CASE NOTES

D. J. HILL & CO. PTY LTD v. WALTER H. WRIGHT PTY LTD[1]

Contract—Incorporation of exemption clause—Implication of clause by course of dealing—Whether actual knowledge of clause necessary for implication.

This case deals with an important commercial question, the status of confirmation notes; but in doing so raises disquieting doubts about the ability of contract law to adapt to a relatively simple and common commercial transaction.

In this instance, an employee of the respondent, D. J. Hill & Co. phoned an employee of the appellant, Walter H. Wright Pty Ltd, to arrange transport by the appellant, a carrying company, of some machinery between two premises of the respondent. The telephone conversation consisted of nothing more, it seems, than an instruction to transport the machine. When the machine was placed on site it was damaged by the negligence of the carriers. An employee of the respondent then signed two documents as a 'receipt of goods and other services'[2] but which apparently also purported to be forms ordering the transport from the appellant, and on the back of which were printed identical 'Consignment Conditions', of which one professed to exempt the carrier from liability for damage caused by any means, including the carrier's negligence. The appellant had carried goods for the respondent or for one of the respondent's associate companies on about ten occasions during the previous eight months, and on each occasion documents had been signed which contained conditions similar to the present ones.

At first instance, the respondent had contended that none of these conditions were part of the contract, and the jury had agreed. On a motion *non obstante veredicto,* Gillard J. had found that there was no evidence on which the jury could find that the conditions were part of the contract. The Full Court agreed with this conclusion, saying:

> there was no evidence that the form was part of the contract, or was mutually treated by the parties as forming part of the basis regulating their contractual relationship.[3]

The appellant argued that the exemption clause should be incorporated into the contract, if it were not already part of the contract, by reason of the previous course of dealing, relying on *J. Spurling Ltd v. Bradshaw*[4] and *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association.*[5] The Full Court rejected this argument, reasoning that since in previous dealings the documents had never become part of the contract, the respondent in the present instance could not have intended to contract on the basis of terms

[1] [1971] V.R. 749. Supreme Court of Victoria, Full Court: Winneke C.J., Starke and Anderson JJ. The judgment of the Court was read by Winneke C.J.
[2] *Ibid.* 750. [3] *Ibid.* 753-4.
[4] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121.
[5] [1966] 1 W.L.R. 287; [1966] 1 All E.R. 309.

which were not in the past transactions part of the contract. Since in no previous dealing was the exemption clause part of the contract, it could not have been intended to imply it into this contract. Clearly this argument depends on the previous conclusion that the document was not incorporated.

Finally the Court apparently approved the decision of Gillard J. that although the respondent knew that there were conditions on the documents from past dealings:

> proof of actual knowledge of such an exemption clause by [both parties] is necessary to raise the implication.[6]

The proposition that actual knowledge of the clause is necessary for 'course of dealing' to operate is in accord with the *dictum* of Lord Devlin in *McCutcheon v. David MacBrayne Ltd*,[7] but was expressly disapproved in *Hardwick's* case,[8] which disapproval was confirmed when the case went to the House of Lords,[9] and applied in *Hollier v. Rambler Motors (AMC) Ltd*,[10] where it was said that whether or not the clause was to be incorporated by course of dealing was to be objectively determined by what the parties were led by each other to believe.

There is some ambiguity in the judgment under consideration. The court states, for instance:

> [s]o far as the signature of the documents by employees of the respondent or its associated companies was concerned, in our opinion, the evidence justified no finding further than that they regarded the forms as delivery dockets, acknowledging that the goods had been delivered by the appellant.[11]

There are many ways in which a document can be incorporated into a contract. The most common is, of course, by signature. A second method is for one party to give the other 'sufficient notice' that the clause in question is a part of the contract. A third method is the 'course of dealing' doctrine. Since the first two of these methods require only an examination of the document, whereas 'course of dealing' means that the court has to examine all the surrounding circumstances both of this contract and of the preceding ones, 'course of dealing' is in practice argued only after the possibility of the first two methods succeeding has been eliminated. There are then two separate questions in this case: first, can the document be incorporated of itself? Second, can the document be incorporated by 'course of dealing'? The appellant in this case argued that, first, since the document was signed, it was part of the contract.

The court seems to have produced two arguments to reject this contention. The first, as set out in the statement quoted above, was that the employees of the respondent who signed the document regarded it as no more than a delivery docket. But, applying the parole evidence rule, what the employees *thought* is surely absolutely irrelevant—the signature *of itself* makes the document part of the contract. It is possible that the court is implying that this is a case of *non est factum*. But since the company was aware that there were terms on the documents, albeit through other employees, this doctrine,

[6] [1971] V.R. 749, 752.
[7] [1964] 1 W.L.R. 125, 134; [1964] 1 All E.R. 430, 437.
[8] *Supra* n. 5.
[9] *Sub. nom. Henry Kendall and Sons v. William Lillico and Sons* [1969] 2 A.C. 31.
[10] [1972] 1 All E.R. 399.
[11] [1971] V.R. 749, 752.

as well, seems totally irrelevant. There also seems to be no reason why, if the document was to be treated as unsigned because the respondent's employees thought it to be no more than a delivery docket, the appellant could not argue that it took reasonable steps to bring the terms to the notice of the respondent, relying on *Parker v. South Eastern Railway Company.*[12]

Consequently, perhaps, the court seems to produce another argument[13] for disregarding the *prima facie* binding signature, that the document was presented after the contract was made and is consequently non-contractual. But it is difficult to see why the court so readily assumes that the document is non-contractual merely because the document was not presented contemporaneously with the making of the oral contract, especially since the telephone conversation apparently spelled out none of those terms which the parties, as businessmen, must have known would be present; and also since both documents are, on their face, order forms, albeit also used to acknowledge receipt. Of course, where the document has no connection with the contract, it is not contractual: *Olley v. Marlborough Court,*[14] but this does not of course mean that *all* documents presented after the oral conversation are automatically non-contractual: *Cooke v. T. Wilson, Sons & Co. Ltd,*[15] *Cockerton v. Naviera Aznar S.A.,*[16] where Streatfeild J. stated that the in corporation of further documents depended on whether the contract was such that special terms should be expected.

Similarly, in *Harnor v. Groves,*[17] terms in a sale note were taken as varying terms of the earlier oral contract. It has been suggested[18] that the court in this case wished to find a document so that the contract would not be invalid under Section 17 of the Statute of Frauds.[19] This section required, however, the contract to be *evidenced* in writing, not to *be* in writing. Similarly, in *Roe v. R. A. Naylor Ltd,*[20] and *Watkins v. Rymill,*[21] claims that a sale note varied an oral contract failed only for lack of communication of the added conditions. Williams J. in *Harnor v. Groves,*[22] indeed, treats the oral contract as mere negotiation; which points to a difficulty not touched on in *Hill v. Wright,*[23] that of saying that there could be any concluded contract on the basis of a telephone call where no terms at all were discussed. And, as implied above, why could not the document be regarded as a subsequent variation of an earlier oral contract, like *Harnor v. Groves*?[24]

However the conclusion that the document was not part of the contract by reason of the signature, whatever the reasoning, leads to the question of whether the document can be incorporated by 'course of dealing'. This is a doctrine which has been less than fully elucidated by the courts. The basis of the doctrine is that if the parties do not expressly mention a term which has been present in past dealings between the parties, that term should be implied into the present contract as a term which:

> if while the parties were making their bargain an officious bystander were to suggest express provision for it in their agreement, they would testily surpress him with a common 'Oh, of course'.[25]

[12] (1877) 2 C.P.D. 416, 423.
[13] [1971] V.R. 749, 753.
[14] [1949] 1 K.B. 532.
[15] (1915) 85 L.J. (K.B.) 888.
[16] [1960] 2 Lloyd's Rep. 450, 460.
[17] (1855) 12 C.B. 667; 139 E.R. 587.
[18] Hoggett, 'Changing a Bargain by Confirming It' (1970) 33 *Modern Law Review* 518, 521.
[19] 29 Car. 2 c. 3 (1677).
[20] (1918) 87 L.J. (K.B.) 958.
[21] (1883) 10 Q.B.D. 178.
[22] (1855) 12 C.B. 667.
[23] [1971] V.R. 749.
[24] (1855) 12 C.B. 667.

It is clear that a consistent and lengthy course is necessary: *Hollier v. Rambler Motors (AMC) Ltd*;[26] but exactly how many dealings are necessary is unclear. Also unclear is whether or not the plaintiff has to have actual knowledge of the proffered terms. Lord Devlin in *McCutcheon v. David MacBrayne Ltd*[27] said:

> [p]revious dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them.

Lord Diplock in *Hardwick's* case,[28] however, countered:

> I think that is wrong. The task of ascertaining what the parties to a contract of any kind have agreed . . . is accomplished not by determining what each party actually thought those rights and liabilities should be, but by what each party by his words and conduct reasonably led the other party to believe.

On principle, Lord Diplock's statement of the law appears the more persuasive. One of the few undisputed requisites for 'course of dealing' is that the course be long and consistent. But as Lord Devlin himself mentions, if actual knowledge of the term is necessary, then previous dealings are really irrelevant. Again, to make a distinction between those who in past dealings had not made themselves aware of the proffered terms and those who had, and to say that because the latter had gone to that trouble, they could not recover and the other party was exempt from liability, whereas the former could gain compensation, is to punish people for making themselves aware of the other party's terms. Surely this is an undesirable consequence? And people would merely have to carefully refrain from reading terms which they knew were on delivery notes to ensure that an exemption clause did not apply to them. This is to say nothing of the difficulty of proving that one party had actual knowledge. Similarly, it is difficult to see why one party should be in a different position when a clause is incorporated by a course of dealing (when actual knowledge would be necessary) from when a clause is incorporated by sufficient notice or by signature, where he is estopped from denying that he did not know of the clause.

But even if Gillard J. was justified in following Lord Devlin, several parts of his judgment are still unclear. Why, for instance does he require actual knowledge that the terms 'applied generally to the defendant's contracts of carriage and crane hire'.[29]

Does this mean that P must know that D contracts only on these terms? If so, why is this necessary in addition to knowledge that these terms apply to *this* contract? Again what is meant by:

> if the existence of an exemption clause is to be strictly proved, then knowledge thereof by both parties arranging the contract is a pre-requisite to any such inference being drawn.[30]

It would seem unlikely that he is here referring to the rule that an exempting clause must be construed strictly, for this would necessitate the clause already being part of the contract. Perhaps he is following Lord Denning in *Olley v. Marlborough Court*.[31]

[25] *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 K.B. 206, 227, *per* McKinnon L.J.

[26] [1972] 1 All E.R. 399.
[27] [1964] 1 All E.R. 430, 437; [1964] 1 W.L.R. 125, 134.
[28] [1966] 1 W.L.R. 287, 345; [1966] 1 All E.R. 309.
[29] [1971] V.R. 749, 752.
[30] *Loc. cit.*
[31] [1949] 1 All E.R. 127, 134.

> People who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. Not only must the terms of the contract be strictly proved, but also the intention to create legal relations . . . must also be clearly proved.

It would seem that by 'strictly' Lord Devlin meant nothing more than 'clearly'. Why is actual knowledge necessary for it to be clear that the parties were contracting on the basis of these terms?

The Full Court indeed mention the appellant's contention that *Hardwick's* case[32] disapproved Lord Devlin's *dictum,* but then neglects to deal with this contention. Perhaps the court by later in the judgment distinguishing *Hardwick's* case[33] is attempting to avoid this conflict, but it is surely no answer to a contention that the doctrine Gillard J. followed is wrong to say that the case disapproving the doctrine can be distinguished.

The Full Court upheld the conclusion of Gillard J. that the document could not be implied into the contract by 'course of dealing' by arguing that since in previous dealings the terms had not been part of the contract in no subsequent contract could the clause be incorporated by 'course of dealing':

> we can see no justification for holding that any of the subsequent contracts was in any different position from the first or that in any of them the form became a contractual document.[34]

Perhaps the simplest answer to this argument is that the courts have never said that it is necessary for the parties to have held themselves bound by the clause in question in past dealings for course of dealing to operate. Indeed *J. Spurling Ltd v. Bradshaw*[35] is a decision to the opposite effect.

Again, the Full Court here repeat an argument of Lord Hodson in *McCutcheon v. David MacBrayne Ltd*[36] that if this dealing is not consistent with previous dealings, then the doctrine of 'course of dealing' cannot apply. A consistent course of dealing is necessary. 'Consistent' seems something very close to exact repetition *cf.* Lord Pearce in *McCutcheon's* case.[37] The Full Court also argue that for 'course of dealing' to operate, there must be a previous course of dealing where the term in question was part of the contract. But the only situation in which both these requirements can be satisfied, that is, that the term be consistent with past dealings and that the term be incorporated into the previous contracts, is when the term in the present dealing is incorporated into the contract itself, that is, when the doctrine of 'course of dealing' is superfluous.

The Court anticipated another argument that can be levelled against their argument that there was no previous dealing where the clause was incorporated by saying:

> [i]t is true that by the time the second and subsequent contracts were made the respondent had knowledge of the existence of the form, but it was unaware of the content of the terms and conditions on the back of it and regarded it, being presented when it was, as nothing more than an acknowledgement by it of delivery of the goods.[38]

[32] [1966] 1 W.L.R. 287; [1966] 1 All E.R. 430.
[33] *Ibid.*
[34] [1971] V.R. 749, 753.
[35] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121.
[36] [1964] 1 All E.R. 430, 433.
[37] [1964] 1 All E.R. 430, 437.
[38] [1971] V.R. 749, 753.

It is possible that the Court are here arguing either that the clause was not incorporated into past contracts because the document, signed or unsigned, was non-contractual; or that, for example, the clause was not incorporated into the ninth dealing by reason of the previous eight dealings because the respondent had then no actual knowledge of the clause and thus the clause cannot be incorporated into this present, tenth, dealing. If this latter interpretation is correct, and it would seem from the apparently approving long quotation of Mr Justice Gillard's judgment that the Court was adopting his view that actual knowledge is necessary for 'course of dealing', then the difficulties outlined above in the judgment of Gillard J. apply also to this point. If on the other hand the former interpretation is correct, it is noticeable that the Full Court do not say that the respondent had knowledge of the *presence* of the terms on the document, although it was admitted for the purposes of the appeal that the respondent possessed such knowledge. Instead the Full Court argue that because the respondent was unaware of the *content* of the terms, it regarded it as no more than a delivery docket. But the orthodox test for whether a document is contractual or not seems to be rather, whether a reasonable man would understand that the document was of a type which would contain special conditions, *Causer v. Browne*,[39] and more pertinently:

> he would be equally bound if he was aware or had good reasons to believe that there were upon the ticket statements intended to affect the relative rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any such, or from making himself acquainted with their purport.[40]

In the light of this, why cannot it be argued that the term became incorporated into the contract on the second or a subsequent dealing?

Again there are some ambiguities in the Court's judgment. It states:

> in this case there was no evidence that the form was part of the contract, or was mutually treated by the parties as forming part of the basis regulating their contractual relationship.[41]

But surely if the second half of this statement is intended as a test for the doctrine of dealing it is inconsistent with the Court's insistence on actual knowledge, since it is quite possible to treat something as the basis of the contract without having actual knowledge of it, for example, an agreement to contract on the 'usual terms'. Also, the court distinguishes *Hardwick's* case[42] and *Spurling's* case[43] because:

> the documents in question were plainly accepted or treated by the parties as contractual documents.

This seems *prima facie* to be the same sort of distinction that Lord Pearce in *Hardwick's* case[44] between that case and *McCutcheon's* case,[45] that in the former case there was a document which the plaintiffs were attempting to incorporate into the contract, whereas in the latter there was no such document.

[39] [1952] V.L.R. 1.
[40] *Parker v. South Eastern Railway Co.* (1877) 2 C.P.D. 416, 425-6, *per* Baggallay L.J.
[41] [1971] V.R. 749, 753-4.
[42] [1966] 1 W.L.R. 287; [1966] 1 All E.R. 430.
[43] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121.
[44] *Supra* n. 42.
[45] [1964] 1 W.L.R. 125; [1964] 1 All E.R. 430.

But in this case there *was* a document. The only distinction between this case and *Hardwick's* case[46] was that there the court agreed that the document *was* incorporated by the course of dealing and was *therefore* contractual, whereas here the court rejected that argument. This is a distinction merely of results, not of facts.

It is of course clear that *McCutcheon v. David MacBrayne Ltd*[47] was heavily influenced by the desire to strike down an unfair exemption clause. It may be questioned whether it would not be more effective in relieving the unfairness not to conceal the worst excesses of these clauses by using other doctrines, especially if the attempt may work the opposite injustice. And if Lord Devlin's *dictum* is good law, it is probable that if the situation of *Harnor v. Groves*[48] were to arise again today the decision would be the same as the original decision.

Similarly, *Hill v. Wright*[49] seems to have been influenced by a desire to analyse this business practice as a normal two-party bargained contract. There is a certain artificiality, for instance, in talking of the 'actual knowledge' of a company. Indeed, from the inclusion of respondent's associate companies in the tally of the dealings between the two parties, it would seem that a company may be held to possess actual knowledge of a term when the dealings had taken place between the associate company and the other party. The courts have not yet faced the difficulty of the 'actual knowledge' theory of deciding exactly who is supposed to have the knowledge. In *McCutcheon's* case[50] the actual knowledge and the past dealings both of McCutcheon and of his agent were examined. In the present case Gillard J. attempts to make a two-party situation in order to avoid the difficulty by saying that there had to be:

> actual knowledge of such an exemption clause by *Falkingham*[51] and by the other person making the contract.[52]

But there is logically no reason why if another employee of the respondent possessed actual knowledge, the company itself should not be held to possess actual knowledge. The theory of 'actual knowledge' thus loses any plausibility it may have gained from the court's reference to the 'officious bystander' test, that is, that the people making the contract have the term in mind when making the contract and merely do not refer to it.

Perhaps this tendency to see the contract in terms simply of a bargain between two parties encouraged the court also to assimilate this case to those in which a private person has had an unfair exemption clause virtually forced upon him. The decision in *McCutcheon's* case[53] flows explicitly from the unfairness of the monopoly situation and non-negotiable bargain that McCutcheon was placed in. In commercial contexts such as *Spurling's* case[54] and *Hardwick's* case,[55] on the other hand, the tendency has been to expect that the companies will wish to transact their business on the basis of standard and established terms. These are, after all, businessmen contracting at arms' length, and confirmation notes have a useful commercial function.[56] The Full Court by insisting that contracts are really made between employees are also effectively denying companies the

[46] *Supra* n. 42.
[47] *Supra* n. 45.
[48] (1855) 12 C.B. 667.
[49] [1971] V.R. 749.
[50] *Supra* n. 45.
[51] My italics. The employee of the respondent who made the oral contract.
[52] [1971] V.R. 749, 752.
[53] *Supra* n. 45.
[54] *Supra* n. 43.
[55] *Supra* n. 42.
[56] Compare Hoggett, *op. cit.* 518.

right to regulate their bargains by restraining their employees from varying the contract by making terms to which the company has not agreed.

It is suggested that Lord Diplock's view that the terms of the contract in these situations are gathered from what each party led the other to believe is preferable, especially as this view is of course by no means an innovation: compare with *Bruce v. Hunter*,[57] *Re Marquis of Anglesea*.[58] It is still to be hoped that the forthcoming report of the Law Commission on exemption clauses in contracts for services will place this area on a more acceptable footing.

PAUL BINGHAM

R. v. HAYWOOD[1]

Criminal law—Murder—Intent—Effect of taking drugs—Defence of automatism—Voluntary and conscious act—Whether verdict of acquital open—Manslaughter—Mens rea—Death caused by unlawful act.

The accused in this case, a youth aged fifteen years, had swallowed a quantity of valium tablets shortly prior to breaking into a nearby house for the purpose of stealing. Whilst in the house he found and consumed some whisky. The accused also found a rifle and ammunition and he tested his marksmanship by shooting at various items inside the house. Following this he fired a number of shots from inside which went beyond the house and one shot struck and mortally wounded a woman. He was charged with murder. The accused gave evidence that, prior to shooting from within the house out into the street, he looked, perceived a tree, and shot at it. He then saw a woman come out of a nearby house and fired two more shots at another tree. He further said that at the time of firing these shots he was aiming accurately and holding the gun by resting it on a windowsill. A plan submitted in evidence showed that the trees did not exist as Haywood perceived them.[2] Psychiatric evidence was presented by the defence to the effect that the acts, including the firing of the homicidal shot (which may have been one of the aimed shots mentioned above), performed by the accused after approximately one half hour from the taking of the valium tablets were acts that were, or might have been, performed involuntarily. Defence Counsel contended that as the act which caused death (the firing of the rifle) was not a voluntary act, because of the combined effect of the drug and alcohol, the accused should not stand culpable. In response the Crown contended that even were the jury to accept the proposition that at the material time the defendant was unable to perform a voluntary act, or if the jury had not been satisfied beyond reasonable doubt that the accused was able to perform a voluntary act, nevertheless, since the condition was due to self-induction, it would not be open to the jury to do other than consider the alternatives of murder or manslaughter.[3] This submission was based on the authority of *R.* v. *Lipman*.[4]

[57] (1813) 3 Camp. 467; 170 E.R. 1448. [58] [1901] 2 Ch. 548.

[1] [1971] V.R. 755, Supreme Court of Victoria, Crockett J.

[2] See Transcript of Crockett J.'s charge to the jury in *Haywood*, pp. 36a-38a. Cf. *R. v. Joyce* [1970] S.A.S.R. 184.

[3] To deny a jury its right to acquit is open to suspicion. See Devlin, *Trial By Jury* (1956) 160-1.

[4] [1970] 1 Q.B. 152; [1969] 3 All E.R. 410.