# FINE PRINT IN CONTRACTS: FROM 'INVISIBLE INK' CASES TO 'RED INK' RULES

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[*The approach of the legislature and judiciary to the widespread use of fine print in contracts has been piecemeal. In this article the authors examine the gradual shift away from the traditional freedom of contract theory. The impact of legislative provisions relating to misleading and deceptive conduct and unconscionability is discussed. The authors then proceed to analyse three recent cases which concern the enforceability of fine print in contractual documents. They conclude that conscience has emerged as an important influence on contract law. The shift in attitude by the legislature and the judiciary indicates a concern that modern contract law reflects the commercial realities of the marketplace.*]

## *INTRODUCTION*

The use of fine print in contractual documents, particularly standard form contracts, is commonplace. The growth in the use of such contracts is easy to explain. From the perspective of the modern marketplace, standardized contracts ('contracts of adhesion') invariably containing clauses in fine print, facilitate the flow of goods and services and are viewed by many as an adjunct to mass marketing. As one American commentator has remarked:

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

The practice, although quite understandable from the viewpoint of the mass supplier of goods and services, can be contentious. Contracts with fine print can be an instrument of abuse in the sense of containing harsh or unfair terms. Moreover, such documents can be misleading and lull consumers into a false sense of security. As one person has cryptically observed, '[w]hat the big print giveth the fine print taketh away.'[2]

In many cases the consumer, signing or accepting the document, does not fully understand or comprehend the precise nature of the contractual terms and, even if such knowledge was possessed, would have no real opportunity to negotiate in respect of those terms. This was emphasized by Lord Denning in his final judg-

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1 Bolgar, V., 'The Contract of Adhesion: A Comparison in Theory and Practice' (1972) 20 *American Journal of Comparative Law Reader* 53 referred to in Burgess, A., 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion' (1986) 15 *Anglo-American Law Review* 255. See also Beale, H., 'Inequality of Bargaining Power' (1986) 6 *Oxford Journal of Legal Studies* 123; Thal, S., 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness (1988) 8 *Oxford Journal of Legal Studies* 17.

2 Sheen, J.F., *Tudor Bunch of Dates* (1992).

ment in the Court of Appeal in *George Mitchell (Chesterhall) v. Finney Lock Seeds Ltd*,[3] where his Honour said:

> None of you nowadays will remember the trouble we had — when I was called to the Bar — with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it.' The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, 'You must put it in clear words', the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.[4]

Similarly, Lord Diplock in *Schroeder (A) Music Publishing Co. Ltd v. Macaulay*,[5] whilst recognizing the commercial benefits of freely negotiated standard form contracts, drew attention to the use of 'take it or leave it' type contracts:

> Standard forms of contracts are of two kinds. The first, of very ancient origin, are those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability, the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.
>
> The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th Century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with other [*sic*] providing similar goods or services, enables him to say, 'If you want these goods or services at all, these are the only terms on which they are available. Take it or leave it.'
>
> To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power.[6]

The legal response by the courts and the legislature to the use of fine print in contractual documents has been piecemeal, and not always consistent with the dichotomy referred to by Lord Diplock. There is no coherent theory and there remains a tension between the concern to ensure the integrity of business transactions on the one hand, and the need to avoid exploitation and unfairness on the other.

The purpose of this article is to analyse how the common law deals with fine print in contracts, whether signed by the parties or not, and how recent statutory reforms have modified this approach. In analysing the common law developments particular emphasis will be placed upon three recent cases: *Interfoto Picture Library v. Stiletto Visual Programmes Ltd*[7] (the *Interfoto* case), *George T. Collings (Aust.) Pty Ltd v. H. F. Stevenson (Aust.) Pty Ltd*[8] (the *George Collings*

[3] (1983) 1 Q.B. 284.
[4] *Ibid.* 296-7.
[5] [1974] 3 All E.R. 616.
[6] *Ibid.* 624.
[7] [1988] 1 All E.R. 348. For an excellent analysis of the *Interfoto* case, see MacDonald, E., 'The Duty to Give Notice of Unusual Contract Terms' (1988) *Journal of Business Law* 375. See also Baxt, R., (1989) 63 Australian Law Journal 429.
[8] (1991) A.T.P.R. 41-104.

case), and *Lezam Pty Ltd v. Seabridge Australia Pty Ltd*[9] (the *Lezam* case). These cases, and the statutory reforms referred to, support the view that contract law is now being influenced by 'the emergence of conscience and the decline of legalism.'[10]

## 1. *TRADITIONAL CONTRACT LAW THEORY AND THE MODERN APPROACH*

The use of fine print in contractual documents was encouraged under traditional theories of freedom of contract and the objective view of contract law.[11] Under these approaches the courts' primary function was perceived as being to give effect to what the parties had agreed. A party to a written agreement was to be taken to have consented to be bound, in case of dispute, by the interpretation which a court might place on the language of the instrument. By and large the law was concerned with objective appearance rather than actual intention.[12] The primary justification given by the courts in support of such an approach was the need to ensure the integrity of business transactions.[13]

Thus if a party signed or willingly accepted a document containing contractual terms, that party would invariably be bound by the document, irrespective of whether or not it had been read. The highwater mark of this approach was reached in 1934 with the decision delivered in *L'Estrange v. F. Graucob.*[14] In that case the plaintiff bought an automatic vending machine for use in her café. She signed a printed order form which contained a fine print clause excluding liability should the machine prove unsuitable or defective. The plaintiff did not read the form, although she acknowledged that there was printed material on it. The Court found against her:

> In this case the plaintiff has signed a document headed 'Sales Agreement', which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them.[15]

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

> Rational planning and risk assumption would not be served by enforcing the part of a contract written in lemon juice which could only be read over the heat of a candle when the one signing had not been informed of the secret. Some business forms and the ways they are used are almost this bad. There is some danger that a judge, temporarily bereft of his common sense, could apply the duty-to-read slogan to what really is close to an invisible ink case and enforce the document as written.[16]

Fortunately, such concerns have proved to be largely unfounded. Even their Honours in *L'Estrange v. F. Graucob* acknowledged that there were limits to the

9 (1992) 107 A.L.R. 291.

10 Starke, J.G., Seddon, N.C. and Ellinghaus, M.P., *Cheshire and Fifoot's Law of Contract* (6th ed. 1992) 43.

11 See generally *ibid.* ch.1.

12 Mason, A. and Gageler, S.J., 'The Contract' in Finn, P.D. (ed.), *Essays on Contract* (1987) 1.

13 *Life Insurance Co. of Australia Ltd v. Phillips* (1925) 36 C.L.R. 60, 77.

14 [1934] 2 K.B. 394.

15 *Ibid.* 404.

16 Macaulay, S., 'Private Legislation and the Duty to Read' [1966] 19 *Vanderbilt Law Review* 1051, 1056.

duty to read before signing or accepting a contract. The Court accepted that the advantages of certainty in contractual relations could not prevail against the harm and injustice that resulted from fraud or misrepresentation.

In cases where a contractual document has been received by a party but not signed, a different rule applies. Knowledge of the written contents of the document is not presumed. Generally, the party relying on the document's terms must establish that reasonable or sufficient notice of those terms was given to the other party.[17] In relatively recent times some matters taken into account pursuant to this rule have evolved in favour of the recipient. These matters are particularly relevant in determining the incorporation of fine print terms into a contract. One factor invariably considered is whether the document would ordinarily be understood as containing the terms in question.[18] Another important matter is whether the term inserted in the contract is unusual or particularly onerous, in which case the party seeking to enforce it may be required to take special steps to bring it to the attention of the other party.[19]

In *MacRobertson Miller Airline Services v. Commissioner of State Taxation (W.A.)*,[20] Jacobs J. suggested that if an unreasonable clause is included in terms that are not read and are not likely to be read, that term should not be accepted, irrespective of whether or not the document containing the terms has been signed. This approach clearly challenges the authority of *L'Estrange v. F. Graucob.*

Similar approaches have been adopted in foreign legal jurisdictions. An exception to the rule developed in *L'Estrange v. F. Graucob*, based on the concept of 'reasonableness', is emerging in Canada. In *Tilden Rent-A-Car Co. v. Clendenning*,[21] for example, the plaintiff had comprehensively insured a motor vehicle pursuant to a policy which, in fine and faint print, excluded liability should the driver involved in an accident have consumed any intoxicating liquor 'whatever be the quantity.' The Ontario Court of Appeal held that the clause could not be relied upon. Dubin J.A. commented:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.[22]

By way of further example, reference can be made to the decision of the

[17] *Parker v. The South Eastern Railway Co* (1877) 2 C.P.D. 416.

[18] *Chapelton v. Barry Urban District Council* [1940] 1 K.B. 532; *Causer v. Browne* [1952] V.L.R. 1. See also Clarke, M., 'Notice of Contractual Terms' [1976] *Cambridge Law Journal* 51; Brownsword, R., 'Incorporating Exemption Clauses' (1972) 35 *Modern Law Review* 179; MacDonald, E., 'Incorporation of Contract Terms by a "Consistent Course of Dealing"' (1988) 8 *Legal Studies* 48; Swanton, J., 'Incorporation of Contractual Terms by a Course of Dealing' (1988) 1 *Journal of Contract Law* 223.

[19] *Thornton v. Shoe Lane Parking Ltd* [1971] 2 Q.B. 163; *J. Spurling Ltd v. Bradshaw* [1956] 1 W.L.R. 461.

[20] (1975) 133 C.L.R. 125, 142.

[21] (1978) 83 D.L.R. (3d) 400.

[22] *Ibid.* 408-9. Note that in Australia s.37 of the Insurance Contracts Act 1984 (Cth) now deals with notification of unusual terms in contracts of insurance.

Californian Supreme Court in *Steven v. The Fidelity and Casualty Co. of New York*.[23] In that case the defendant, a life insurance company, issued policies from vending machines at airports. Owing to the cancellation of his scheduled flight, Steven, the plaintiff's husband, was obliged to take a substitute flight. The chartered aircraft carrying Steven crashed and he was killed. The insurers argued that he was not travelling as a passenger as defined under the policy, a term of which required the insured to be travelling on a scheduled flight. The trial Judge accepted this contention.

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

*L'Estrange v. F. Graucob, Tilden Rent-A-Car Co. v. Clendenning*, and *Steven v. The Fidelity and Casualty Co. of New York*, are all examples of cases where the party seeking to enforce a contractual obligation was met by a defence based on a clause which was included in the fine print of the contract. The approach of the Courts in each case was to ascertain whether the particular clauses in issue could be said to have been incorporated into the contract. A relatively recent English decision, the *Interfoto* case, clearly embraces the developments made in this area of the law since *L'Estrange v. F. Graucob* was decided. The *Interfoto* case will be examined below.

It is fairly clear, however, that this judicial technique, based as it is on the requirement of incorporation, has its limitations. It may help curb, but will not always prevent, exploitation or unfairness resulting from the inclusion of fine print clauses in contracts. This no doubt explains, at least in part, the steps taken by the Australian courts in developing an expanded equitable jurisdiction based on the doctrine of 'unconscionability'. In recent times these courts have been prepared to grant relief from the consequences of the enforcement of fine print contractual clauses, where the circumstances have been such as to make such enforcement manifestly unfair.

Traditionally, the doctrine of unconscionability operated in recognition of the undesirability of holding certain classes of people to contracts they had signed or accepted without having read. Such people included illiterates, those of limited mental ability, and minors. The doctrine has recently been resurrected. In the well known case of *Commercial Bank of Australia Ltd v. Amadio*,[24] the High Court of Australia set aside a guarantee given to the bank by the plaintiffs. The guarantee was designed to secure the debts incurred by the plaintiffs' son, who was considerably overdrawn. The plaintiffs were quite elderly and of Italian descent, possessing a limited grasp of the English language. They had obtained no independent

[23] 27 Cal. Reptr 172 (1962).

[24] (1983) 151 C.L.R. 447. See also *National Australia Bank Limited v. Nobile & Anor* [1988] A.T.P.R. 40-856; *Nolan v. Westpac Banking Corporation* [1989] A.T.P.R. 40-982; Sneddon, M., 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice' (1990) 13 *University of New South Wales Law Journal* 302; O'Donovan, J., 'Guarantees: Vitiating Factors and Independent Legal Advice' (1992) 66 *Law Institute Journal* 51.

legal advice, and were under the impression that their son's business was quite prosperous. Deane J. stated that the equitable jurisdiction was

> long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances . . .[25]

It is beyond the scope of this article to discuss the impact of *Waltons Stores (Interstate) Ltd v. Maher*[26] and *Commonwealth v. Verwayen*[27] in this area. The extended application of the equitable doctrine of unconscionability is, however, clearly evidenced by the recent decision of the Victorian Supreme Court in the *George Collings* case, which will be analysed below. It is clear from this decision, and other recent case law, that there is an increasing emphasis on the need for fairness in contractual dealings.

## 2. *STATUTORY REFORM*

Recent legislative reforms also highlight a move away from the objective theory of contract law. Apart from developments brought about by the courts, there have been other forces at work which have impacted upon the use of standard form contracts and the inclusion of fine print clauses in those contracts. Statutory reform has taken place in areas in which the common law of contract has failed to adequately protect an economically weaker party from the greater bargaining power of another.[28] The Credit Acts adopted by several Australian States[29] provide a good illustration. For example, s.152 of the Credit Act 1984 (Vic.) provides, *inter alia*, that the Credit Tribunal can prevent a creditor from using a document that is expressed in language that is not readily comprehensible, or that is written in a style or manner that detracts from the legibility of the document. Divisions 2 and 2A of the Trade Practices Act 1974 (Cth), which counter the effect of exclusion clauses in 'consumer' transactions in relation to the quality and description of goods and services, is another good example.

### 2.1 *Misleading or Deceptive Conduct*

Section 52 of the Trade Practices Act,[30] which deals with misleading or deceptive conduct, or conduct that is likely to mislead or deceive, has had a significant impact in the contractual area. A detailed analysis of the section will not be

25 *Ibid.* 474.

26 (1988) 164 C.L.R. 387. Amongst the plethora of literature dealing with this topic readers are referred to Bagot, C.N.H., 'Equitable Estoppel and Contractual Obligations in the Light of *Waltons v. Maher*' (1988) 62 *Australian Law Journal* 926; Clark, E., 'The Swordbearer has Arrived: Promissory Estoppel and *Waltons Stores (Interstate) Ltd v. Maher*' (1989) 9 *University of Tasmania Law Review* 68; Stoljar, S., 'Estoppel and Contract Theory' (1990) 3 *Journal of Contract Law* 1, 16; Parkinson, P., 'Equitable Estoppel: Developments after *Waltons Stores (Interstate) Ltd v. Maher*' (1990) 34 *Journal of Contract Law* 50; and Sutton, K., 'A Denning Come to Judgment: Recent Judicial Adventures in the Law of Contract' (1989) 15 *University of Queensland Law Journal* 131.

27 (1990) 95 A.L.R. 321; (1990) 64 A.L.J.R. 540.

28 Mason and Gageler, *op. cit.* n.12, 27.

29 1984 (N.S.W.); 1984 (Vic.); 1987 (Qld); 1984 (S.A.); 1984 (W.A.).

30 Although discussion in this article will concentrate on s.52, this section is mirrored in all state and territory Fair Trading Acts. This may be significant where the party in breach is not a corporation.

undertaken here because of space constraints, and the existence of several excellent publications already dealing with the topic.[31] However, a few case examples serve to illustrate the importance of the section.

In the context of advertising it has been held that qualifications referred to in fine print may not be effective to negate a false or misleading impression.[32] For example, in *Henderson v. Pioneer Homes Pty Ltd*[33] Smithers J. commented:

> If a document is addressed to simple or ordinary people and contains a firm, prominent and simple assertion which all can understand, the impression created thereby is not to be washed away by implications said to be lurking in statements positive, rather than negative in form, in a legend in the advertisement, the alleged full import of which is not stated. The sort of reader in contemplation is hardly likely to think that what is stated so plainly and attractively in lines one and two, is being cancelled by implications to be gathered from the small print.[34]

In business transactions, the same approach prevails. This is evidenced by *Dibble & Anor v. Aidan Nominees Pty Ltd & Anor*[35] where the applicants, a husband and wife, signed a lease agreement with Aidan Nominees (Aidan). The Dibbles were experienced in the fish and chips business, but were described by the trial Judge, Muirhead J., as 'pretty simple trusting folk to whom legal documents meant little.'[36] They were assured by Aidan that they would have the sole right to sell fish and chips at the food market involved, and that an established stallholder opposite would cease selling chips as soon as the Dibbles commenced business. After a quick examination of the lease document the Dibbles signed it on the assumption that it gave effect to these verbal assurances. However, the document expressly reserved to the lessor, Aidan, the capacity to grant various rights to others to sell food (including chips). The established stallholder did not stop selling chips, and this affected the takings of the applicants' business, which were disappointing.

At common law the parol evidence rule would have created potential obstacles in relation to the oral representations. Furthermore, although it was not argued that Aidan's representations constituted a collateral contract, there would have been difficulty in enforcing any alleged collateral contract on the grounds of its inconsistency with the main contract because, as previously explained, the lease reserved to the lessor the capacity to grant to other tenants the right to sell other foods.[37] The Dibbles, however, successfully claimed that there had been a breach of s.52 of the Trade Practices Act, in that the oral representations by Aidan constituted misleading or deceptive conduct. Mr Justice Muirhead retraced the prior authorities and noted that s.52 is aimed to protect the 'astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations.'[38]

31 Readers are referred to the excellent article by French, R.S., 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *Australian Law Journal* 250. See also Pengilley, W., 'Section 52 of the Trade Practices Act: A Plaintiff's New Exocet' (1987) 15 *Australian Business Law Review* 247; Healey, D. and Terry, A., *Misleading and Deceptive Conduct* (1991).

32 See the cases referred to in Jordan, H., 'The Asterisk in Advertising' (1990) 6 *Trade Practices Law Bulletin* 42.

33 (1980) A.T.P.R. 40-159.

34 *Ibid.* 42,247. (Emphasis added.)

35 (1986) A.T.P.R. 40-693.

36 *Ibid.* 47,614.

37 *Hoyt's Pty Ltd v. Spencer* (1919) 27 C.L.R. 133. Discussed by Phillips, J.C. and Carter, J.W., 'The Demise of *Hoyt's Pty Ltd v. Spencer*' (1990) 2 *Journal of Contract Law* 181.

38 *Supra* n.35, 47,619. See also Clarke, B.R., 'The Death of the Reasonable Man' (1991) 65 *Law Institute Journal* 294.

The significance of this decision is that if a document has been signed but not read or, if read, not comprehended, there may still be a s.52 claim if the party has been induced to sign by representations (innocent or otherwise) which are misleading or deceptive.

By way of further example of the importance of s.52, reference can be made to *Collins Marrickville Pty Ltd v. Henjo Investments Pty Ltd & Ors*,[39] which illustrates that a failure to qualify a statement or representation can constitute misleading or deceptive conduct. This case also dealt with the use of a disclaimer clause in a contract and its ineffectiveness in preventing a party who had been misled or deceived from seeking a remedy. The appellant alleged that it had been induced to enter into a contract to buy the respondents' licensed restaurant by virtue of representations, *inter alia*, that the restaurant's seating capacity was 128. In fact, although the restaurant could physically hold that number of people, its licensed capacity was only 84. Wilcox J. held, at first instance, that the respondents' failure to mention this restriction constituted misleading or deceptive conduct under s.52 of the Trade Practices Act. This finding was subsequently affirmed by the Full Federal Court on appeal. His Honour also held that clauses in the purchase agreement that purported to negate the effect of pre-contractual representations were ineffective in excluding the operation of s.52. As he said:

> If in fact the misleading conduct of the respondent has induced an applicant to enter into an agreement, that inducement is not negated because, in the agreement itself, the applicant says to the contrary.[40]

A further observation can be made with regard to s.52. It is well established that breach of that section is not dependent on proof of intent. As Muirhead J. remarked in *Henderson v. Pioneer Homes Pty Ltd*, '[a]n applicant need not prove an intent to deceive merely the fact of deception.'[41] This means that the traditional distinction in contract law between innocent and fraudulent misrepresentation is irrelevant when determining a breach of s.52.

Furthermore, the existence of s.87 of the Trade Practices Act means that, in addition to the usual remedies of damages and/or rescission, a court has wide discretionary powers to make a range of remedial orders where appropriate. These include the power to declare a contract (or any part of a contract) void, to vary a contract, and to refuse to enforce a contract. Unlike the common law, which differentiates between fraudulent and innocent misrepresentations when granting remedies, these statutory remedies are available to the innocent party irrespective of whether the misleading or deceptive conduct was intentional.

The application of s.52 to situations involving contracts containing small print clauses was recently analysed by the Federal Court in the *Lezam* case. This case will be examined below.

### 2.2 *Unconscionable Conduct*

Although the operation of s.52 is wide, it cannot, in the absence of misleading or deceptive conduct, be utilized to grant relief to a party where the bargain is

[39] (1987) 72 A.L.R. 601. On appeal (1988) 79 A.L.R. 83.

[40] *Ibid.* 613.

[41] *Supra* n.35, 47,619 referring to the decision of the High Court in *Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Pty Ltd* (1978) 140 C.L.R. 216.

unconscionable. A recent development has been the introduction of statutory provisions having a more general application to unfair contracts, such as s.52A of the Trade Practices Act (introduced in 1986 and, as a result of recent amendments, renumbered as s.51AB), mirror provisions in all State Fair Trading Acts, and the Contracts Review Act 1980 in New South Wales. These provisions enable courts to grant relief to 'consumers' from unfair terms and from the oppressive operation of contracts.[42] The law is not based on the need to evidence some special disability on the part of the 'consumer'. Sub-section 52A(1), for example, simply provides that a corporation shall not, in trade or commerce in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Sub-section (2) of s.52A provides that in determining whether there has been a contravention of sub-s. (1), a court may have regard to:

> (a) the relative strengths of the bargaining positions of the corporation and the consumer;
> (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
> (d) whether any undue influence was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

Sub-section (5) limits the operation of these provisions to 'consumer' type transactions by defining goods or services as being of 'a kind ordinarily acquired for personal domestic or household use or consumption.'

Provisions such as these conform with and expand upon the present tendency of the courts to give the established equitable grounds a wider operation. This trend has been reinforced by the introduction of sub-s. 51AA(1) of the Trade Practices Legislation Amendment Act 1992 (Cth), which provides that '[a] corporation must not, in trade or commerce, engage in conduct that is unconscionable within the category of the unwritten law, from time to time, of the states and territories.' Although the precise scope of this provision is not clear, it does extend the prohibition contained in s.52A.[43] Developments such as these further underline the decline of freedom of contract as a paramount principle in the field of contract law.[44]

### 3. *RECENT CASE LAW*

The general shift in judicial attitude away from the sanctity of contract doctrine is evidenced by three recent cases dealing with contracts containing 'fine print'. In two of those cases the parties seeking to avoid the contracts had not read the

42 See Goldring, J., 'Certainty in Contracts, Unconscionability and the Trade Practices Act: The Effect of Section 52A' (1988) 11 *Sydney Law Review* 514.

43 For a discussion of the background to this Amendment Act see Taperell, G.Q., 'Unconscionable Conduct and Small Business: Possible Extension of s.52A of the Trade Practices Act 1974' (1990) 18 *Australian Business Law Review* 370. As noted, s.52A has been renumbered as s. 51AB and relocated after s. 51AA in Part IVA of the Act. For the purposes of this article the authors have continued to refer to s.52A by its former description because readers will be more familiar with it as such.

44 Mason and Gageler, *op. cit.* n.12, 28.

terms which were, in both cases, onerous or unusual. The first of these, the *Interfoto* case, was a decision of the Court of Appeal in England. In that case the focus was on whether the fine print clause in question had been incorporated into the parties' unsigned contract. The Victorian Supreme Court in the *George Collings* case, on the other hand, focused on the enforceability of a signed standard form document containing fine print clauses.

The third case, the *Lezam* case, concerned a small print disclaimer included in the documentation which passed between the contracting parties. The Full Court of the Federal Court found that the disclaimer had been incorporated into the final contract, so that the primary issue concerned its enforceability. Thus all three cases, which dealt with different issues arising from 'fine print' contracts, were decided on the basis of different rules, both common law and statutory.

### 3.1 *The* Interfoto *Case*

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

The delivery note specified the date of return as being fourteen days after the date of dispatch which was marked as 5 March, 1984. At the bottom of the note was a list of nine conditions, one of which provided for the return of all transparencies within fourteen days, with a holding fee of £5 payable *per* transparency for each late day, plus V.A.T.

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

In the lower Court, evidence was given that most photographic libraries charged less than £3.50 *per* week for retention of transparencies. Surprisingly, it was not argued that condition 2 constituted a penalty.[45] Rather, the focus was on whether it formed part of the contract between the parties. The trial Judge found that it did, and entered judgment for the respondent. His Honour's decision on this point was reversed by the Court of Appeal.

Although this was not a case involving exclusion clauses, their Lordships hearing the appeal drew heavily on case law in that area, particularly *Parker v. S. E. Railway Co.*[46] and *Thornton v. Shoe Lane Parking Ltd.*[47] As the delivery note was an unsigned document, the question arose as to whether reasonable notice

[45] (1988) 1 All E.R. 348, 358 *per* Bingham L.J.:

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

[46] *Supra* n.17.

[47] *Supra* n.19.

had been given in relation to condition 2. In *Thornton's* case, Lord Denning M.R. dealt with a clause exempting a car park proprietor from liability for personal injury. In the course of his judgment his Lordship said:

> I do not pause to enquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in *J. Spurling Ltd v. Bradshaw* [1956] 1 WLR 461, 466. In order to give sufficient notice, it would need to be painted in red ink with a red hand pointing to it — or something equally startling.[48]

In the Court of Appeal in the *Interfoto* case, Bingham L.J. relied heavily on Lord Denning's approach, holding that the appellant should have realized that the delivery note contained contractual conditions, but only those which one might usually or reasonably expect. The crucial question was whether the respondent could be said fairly and reasonably to have brought condition 2 to the notice of the appellant. His Lordship concluded that the appellant was relieved of liability not because it had failed to read the conditions, but because the respondent did not do what was necessary to draw the unreasonable and extortionate clause to the appellant's attention. Similarly, Dillon L.J. said:

> It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in *Thornton v. Shoe Lane Parking Ltd*, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.[49]

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

Some of the implications of the *Interfoto* case will be examined below, but it should be reiterated that, unlike *L'Estrange v. F. Graucob*, the case did not deal with a signed document. The focus of the Court was on whether the clause formed part of the contract. Nevertheless, overtones of unfairness pervade the judgments of their Lordships, particularly the references to the onerous and unusual nature of the clause. It is now appropriate to discuss the *George Collings* case, which involved a signed document commonly used in the real estate industry containing, like that in the *Interfoto* case, some onerous clauses.

### 3.2 *The* George Collings *Case*

The issue before the Court essentially concerned the validity of a standard form sole agency agreement published by the Real Estate and Stock Institute of Victoria (R.E.S.I.). Submerged in the fine print of the agreement was a clause creating a general or open agency at the expiration of the sole agency period, subject to written notification by the vendor to the contrary. This clause provided that the sole agent remained agent for the sale indefinitely, with the right to receive a commission for the introduction, at any time, of an able purchaser within the terms of the appointment. In this case, the plaintiff real estate agent, almost three months after the expiration of the R.E.S.I. sole agency agreement entered into with the defendant vendor, produced a willing and able purchaser for the vendor's commercial site. The vendor declined to sell. The agent sued for unpaid commis-

[48] *Ibid.* 170.
[49] *Supra* n.45, 352.

sion. The defendant resisted the claim on a number of grounds, including: (i) the unconscionable nature of the general agency clause; (ii) the fact that the signature on the contract had been induced by a misrepresentation; and (iii) breach of a fiduciary duty.

Nathan J. of the Victorian Supreme Court initially noted the *prima facie* obligation to comply with the terms of a written and signed agreement (citing *L'Estrange v. F. Graucob*), an obligation which, his Honour stated, would 'at a superficial glance appear to be more onerous where the signatory ... was a knowledgeable and competent person in the field of commerce to which the contract related.'[50] Nevertheless, his Honour went on to decide that, in this case, the obligation did not prevail.

### 3.2.1 *Unconscionability at Equity*

Nathan J. relied predominantly upon the principle of 'unconscionability' in dismissing the action. Although his Honour observed that 'a court will not set aside a harsh bargain, freely entered into, unless the terms can be seen objectively to offend good conscience and equity,' he reasoned that in this case the obligation creating a general indeterminate agency was unconscionable.[51] One reason given was that the clause creating this right was 'submerged in the fine print of the contract.'[52]

More importantly, Nathan J. found that it was unconscionable to embed in a *pro forma* contract a term inconsistent with its stated purpose. In this case the agreement was entitled in bold print 'Exclusive Sole Agency Agreement'. Given that the agreement also created a general indeterminate agency it was 'incorrectly and unfairly entitled.'[53] There were also provisions in the agreement implying that it was a sole agency agreement only, and that it would come to an end after the defined period lapsed. This was reinforced by a reference in a marginal note to the availability of a non-exclusive agency agreement from R.E.S.I. should it be required, implying that if such an arrangement was desired, a further agreement would have to be entered into.

Nathan J. also concluded that it was unconscionable to impose upon a vendor a contingent liability to pay commission for an indeterminate period. A vendor who had not had the obligation to terminate the general agency by written notice brought to his or her attention, would unknowingly be liable to pay a commission say five or ten years later. This was held to be 'an unwarranted extension of the contractual arrangements.'[54]

His Honour also supported his conclusion with two further observations, both of which concerned the actual conduct of the agent's representatives. First, the agent repeatedly returned to the vendor in order to extend the periods of its sole agency. In fact, the standard form contract was presented to the vendor for signing on three separate occasions. 'By doing so,' his Honour held, 'it either believed it

50 (1991) A.T.P.R. 41-104, 52,621.
51 *Ibid.* 52,623.
52 *Ibid.* 52,622.
53 *Ibid.*
54 *Ibid.*

needed the agreements to safeguard its position or was not prepared to rely upon the open agency created by the first or any other of the agreements.'[55] And second, when the vendor had asked the agent whether the agreement contained any more 'onerous terms' than those explained verbally, and was assured that there were none, the vendor 'was, in effect, told there was no need to read it.'[56]

### 3.2.2 *Unconscionability under Statute*

Nathan J. then turned to the statutory provisions dealing with 'unconscionability': s.52A of the Trade Practices Act 1974 (Cth) and s.11A of the Fair Trading Act 1985 (Vic.). These provisions, as seen above, prohibit unconscionable conduct in connection with the supply or possible supply of goods or services to a person. The sections only cover the conduct of persons who acquire goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption.'[57] It must be said that his Honour did not fully address this issue, simply concluding that he was satisfied that the provision of real estate services under an agency agreement '[did] amount to the provision of services within the meaning of the Act.'[58] Naturally, there will be many transactions engaged in where both parties are businesses which can properly be described as involving consumer or domestic type goods or services, and this case may well be one. Nevertheless, with respect to Nathan J., this issue required further consideration although, as his Honour was prepared to hold the transaction unconscionable in equity, it did not affect the ultimate outcome.

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

### 3.2.3 *Misrepresentation/Negligence*

The vendor also defended the claim on the bases of misrepresentation and negligence. In particular, it relied on: (i) the failure of the agent to answer his specific enquiry as to the liability to pay commission; (ii) the failure of the agent to mention the creation of a general agency; and (iii) the positive assertion by the agent that there were no further 'onerous provisions' when the question was specifically posed by the vendor. Whilst the first ground involved a 'culpable omission,' the positive representations by the agent that the only commission due

[55] *Ibid.*
[56] *Ibid.* 52,624.
[57] Trade Practices Act 1974 (Cth) s. 52(5).
[58] *Supra* n.50, 52,623

was that payable under the exclusive agency agreement, and the assurance that there were no further onerous provisions, were held to be relevant and pertinent misrepresentations of fact.[59]

Nathan J. took the view that if these representations were 'made ignorantly' they amounted to negligent mis-statements of fact in circumstances where the vendor had made it known that it relied upon the agent's advice and statements.[60] His Honour relied on a line of authority commencing with *Hedley Byrne & Co. Ltd v. Heller Partners Ltd*,[61] and ending with *L. Shaddock & Associates Pty Ltd & Anor v. Parramatta City Council (No.1)*.[62] It is interesting to note that it does not appear to have been argued before Nathan J. that the agent's conduct constituted misleading or deceptive conduct under s.52 of the Trade Practices Act, bearing in mind that, as mentioned earlier, a breach of that section is not predicated on fault.

### 3.2.4 *Breach of Fiduciary Duty*

Nathan J. had little difficulty in concluding that a fiduciary duty existed on the ground that the relationship was one of principal and agent:

> Fundamental to a fiduciary relationship is the obligation for both parties to act upon the basis of mutual trust and confidence and the duty of disclosure is vital to this.[63]

The agent in this case was obliged to exhibit utmost good faith, frankness and candour to the vendor in asserting a right as a general agent, but failed to do so. The agent knew that the vendor was looking to repose faith and trust in it. When asked for information which could have influenced the vendor's decision to enter into the agency agreement, and upon which it knew the vendor would rely, it failed to provide adequate information.

The implications of this case combined with those of the *Interfoto* case will be examined below. However, given the failure of the applicant in this case to rely upon s.52 of the Trade Practices Act, it is appropriate to discuss the *Lezam* case first, where the sole ground relied upon by the applicant, in attempting to avoid the consequences of words used in a disclaimer clause, was breach of s.52.

### 3.3 *The* Lezam *Case*

The lessor (Lezam) entered into a six year lease (with options) for commercial office premises with the lessee (Seabridge). The lease negotiations were conducted on behalf of Lezam by an estate agent. The property leased encompassed five floors of a building in Sydney for a total rental of approximately $455,000 *per annum*. In assessing the reasonableness of the rental charge, Seabridge worked on the basis of dollars *per* square foot of leased floor size. The agent advised Seabridge that the floor size was about 24,000 square feet. Negotiations proceeded on this basis. Similar advice was later given in writing by the agent in an itemized

[59] *Ibid.*
[60] *Ibid.* 52,626.
[61] (1964) A.C. 465.
[62] (1981) 150 C.L.R. 225.
[63] *Supra* n.50, 52,625.

lease schedule. On the bottom of each page of the written advice was a disclaimer in quite small writing which stated that all advice and details were 'believed to be correct but any intending tenant/purchaser should not rely on them as statements or representations of fact but must satisfy themselves by inspection or otherwise as to the correctness of each of them.' There was some divergence of opinion amongst the Judges in this case as to the legibility of the small print disclaimer clause. However, the outcome of the case did not rest on these different views, as their Honours all appeared to accept that the disclaimer had been incorporated into the contract.

After the lease had been on foot for some time, a survey of the premises revealed that the floor size was nearly 12 *percent* less than that indicated by the agent to Seabridge. Seabridge claimed to have been misled, by the oral and written statements made in the course of the negotiations leading up to the signing of the lease, into thinking that the total floor area to be leased was greater than was in fact the case. It claimed that s.52 of the Trade Practices Act had been breached, and sought damages on the basis of having paid a substantially greater amount of rent than it would have done had it known the true position.

Although a new trial was ordered on the question of damages, the Court was unanimous in its view of the effects of a disclaimer incorporated into a contract when it comes to determining a breach of s.52. The view of Burchett J., with which the Court essentially agreed, was that if one makes a misrepresentation that induces a party to contract, the misrepresentor cannot avoid liability for it by introducing some qualification in the final agreement when the substance of the misrepresentation is not withdrawn. Thus the agent's small print disclaimer in this case was held to be no defence to a breach of s.52.

In reaching his decision, Burchett J. emphasized that the critical issue was not whether the disclaimer had been incorporated into the contract, but whether the conduct of the defendant, taken as a whole, was misleading or deceptive or likely to be so:

> When a court comes to apply that principle to a case of a plain misrepresentation, said later to have been disclaimed, it should not allow fine textual analysis, nor the differently orientated rules of contract law, to detract it from seeing the obvious. A disclaimer or qualification will frequently have little or no effect on the impact of a misrepresentation. A man may tell a lie loudly, while murmuring the truth inaudibly, unconvincingly, or so blandly that it is unlikely to receive any hearing. Much the same may be true of a disclaimer which is inconspicuous, or very general, or apparently merely formal.[64]

Thus, once a misrepresentation that constitutes misleading or deceptive conduct has been shown, s.52 of the Trade Practices Act cannot be excluded by a formal disclaimer. In these circumstances an exclusion clause will only be effective where the conduct as a whole can be shown to have not been misleading. In the present case the misleading conduct complained of was held not to be rendered blameless by the small print clause at the bottom of the page which otherwise reiterated the misrepresentation.

This decision is entirely consistent with *Dibble v. Aidan Nominees Pty Ltd* and *Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd.* It is, however, significant because of the way the Court clearly contrasted the application of the new

64 (1992) 107 A.L.R. 291, 312.

statutory rules with 'the differently orientated rules of contract law.' The trial Judge, Mr Justice Beaumont, appeared to rely upon the traditional notions of common law contract principles in downplaying the effect of s.52 in circumstances where a formal contract had been executed by the parties. Beaumont J. stated that:

> There are reasons of both principle and policy why the courts should not permit the stability of commercial relationships and dealings to be threatened by reliance upon oral statements . . . made in the course of negotiating a formal contract . . . . The courts should exercise caution in invoking provisions such as s.52 based upon things said, or not said, in oral discussion in the course of negotiations which lead to a formal document or agreement being drawn up.[65]

Beaumont J. then went on to explain that in cases where the formal document specifically deals with a matter, the courts should be reluctant to interfere with the contract. Nevertheless, his Honour thought the same considerations did not apply, as in this case, where the oral statement concerned a matter not dealt with in the formal contract.

Mr Justice Sheppard rejected this approach, indicating that every case involving s.52 depended upon its own facts and circumstances and that no preconceived approaches should be applied in determining whether a breach has occurred.[66] The evidence, his Honour held, has to be looked at as a whole and in its context. Sheppard J. acknowledged that the weighing up of evidence of representations said to have been made in the course of conversations often presents great difficulty, and that the court must examine such evidence with a degree of care. The traditional rules of contract law had clearly been put to one side by Sheppard J. in making this observation.

### 3.4 *Implications of the* Interfoto, George Collings *and* Lezam *Cases*

The enforceability of many contracts containing fine print is now open to question. As Dr Warren Pengilley concluded in referrence to the *George Collings* case, 'the most respectable standard contracts can be open to attack.'[67] Failing to object to the provisions of a standard form document containing fine print clauses, or indeed signing such a document, no longer necessarily means that the contract is binding. The authority of *L'Estrange v. F. Graucob* has been undermined by the introduction of statutory provisions, such as ss 52 and 52A of the Trade Practices Act, and by a shift in judicial attitude, particularly with respect to unconscionability.

Although an English authority and therefore only persuasive, the *Interfoto* case confirms that it is not generally sufficient to argue that a person receiving a document was aware of the general nature of the document and that it contained written clauses. The concept of reasonable notice is undergoing change, especially in relation to unusual or onerous terms such as those relied on in the *Interfoto* case. The location and size of the print are important aspects to consider in determining the enforceability of such provisions, and in many instances it will

[65] *Ibid.* 297, quoting a passage from *Seabridge Australia Pty Ltd v. J.L.W. (N.S.W.) Pty Ltd* (1991) 29 F.C.R. 415, 421-2.

[66] *Ibid.*

[67] Pengilley, W., 'Unconscionable Conduct' (1991) 7 *Trade Practices Law Bulletin* 25.

not be adequate to simply hand over a document, or even obtain a customer's signature. Actual assent may be required.[68]

It is significant that in the *George Collings* case the finding of unconscionability on equitable grounds was not, on the surface, derived from circumstances of unequal bargaining power where one party was under a special disability in dealing with the other party. At the very least it can be said that in this case the plaintiff was represented by a commercially competent person. This certainly distinguishes the case from many that have preceded it. The case reinforces the view expressed by Davies J. in *National Australia Bank v. Nobile & Anor*,[69] that the concept of unconscionability should not be construed too narrowly, and should encompass an injustice brought about by fraud or oppression, misrepresentations both active and passive, and events which result in injustice arising accidentally. In the words of Nathan J., 'this opinion properly reflects the current law in Australia.'[70]

Factors now being considered by the courts include the *fairness* (in all the circumstances) of the arrangement, the *bargaining power* of the parties, the *comprehension* of the party in relation to the contract,[71] and the presence or absence of *independent advice*.[72]

In so far as statutory unconscionability is concerned, the *George Collings* case confirms the views expressed by the Trade Practices Commission in its excellent guide to the operation of s.52A.[73] The guide gives special mention to standard form contracts:

> Use of an industry-wide take it or leave it standard form of contract may lead to unconscionable conduct if, in the particular circumstances,
> - the terms of the contract are onerous and their onerous nature is disguised by using fine print, unnecessarily difficult language, or deceptive layout; and
> - the customer is asked to sign the form without being given an opportunity to consider or to object to such terms, or is given an explanation in summary form which omits mention of onerous provisions.[74]

68 See Mason and Gageler, *op. cit.* n.12, 12.

69 *Supra* n.24.

70 *Supra* n.50, 52,622.

71 Whilst plain English may not be essential, it is obviously desirable. In *Stag Line Ltd v. Tyne Shiprepair Group Ltd & Ors (The Zinnia)* [1984] 2 Lloyd's Rep. 211, Straughton J., when determining whether an agreement was enforceable under the Unfair Contract Terms Act 1977 (U.K.), commented at 222:

> I would have been tempted to hold that all the conditions are unfair or unreasonable for two reasons: first, they are in such small print that one can barely read them; secondly, the draftsmanship is so convoluted and prolix that one almost needs an LL.B to understand them.

See the discussion in Adams, J. and Brownsword, R., 'The Unfair Contract Terms Act: A Decade of Discretion' (1988) 104 *Law Quarterly Review* 94. More recently in *Bridge Wholesale Acceptance Australia Ltd v. GVS Associates Pty Ltd* (1991) A.S.C. 56-105, a case where the 'defence of unjustness' under the Contracts Review Act 1984 (N.S.W.) was raised, the Court found:

> the guarantee is not unusual in that no attempt has been made to express its provisions in plain English and each of its operative provisions consists of one long sentence. It is closely printed. The significance of a number of provisions would be unintelligible to a lay person.

See Pengilley, W., 'Fine Print May be Unenforceable' (1992) 7 *Trade Practices Law Bulletin* 73.

72 This has proved to be a particularly significant factor with respect to the enforceability of many guarantees. See Sneddon, *op. cit.* n.24; O'Donovan, *op. cit.* n.24. See also *Lee v. Cafred Pty Ltd & Ors* (1992) A.T.P.R. 41-170; *Peters v. Commonwealth Bank of Australia* (1992) Australian Contract Reports 90-012.

73 The Trade Practices Commission, *Unconscionable Conduct* (March 1987).

74 *Ibid.* 6.

Like the *George Collings* case, the *Lezam* case involved a dispute where the negotiations were handled by two very experienced businesspersons, one an associate director and the other a general manager and company secretary. It is now clear that no matter who is involved in contractual negotiations, if one party makes a representation in the course of trade or commerce which in fact misleads or deceives the other, then the latter is entitled to a remedy pursuant to s.52 of the Trade Practices Act.

4. *CONCLUSION*

It is quite apparent that there has been a gradual shift in the attitude of the courts and the legislature to ensure that modern contract law reflects commercial reality. To begin with, where an unsigned document contains unusual or onerous clauses, the courts may require evidence that printed conditions of the contract have been brought to the attention of the other party before they will be treated as having been incorporated into the contract. If such conditions are in fine print, producing such evidence will often be a difficult task. This development was described in *Interfoto* as a logical attempt to bring the common law into modern conditions.[75]

So far as signed contracts are concerned, until recently, because of the limited exceptions to *L'Estrange v. F. Graucob*, it has been more difficult to argue that fine print clauses have not been incorporated into a contract. However, some observations made in a joint article by the present Chief Justice, Sir Anthony Mason, and S.J. Gageler, are apposite.[76] Writing in 1987, they said in relation to *L'Estrange v. F. Graucob*:

> Although the principle for which the decision stands has been said to reflect an estoppel, it is not a true example of estoppel because the party who proffers the document does not rely on the signature as an acknowledgement of the conditions and act on it to his detriment. That party knows or has reason to know that the other party has not read and assented to the specific conditions. Nor does the principle rest on reliance. Instead it seems to be based on the importance of a formal signature and the need to exclude an inquiry into the reality of assent. The requirements of fairness and justice may well call for its re-examination.[77]

The judgment of Nathan J. in the *George Collings* case appears to reflect these sentiments. If small print conditions have been incorporated into a contract, the courts will not always enforce such provisions if they are seen as 'unconscionable'. The conditions of contract may be unfairly disguised, worded so that some conditions are inconsistent with the rest of the document, or be deceptively concealed by the words or actions of the party relying upon them.

The extension of this type of protection to 'commercially competent' businesspersons, as in the *George Collings* case, reinforces the judicial trend towards construing the concept of unconscionability in quite broad terms, in contrast to the way the concept has been traditionally viewed and applied. As seen above, this case and the *Interfoto* case evidence the view that conscience is becoming an important influence in the area of contract law.[78]

75 *Supra* n.7.

76 Mason and Gageler, *op. cit.* n.12.

77 *Ibid.* 11-2.

78 Sutton, *op. cit.* n.26, 131, goes so far as to say 'that unconscionability is now the hallmark for the enforceability of contracts.' In addition, the Victorian Law Reform Commission Discussion Paper No.27, *An Australian Contract Code* (Sept. 1992) refers, at 6, to the central role of unconscionability in its proposed Code.

Finally, even if small print conditions have been incorporated into a contract and are not unconscionable, they can still be avoided by a party who has been induced into the contract by the misleading or deceptive conduct of the other. As evidenced by the *Lezam* case, once misrepresentation has been shown, statutory provisions like s.52 of the Trade Practices Act will prevail over any words included in the small print of a contract, irrespective of whether the parties to the contract are experienced businesspersons. The traditional rules of contract, which made it extremely difficult to introduce oral evidence at variance with the contents of a formal written contract, have been put aside in cases like this.

Some businesspersons may view these developments with concern and alarm, as may traditional advocates of the objective approach of contract law. A word of comfort, however, can be found in the *dicta* of Kirby P. in the recent case of *Austotel Pty Ltd & Anor v. Franklins Self-Serve Pty Ltd.*[79] There his Honour, in dealing with a dispute between businesspersons who had had the benefit of legal advice, said this:

> We are not dealing here with ordinary individuals invoking the protection of equity from the unconscionable operation of a rigid rule of common law. Nor are we dealing with parties which were unequal in bargaining power. Nor were the parties lacking in advice either of a legal character or of technical expertise . . . At least in circumstances such as the present, courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of businesspeople.[80]

Although his Honour's judgment related to different circumstances from those examined in this article, it reaffirms the view of the House of Lords in *Photo Production Ltd v. Securicor Transport Ltd*[81] that clauses in contracts freely negotiated by businesspersons of equal bargaining strength should *prima facie* be considered reasonable. The dichotomy referred to in *Schroeder v. Macaulay*[82] between standard form documents which contain reasonable terms and those which are 'take it or leave it contracts,' appears to still have relevance. This view has recently been reinforced in a speech by Mr Justice Pincus of the Federal Court referring to s.52 of the Trade Practices Act:

> One tends to become exasperated at the task of trying to marry the consequences of s.52 in a sensible way with pre-existing legal rules. I am sometimes apprehensive that dishonest or thin allegations of oral misrepresentation may be allowed to upset bargains which should in justice be allowed to stand. On the other hand, if s.52 remedies are applied with care and restraint, they may tilt the commercial balance back in favour of the honest trader in a way which is, in the long run, good for Australian business . . .[83]

Nevertheless, as emphasized throughout this article, the judiciary and legislature have shown a greater willingness to interfere with contracts entered into by businesspersons, especially if they involve the use of small print containing onerous or unusual clauses or disclaimers, and certainly if those contracts have been entered into as a result of conduct which is misleading or deceptive. As long

79 (1989) 16 N.S.W.L.R. 582.

80 *Ibid.* 585. See also *Halton Pty Ltd v. Stewart Bros Drilling Contractors Pty Ltd* (1992) A.T.P.R. 41-158.

81 (1980) 1 All E.R. 556.

82 *Supra* n.5.

83 Pincus, J., 'Trade Practices 1988' (1988) 2 *Commercial Law Quarterly* 15, 16.

ago as 1957, Lord Denning M.R. remarked, '[w]e do not allow printed forms to be made a trap for the unwary.'[84] Recent statutory innovations and case law have not only endorsed this view, but have recognized it as an important principle in modern day contractual dealings.

[84] *Neuchatel Asphalte Co. Ltd v. Barnett* (1957) 1 W.L.R. 356, 360. See also *Jacques v. Lloyd D. George & Partners Ltd* (1968) 1 W.L.R. 625, the facts of which are similar to those of the *George Collings* case.