Clickwrap contracts

Is an 'I agree' click the same as a signature?

By David Ash

Introduction

Lobbyists, legislators and judges have always grappled with the lopsided bargain. This article looks at the challenge thrown up by the online transaction. Does clicking 'I agree' mean 'I agree'? And if it does then what, exactly, is being agreed?

Is there a contract at all?

A standard form contract has a first page applying to the individual consumer (with the make, the model, the price, etc) and a second page applying indiscriminately to the offeror's intended customers.

The online transaction must be approached differently. There is a developing taxonomy of browsewrap, clickwrap, scrollwrap and sign-in wrap, and the separate question of whether a hyperlink can or cannot incorporate terms.

The different fact scenarios are beyond this article. Reference may be had to Simon Blount's *Electronic Contracts*, 2nd ed, 2015, LexisNexis. The important point is that the voyage from the offeror's home screen to its payment and receipt screens may well be relevant, either as surrounding circumstances or as part of the contract itself.

There are temporal and spatial issues. If things are changing on the face of the transaction, what may this say about the continuing applicability of a box ticked at the outset?

In practical terms, are you still drafting the request: 'If the contract is in writing and signed, please provide a copy.' when you should be asking something along the lines: 'If the contract is online, please provide a screenshot of each step from offer to acceptance?'

The law of the pen in Australia

If the contract is contained in a railway ticket or other unsigned document, it is necessary for the party invoking its terms to prove that

the other was aware or ought to have been aware, of its terms and conditions. However, these cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation or of statutory amelioration, the party signing it is bound, and it is immaterial whether they have read the document or not.

These propositions – the rule in Graucob – comprise the settled law of Australia: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; 219 CLR 165; 79 ALJR 129; 211 ALR 342, [57]*. The High Court added at [53]:

> The proposition [adopted in the courts below] appears to be that a person who signs a contractual document without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms. If the proposition is limited to some terms and not others, it is not easy to see what the discrimen may be.

In summary, where the contract is unsigned, reasonable or actual awareness is in issue, and where the contract is signed, the signature forecloses that issue.

The forensic difference is vital. Where the consumer has signed the contract, the consumer bears the burden of disavowing their own act. Where the consumer has not signed the contract, the offeror bears the burden that reasonable notice has been given: see e.g., *Sydney Corporation v West (1965) 114 CLR 481*, 486 per Barwick CJ and Taylor J.

The US position

I recommend two judgments. First, Sotomayor J's reasons in *Specht v Netscape 306 F3d 17(2002)* provide an enduring and authoritative framework authored by a preeminent US jurist. Secondly, Weinstein J's reasons in *Berkson v Gogo LLC 97 FSupp3d 359 (2015)* provide a recent and vibrant conspectus by a trial judge.

Judge Sotomayor observed (1) paper transaction principles apply equally to the emergent world of online product delivery; (2) a party cannot avoid the terms of a paper contract on the ground that they failed to read it; (3) however, when the paper does not appear to be a contract and terms are not called to the attention of the recipient, no contract is formed with respect to the undisclosed term; and (4) reasonably conspicuous notice and unambiguous manifestation of assent by consumers are essential if electronic bargaining is to have integrity and credibility.[1]

Thus a signature – that is, an 'unambiguous manifestation of assent' – does not preclude a parallel assessment of 'reasonably conspicuous notice'. In electronic bargaining, a click may and almost certainly will, amount to a concluded bargain, but that will be upon an assessment of the evidence of the transaction as a whole and not upon the presumptive effect of a click.

Two further matters of relevance to Australia.

First, the usual admonition – each case

depends on its facts – applies to online transactions with unusual force. Judge Sotomayor distinguished a number of cases where a contract had been found to exist, because a review of those cases showed 'much clearer notice' than in the case before her.[2] If the offer carries 'an immediately visible notice of the existence of… terms' and requires 'unambiguous manifestation of assent to those terms', that will be enough.[3] Anything less, and the offeror, at least in the US, will have its work cut out.

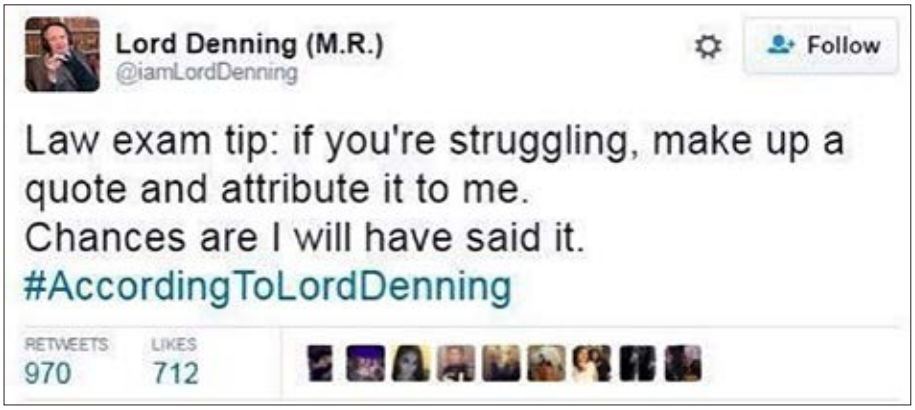
Secondly, the makeup of the reasonable user is as essential and as elusive in US jurisprudence as Australian jurisprudence.

On the one hand, both the US and Anglo-Australian courts have declined to recognise a juridical entity called 'the unsophisticated consumer'. In Australia, for example, a person seeking to avoid their signature cannot say 'I have a special legal status because I am not a businessperson.' As the rule in Graucob makes clear, the person must positively establish an equity or an extra-contractual representation or a statutory 'out'.

On the other hand, both the US and Anglo-Australian courts acknowledge that one type of consumer may differ from notice to another. A good example is Specht itself. Judge Sotomayor noted that in one case on which Netscape placed 'great importance', the offeror's terms of use 'were well known to [the consumer], which took the information daily with full awareness that it was using the information in a manner prohibited by the terms of [the corporation's] offer.' She simply noted 'The case is not closely analogous to ours.' [4]

Consumer law

It must be noted that Australian parliaments, as distinct from Australian courts, recognise a category of law called consumer law. However, contract law is not consumer law. Consumer law focuses on a supply of goods or services by a provider to a consumer, whether the supply is by contract or not. Whether a practitioner acting to shield a consumer from a contractual claim is able to invoke the sword of statutory consumer law is a complex question in both form and substance. It is sufficient for current purposes to note that the regimes are different.



Question 1 – Who was in the minority?

Will Australian courts apply the rule in Graucob by analogy?

Provided that there is a bargain at all – as to which, see above – will Australian courts say that a click of 'I agree' is analogous to a signature, so that argument about awareness is foreclosed?

In Toll, the court was at pains to focus on the physical use of the pen as a line of division. It justified the division by reference to two different policies. First, the significance given by the signer to the act of signing. Secondly, the need to protect both the person who asks for the document to be signed and for third parties who have a valid commercial interest in the signed document's binding nature, including but not limited to banks and insurers. As the court acknowledged, each policy feeds on the other.

As to the first, I think an offeror who argues 'it is common knowledge that a clicker gives the same significance to a click as a signer gives to the act of signing' is doomed to fail. A young person's development of their signature is, or at least was, part of growing up. It may not have had the emotional immediacy of one's first kiss or first drink or first driving lesson, but each of us when we had our signature in its final form felt different from when we hadn't.

The second is more difficult. A court is in the business of administering justice, not dispensing it. The danger of an individualised justice is apparent. However, I am not sure that an argument 'We used to rely on the pen, the pen has been replaced by a click, ergo we rely on the click' is demonstrably common knowledge. Put another way, replacement of the physical means does not evidence continuity of reliance.

An apt yet inappropriate analogy?

An analogy can be both apt and inappropriate. On the one hand, to warn against putting the cart before the horse is as true today as it was a thousand years ago. On the other hand, it is a century since the horse-and-cart gave way to the mechanised vehicle, we are soon to have not only mechanised but driverless vehicles, and in any event, how many of today's children will ever see a horse drawing a cart?

Where a signature is applied to a piece of paper and a copy of the signed paper is immediately returned to the signer, there is a viscerally physical process of exchange and no matter how unwise the transaction may turn out to be for the signer, we can understand even if we refuse to accept an argument that mutuality was such that the terms in the paper have now adhered to the signer.

The online process may be very different. The 'I agree' click is often not at the end of the process, or even the point of or the price of entry. If that is the circumstance, can the 'I agree' click have any analogue in orthodox bargain theory except, ironically if not paradoxically, an invitation to treat?

Conclusion

In a debate in the House of Lords in 1977, Lord Denning said:

> I wish particularly to draw attention to the printed conditions which appear on

> the backs of order forms, warehousemen's notes, laundry cleaning documents and the like; whatever it may be, we sign them without reading them and, if we do not read them or there is no place for signing, we are bound by them.
>
> They are said to be contracts, but we have never agreed to them. It is a fiction of the law to say they are contracts, and it has been a great mistake of the law hitherto to say that the courts cannot inquire as to whether or not they are reasonable.

In his speech, Denning muses on Graucob. He was allowed to; he had appeared for the successful offeror in Graucob almost a half century before! For the rest of us, whether current Australian, American or English authority is 'a great mistake' or whether any 'mistake' is now to be inflicted upon a new generation of consumers is a value-driven debate best left for another day.

The only purpose of this article is to suggest (a) that a practitioner advising a consumer in an online transaction must nail down what, precisely, the alleged bargain is said to be in all the temporal and spatial circumstances; and (b) that a practitioner advising a putative offeror seeking to enforce an online transaction is still going to have to have their work cut out.

To use a redundant expression from the last century, 'stay tuned'.

ENDNOTES

1 Specht, 20-22, 28.
2 Specht, 26.
3 cf Specht, 23.
4 Specht, fn 16.