Trade Practices - Limitation Clause - Misleading and Deceptive Conduct?

Halton Pty Ltd v Stewart Bros Drilling Contractors Pty Ltd (1992) ATPR ¶41-158

Halton Pty Ltd ("Halton"), the owner of a property at Brighton-le-Sands, Sydney, was redeveloping the site. Halton accepted a quotation from Stewart Bros Drilling Contractors Pty Ltd ("the contractor") for the supply, installation and stressing of a number of sand anchors to be attached to a retaining wall in accordance with plans and specifications prepared by Halton's consulting engineers.

Halton accepted the quote and the contractor forwarded "Terms of Engagement" for signature. Clause 7 of these Terms of Engagement read:

> "7. Limitation of Liability
> The Liability of SBDC to the Client whether in contract or in tort and whether for negligence or otherwise is hereby limited to the total aggregate amount of $5,000. SBDC shall in no event be liable to the Client in respect of any circumstances not notified to SBDC within 12 months from completion of the Services."

Halton signed and returned these Terms of Engagement and the contractor then executed them.

After attaching the sand anchors to the retaining wall, the wall deflected causing considerable damage to Halton's property and to the adjoining Council property and services. Halton claimed that the damage was caused by negligent installation of the sand anchors and that its loss due to that negligence was in the vicinity of $400,000.

Relying upon clause 7 of the Terms of Engagement, the contractor asserted that, even if it had been negligent (which it denied), its liability to Halton was limited to $5,000.

Halton then commenced these proceedings and sought an order that clause 7 be rectified to reflect the true intention of the parties that, instead of providing a limitation of liability, the clause provide for retention of $5,000 for 12 months. Alternatively, a declaration that the contractor, in explaining the Terms of Engagement to Halton prior to their execution, had been guilty of misleading and deceptive conduct in breach of section 52 of the Trade Practices Act, and an order for consequential relief. Halton sought damages for the negligent installation of the sand anchors.

The evidence indicated that Halton did not have a clear understanding of the meaning and potential effect of the limitation clause, but that it did not seem to be a matter of particular concern to Halton. Halton's erroneous understanding was that it was, or was equivalent to, a retention clause.

Halton's case was that the limitation clause could not be relied upon because it had been procured by a misrepresentation by the contractor. Halton relied upon the principle enunciated by Scrutton LJ in *L'Estrange v F. Graucob Ltd* (1934) 2 KB 394 at 403 that when a document contains a contractual term such as an exclusion or limitation of liability clause then, in the absence of fraud or misrepresentation by the party relying on the clause as to its nature and effect, a party signing the contract is bound by the clause regardless of whether or not he has read the contract.

Palmer AJ said there was no difficulty of principle in applying Scrutton LJ's principle from *L'Estrange v Graucob* to this case.

Palmer AJ accepted the contractor's evidence that he had informed Halton of the nature and effect of the clause. On the evidence, Palmer AJ concluded that Halton's staff had developed a misunderstanding on their own and that the contractor was not responsible for Halton's erroneous belief as to the effect of clause 7.

Halton then submitted that the contractor should have appreciated that Halton did not understand the nature and effect of the clause and that the contractor had a duty to give a full explanation of the clause. Further, that silence on the contractor's part constituted misrepresentation within the principle in *L'Estrange v Graucob* or, alternatively, constituted misleading or deceptive conduct within the provisions of section 52 of the Trade Practices Act.

Palmer AJ was unable to accept this submission. Halton's employee had not asked for a general explanation. Rather, she had asked a limited and specific question of a person who Palmer AJ said had no obligation, contractual or voluntarily assumed, to give general advice regarding the clause. Palmer AJ said that the contractor's only obligation was to answer that specific question accurately and in such a way as not to be misleading or deceptive. On the evidence, Palmer AJ concluded that obligation had been discharged.

Palmer AJ said:

> "One must bear in mind that this conversation tool place between representatives of parties who were negotiating a commercial contract at arm's length, each being legitimately entitled to have regard to its own interest. To require [the contractor's representative] to embark upon the explanation and interrogation which I have described would be to impose upon [the contractor] a duty which arises only in the case of a special relationship of reliance between the parties, such as that between a professional advisor and his client, or that between a fiduciary obligor and his obligee, or that between one who has assumed responsibility to provide complete and accurate information and he who makes known his reliance upon such information. In commercial dealings between parties negotiating at arm's length in their own interests one must guard against being too ready to discover such a special relationship and to impose upon thereby obligations which would be quite contrary to ordinary commercial expectations."

Palmer AJ held Haltons' mistaken belief about clause 7 was not induced by or attributable to the contractor in any way. Further, that it followed that Halton's attack on clause 7 based upon misrepresentation or breach of section 52 of the Trade Practices Act failed.

- **John Tyrril**

Variations - Duty of Fairness to Order

Davey Offshore Ltd v Emerald Field Contracting Ltd [1991] 55 Build. LR 22

This case arose out of a lump sum design and construct (turnkey) contract for the construction of facilities for the Emerald Oilfield in the North Sea. The contract price was $127m but the contractor's cost of completing the work was estimated at more than $200m. The contractor sought to establish that the principal had a duty to order variations to correct inconsistencies in description of the work in schedules which formed part of the contract. The case is interesting in that the Official Referee, Judge Thayne Forbes QC held that there is no principle of law that there is a duty of fairness requiring the principal or the superintendent to order a variation to assist a contractor.

The Official Referee found that there were discrepancies in the contract documents but that the contract did not impose any express or implied obligation upon the principal to exercise the power to order a variation and consequently be liable to pay extra. The contract did not include provision for a superintendent but the Official Referee found that the principal was in no different position than if the contract had vested in the principal the same powers and duties normally given to a superintendent.

The Official Referee (at p61) said:

> "I accept that an architect or engineer appointed to a contract is obliged to act fairly in the discharge of such of his duties under the contract as require him to use his professional skill and judgment in forming an opinion or making a decision where he is, in effect, "holding the balance between his client and the contractor": see for example the speech of Lord Reid in *Sutcliffe v Thackrah* [1974] AC 727 at pages 736 to 737 and *Pacific Associates v Baxter* [1990] QB 993. In my judgment, it is clear that the obligation to act fairly is concerned with those duties of the architect/engineer which require him to use his professional judgment in holding the balance between his client and the contractor. Such duties are those where the architect/engineer is obliged to make a decision or form an opinion which affects the rights of the parties to the contract, eg valuations of work, ascertaining direct loss and expense, granting extensions of time, etc. When making such decisions pursuant to his duties under the contract, the architect/engineer is obliged to act fairly.
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> I accept (the principal's) submission that the authorities do not support the proposition that an architect/engineer (or in the case of this contract, the employer) has to exercise a power to order a variation when it is fair to do so. There may be cases where, unless the architect/engineer exercises his power to vary the contract, the contractor will be unable to perform the contract (the contractual deadlock). In such a case, depending on the terms of the contract in question, the court will imply a term that the employer exercise his power to vary (even when expressed permissively), the exercise of which is in such circumstances necessary for the performance of the contract by the contractor: see *NWMRHB v Bickerton* [1970] 1 WLR 607 and *Holland Hannen & Cubitts v WHTSO* [1981] 18 BLR 80. However, such a term is not a term that the architect will act fairly and it is implied because it is necessary, not because it is fair to do so (although it may be fair from the contractor's point of view). In my opinion Judge Newey QC did not purport to found his decision on the concept of fairness to the contractor, nor was that the basis of the decision in *Bickerton*. It was necessity which was the basis of the implication in both cases.
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> I am of the opinion that the question, whether a party is obliged to exercise a power which he possesses under the contract, is not to be answered by reference to a concept such as fairness to the other party, but by reference to the following:
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> (i) the express terms of the contractual provision from which the power derives, to see if and to what extent there is an obligation to exercise the power;
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> (ii) where the contract will not otherwise work, in which case a *Bickerton* type term will be implied.

The Official Referee found that there was no implied term that in and about the operation of the power to order variations, the principal by its servants and agents would act fairly between the principal and the contractor.

The contract included the express term that the principal "shall not by any acts or omissions delay or obstruct (the contractor) in the performance of the Work". The Official Referee held that that clause did not impose any obligation upon the principal to order a variation to assist the contractor.

- **Philip Davenport**