1978 CarswellOnt 125, 4 B.L.R. 50, 18 O.R. (2d) 601, 83 D.L.R. (3d) 400

Tilden Rent-A-Car Co. v. Clendenning

TILDEN RENT-A-CAR COMPANY v. CLENDENNING

Ontario Supreme Court [Court of Appeal]

Dubin, Lacourciere and Zuber JJ.A.

Heard: October 20 and 21, 1977
Judgment: March 30, 1978
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Counsel: *D.G. Cormack* , for plaintiff, appellant.

A.A. Morscher , for defendant, respondent.

Subject: Corporate and Commercial; Contracts; Insurance

Contracts --- Formation of contract — Consensus ad idem — Intention of parties.

Contracts --- Formation of contract — Acceptance of specific terms.

Insurance --- Contracts of insurance — Formation of contract — Communication of terms.

Customer not liable for damage to car.

The defendant, as he had done on many occasions, rented a car from the plaintiff. The defendant was asked if he wanted additional coverage and he replied affirmatively. A contract was submitted to him and he signed it without reading it. However, a clause on the face of the contract provided that notwithstanding payment of the additional fee, the defendant was to be fully liable for all collision damage if the vehicle were used or driven in violation of any provision of the rental contract.

On the reverse side of the contract, in small type and so faint on the customer's copy as to be hardly legible, were a series of provisions which included an agreement by the defendant that he would not use the vehicle in violation of any law of any public authority and that the vehicle would not be operated by any person who had drunk or consumed any intoxicating liquor, whatever the quantity. The defendant, while endeavouring to avoid a collision, damaged the vehicle by driving it into a pole. The defendant pleaded guilty to a charge of impaired driving, but he maintained that he had done so on the advice of counsel and that, at the time of

the accident, he had been capable of proper control of the vehicle. It was established that the practice of the plaintiff was not to draw the attention of the customer to the exclusionary conditions unless inquiries were made. If inquiries were made, the plaintiff would advise that by payment of the additional fee the customer had complete coverage unless he were intoxicated or unless he committed an offence under the Criminal Code such as intoxication. The defendant assumed that he would not be responsible for any damage to the vehicle on payment of the additional fee unless such damage was caused by reason of his being so intoxicated as to be incapable of proper control of the vehicle. On the evidence it was clear that the defendant had not acquiesced to the exclusionary terms.

The plaintiff's action for damages to the vehicle was dismissed at trial. The plaintiff appealed.

Held (Lacourciere J.A. dissenting):

The appeal was dismissed.

Per Dubin J.A. (Zuber J.A. concurring):

The English rule established in *L'Estrange v. Graucob Ltd.* is that a party who signs a contract is bound by its terms whether he has read them or not, unless such party can show fraud or misrepresentation or can rely on the defence of non est factum. The Canadian approach has not been as rigid. Consensus ad idem is as much a part of the law of written contracts as it is of oral contracts. The signer of a contract is bound by the terms of the document only if the other party believes on reasonable ground that the terms of the contract truly express the signer's intention.

In the present case, the contract was signed in a hurried informal manner and the exclusionary provisions were inconsistent with the overall purpose for which the contract was entered into by the defendant. In these circumstances something more should have been done by the plaintiff than merely handing the contract over to be signed. In modern commercial practice, a party cannot seek to rely on the terms of a standard printed contract where he knows or ought to know that the signature of the other party does not represent his true intention and that the signing party is unaware of stringent and onerous provisions contained in the contract. Under such circumstances the party seeking to rely on such terms should not be able to do so unless he has first taken reasonable measures to draw such provisions to the attention of the other party. In the absence of such measures it is not necessary for the party denying knowledge of such provisions to prove either fraud, misrepresentation or non est factum.

The plaintiff took no steps to alert the defendant of the onerous provisions in the plaintiff's standard form contract. The defendant was unaware of them. Consequently the plaintiff could not rely on them and the defendant was not liable for any damage to the vehicle while being driven by him. Also the trial Judge was wrong to have imputed a term into the contract to the effect that the defendant had full coverage unless at the time of damage he was operating the vehicle while under the influence of intoxicating liquor to such an extent as to be for the time incapable of the proper control of the vehicle, as such a provision had not in fact been represented as being a term of the contract.

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Per Lacourciere J.A. (dissenting):

There is a distinction at common law between standard form contracts that have been signed and those that have not. A person who signs such a contract is bound by its printed conditions, absent fraud, misrepresentation or the defence of non est factum, even if he has not read them. A person who has not signed such a contract must be given notice of any such conditions before he will be bound by them. In the instant case, in order to escape liability, the onus was on the defendant to establish that the terms of the contract were misrepresented to him. The defendant had not met this onus. The common law has refused to strike down contractual standard form conditions unless the terms are so unreasonable as to amount to fraud or are manifestly irrelevant to the object of the contract. The exclusionary provisions of the contract were not of this nature nor were they unfair, unreasonable or oppressive.

Cases considered:

Can. Bank of Commerce v. Foreman, 22 Alta. L.R. 443, [1927] 1 W.W.R. 783, [1927] 2 D.L.R. 530 (C.A.) — *applied*

Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.; Okanagan Mainline Real Estate Bd. v. Whillis-Harding Ins. Agencies Ltd., [1971] S.C.R. 493, [1971] 1 W.W.R. 289, *(* sub nom. *Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.)* 16 D.L.R. (3d) 715, *(*sub nom. *Okanagan Mainline Real Estate Bd. v. Can. Indemnity Co.)* [1971] I.L.R. 1-383 — *referred to*

Colonial Invts. Co. v. Borland (1911), 1 W.W.R. 171 , affirmed 5 Alta. L.R. 71, 2 W.W.R. 960, 6 D.L.R. 211 (C.A.) — *applied*

Gibaud v. Great Eastern Ry. Co., [1920] 3 K.B. 689 , affirmed [1921] 2 K.B. 426 , [1921] All E.R. Rep. 35 (C.A.)*referred to*

Gillespie Bros. & Co. v. Roy Bowles Tpt. Ltd., [1973] Q.B. 400, [1973] 1 All E.R. 193 — *considered*

Jaques v. Lloyd D. George & Partners Ltd., [1968] 1 W.L.R. 625, [1968] 2 All E.R. 187 (C.A.) — *referred to*

Lee (John) & Son (Grantham) Ltd. v. Ry. Executive, [1949] 2 All E.R. 581 (C.A.) — *referred to*

L'Estrange v. F. Graucob Ltd., [1934] 2 K.B. 394 , [1934] All E.R. Rep. 16 — *not followed*

Linton (B.G.) Const. Ltd. v. C.N.R., [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, 3 N.R. 151, 49 D.L.R. (3d) 548 — *referred to*

McCutcheon v. David MacBrayne Ltd., [1964] 1 W.L.R. 125, [1964] 1 All E.R. 430 (H.L.) — *referred to*

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Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown (1883), 8 App. Cas. 703 (H.L.) — *referred to*

Neuchatel Asphalte Co. v. Barnett, [1957] 1 W.L.R. 356, [1957] 1 All E.R. 362 (C.A.) — *referred to*

New Zealand Shipping Co. v. A.M. Satterthwaite & Co., [1975] A.C. 154, [1974] 1 All E.R. 1015 (P.C.) — *referred to*

O'Connor Real Estate Ltd. v. Flynn (1969), 3 D.L.R. (3d) 345 , affirmed 1 N.S.R. (2d) 949, 11 D.L.R. (3d) 559 (C.A.) — *referred to*

Provident Savings Life Assur. Society v. Mowat (1902), 32 S.C.R. 147 — *referred to*

Smith v. Hughes (1871), L.R. 6 Q.B. 597 , [1861-73] All E.R. Rep. 632 — *referred to*

Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 All E.R. 61 (H.L.) — *referred to*

Thompson v. London, Midland & Scottish Ry. Co., [1930] 1 K.B. 41 (C.A.) — *referred to*

Statutes considered:

Sale of Goods Act, 1893 (U.K.), c. 71.

Authorities considered:

Sales, "Standard Form Contracts" (1953), 16 M.L.R. 318 .Spencer, "Signature, Consent and the Rule in L'Estrange v. Graucob", [1973] C.L.J. 104 .Waddams, "Contracts — Exemption Clauses — Unconscionability — Consumer Protection" (1971), 49 Can. Bar Rev. 578.Waddams, The Law of Contracts, p. 191.
Appeal from a decision of the trial Judge dismissing the plaintiff's claim for damages to a rented automobile.

***Dubin J.A.* (*Zuber J.A.* concurring):**

1 Upon his arrival at Vancouver airport, Mr. Clendenning, a resident of Woodstock, Ontario, attended upon the office of Tilden Rent-A-Car Company for the purpose of renting a car while he was in Vancouver. He was an experienced traveller and had used Tilden Rent-A-Car Company on many prior occasions. He provided the clerk employed at the airport office of Tilden Rent-A-Car Company with the minimum information which was asked of him, and produced his American Express credit card. He was asked by the clerk whether he desired additional coverage, and, as was his practice, he said "yes". A contract was submitted to him for his signature, which he signed in the presence of the clerk, and he returned the contract to her. She placed his copy of it in an enevelope and gave him the keys to the car. He then placed the contract in the glove compartment of the vehicle. He did not read the terms of the contract before signing it, as was readily apparent to the clerk, and in fact he did not read the contract

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until this litigation was commenced, nor had he read a copy of a similar contract on any prior occasion.

2 The issue on the appeal is whether the defendant is liable for the damage caused to the automobile while being driven by him by reason of the exclusionary provisions which appear in the contract.

3 On the front of the contract are two relevant clauses set forth in box form. They are as follows:

> **15. COLLISION DAMAGE WAIVER BY CUSTOMERS INITIALS 'J.C.'**
>
> *In consideration of the payment of 2.00 per day customers liability for damage to rented vehicle including windshield is limited to NIL* . But notwithstanding payment of said fee, customer shall be fully liable for all collision damage if vehicle is used, operated or driven in violation of any of the provisions of this rental agreement or off highways serviced by federal, provincial, or municipal governments, and for all damages to vehicle by striking overhead objects.
>
> 16. I, the undersigned have read and received a copy of above and reverse side of this contract.
>
> Signature of customer or employee of customer
>
> 'John T. Clendenning'

4 'The italics are mine.'

5 On the back of the contract in particularly small type and so faint in the customer's copy as to be hardly legible, there are a series of conditions, the relevant ones being as follows:

> 6. The customer agrees not to use the vehicle in violation of any law, ordinance, rule or regulation of any public authority.
>
> 7. The customer agrees that the vehicle will not be operated:
>
> (a) By any person who has drunk or consumed any intoxicating liquor, whatever be the quantity, or who is under the influence of drugs or narcotics ...

6 The rented vehicle was damaged while being driven by Mr. Clendenning in Vancouver. His evidence at trial, which was accepted by the trial Judge, was to the effect that in endeavouring to avoid a collision with another vehicle and acting out of a sudden emergency, he drove the car into a pole. He stated that although he had pleaded guilty to a charge of driving while impaired in Vancouver, he did so on the advice of counsel, and at the time of the impact he was capable of the proper control of the motor vehicle. This evidence was also accepted by the trial Judge.

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7 Mr. Clendenning testified that on earlier occasions when he had inquired as to what added coverage he would receive for the payment of $2 per day, he had been advised that "such payment provided full non-deductible coverage". It is to be observed that the portion of the contract reproduced above does provide that "in consideration of the payment of $2.00 per day customers liability for damage to rented vehicle including windshield is limited to NIL".

8 A witness called on behalf of the plaintiff gave evidence as to the instructions given to its employees as to what was to be said by them to their customers about the conditions in the contract. He stated that unless inquiries were made, nothing was to be said by its clerks to the customer with respect to the exclusionary conditions. He went on to state that if inquiries were made, the clerks were instructed to advise the customer that by the payment of the $2 additional fee the customer had complete coverage "unless he were intoxicated, or unless he committed an offence under the *Criminal Code* such as intoxication".

9 Mr. Clendenning acknowledged that he had assumed, either by what had been told to him in the past or otherwise, that he would not be responsible for any damage to the vehicle on payment of the extra premium unless such damage was caused by reason of his being so intoxicated as to be incapable of the proper control of the vehicle, a provision with which he was familiar as being a statutory provision in his own insurance contract.

10 The provisions fastening liability for damage to the vehicle on the hirer, as contained in the clauses hereinbefore referred to, are completely inconsistent with the express terms which purport to provide complete coverage for damage to the vehicle in exchange for the additional premium. It is to be noted, for example, that if the driver of the vehicle exceeded the speed limit even by one mile per hour, or parked the vehicle in a no-parking area, or even had one glass of wine or one bottle of beer, the contract purports to make the hirer completely responsible for all damage to the vehicle. Indeed, if the vehicle at the time of any damage to it was being driven off a federal provincial or municipal highway, such as a shopping plaza for instance, the hirer purportedly would be responsible for all damage to the vehicle.

11 Mr. Clendenning stated that if he had known of the full terms of the written instrument, he would not have entered into such a contract. Having regard to the findings made by the trial Judge, it is apparent that Mr. Clendenning had not in fact acquiesced to such terms.

12 It was urged that the rights of the parties were governed by what has come to be known as "the rule in *L'Estrange v. F. Graucob Ltd.*", [1934] 2 K.B. 394 , [1934] All E.R. Rep. 16, and in particular the following portion from the judgment of Scrutton L.J. at p. 403:

> ... In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. *When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not* .

[The italics are mine.]

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13 In the same case Maugham L.J. added at p. 406:

> ... There can be no dispute as to the soundness in law of the statement of Mellish L.J. in *Parker v. South Eastern Ry Co.*, 2 C.P.D. 416 , 421, which has been read by my learned brother, to the effect that where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents. That is true in any case in which the agreement is held to be an agreement in writing.
>
> There are, however, two possibilities to be kept in view, The first is that it might be proved that the document, though signed by the plaintiff, was signed in circumstances which made it not her act. That is known as the case of Non est factum.

14 And at p. 407:

> Another possibility is that the plaintiff might have been induced to sign the document by misrepresentation.

15 Consensus ad idem is as much a part of the law of written contracts as it is of oral contracts. The signature to a contract is only one way of manifesting assent to contractual terms. However, in the case of *L'Estrange v. F. Graucob Ltd.* , supra, there was in fact no consensus ad idem. Miss L'Estrange was a proprietor of a cafe. Two salesmen of the defendant company persuaded her to order a cigarette machine to be sold to her by their employer. They produced an order form which Miss L'Estrange signed without reading all of its terms. Amongst the many clauses in the document signed by her, there was included a paragraph with respect to which she was completely unaware, which stated "any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded". In her action against the company she alleged that the article sold to her was unfit for the purposes for which it was sold and contrary to The Sale of Goods Act [1893 (U.K., 56 & 57 Vict., c. 71)]. The company successfully defended on the basis of that exemption clause.

16 Although the subject of critical analysis by learned authors (see, for example, Spencer, "Signature, Consent, and the Rule in *L'Estrange v. Graucob*", [1973] C.L.J. 104), the case has survived, and it is now said that it applies to all contracts irrespective of the circumstances under which they are entered into, if they are signed by the party who seeks to escape their provisions.

17 Thus, it was submitted that the ticket cases, which in the circumstances of this case would afford a ready defence for the hirer of the automobile, are not applicable.

18 As is pointed out in Waddams, The Law of Contracts. p. 191:

> From the 19th century until recent times an extraordinary status has been accorded to the signed document that will be seen in retrospect, it is suggested, to have been excessive.

19 The justification for the rule in *L'Estrange v. F. Graucob Ltd.* , supra, appears to have

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been founded upon the objective theory of contracts by which means parties are bound to a contract in writing by measuring their conduct by outward appearance rather than what the parties inwardly meant to decide. This, in turn, stems from the classic statement of Blackburn J. in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 , [1861-73] All E.R. Rep. 632:

> ... I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke* [(1848), 2 Ex. 654 at 663, 154 E.R. 652]. *If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he has intended to agree to the other party's terms* .

[The italics are mine.]

20 Even accepting the objective theory to determine whether Mr. Clendenning had entered into a contract which included all the terms of the written instrument, it is to be observed that an essential part of that test is whether the other party entered into the contract in the belief that Mr. Clendenning was assenting to all such terms. In the instant case, it was apparent to the employee of Tilden-Rent-A-Car that Mr. Clendenning had not in fact read the document in its entirety before he signed it. It follows under such circumstances that Tilden-Rent-A-Car cannot rely on provisions of the contract which it had no reason to believe were being assented to by the other contracting party.

21 As stated in Waddams, The Law of Contracts, p. 191:

> One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words he uses their reasonable meaning. But the other side of the same coin is that only a reasonable expectation will be protected. If the party seeking to enforce the document knew or had reason to know of the other's mistake the document should not be enforced.

22 In ordinary commercial practice where there is frequently a sense of formality in the transaction, and where there is a full opportunity for the parties to consider the terms of the proposed contract submitted for signature, it might well be safe to assume that the party who attaches his signature to the contract intends by so doing to acknowledge his acquiescence to its terms, and that the other party entered into the contract upon that belief. This can hardly be said, however, where the contract is entered into in circumstances such as were present in this case.

23 A transaction, such as this one, is invariably carried out in a hurried, informal manner. The speed with which the transaction is completed is said to be one of the attractive features

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of the services provided.

24 The clauses relied on in this case, as I have already stated, are inconsistent with the overall purpose for which the contract is entered into by the hirer. Under such circumstances, something more should be done by the party submitting the contract for signature than merely handing it over to be signed.

25 In an analogous situation Lord Devlin in the case of *McCutcheon v. Davin MacBrayne Ltd.*, [1964] 1 W.L.R. 125, [1964] 1 All E.R. 430 (H.L.) , commented as follows at pp. 132-134 [p. 436]:

> ... It would be a strangely generous set of conditions in which the persistent reader, after wading through the verbiage, could not find something to protect the carrier against 'any loss ... wheresoever or whensoever occurring'; and condition 19 by itself is enough to absolve the respondents several times over for all their negligence. *It is conceded that if the form had been signed as usual, the appellant would have had no case* . But by a stroke of ill luck for the respondents it was upon this day of all days that they omitted to get Mr. McSporran to sign the conditions. What difference does that make? *If it were possible for your lordships to escape from the world of make-believe, which the law has created, into the real world in which transactions of this sort are actually done, the answer would be short and simple. It should make no difference whatever. This sort of document is not meant to be read, still less to be understood. Its signature is in truth about as significant as a handshake that marks the formal conclusion of a bargain* .
>
> Your Lordships were referred to the dictum of Blackburn J., in *Harris v. Great Western Railway Co.* (1876), 1 Q.B.D. 515 at p. 530. The passage is as follows:
>
> > And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in delivering the judgment of the Exchequer in *Freeman v. Cooke* (1848), 2 Exch. 654 , that is, if he "means his representation to be acted upon, and it is acted upon accordingly: or if, whatever a man's real intentions may be, he so conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true".
>
> If the ordinary law of estoppel was applicable to this case, it might well be argued that the circumstances leave no room for any representation by the sender on which the carrier acted. I believe that any other member of the public in the appellant's place, — and this goes

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> for lawyers as well as for laymen, — would have found himself compelled to give the same sort of answers as the appellant gave; and I doubt if any carrier who serves out documents of this type could honestly say that he acted in the belief that the recipient had 'made himself acquainted with the contents'. But Blackburn, J. (1876), 1 Q.B.D. at p. 530, was dealing with an unsigned document, a cloakroom ticket. Unless your lordships are to disapprove the decision of the Court of Appeal in *L'Estrange v. F. Graucob Ltd.*, [1934] All E.R. Rep. 16, [1934] 2 K.B. 394 , — and there has been no suggestion in this case that you should, — the law is clear, without any recourse to the doctrine of estoppel, that a signature to a contract is conclusive.

[The italics are mine.]

26 An analysis of the Canadian cases, however, indicates that the approach in this country has not been so rigid. In the case of *Colonial Invts. Co. v. Borland* (1911), 1 W.W.R. 171 at 189 , affirmed 5 Alta. L.R. 71, 2 W.W.R. 960, 6 D.L.R. 211 (C.A.) , Beck J. set forth the following propositions:

> *Consensus ad idem* is essential to the creation of a contract, whether oral, in writing or under seal, subject to this, that as between the immediate parties (and merely voluntary assigns) apparent — as distinguished from real — consent will on the ground of estoppel effect a binding obligation unless the party denying the obligation proves:
>
> (1) That the other party knew at the time of the making of the alleged contract that the mind of the denying party did not accompany the expression of his consent; or
>
> (2) Such facts and circumstances as show that it was not reasonable and natural for the other party to suppose that the denying party was giving his real consent and he did not in fact give it ...

27 In commenting on the *Colonial Invt. Co. v. Borland* case, Spencer, in the article above cited, observes at p. 121: "It is instructive to compare a Canadian approach to the problem of confusing documents which are signed but not fully understood."

28 And at p. 122 the author concludes his article with the following analysis:

> Policy considerations, but of different kinds, no doubt lay behind both the Canadian and the English approaches to this problem. The Canadian court was impressed by the abuses which would result — and, in England, *have* resulted — from enabling companies to hold ignorant signatories to the letter of sweeping exemption clauses contained in contracts in standard form. The English courts, however, were much more impressed with the danger of furnishing an easy line of defence by which liars could evade contractual liabilities freely assumed. It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of any express misrepresentation by the other party of that legal effect. Forty years later, most lawyers would admit that the English courts made a bad choice between two evils ...

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29 The significance of the circumstances under which a contract is entered into is noted by Taschereau J. in *Provident Savings Life Assur. Society v. Mowat* (1902), 32 S.C.R. 147 , as follows at p. 162:

> ... As remarked by Mr. Justice Maclennan [27 O.A.R. 675 at 699]:
>
> > The case of a formal instrument like the present, prepared and executed, after a long negotiation, and correspondence delivered and accepted, and acted upon for years, is wholly different from the cases relating to railways and steamship and cloak-room tickets, in which it has been held that conditions qualifying the principal contract of carriage or bailment, not sufficiently brought to the attention of the passenger or bailor are not binding upon him. Such contracts are usually made in moments of more or less haste and confusion and stand by themselves.

30 I see no real distinction in contracts such as these, where the signature by itself does not truly represent an acquiescence of unusual and onerous terms which are inconsistent with the true object of the contract, and the ticket cases. This point was made y Beck J.A. in *Can. Bank of Commerce v. Foreman*, [1927] 2 D.L.R. 530 , at 537, 22 Alta. L.R. 443, [1927] 1 W.W.R. 783 , where he stated:

> Personally I have a very strong opinion, which is not to the full extent shared by other members of the Court and expressed in *Gray-Campbell Ltd. v. Flynn*, [1923] 1 D.L.R. 51, 18 Alta. L.R. 547 , and for which I see some support in some circumstances in *Ball v. Gutschenritter*, [1925] 1 D.L.R. 901 , at p. 908 (and see also *Jadis v. Porte* (1915), 23 D.L.R. 713, 8 Alta. L.R. 489) — *the opinion that when a contract of a common type contains special onerous and unusual provisions it is the duty of the party in whose interest such provisions are inserted to see that they are effectively called to the attention of the other party under the penalty of their being held not binding upon the latter party* but I think that would not ordinarily affect the residue of the contract and consequently the question does not arise in the present case. The only special provision which the bank needs to invoke, and which is of that special character that it alters the rights of the parties, is that permitting the giving of time to the debtor etc.; but this I would not place under the category of special provisions of an onerous or special character but would consider to be such a provision as the ordinary layman would suppose to express the law independently of a special provision.

[The italics are mine.]

31 The same point of view was expressed by Lord Denning in the case of *Jaques v. Lloyd D. George & Partners Ltd.*, [1968] 1 W.L.R. 625 630, [1968] 2 All E.R. 187 at 190 (C.A.) :

> The principles which, in my opinion, are applicable are these: When an estate agent is employed to find a purchaser for a business or a house, the ordinary understanding of mankind is that the commission is payable out of the purchase price when the matter is concluded. If the agent seeks to depart from that ordinary and well-understood term, then he

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> must make it perfectly plain to his client. He must bring it home to him so as to make sure he agrees to it. When his representative produces a printed form and puts it before the client to sign, he should explain its effect to him, making it clear that it goes beyond the usual understanding in these matters. In the absence of such explanation a client is entitled to assume that the form contains nothing unreasonable or oppressive. If he does not read it and the form is found afterwards to contain a term which is wholly unreasonable and totally uncertain, as this is, then the estate agent cannot enforce it against the innocent vendor.

32 In commenting on *Jaques v. Lloyd D. George & Partners Ltd.* , supra, and on the case of *O'Connor Real Estate Ltd. v. Flynn* (1969), 3 D.L.R. (3d) 345 , affirmed 1 N.S.R. (2d) 949, 11 D.L.R. (3d) 559 , in 49 Can. Bar Rev., Professor Waddams makes the following observations at pp. 590-591:

> These cases suggest that there is a special onus on the supplier to point out any terms in a printed form which differ from what the consumer might reasonably expect. If he fails to do so, he will be guilty of a 'misrepresentation by omission', and the court will strike down clauses which 'differ from the ordinary understanding of mankind' or (and sometimes this is the same thing) clauses which are 'unreasonable or oppressive'. If this principle is accepted, the rule about written documents might be restated as follows: the signer is bound by the terms of the document if, and only if, the other party believes on reasonable grounds that those terms truly express the signer's intention. This principle retains the role of signed documents as a means of protecting reasonable expectations; what it does not allow is that a party should rely on a printed document to contradict what he knows, or ought to know, is the understanding of the other party, Again this principle seems to be particularly applicable in situations involving the distribution of goods and services to consumers, though it is by no means confined to such situations.

33 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.

34 In the case at bar, Tilden Rent-A-Car took no steps to alert Mr. Clendenning of the onerous provisions in the standard form of contract presented by it. The clerk could not help but have known that Mr. Clendenning had not in fact read the contract before signing it. Indeed the form of the contract itself with the important provisions on the reverse side and in very small type would discourage even the most cautious customer from endeavouring to read and understand it. Mr. Clendenning was in fact unaware of the exempting provisions. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses, and it was

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not incumbent on Mr. Clendenning to establish fraud, misrepresentation or non est factum. Having paid the premium, he was not liable for any damage to the vehicle while being driven by him.

35 As Lord Denning stated in *Neuchatel Asphalte Co v. Barnett*, [1957] 1 W.L.R. 356 , at 360, [1957] 1 All E.R. 362 at 365 :

> We do not allow printed forms to be made a trap for the unwary.

36 In this case the trial Judge held that "the rule in *L'Estrange v. Graucob* " governed. He dismissed the action, however, on the ground that Tilden Rent-A-Car had by their prior oral representations misrepresented the terms of the contract. He imputed into the contract the assumption of Mr. Clendenning that by the payment of the premium he was "provided full non-deductible coverage unless at the time of the damage he was operating the automobile while under the influence of intoxicating liquor to such an extent as to be for the time incapable of the proper control of the automobile". Having found that Mr. Clendenning had not breached such a provision, the action was dismissed.

37 For the reasons already expressed, I do not think that in the circumstances of this case "the rule in *L'Estrange v. Graucob"* governed, and it was not incumbent upon Mr. Clendenning to prove misrepresentation.

38 In any event, if "the rule in *L'Estrange v. Graucob"* were applicable, it was in error, in my respectful opinion, to impute into the contract a provision which Tilden Rent-A-Car had not in fact represented as being a term of the contract.

39 As was stated in *Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.; Okanagan Mainline Real Estate Bd. v. Whillis-Harding Ins. Agencies Ltd.*, [1971] S.C.R. 493 at 500, [1971] 1 W.W.R. 289, 16 D.L.R. (3d) 715 *(sub nom. Can. Indemnity Co. v. Okanagan Mainline Real Estate Bd.)*, [1971] I.L.R. 1-383 *(sub nom. Okanagan Mainline Real Estate Bd. v. Can. Indemnity Co.):*

> A party who misrepresents, albeit innocently, the contents or effect of a clause inserted by him into a contract cannot rely on the clause in the face of his misrepresentation ...

40 Under such circumstances, absent the exclusionary provisions of the contract, the defendant was entitled to the benefit of the contract in the manner provided without the exclusionary provisions, and the action, therefore, had to fail.

41 In the result, therefore, I would dismiss the appeal with costs.

Lacourciere J.A. **(dissenting):**

42 I have had the advantage of reading the reasons for judgment prepared for release by my brother Dubin, which relieves me of the obligation of setting out the facts in this appeal, which are not really in dispute, or the relevant clauses of the contract. In my view the printing

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is not difficult to read, and the presence of conditions on the reverse side of the signed contract is brought to the signatory's attention in a very clear way.

43 It is not in dispute that the respondent violated two conditions of the contract: he drove the company's vehicle into a post, after drinking an unrecalled quantity of alcohol between 11:30 p.m. and 2 a.m. He was given a breathalyzer test, indicating a police officer's belief, on reasonable and probable grounds, that he had committed an offence of driving a motor vehicle while his ability to drive was impaired by alcohol or after having consumed alcohol in such quantity that the proportion of alcohol in his blood exceeded the penal limit. On the advice of counsel he pleaded guilty to a charge of impaired driving. I have set this out only to show that the respondent's violation of the contractual conditions was not a mere technical breach of an admittedly strict clause.

44 In the wisdom of the common law there has been a traditional distinction with respect to standard form contracts between the position of a person who signed the contract and the one who did not do so. In the absence of duress, fraud or misrepresentation — and subject to the defence of non est factum — the former was bound by the printed conditions, even if he or she did not read them: *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 , [1934] All E.R. Rep. 16. The non-signatory was also bound if that person knew of the existence of the conditions; in the absence of knowledge, the question of the notice given by the other party became important. The distinction rests clearly on that essential prerequisite of a contract, consensus ad idem. The signatory is legally bound by the plain meaning of the words to which he has given assent, whereas the non-signatory should not be deemed to have assented to unknown printed conditions, unless he was given notice of their existence. See H.B. Sales, "Standard form Contracts" (1953), 16 M.L.R. 318 .

45 The respondent, a frequent user of rented vehicles, could not recall what was said at the Tilden counter before he signed the agreement and initialled the collision damage waiver clause. He was aware that the contract contained writing on the back, but he claims that his attention was never drawn to the printed conditions until the action was brought against him.

46 After careful examination of the evidence, I am unable to agree with the learned trial Judge's conclusion that Tilden's counter clerk misrepresented the contract. The evidence of all witnesses concerning the common practice at a car rental counter had minimal probative value, and was probably inadmissible by reason of the parol evidence rule, in addition to being, at best, secondary evidence of what passed between the parties before the signing of the written contract.

47 I am therefore in agreement with Dubin J.A. that the learned trial Judge was in error when he imported into the contract an assumption made by the respondent concerning the extent and import of the exemption clause relating to alcohol, on the basis of tenuous and doubtful evidence. Once the respondent, not claiming fraud or duress, admitted having signed the contract, the onus was on him to prove by a preponderance of acceptable evidence that the conditions were misrepresented to him. In my view, this onus was not met by the respondent. The appellant has accordingly shown reversible error in the trial below.

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48 Although the above would be sufficient to dispose of the appeal, I feel bound to express my view on the submission made on behalf of the respondent that the contract contained such unusual and onerous exculpatory terms that the respondent is not bound by them unless the appellant proves that reasonable measures were taken to draw them to his attention. The words "onerous and unusual", used by Beck J.A. in *Can. Bank of Commerce v. Foreman*, [1927] 2 D.L.R. 530 at 537, 22 Alta. L.R. 443, [1927] 1 W.W.R. 783 (C.A.) , correspond to the words "unreasonable or oppressive" used by Lord Denning in *Jaques v. Lloyd D. George & Partners Ltd.*, [1968] 1 W.L.R. 625 at 630, [1968] 2 All E.R. 187 (C.A.) . The principle developed in these cases relied upon by the appellant for the above submission, was there applied to signed documents.

49 I note, first, that these decisions, however persuasive they may be, have no binding effect on this Court, and that in the *Jaques* case, supra, Edmund Davies L.J. and Cairns J. agreed in the result, but for different reasons (misrepresentation and uncertainty) and they did not refer to Lord Denning's dicta on unreasonableness and oppression. Even Lord Denning found the clause there in question to be not merely "wholly unreasonable", but also "totally uncertain" at p. 630. He went on to find misrepresentation on the facts. In *Can. Bank of Commerce v. Foreman* , supra,the question of whether the defendant there understood the effect of certain exemption clauses did not arise. Beck J.A. at p. 537 was of the opinion that the clause relied on by the plaintiff bank was not of an "onerous or special character". He did not expand on what was meant by those words.

50 It is recognized that certain exemption clauses can be particularly unfair and unreasonable: some are irrelevant and "foreign to the contract" in the sense that they are contradictory and incompatible with the main oject of the contract. Sankey L.J. in *Thompson v. London, Midland & Scottish Ry. Co.*, [1930] 1 K.B. 41 at 56 (C.A.) , referred to "such unreasonable conditions that nobody could contemplate that they exist". In *Gibaud v. Great Eastern Ry.*, [1920] 3 K.B. 689 at 699-700 , affirmed [1921] 2 K.B. 426 , [1921] All E.R. Rep. 35 (C.A.), Bray J. said:

> ... Every contract is voidable by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then I should say that the assent of the party receiving the ticket was obtained by fraud, and he would not be bound. The mere fact that the judge or jury considered the condition unreasonable would not in my opinion be sufficient justification for a finding that the assent was obtained by fraud.

51 One can think of many examples of such irrelevant clauses which would amount to fraud.

52 Sales in his article, supra, makes a distinction between such irrelevant conditions and unreasonable conditions at p. 326:

> Certainly terms of that kind 'referring to irrelevant conditions' are not inserted in their contracts by such sober bodies as railway companies on their successor, but this is not to say

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> that harsh, unfair or unreasonable conditions might not be imposed by companies having the necessary economic power to refuse to bargain or the good fortune to escape detection until the contract is concluded. There has, however, never been a case decided in the plaintiff's favour because a condition of a contract, not subject to statutory restriction, was unreasonable, harsh, or unfair and it is apparent that no conditions in a standard form contract could, apart from statute, be invalidated on the score of unreasonableness, unless they were of a fraudulent nature. As has been tersely said by Viscount Haldane, L.C. in *Grand Trunk Ry. of Canada v. Robinson*, [1915] A.C. 740 , 747, 'if the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice.'

53 Lord Denning went beyond that in the *Jaques* case, supra, and in *John Lee & Son (Grantham), Ltd. Ry. Executive*, [1949] 2 All E.R. 581 at 584 (C.A.) , in referring to an unreasonably onerous term in a standard form contract referred to the "vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused".

54 Lord Denning repeated the above words in *Gillespie Brothers & Co. v. Roy Bowles Tpt. Ltd.*, [1973] Q.B. 400 at 415-416, [1973] 1 All E.R. 193 , where he talked of unreasonableness amounting to unconscionability. However, that case involved an attempt by a party to exempt himself from his liability at common law, which is not the situation in the present case. Furthermore Lord Buckley, while agreeing with Lord Denning in the result, disagreed with his approach and stated at p. 421:

> ... It is not in my view the function of a court of construction to fashion a contract in such a way as to produce a result which the court considers that it would have been fair or reasonable for the parties to have intended. The court must attempt to discover what they did in fact intend.

55 Some attempts at exemption from common law liability may merit the harsh words of Lord Denning. But the common law has traditionally refused to strike down contractual "standard form" conditions unless the terms are "so unreasonable as to amount to fraud, or manifestly irrelevant to the object of the contract": *Gibaud v. Great Eastern Ry. Co.* , supra.

56 The traditional attitude, with which I respectfully agree, has been for judges to avoid the difficult task of deciding the issue of "reasonableness" of clauses in businesses which compete freely in the marketplace for consumer support. This attitude is reflected in the remark of Lord Bramwell in *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown* (1883), 8 App. Cas. 703 at 718 :

> ... It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not.

57 Lord Reid in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61, [1967] 1 A.C. 361 (H.L.) in dealing with the doc-

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trine of fundamental breach in the construction of exemption clauses, did not depart from this view, and in fact confirmed it, when he said at p. 76:

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must surely imply some choice or room for bargaining. At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason; but this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable, or whether it was freely agreed by the customer. It does not seem to me to be satisfactory that the decision must always go one way if, e.g., defects in a car or other goods are just sufficient to make the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people, and it appears to me that its solution should be left to Parliament. If your lordships reject this new rule, there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation.

58 The "Suisse Atlantique" case was quoted with approval and applied by the majority in the Supreme Court of Canada in *B.G. Linton Const. Ltd. v. C.N.R.*, [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, 3 N.R. 151, 49 D.L.R. (3d) 548 .

59 I set out here for convenience the impugned clauses in this case:

> 6. The customer agrees not to use the vehicle in violation of any law, ordinance, rule or regulation of any public authority.
>
> 7. The customer agrees that the vehicle will not be operated:
>
> (a) By any person who has drunk or consumed any intoxicating liquor, whatever be the quantity, or who is under the influence of drugs or narcotics;
>
> (b) By any person who is for the time being not authorized by law or qualified to drive or operate the vehicle or under the age of 18 years in any event;
>
> (c) In any race, speed test or contest;
>
> (d) To propel or tow any vehicle;
>
> (e) To carry explosives or to carry radio-active material;
>
> (f) Outside the scope of the employment of the driver, when the driver is the employee of the customer;

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(g) At an illegal, reckless or otherwise abusive speed;

(h) For the transportation of passengers or goods for a consideration expressed or implied;

(i) For any illicit or prohibited trade or transportation.

60 These clauses are certainly not irrelevant or foreign to the contract in the sense of the *Gibaud* case, supra. They do not, for example, purport to exempt Tilden from any implied undertaking as to the roadworthy fitness of the vehicle. They are not exemptions from common law liability or statutory liability, as was the impugned clause in *Gillespie Bros.* , supra.

61 In this contract of bailment of a vehicle for a fixed remuneration, the customer is normally bound to take reasonable care of the vehicle, and is liable for damages caused by his negligence. This is subject to collision insurance: the customer is responsible for the deductible amount, $100 or $200 depending on location. By the payment of an additional premium, this liability of the customer is eliminated with this proviso:

> ... notwithstanding payment of said fee, customer shall be fully liable for all collision damage if vehicle is used, operated or driven in violation of any of the provisions of this rental agreement or off highways serviced by federal, provincial, or municipal governments, and for all damages to vehicle by striking overhead objects.

62 The clause is undoubtedly a strict one. It is not for a court to nullify its effect by branding it unfair, unreasonable and oppressive. It may be perfectly sound and reasonable from an insurance risk viewpoint, and may indeed be necessary in the competitive business of car rentals, where rates are calculated on the basis of the whole contract. On this point, see the majority judgment delivered by Lord Wilberforce in *New Zealand Shipping Co. v. A.M. Satterthwaite & Co. Ltd.*, [1975] A.C. 154 at 169, [1974] 1 All E.R. 1015 (P.C.) , where it was held that the court must give effect to the clear intent of a commercial document.

63 I am of the view that, even if the respondent's signature is not conclusive, the terms of the contract are not unusual, oppressive or unreasonable and are binding on the respondent. I would therefore allow the appeal with costs, set aside the judgment below and in lieu thereof substitute a judgment for the amount of the agreed damages and costs.

Appeal dismissed.

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