to enable them to buy units in a limited partnership. Rural Finance in turn assigned the loans to Equuscorp.

The limited partnership was part of a complex structure that had the ultimate purpose of investing in the farming of freshwater crustaceans in Queensland. It would appear that the investments and the complexity of the structure were in part driven by taxation considerations – the people 'marketing' this arrangement also operated a similar arrangement relating to blueberries.

For present purposes, the relevant issue is that the investors argued that, prior to executing the loan agreements, they each orally agreed with Rural Finance that the loans were 'limited recourse' – that is, the investors would only be required to repay part of the loans, with the income generated by the limited partnership being applied to extinguish the loans. The written agreements entered between the investors and Rural Finance did not reflect a 'limited recourse' arrangement, and required each investor to repay the full amount of the relevant loan.

The Court again stressed that, having executed a written loan agreement, each of the investors is bound by it.

The primary judge found for the investors on this point – the 'operative' agreement between each investor and Rural Finance was that which had been agreed orally between the parties prior to signing the written documents. The Court of Appeal of the Supreme Court of Queensland disagreed with the primary judge, and overturned the finding that the terms of the loan were those that were agreed orally.

The High Court's decision

The High Court agreed with the Court of Appeal and held that the relevant agreement between the investors and Rural Finance was recorded wholly in the written loan agreements. The Court again stressed that, having executed a written loan agreement, each investor is bound by it [33]. The Court went on to state at [36]:

> If there was an earlier, oral, consensus, it was discharged and the parties' agreement recorded in the writing they executed.

The Court, as in *Toll,* again referred to the fact that a court will hold a party to the obligations it assumes in a written agreement 'unless relief is afforded by the operation of statute or some other legal or equitable principle applicable to the case' [35].

Conclusion

It is important to note that the High Court is not saying that it will never 'look behind' the words set out in a signed document. In both decisions, the Court notes that a party could still argue that there was an error in the final document, or that there had been some fraud, mistake or misrepresentation associated with the finalisation or signing of the document (see, for example, [32] and [33] of *Equus*). In addition, there may have been conduct after the execution of the agreement that could give rise to an estoppel argument or other equitable action. It is also important to note that, in *Toll* at least, the Court took notice of the fact that each of the parties 'is a substantial commercial organisation, capable of looking after its own interests' [29].

These decisions should not be seen as a panacea for sloppy contract management, disorganised or rushed contract negotiations or 'sharp' business practices.

Text of the decisions is available at:

<http://www.austlii.edu.au/au/cases/cth/high_ct/2004/52.html> (*Toll*)
<http://www.austlii.edu.au/au/cases/cth/high_ct/2004/55.html> (*Equuscorp*).

Tips for clients

- Always read the small print, on both sides of the page.
- Be wary of any purchase orders, consignment notes etc. that seek to incorporate other documentation 'by reference' – always seek to have all relevant documentation prior to signing anything.
- Where a standing offer or other form of contract has already been signed with a service provider, ensure that any subsequent documentation (for example, purchase orders or invoices) does not seek to introduce new or additional terms and conditions.
- Ensure that any written documentation fully and accurately sets out the agreement reached between the parties – don't rely on 'understandings' reached prior to contract signature or 'handshake agreements'.

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