HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

TOLL (FGCT) PTY LIMITED
(formerly Finemores GCT Pty Limited) APPELLANT

AND

ALPHAPHARM PTY LIMITED & ORS RESPONDENTS

Toll (FGCT) Pty Limited v Alphapharm Pty Limited [2004] HCA 52
11 November 2004
S63/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside order 1 of the orders of the New South Wales Court of Appeal and, in lieu thereof, order that the appeal to that Court be allowed with costs.*

3. *Set aside orders 1, 2 and 4 of the trial judge and in lieu thereof, order that:*

   (a) *the First and Second Plaintiffs' claim in the District Court of New South Wales be dismissed;*

   (b) *judgment be entered for the Defendant;*

   (c) *the First and Second Plaintiffs pay the Defendant's costs of the trial; and*

   (d) *the First and Second Plaintiffs pay the costs of the First and Third Cross Defendants.*

4. *Order that the First Respondent repay to the Appellant the sum of $683,061.86 together with interest from the date of payment at rates under the* District Court Act *1973 (NSW) or as agreed.*

On appeal from the Supreme Court of New South Wales

Representation:

S J Gageler SC with A S Bell for the appellant (instructed by Clayton Utz)

S T White with E G H Cox for the first respondent (instructed by Withnell Hetherington)

J E Griffiths SC with J K Kirk for the second and third respondents (instructed by Allens Arthur Robinson)

CATCHWORDS

Toll (FGCT) Pty Limited v Alphapharm Pty Limited

Contract – Construction and interpretation – Terms – Officer of a corporation authorised to contract on corporation's behalf – Contractual document signed by officer contained onerous terms – Officer failed to read document – Conclusiveness of act of signature or execution – Whether notice of onerous terms or exclusions required.

Principal and agent – Contract – Authority – Whether agent authorised to contract on terms that include exclusions of liability of other contracting party.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The issues in this appeal relate to a contract for the transportation of goods. The carrier relies upon an exclusion clause or, alternatively, a clause providing for an indemnity. The question is whether those clauses formed part of the contract and, if so, who was bound by them.

2 The appellant ("Finemores") carried on a business which included the transportation of refrigerated goods. In February and March 1999, a quantity of influenza vaccine known as Fluvirin was imported into Australia. It was intended for supply by the first respondent ("Alphapharm") to customers in New South Wales, Queensland, Western Australia, South Australia and Victoria. The vaccine was sensitive to changes in temperature. Finemores undertook to collect the goods on arrival in Australia, transport them to its warehouse in Sydney, store them, and then deliver them to designated customers. The goods were damaged through exposure to the wrong temperatures, some while in storage, and some during transport to the customers. The damaged goods were in batches intended for supply to Alphapharm's customers in Queensland and New South Wales. Alphapharm sued Finemores, and obtained judgment for $683,061.86.

3 The second and third respondents are Ebos Group Limited ("Ebos"), a New Zealand company, and its wholly owned Australian subsidiary Richard Thomson Pty Limited ("Richard Thomson"), a general wholesaler of medical supplies. In order to explain the relationship between the first, second, and third respondents, which forms part of the background to the dealings with Finemores, it is necessary to describe the distribution agreements under which the Fluvirin was imported.

The distribution agreements

4 What was referred to as "the flu season" extends in Australia from 1 February to 31 July. Fluvirin was imported for the 1998 flu season, and again for the 1999 flu season. The damaged vaccine was imported for the 1999 flu season.

5 The Fluvirin was exported from the United Kingdom by Medeva Pharma Ltd pursuant to an agreement with Ebos, which was the distributor of Fluvirin for New Zealand and the rest of the South Pacific. In 1998, Ebos entered into a sub-distribution agreement with Alphapharm, appointing Alphapharm exclusive distributor of Fluvirin in Australia. Clause 5.1 of the sub-distribution agreement between Ebos and Alphapharm provided that the vaccine would be supplied by Ebos free into store to Alphapharm's designated Sydney warehouse. Clause 5.4 provided that risk would pass to Alphapharm upon delivery in accordance with

cl 5.1, but that, notwithstanding the passing of risk, title to any consignment would not pass to Alphapharm until Ebos had received payment.

6 In late 1997 or early 1998, the Managing Director of Ebos, Mr Waller, spoke to the Operations Manager of Richard Thomson, Mr Gardiner-Garden, about the sub-distribution agreement between Ebos and Alphapharm. Mr Gardiner-Garden agreed that, for an annual fee to be paid by Ebos to Richard Thomson, Richard Thomson would "look after the collection, storage and [regulatory] approval for the Fluvirin sent to Australia". That is how it came about that Richard Thomson dealt with Alphapharm and, later, Finemores.

7 During the 1998 flu season, Richard Thomson collected the Fluvirin from the airport and stored it in its own warehouse. Employees of Alphapharm went to the warehouse and placed temperature monitors on particular batches of Fluvirin. Alphapharm then arranged for collection of those batches and delivery to its customers. Dealings in the 1998 season were uneventful.

The contract with Finemores

8 For the 1999 flu season, Richard Thomson decided to engage the services of Finemores to collect the vaccine upon arrival in Sydney, transport it to Finemores' warehouse and store it. On 15 February 1999, the General Manager of Richard Thomson, Mr McGee, spoke to the Business Planning Manager of Alphapharm, Mr van der Pluijm. Mr McGee said: "We are going to use Finemores to carry from the airport to Finemores' warehouse in [Sydney]. We recommend that you use Finemores for carriage from the warehouse to the purchasers, to reduce handling." Mr van der Pluijm said: "That is a good idea. I will accept that." In cross-examination it was put to Mr van der Pluijm that Alphapharm left it to Richard Thomson to make the arrangements with Finemores about Alphapharm's use of Finemores' services, and he agreed. He accepted that he understood that Richard Thomson would have to make a contractual arrangement with Finemores for Finemores to agree to carry the goods to Alphapharm's customers, and that he left it to Mr McGee "to enter such arrangement as was necessary in that regard". He also acknowledged that it was left to Richard Thomson to inform Alphapharm about when goods had arrived, and the details of storage. The trial judge found:

> "Mr van der Pluijm ... expected that Alphapharm would ultimately be liable to pay for transport from the [Finemores] depot to its customers, and left it to [Richard Thomson] to inform Finemores of when transport would be required for [the] vaccine, in what quantities and to what destinations it was to go. It was left to staff at Finemores to appropriate and assemble

the boxes of vaccine from the stock, so as to be ready for packing prior to transport."

9 In brief, Alphapharm accepted Richard Thomson's suggestion that the services of Finemores be used to collect the vaccine, store it, and transport it from the warehouse to the purchasers. The information and instructions necessary to procure transportation of the vaccine by Finemores to Alphapharm's customers were to be given to Finemores by Richard Thomson. Finemores' warehouse thus became Alphapharm's designated Sydney warehouse for the purposes of cl 5.1 of the sub-distribution agreement between Ebos and Alphapharm. The goods were to be delivered free into store. Ebos was liable to bear the cost of delivery into store. Alphapharm was liable to bear the cost of transportation from the warehouse to Alphapharm's customers. At no time up to the damage to the goods in question did Alphapharm have any direct dealings with Finemores about the terms and conditions of, or payment for, such transportation. It was Richard Thomson that agreed with Finemores on the charges to be made for storage and transportation, and directed Finemores as to delivery of the goods to Alphapharm's customers. It should be added that the goods in question were valuable, but relatively small in size and weight, so that the costs of transportation were small in comparison with the worth of the goods. That subject was raised early in the dealings between Finemores and Richard Thomson. It was a significant feature of the commercial context[1].

10 The dealings between Richard Thomson and Finemores came about as follows. On 20 January 1999, Mr McGee telephoned the Transport Manager of Finemores, Mr Cheney. Mr McGee explained the transport and storage requirements for Fluvirin, and requested a quotation for Finemores' services. By way of confirmation, Mr McGee sent a fax to Mr Cheney on the same day, which repeated the requirements and said:

> "These are highly perishable vaccines for flu inoculation in humans. It is therefore vital that you can assure us of being able to maintain and evidence your part of the cold chain from pick up to drop off. These goods are also of high cost and therefore could you please advise what insurance cover will be and what security you provide as the goods cannot be easily replaced if lost."

---

1 In the Court of Appeal, Young CJ in Eq remarked that the distinction between goods carried at owner's risk and those carried at the carrier's risk with differential rates has been around as long as carriers.

11 The reference to the "chain from pick up to drop off" covered collection of the goods upon arrival in Australia, transport to Finemores' warehouse, storage at Finemores' warehouse, and delivery to Alphapharm's customers. The reference to the need to "evidence" the "cold chain" related to the need for assurance to the customers and regulatory authorities of the efficacy of the vaccine.

12 On 12 February 1999, Mr Cheney sent Mr McGee a quotation by fax. It was headed "Freight Rate Schedule". It was addressed to Richard Thomson. Rates for transportation, effective from 12 February 1999, were quoted. They varied with the destination. Rates were also quoted for "Sydney Storage". The Schedule also stated certain "Conditions". These related to the mechanics of loading and despatch. For example, pallets were to be adequately labelled, pick up drivers were to sign for pallets, no responsibility was taken for carton count, a charge was to be made for futile or rejected deliveries, unacceptable delays in loading or unloading could result in a charge for waiting time, bookings were to be confirmed in accordance with certain procedures, and consignments were to be available for pick up by a certain time.

13 In a covering letter to Richard Thomson, dated 11 February 1999, Finemores wrote:

> "Further to our recent discussion regarding the transportation of your products to various interstate locations, we are pleased to have the opportunity of providing our quotation.
>
> ...
>
> Please note we are not common carriers and all cartage is subject to the conditions as stated on the reverse side of our consignment note, a copy of which is attached. We do not insure goods and our trading terms are strictly 14 days from the date of invoice.
>
> To ensure that your goods travel at the required temperature, each one of our refrigerated vans use a 'Partlow Card' to record the temperature throughout the entire journey. ...
>
> We trust you will find our rates competitive and that you will avail yourself of the service we provide. Following acceptance to our quotation, 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."

14 The reference to "the transportation of your products to various interstate locations" reflects the role of Richard Thomson vis-à-vis Ebos and Finemores. The products were not those of Richard Thomson. They were being supplied by Ebos to Alphapharm, and then by Alphapharm to Alphapharm's customers. The agreement as to passing of risk and title from Ebos to Alphapharm has been noted above. The interstate locations were the locations of Alphapharm's customers.

15 It is common ground that no copy of any form of consignment note was attached to the letter. No party argued that the conditions on Finemores' form of consignment note formed part of any relevant contract. As will appear, however, the Credit Application referred to in the letter was of central importance.

16 As was noted above, on 15 February 1999, Richard Thomson informed Alphapharm of its decision to engage Finemores, and Alphapharm agreed that it also would use the services of Finemores so as to reduce handling.

17 On 17 February 1999, Mr Gardiner-Garden visited Finemores' premises and had a meeting with Mr Cheney. At that meeting Mr Cheney handed Mr Gardiner-Garden a form of "Application for Credit". This was the document referred to in the letter of 11 February 1999 as the Credit Application which Richard Thomson was requested to complete. The document was signed by Mr Gardiner-Garden and dated 17 February 1999. He also signed the Freight Rate Schedule. Mr Gardiner-Garden left the documents with Mr Cheney. Mr Cheney forwarded the completed Application for Credit to the Credit Department of Finemores in Melbourne.

18 The Application for Credit was a printed form, with printing on the front and back. As completed, it identified Richard Thomson as the applicant, and the customer, and gave information about Richard Thomson, including credit references. It referred to the terms of trading as nett 7 days unless otherwise confirmed in writing. (The letter of 11 February had allowed 14 days, and this was later confirmed in writing.) Immediately above the place where Mr Gardiner-Garden signed there appeared the words:

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

Mr Gardiner-Garden gave evidence, the legal significance of which is in dispute, that he did not read the "Conditions of Contract", and that they were not mentioned in conversation by him or by Mr Cheney.

19 There were 15 "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.

20 The Conditions of Contract included the following clauses:

> "5. The Customer warrants that in entering into this Contract it does so on its own account and as agent for the Customer's Associates.
>
> 6. Notwithstanding any other clause of this Contract ... under no circumstances shall the Carrier be responsible to the Customer for any injurious act or default of the Carrier, nor, in any event, shall the Carrier be held responsible for any loss, injury or damage suffered by the Customer either in respect of:
>
> (a) the theft, misdelivery, delay in delivery, loss, damage or destruction, by whatever cause, of any goods being carried or stored on behalf of the Customer by the Carrier at any time (and regardless of whether there has been any deviation from any agreed or customary route of carriage or place of storage) ...;
>
> (b) any consequential loss of profit, revenue, business, contracts or anticipated savings; or
>
> (c) any other indirect consequential or special loss, injury or damage of any nature
>
> and whether in contract, tort (including without limitation, negligence or breach of statutory duty) or otherwise.
>
> In this clause ... 'Customer' includes the Customer's Associates.
>
> ...
>
> 8. The Customer agrees to indemnify the Carrier ... in respect of:

...

(e) any demand or claim brought by or on behalf of the Customers' [sic] Associates arising out of, related to, or connected with this Contract.

9. It shall at all times be the Customer's responsibility to effect insurance necessary to cover its risks and the risks of any of the Customer's Associates in any way arising from, relating to or connected with this Contract. Upon the written request of the Customer, the Carrier will endeavour to arrange, on the Customers' [sic] behalf, insurance to cover those risks or some of them as may be requested, but the Carrier [shall] not be held responsible for any loss, injury or damage, direct or indirect, suffered by the Customer or any of the Customer's Associates and whether in contract, tort (including, without limitation, negligence or breach of statutory duty) or otherwise, arising from any act or default on the part of the Carrier in this regard."

By cl 3(b), "Customer's Associates" was defined to mean:

"(i) the owner, sender or receiver of the goods;

(ii) a person having an interest in the goods;

(iii) the Customer's principal; and

(iv) any agent, representative, employee or sub-contractor of the Customer or those persons."

21 The "Application for Credit" was designed to have a wider potential operation than one limited to this particular transaction. As the reply of Finemores indicated, it was an application by Richard Thomson to open an account with Finemores, and was intended to cover future dealings. Finemores responded formally by a letter dated 24 February 1999, which welcomed Richard Thomson "as an account customer", assigned Richard Thomson an "account number" 2RITH1, confirmed trading terms of 14 days, said that another copy of the Conditions of Contract was enclosed, and concluded by saying that Finemores looked forward to a long and mutually beneficial association. As will appear, in the meantime Finemores had acted on the basis of an acceptance of the application, and had already notified Richard Thomson of its account number.

22 On 12 February 1999, Alphapharm had written to Richard Thomson providing the addresses and quantities for delivery of 72,240 doses of the vaccine to four of Alphapharm's customers, including 28,160 doses to Queensland Medical Laboratory ("QML") for Queensland Health. Richard Thomson communicated those details to Finemores on 24 February 1999, to "confirm shipping details for Alphapharm consignments to designated destinations as per their schedule."

23 On 18 February 1999, the first shipment of Fluvirin arrived in Australia and was collected and taken into storage by Finemores. On 18, 19 and 21 February 1999, Finemores sent four invoices to Richard Thomson for the transport of Fluvirin from the airport to the warehouse and for storage and handling. Each invoice referred to Richard Thomson's customer number, 2RITH1.

24 On 11 March 1999, Mr Gardiner-Garden gave Mr van der Pluijm what the latter described in his evidence as "a copy of Richard Thomson's contract with Finemores, including the terms and conditions." Mr van der Pluijm read them. His evidence was that they did not give him any cause for concern. The evidence also showed that Alphapharm had its own insurance cover in respect of the goods.

25 Although it is of marginal relevance only, it may be added that on 16 March 1999, after the second loss referred to below, an officer of Finemores telephoned Mr van der Pluijm and said that Finemores would not transport any more product for Alphapharm unless Alphapharm itself became an account customer. The officer sent Mr van der Pluijm an Application for Credit, with the same terms and conditions on the reverse. Mr van der Pluijm read it, signed it and sent it back to Finemores. He said in evidence that he had no difficulty with the terms and conditions. He also said he made enquiries of a third party, and was told they were normal standard terms. The application was accepted. No one suggested that it governed the losses the subject of these proceedings. The primary judge regarded it as significant that "there was not, before the losses occurred which are the subject of this action, any discussion between Alphapharm and Finemores about the terms on which Finemores would carry its goods, and no one at Alphapharm saw or signed any Application for Credit which contained the Conditions of Contract such as were signed by Richard Thomson until after the losses occurred." However, the evident explanation was that, up until a time after the losses occurred, Alphapharm left it to Richard Thomson to make the necessary arrangements for storage of the goods (in Alphapharm's designated store) and transportation to Alphapharm's customers.

The losses

26 After the first shipment of Fluvirin arrived on 18 February 1999, Finemores took the stock into its warehouse and set quantities aside in accordance with Richard Thomson's instructions. On 25 February 1999, Mr van der Pluijm went to Finemores' warehouse, where he prepared the goods for delivery to Alphapharm's customers. He labelled each consignment, added a packing list, and inserted temperature monitors. It was common ground that at this point risk in the goods had passed to Alphapharm. On 25 February 1999, Ebos invoiced Alphapharm for 72,240 doses. Alphapharm paid on 8 March 1999.

27 In transit from Finemores' warehouse to QML in Queensland, the temperature of 28,160 doses dropped below the minimum. The consignment was rejected by Queensland Health on 5 March 1999.

28 On 25 and 27 February 1999, Finemores collected a second shipment of Fluvirin from the airport and stored it at its warehouse. On 3 March 1999, Alphapharm wrote to Richard Thomson with details for the delivery of 28,160 doses to the Commonwealth Serum Laboratories in Sydney. The purchaser was New South Wales Health. Richard Thomson, in turn, communicated the delivery details to Finemores. On 4 March 1999, Mr van der Pluijm visited the warehouse and prepared the consignment for shipment. On the same day, Ebos invoiced Alphapharm for 28,160 doses. Alphapharm paid for the goods on 12 April 1999. The goods dropped below minimum temperature while still in storage. The Fluvirin was rejected by New South Wales Health.

The litigation

29 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.

30 Although their interests appear to have been quite distinct, Ebos and Alphapharm joined as plaintiffs in an action against Finemores in the District Court of New South Wales. In the result, judgment was entered in their favour jointly in the amount of $683,061.86 for damages and interest. It was common ground in this Court that this was an error, and that judgment should have been entered in favour of Alphapharm alone. It is, therefore, convenient to refer only to Alphapharm's claim.

31 Alphapharm's claim against Finemores, so far as presently relevant, was for damages for negligence as a bailee. Its entitlement to succeed on that claim, subject to the contractual defences raised by Finemores, is not presently in issue.

32 Finemores, by way of defence to Alphapharm's claim, relied on cl 6 of the Conditions of Contract on the reverse of the Application for Credit, read in the light of the definition of "Customer's Associates" in cl 3, and also in the light of cl 9. There is no dispute about the meaning of those provisions. It is their application that is in question.

33 It was common ground that Alphapharm fell within the definition of a "Customer's Associate", Richard Thomson being the customer. Finemores argued that Richard Thomson contracted with Finemores both on its own account and as agent both for Ebos and Alphapharm, in accordance with the warranty in cl 5, and that they were bound by the Conditions of Contract. Alphapharm advanced two reasons as to why it was not bound by cl 6. First it was said that, although there was a contract between Richard Thomson and Finemores, the Conditions of Contract on the reverse side of the Application for Credit did not form part of the terms of that contract. Secondly, it was denied that Richard Thomson contracted as agent for Alphapharm. Against the possibility that the first argument might fail, but the second argument might succeed, Finemores cross-claimed for an indemnity from Richard Thomson pursuant to cl 8 of the Conditions of Contract. In answer to that cross-claim, Richard Thomson relied on the first argument.

34 Both of the arguments of Alphapharm (and, therefore, as to the first, the argument of Richard Thomson also) succeeded before the trial judge, Acting Judge Hogan. That decision was upheld in the New South Wales Court of Appeal (Sheller JA, Young CJ in Eq, Bryson J)[2]. There are, therefore, two principal issues for this Court. The first is whether the terms of the contract made between Richard Thomson and Finemores included the Conditions of Contract and, in particular, either or both of cl 6 and cl 8 (the terms of contract issue). The second is whether Alphapharm is bound by cl 6 (the agency issue).

The terms of contract issue

35 A striking feature of the evidence at trial, and of the reasoning of the learned primary judge, is the attention that was given to largely irrelevant

---

2 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2003) 56 NSWLR 662.

information about the subjective understanding of the individual participants in the dealings between the parties. Written statements of witnesses, no doubt prepared by lawyers, were received as evidence in chief. Those statements contained a deal of inadmissible material that was received without objection. The uncritical reception of inadmissible evidence, often in written form and prepared in advance of the hearing is to be strongly discouraged. It tends to distract attention from the real issues, give rise to pointless cross-examination and cause problems on appeal where it may be difficult to know the extent to which the inadmissible material influenced the judgment at first instance.

36 In *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[3], Mason J observed:

> "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."

37 It is not in dispute that Finemores stored and transported the goods pursuant to a contract made between Finemores and Richard Thomson. The role of Alphapharm in that contract is a matter of dispute, and is the subject of the agency issue. It may be put to one side for the moment. The issue presently under consideration concerns the identification of the terms on which Finemores and Richard Thomson contracted.

38 It is not in dispute that Mr Gardiner-Garden was authorised by Richard Thomson to sign the Application for Credit, and that when he signed that document he did so intending that it would affect the legal relations between Richard Thomson and Finemores. So much was acknowledged in the course of argument in this Court. Counsel for Richard Thomson said that there was no suggestion that the document that was signed was not intended to create legal relations. In their consideration in *Ermogenous v Greek Orthodox Community of SA Inc*[4] of the requisite intention to create contractual relations, Gaudron, McHugh, Hayne and Callinan JJ said:

---

3 (1982) 149 CLR 337 at 352.

4 (2002) 209 CLR 95 at 105-106 [25].

> "Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened[5]. It is not a search for the uncommunicated subjective motives or intentions of the parties."

The point at issue on this appeal concerns not the creation of legal relations but the nature of the legal relations created.

39 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.

40 This Court, in *Pacific Carriers Ltd v BNP Paribas*[6], has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. 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

---

5 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348-353 per Mason J; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436; 186 ALR 289.

6 (2004) 78 ALJR 1045; 208 ALR 213.

consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction[7].

41 In *Taylor v Johnson*[8], Mason ACJ, Murphy and Deane JJ explained the significance of the difference between the subjective and objective theories of contractual assent by reference to the impeachment of a contract on the ground of unilateral mistake. They said:

> "According to the subjective theory, there is no binding contract either at common law or in equity, equity following the common law in this respect. Of course in deciding whether the contract is void ab initio for the unilateral mistake, regard will be had to the doctrine of estoppel in order to determine whether effect should be given to the claim that there has been unilateral mistake. On the other hand, according to the objective theory, there is a contract which, in conformity with the common law, continues to be binding, unless and until it is avoided in accordance with equitable principles which take as their foundation a contract valid at common law but transform it so that it becomes voidable. The important distinction between the two approaches is that, according to the subjective theory, the contract is void ab initio, whereas according to the objective theory, it is voidable only."

Their Honours went on to say that "the clear trend in decided cases and academic writings has been to leave the objective theory in command of the field."

42 Consistent with this objective approach to the determination of the rights and liabilities of contracting parties is the significance which the law attaches to the signature (or execution) of a contractual document. In *Parker v South Eastern Railway Company*[9], Mellish LJ drew a significant distinction as follows:

> "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. The parties may,

---

7 *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at 1050-1051 [22]; 208 ALR 213 at 221.

8 (1983) 151 CLR 422 at 429.

9 (1877) 2 CPD 416 at 421.

> however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it."

43 More recently, in words that are apposite to the present case, in *Wilton v Farnworth*[10] Latham CJ said:

> "In the absence of fraud or some other of the special circumstances of the character mentioned, a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it. Any weakening of these principles would make chaos of every-day business transactions."

44 In *Oceanic Sun Line Special Shipping Company Inc v Fay*[11], Brennan J said:

> "If a passenger signs and thereby binds himself to the terms of a contract of carriage containing a clause exempting the carrier from liability for loss arising out of the carriage, it is immaterial that the passenger did not trouble to discover the contents of the contract."

45 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, as Latham CJ put it, 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.

46 The statements in the above authorities accord with the well-known principle stated by Scrutton LJ in *L'Estrange v F Graucob Ltd*[12] ("*L'Estrange v*

---

10 (1948) 76 CLR 646 at 649.

11 (1988) 165 CLR 197 at 228.

12 [1934] 2 KB 394 at 403.

Graucob") 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." Scrutton LJ, in turn, was repeating the substance of what had been said by Mellish LJ in *Parker v South Eastern Railway Company*[13]. The principle was applied in *Foreman v Great Western Railway Company*[14]. A consignor of cattle sent them for transportation by a railway company. They were put in the charge of a drover, who could not read. The drover signed a contract of carriage which contained an exclusion clause. The drover's employer was held to be bound by the clause. The Exchequer Division said that "the plaintiff who sends the [illiterate] servant to sign the document is in no better or worse position than if he had signed it himself without reading it."[15] In his lecture published as "Form and Substance in Legal Reasoning: The Case of Contract"[16], Professor Atiyah posed, with reference to *L'Estrange v Graucob*, the question why signatures are, within established limits, regarded as conclusive. He answered:

> "A signature is, and is widely recognized even by the general public as being a formal device, and its value would be greatly reduced if it could not be treated as a conclusive ground of contractual liability at least in all ordinary circumstances."

Professor Atiyah added[17]:

> "However, what is, I think, less clear is what is the underlying reason of substance in this kind of situation. 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

---

13 (1877) 2 CPD 416 at 421.

14 (1878) 38 LT 851.

15 (1878) 38 LT 851 at 853.

16 MacCormick and Birks (eds), *The Legal Mind: Essays for Tony Honoré*, (1986), Ch 2, 19 at 34.

17 MacCormick and Birks (eds), *The Legal Mind: Essays for Tony Honoré*, (1986), Ch 2, 19 at 35.

asked, whether the signature is merely conclusive evidence of agreement, or whether it is itself a criterion of agreement.[18]"

These themes appeared in the judgment of this Court in *Petelin v Cullen*[19]. There, the Court upheld a plea of non est factum. Under the common law rules, a plea of non est factum was a plea of the general issue which put in issue that the defendant had executed the deed alleged in its declaration[20]. In their joint judgment in *Petelin*, Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ said[21]:

> "The principle which underlies the extension of the plea to cases in which a defendant has actually signed the instrument on which he is sued has not proved easy of precise formulation. The problem is that the principle must accommodate two policy considerations which pull in opposite directions: first, the injustice of holding a person to a bargain to which he has not brought a consenting mind; and, secondly, the necessity of holding a person who signs a document to that document, more particularly so as to protect innocent persons who rely on that signature when there is no reason to doubt its validity. The importance which the law assigns to the act of signing and to the protection of innocent persons who rely upon a signature is readily discerned in the statement that the plea is one 'which must necessarily be kept within narrow limits' ... and in the qualifications attaching to the defence which are designed to achieve this objective."

47 The importance which, for a very long time[22], the common law has assigned to the act of signing is not limited to contractual documents. *Wilton v Farnworth* was not a contract case. The passage from the judgment of

---

18 See Hart, "The Ascription of Responsibility and Rights", (1949) 49 *Proceedings of the Aristotelian Society* 171.

19 (1975) 132 CLR 355.

20 Bullen and Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3rd ed (1868) at 467-468.

21 (1975) 132 CLR 355 at 359.

22 See *Whelpdale's Case* (1604) 5 Co Rep 119a [77 ER 239]; Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 50-51.

Latham CJ quoted above is preceded by a general statement that, where a man signs a document knowing that it is a legal document relating to an interest in property, he is in general bound by the act of signature[23]. 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.

48 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[24].

49 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[25] 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

---

23 (1948) 76 CLR 646 at 649.

24 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 843 per Lord Wilberforce, 851 per Lord Diplock; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 507-508; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 62 [24].

25 Hart, "The Ascription of Responsibility and Rights", (1949) 49 *Proceedings of the Aristotelian Society* 171 at 174.

negative examples showing where the concept may not be applied or may only be applied in a weakened form."

50 An application of settled principle in the present case leads to the conclusion that the terms and conditions on the reverse of the Application for Credit formed part of the contract governing the storage and transportation of the goods.

51 The reasoning of the primary judge, accepted by the Court of Appeal, was based upon the proposition that, in order for those terms and conditions to be made part of the contract, it was necessary for Finemores to establish that it had done what was reasonably sufficient to give Richard Thomson notice of the terms and conditions (the major premise), and the further proposition that Finemores had not done what was reasonably sufficient to give Richard Thomson such notice (the minor premise).

52 It would be possible to dispose of the appeal by disagreeing with the minor premise. 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.

53 Of wider importance, however, is the major premise. If correct, it involves a serious qualification to the general principle concerning the effect of signing a contract without reading it. The proposition appears to be 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. If the proposition is limited to some terms and not others, it is not easy to see what the discrimen might be.

54 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?

55 In *L'Estrange v Graucob*[26], Scrutton LJ said that the problem in that case was different from what he described as "the railway passenger and cloak-room ticket cases, such as *Richardson, Spence & Co v Rowntree*[27]", where "there is no signature to the contractual document, the document being simply handed by the one party to the other." His Lordship said:

> "In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed."

56 In the same case Maugham LJ[28], who agreed with Scrutton LJ, referred to three possible circumstances in which the party who signed the document might not have been bound by its terms. The first was if the document signed was not a contract but merely a memorandum of a previous contract which did not include the relevant term. The second was a case of non est factum. The third was a case of misrepresentation.

57 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

---

26 [1934] 2 KB 394 at 402-403.

27 [1894] AC 217.

28 [1934] 2 KB 394 at 406-407.

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. *L'Estrange v Graucob* explicitly rejected an attempt to import the principles relating to ticket cases into the area of signed contracts. It was not argued, either in this Court or in the Court of Appeal, that *L'Estrange v Graucob* should not be followed.

58 The reasoning of the primary judge on the matter was as follows:

> "The question for decision then is whether the 'Conditions of Contract' on the back of the Application for Credit formed part of the contract.
>
> This is not a case where the parties have signed a single formal document which purports to contain all the terms and conditions of the contract between them. The relevant writing forms but part of one document out of a number which partly evidence the contract.
>
> Neither are the facts on all fours with those in *Liaweena (NSW) Pty Ltd v McWilliams Wines Pty Ltd*[29], where the party receiving a notice knew that it contained conditions which the other party intended to form part of future contracts, but because of an innocent misrepresentation did not read them. In this case I accept that Mr Garden did not realise that there were conditions on the back of the Credit application, especially conditions of a kind which so radically affected the contract. However, I do not think that he was induced not to read them because of any misrepresentation, however innocent. He did not give evidence that he was so misled, because he could not remember the circumstances of his signing the document.
>
> However, I also respectfully accept the statement in that case that the underlying question is whether the defendant 'did what was reasonably sufficient to give the plaintiff notice of the condition.' I also note the

---

29 (1991) ASC ¶56-038.

statement in *Remath Investments No 6 Pty Ltd v Chanel Australia Ltd*[30] that this obligation applies not merely to the existence but also to the content of the conditions.

Mr Garden had already read a document containing rates and conditions. He was then presented with another document which on its face related to matters relevant to his company's creditworthiness. All that was done to give him notice was the single sentence above the space provided for his signature which read 'Please read "conditions of contract" (Overleaf) prior to signing.' Had he noticed that sentence, he would have been quite justified in assuming that overleaf there were conditions relating to the terms upon which credit would be extended to his company. Conditions about cartage and storage had been set out in the previous document. There was nothing in the Application for Credit document itself, in the surrounding circumstances or in anything that Finemores had said or done that should have alerted him to the fact that the document contained conditions which so radically affected the contract.

I am satisfied that Finemores did not do what was reasonably sufficient to give Richard Thomson notice of the existence or of the content of the conditions of contract on the back of the Application for Credit form. Those conditions did not therefore form part of the contract between Finemores and Richard Thomson." (footnotes added)

59 Passing over the statement that *all* that was done to give notice was to provide for signature immediately below a request to read the conditions overleaf before signing (a proposition that goes to the minor premise), the reasoning proceeds upon a transposition to this area of discourse of the reasoning in the ticket cases: the very thing that *L'Estrange v Graucob* held should not be done.

60 The case of *Remath Investments No 6 Pty Ltd*[31] is clearly distinguishable. Goods were stolen from a bond store. Invoices referred to storage conditions which were said to be available on request. The Court of Appeal held that the storage conditions were not part of the contracts covering the stolen goods. "The contracts did not expressly incorporate those conditions and the invoices were

---

30 Unreported, Supreme Court of New South Wales Court of Appeal, 24 December 1992 at 4.

31 *Remath Investments No 6 Pty Ltd v Chanel (Australia) Pty Ltd* unreported, Supreme Court of New South Wales Court of Appeal, 24 December 1992.

sent too late to have any contractual effect."[32] Both parties accepted that the test was whether "the appellant did what was reasonably sufficient to give ... notice of the condition[s]."[33] That is not the basis on which the present case is to be decided.

61 All three members of the Court of Appeal accepted the primary judge's erroneous view that the critical question was whether Finemores gave Richard Thomson reasonably sufficient notice of the conditions on the reverse side of the Application for Credit. Bryson J, with whom Sheller JA agreed, was troubled about the negative answer that was given to the question, and said that he may have come to a different conclusion, but held that the conclusion of the trial judge was open to him and should not be disturbed. This led to a submission in this Court that the Court of Appeal had abdicated its responsibility to review the trial judge's reasoning, but it is unnecessary to pursue that point.

62 Young CJ in Eq referred to the English case of *Grogan v Robin Meredith Plant Hire*[34], in which the issue was whether the signature of a plant driver's time sheet by the agent of a company which had hired the driver and plant varied a pre-existing contract of hire so as to incorporate standard conditions of the Contractors Plant Association which were referred to on the time sheet. The English Court of Appeal answered the question in the negative. The question was identified as being whether in the circumstances a reasonable person would have understood the act of signing the time sheet as intended to have the effect of varying a contract that had already been made. The time sheet, the Court of Appeal said, was essentially an administrative and accounting document. That decision has no bearing on the present case, especially in light of the acknowledgment that the Application for Credit was intended to affect legal relations, and the fact that there was no pre-existing contract.

63 There may be cases where the circumstances in which a document is presented for signature, or the presence in it of unusual terms, could involve a misrepresentation. No such problem exists in the present case. There could also

---

32 *Remath Investments No 6 Pty Ltd v Chanel (Australia) Pty Ltd* unreported, Supreme Court of New South Wales Court of Appeal, 24 December 1992 at 4.

33 *Remath Investments No 6 Pty Ltd v Chanel (Australia) Pty Ltd* unreported, Supreme Court of New South Wales Court of Appeal, 24 December 1992 at 9.

34 [1996] TLR 93.

be circumstances in which one party would not reasonably understand another party's signature to a document as a manifestation of intent to enter into legal relations, or of assent to its terms. Again, that is not this case. It was reasonable of Finemores to treat Mr Gardiner-Garden's signature as a manifestation of assent to the conditions he had been invited to read before signing.

64 There was, in the reasoning of the Court of Appeal, some emphasis on the fact that the document signed by Mr Gardiner-Garden was an Application for Credit, and a suggestion that there is something surprising about such a document containing anything other than terms of payment. Bryson J said that the Application for Credit "was not altogether clearly an indication that the conditions were to be part of the contractual arrangement" and that a condition such as cl 6 or cl 8 was not what might be expected in an Application for Credit. Part of the answer to this has already been mentioned. The Application for Credit was in substance an application by Richard Thomson to become an account customer, and it was to cover all future dealings with Finemores. The Application for Credit had been referred to in the first written communication from Finemores to Richard Thomson. 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. Furthermore, it should be noted that the commercial context in which the terms and conditions operated included, as a key element, the matter of insurance. Clause 6 is to be understood in the light of cl 9. Alphapharm's later acceptance of the same standard terms was no doubt related to the fact that it had its own insurance. More fundamentally, the concern felt by the Court of Appeal was not addressed under the rubric of misrepresentation. 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.

65 The Victorian Court of Appeal, in *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* (Winneke P and Tadgell JA; Batt JA dissenting)[35], considered a case in which a plaintiff, attending a radio station promotional function at a go-kart

---

35 [1998] 4 VR 661.

track, was required to sign a document at the point of entry. He was bustled into signing the document without being given an opportunity to read it. The document was headed, in bold capitals, "TO HELP WITH OUR ADVERTISING". The plaintiff said he thought it was a form for marketing or promotional purposes. It contained an exclusion of liability clause. The plaintiff was injured. The Court of Appeal held that the exclusion clause did not apply. There was no finding that any contract of hire was made between the parties. There was no fee charged for entry, and no contract of entry. No one told the plaintiff he would be required to sign any contractual document.

66 The defendant conceded that "contractual documents containing an onerous exemptive provision must be brought to the notice of the party against whom they are to be enforced"[36]. Tadgell JA (with whom Winneke P agreed) referred[37] to the "trenchant" criticism of *L'Estrange v Graucob* in an article[38] to which, however, Professor Atiyah had responded as described earlier in these reasons. The defendant, having made the concession above, took its stand on a factual issue, whether in the instant case the exemptive provision had been brought to the notice of the plaintiff[39]. In these circumstances, the decision stands apart from the present appeal. That being so, it is unnecessary to enter upon a question whether the outcome in *Le Mans* may be supported on the basis of a misrepresentation as to the nature of the document signed.

67 In this case the printed conditions on the Application for Credit formed part of the contract of storage and transportation.

68 There is a further point that should be mentioned. In dealing with an argument about when the contract was made, Bryson J referred to one of a number of alternatives advanced by counsel for Finemores, which was that agreement was reached on 24 February 1999, when a letter accepting the Application for Credit was posted. On that basis, his Honour said, the first consignment to Brisbane pre-dated the contract, and the loss occurred before the conditions of contract were agreed. The alternative argument with which his

---

36 [1998] 4 VR 661 at 667.

37 [1998] 4 VR 661 at 667.

38 Spencer, "Signature, Consent and the Rule in *L'Estrange v Graucob*", (1973) *Cambridge Law Journal* 104.

39 [1998] 4 VR 661 at 667.

Honour was dealing was misconceived. Bryson J was right to point out that, if correct, it had the consequence he mentioned, but it was not correct. Finemores acted upon the Application for Credit, and accepted it by conduct, when, on 18 February 1999, it collected the first shipment of vaccine, took it into storage, and sent an invoice referring to Richard Thomson's customer number, being the same number as was confirmed in the later letter welcoming Richard Thomson as an account customer. This occurred before the first loss.

The agency issue

69 This issue was decided against Finemores by the primary judge. Because the Court of Appeal found as it did on the terms of contract issue, it did not need to consider the agency issue in detail. One member of the Court of Appeal, Young CJ in Eq, briefly stated his agreement with the trial judge on the point. The other members of the Court of Appeal said they agreed with Young CJ in Eq.

70 Richard Thomson had no proprietary interest in the damaged goods. They were sold by Ebos to Alphapharm, for on-sale to Alphapharm's customers. Risk passed to Alphapharm when they were delivered into store, and property passed when Alphapharm paid for them. The transportation (relevantly, to Queensland) was for the purpose of delivery of the goods to Alphapharm's customers. Similar transportation to other States was also required. As between the three respondents, Alphapharm was to bear the cost of such of the services of Finemores as were provided for Alphapharm's benefit. In contracting to obtain the supply of those services, Richard Thomson was acting for the benefit of Alphapharm. As Dixon AJ said in *Press v Mathers*[40], "in 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." Such a consideration may not be conclusive, but it is a useful practical starting point.

71 It was Richard Thomson that agreed with Finemores upon the rates to be charged for Finemores' services, but it was Ebos and Alphapharm that received the benefit, and bore the cost, of those services. It was Richard Thomson that gave Finemores the necessary information and instructions relating to delivery of the goods to Alphapharm's customers, but it did this in response to instructions it received from Alphapharm. All this happened in consequence of the

---

40 [1927] VLR 326 at 332.

conversation between Mr McGee and Mr van der Pluijm of 15 February 1999 in which the latter accepted the former's recommendation that Alphapharm "use Finemores for carriage from the warehouse to the purchasers, to reduce handling". All relevant use by Alphapharm of the services of Finemores occurred through Richard Thomson as an intermediary. Subject only to Mr van der Pluijm's attendances at the warehouse to label the goods, and thereby appropriate them to Alphapharm, it was through Richard Thomson that Alphapharm dealt with Finemores. Mr van der Pluijm, in cross-examination, acknowledged the obvious fact that Alphapharm left it to Richard Thomson to arrange for the storage of the goods and their delivery to Alphapharm's customers.

72 Finemores was not privy to the sub-distribution agreement between Ebos and Alphapharm. It was not aware, and could not reasonably have been expected to be aware, of the contractual provisions governing risk and title. The commercial purpose of cl 5 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. Such a situation is common. Finemores required its account customer to agree to detailed conditions about liability for damage to the goods. 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.

73 When the goods that were sent to QML were transported from Sydney to Brisbane, they were being transported pursuant to a contract. There was no dispute about the rate of freight. That rate was agreed by Richard Thomson, but Richard Thomson was acting pursuant to the decision of 15 February 1999 that Alphapharm would use the services of Finemores. It was obvious that Richard Thomson would make a contract with Finemores upon some terms and conditions. Once again, Mr van der Pluijm acknowledged as much in cross-examination. There was no suggestion of any limitation being imposed by Alphapharm as to the terms and conditions to which Richard Thomson might agree. When, later, Mr van der Pluijm saw the terms and conditions he had no problem with them, and subsequently he accepted the same terms and conditions when Alphapharm dealt directly with Finemores.

74 The primary judge had no difficulty in concluding that Richard Thomson acted, and had authority to act, as agent for Ebos. He said that it was "beyond doubt that Richard Thomson was the agent of Ebos for the purpose of arranging transport and storage". The reference to transport, in that finding, must have been to transport into Finemores' warehouse. The contention of Finemores was, and is, that, insofar as the services of Finemores under its contract with Richard

Thomson were provided for the benefit of Ebos, Richard Thomson, in accordance with cl 5 of the Conditions of Contract, acted as agent for Ebos, and, insofar as the services were provided for the benefit of Alphapharm, Richard Thomson acted as agent for Alphapharm. No issue arises in the present appeal in relation to the contractual liability of Richard Thomson to Finemores, and it is unnecessary to examine, and no argument was directed towards, the question whether, upon analysis, there were two contracts or only one.

75 As to Alphapharm, the primary judge accepted that, after Mr van der Pluijm labelled the goods and addressed them to Alphapharm's customers, Alphapharm "had a possessory title sufficient to give rise to a duty in [Finemores], owed to Alphapharm, to exercise reasonable care in relation to the parcels." He continued:

> "That duty did not arise from any contract between Alphapharm and Finemores. It arose from the handing over of possession by Alphapharm to Finemores of the parcels then and there in the warehouse. There was no contract between them. Richard Thomson was never constituted Alphapharm's agent to create a contract between Alphapharm and Finemores. There was no evidence of any express appointment of Richard Thomson by Alphapharm as its agent to create such a contract. Insofar as there was any relationship of agency between Alphapharm and Richard Thomson, it was a limited one whereby Richard Thomson made the administrative arrangements on behalf of Alphapharm for the timing and size and identification of the outbound shipments. Even if it be accepted that Mr van der Pluijm agreed with someone at Richard Thomson that, because Richard Thomson had an account with Finemores, Finemores should invoice Richard Thomson for all transportation including that from Finemores to the Alphapharm customer, and then pass the relevant cost on to Alphapharm, I would not accept that Richard Thomson was thereby constituted the agent of Alphapharm to enter into a contract on its behalf which contained the onerous conditions on which the defendant relies.
>
> Even if the exculpatory clauses in the conditions of contract signed by Richard Thomson ... were part of the contract between Finemores on the one hand and Ebos or Richard Thomson or both of them on the other, they did not affect the relationship between Alphapharm and [Finemores]."

76 Earlier in his reasons, his Honour said, with reference to the arrangements preparatory to transport by Finemores:

> "I think that Mr van der Pluijm also did not then advert to any need to have a clear contractual relationship between the carrier and his company about the terms of carriage."

For reasons that have already been explained, Mr van der Pluijm's subjective understanding is not important for the resolution of the issues that arose in this case.

77 In the Court of Appeal, Young CJ in Eq said:

> "There is always a danger in merely asking the question, 'Was X the agent for Y?'. As the High Court made clear in *Petersen v Moloney*[41], the vital question is 'Was X the agent of Y to make the contract?' or as the case may be. In the present case there is no doubt that [Richard Thomson] was Alphapharm's agent for some purposes. However, in my view, the trial judge was correct in his conclusion that it was not Alphapharm's agent to contract."

78 The apparent readiness to accept that Richard Thomson contracted as agent for Ebos, and that if, for example, goods had been damaged in the course of transit into Finemores' store Ebos would have been bound by cl 6 (if it were otherwise part of the transportation contract), in contrast with the rejection of a similar contention in relation to Alphapharm, shows that the problem was seen as one of authority. Richard Thomson was a subsidiary of Ebos, and was paid a fee for administering the distribution agreement. Presumably, that was seen as making it easier to conclude that Richard Thomson had authority to bind Ebos to the relevant conditions of contract. With respect, the distinction between Ebos and Alphapharm is unconvincing. They both required the services of Finemores, and they both relied on Richard Thomson to procure those services. The conclusion that Richard Thomson was dealing with Finemores as agent of Ebos but not as agent of Alphapharm is difficult to accept.

79 The use of the concept of agency as a method of overcoming the requirements of privity in a commercial context such as the present was suggested by Lord Reid in *Midland Silicones Ltd v Scruttons Ltd*[42], and taken up

---

41 (1951) 84 CLR 91 at 94.

42 [1962] AC 446 at 474.

in *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd*[43], and *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd*[44]. The technique was recently described by Lord Bingham of Cornhill as "a deft and commercially-inspired response to technical English rules of contract, particularly those governing privity and consideration"[45]. In the case of a stevedore seeking the benefit of a Himalaya clause, courts have been ready to conclude that the carrier was acting with the stevedore's authority[46]. In the present case, the particular clause in question operates against, rather than in favour of, Alphapharm. On the other hand, a conclusion that Richard Thomson was authorised to act on behalf of Alphapharm may be more obvious than a conclusion that a carrier at time of shipment was authorised to act on behalf of an unknown stevedore in a foreign country.

80 The evidence made it plain that Alphapharm required services of the kind provided by Finemores, that it decided to use the services of Finemores, that it designated Finemores' warehouse as its store for the purpose of the sub-distribution agreement, that it appropriated the goods while they were in Finemores' store, and that it required Finemores to transport the goods to Alphapharm's customers. It is also clear that Alphapharm left it to Richard Thomson to arrange the necessary contract pursuant to which Finemores was to provide those services for the benefit of Alphapharm. The terms on which Richard Thomson contracted were Finemores' standard terms and conditions.

81 The primary judge's conclusion that the relationship of agency "was a limited one whereby Richard Thomson made the administrative arrangements on behalf of Alphapharm for the timing and size and identification of the outbound shipments" appears to overlook the most obvious feature of the commercial circumstances, which was that the outbound shipments were to take place pursuant to a contract, and that, at the very least, the rates of freight and terms of payment had to be agreed. It is not enough to say that Richard Thomson was to pass the cost on to Alphapharm. Someone had to agree about the cost, which was to be borne by Alphapharm. The evidence compels the conclusion that

---

43 [1975] AC 154.

44 (1980) 144 CLR 300.

45 *Homburg Houtimport BV v Agrosin Ltd* [2004] 1 AC 715 at 744.

46 eg *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231 at 241 per Barwick CJ.

Alphapharm authorised Richard Thomson to contract with Finemores and to agree upon rates of freight, terms of payment, and such other standard terms and conditions of the contract of storage and transportation as were required by Finemores. So long as the terms and conditions to which Richard Thomson agreed were Finemores' standard terms and conditions then Richard Thomson was acting within its authority.

82 In the result, Alphapharm was bound by cl 6 of the Conditions of Contract. No issue arises of the indemnity claim made under cl 8 of the Conditions of Contract.

Conclusion and orders

83 The appellant succeeds on both issues. At the conclusion of the hearing of the appeal the parties agreed upon the appropriate orders depending upon the outcome of the appeal. The following orders should be made:

1. Appeal allowed with costs.

2. Set aside order 1 of the orders of the New South Wales Court of Appeal and, in lieu thereof, order that the appeal to that Court be allowed with costs.

3. Set aside orders 1, 2 and 4 of the trial judge and in lieu thereof, order that:

   (a) the First and Second Plaintiffs' claim in the District Court of New South Wales be dismissed;

   (b) judgment be entered for the Defendant;

   (c) the First and Second Plaintiffs pay the Defendant's costs of the trial; and

   (d) the First and Second Plaintiffs pay the costs of the First and Third Cross Defendants.

4. Order that the First Respondent repay to the Appellant the sum of $683,061.86 together with interest from the date of payment at rates under the *District Court Act* 1973 (NSW) or as agreed.