

1983

The Conflict between Law and Commerce: George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.

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Recommended Citation

Hasson, Reuben A. "The Conflict between Law and Commerce: George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd." *Canadian Business Law Journal* 8.2 (1983): 218-226.

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COMMENTARY

THE CONFLICT BETWEEN LAW AND COMMERCE: GEORGE MITCHELL (CHESTERHALL) LTD. v. FINNEY LOCK SEEDS LTD.

The decision in *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*¹ attracted a certain amount of attention in the English press. This was not because of the perceived importance of the case — indeed, the decision was seen as a rather quaint English legal dispute about cabbages with “no hearts”.² The fact that made the case noteworthy for the press was that this was Lord Denning M.R.’s last judgment before his retirement. I will try to show that the case is an important one and one that is potentially disastrous for the commercial community.

The Facts

The plaintiffs ordered 30 lbs. of cabbage seed for £192 which they planted over 63 acres. Six months later what appeared to be ordinary cabbage leaves turned out to be commercially useless. The plaintiffs recovered £100,000 (£61,000 damages plus £39,000) from Parker J.,^{2a} who gave short shrift to a disclaimer clause which, to the neutral observer, seems watertight.³

This decision was affirmed by a unanimous Court of Appeal. Lord Denning found the disclaimer clause disallowing expectancy damages invalid under what is now s. 55(3) of the Sale of Goods Act. That provision allows the courts to strike down any clause in a commercial contract which the court finds to be “unreasonable”. Oliver L.J. did not find it necessary to rely on s. 55(3) since he was able to hold that the exemption clause was not specific enough to exclude liability for expectancy damages.⁴ Kerr L.J.

¹ [1982] 3 W.L.R. 1036 (C.A.), affg [1981] 1 Lloyd’s Rep. 476.

² *Ibid.*, at p. 1040, F.

^{2a} See [1981] 1 Lloyd’s Rep. 476.

³ The exemption clause is reproduced below; see the text at footnote 16, *infra*.

⁴ If pressed, his Lordship would have found the exemption clause unreasonable: *supra*, footnote 1 at p. 1053, C.

found the disclaimer clause “unreasonable”. under s. 55(3) and, for good measure, found the wording of the disclaimer clause not specific enough to exclude liability for loss of profits. Before discussing the two grounds for decision, it is desirable to examine the philosophical base of the decision.

Are All Contracts Consumer Contracts?

Lord Denning, as usual, gives the clearest guide to the court’s approach in dealing with the problem. His Lordship gives a brief history of freedom of contract which has some charm but is entirely irrelevant to the problem before the court. The story is this:⁵

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

It was a bleak winter for our law of contract. It is illustrated by two cases, *Thompson v. London, Midland and Scottish Railway Co.*, [1930] 1 K.B. 41 (in which there was exemption from liability, not on the ticket, but only in small print at the back of the timetable, and the company was held not liable) and *L’Estrange v. F. Graucob Ltd.* [1934] 2 K.B. 394 (in which there was complete exemption in small print at the bottom of the order form, and the company was held not liable).

His Lordship then describes how the courts slew the dragon of freedom of contract.

This is a heart-warming tale about an old battle, although it is a little ungenerous of his Lordship to give almost no credit to the Legislature, which has done far more than the courts to remove unfair contract terms.⁶ The important thing about this battle is

⁵ *Supra*, footnote 1 at p. 1043, A-D.

⁶ The only statutes that his Lordship mentions are the Supply of Goods (Implied Terms)

that it is entirely irrelevant to the problem of clauses excluding liability for loss of profits, the issue in the present case. Many observers have pointed out that these clauses are almost universal in the commercial world.⁷ Apart from their near-universality, these clauses are essential to the functioning of modern commerce.⁸

Proof of the fact that the court is seeing a commercial contract through consumer-coloured spectacles is to be seen in the way that the court deals with the decision in *R. W. Green Ltd. v. Cade Bros. Farms*.⁹ In that case, Griffiths J. refused to use s. 55(3) to upset an almost identical disclaimer clause in a case involving the sale of seed potatoes. That case was distinguished on the ground that there the contract was negotiated between the National Association of Seed Potato Merchants and the National Farmers' Union.

In the present case, Lord Denning said:¹⁰

The clause was not negotiated between persons of equal bargaining power. It was inserted by the seed merchants in their invoices without any negotiation with the farmers.

Thus, unless contractual terms are the product of negotiation between trade associations, or else it is shown that there was bargaining between the parties, a contractual provision in a seller's contract is open to attack because of inequality of bargaining power. It is difficult to see why a contractual term hammered out between two trade associations should be treated with respect, whereas no such respect is accorded to the contract of two businessmen. In the present case, the defendant seed-merchants are assumed to be in a superior bargaining position to the plaintiff farmers but the only evidence for this is the disclaimer clause. Since disclaimer clauses are virtually universal in the commercial world,¹¹ a disclaimer clause is evidence of very little.

Act 1973 and the Unfair Contract Terms Act 1977: see, *supra*, footnote 1 at p. 1044, H. Mention might have been made of Hire Purchase Acts dating from 1938 and the Consumer Credit Act 1974, all of which are more important than all the judicial decisions on fundamental breach.

⁷ See, e.g., Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", 28 *Am. Soc. Rev.* 55 (1963); Beale and Dugdale, "Contracts between Businessmen: Planning and The Use of Contractual Remedies", 2 *British J. Law Soc.* 45 (1975).

⁸ See Morris A. Shanker, "A Retreat to Progress (A Proposal to Eliminate Damage Awards for Loss of Business Profits)", 3 *C.B.L.J.* 363 (1979).

⁹ [1978] 1 *Lloyd's Rep.* 602, noted by Professor Ziegel in 57 *Can. Bar Rev.* 105 (1979).

¹⁰ *Supra*, footnote 1 at p. 1047, H.

¹¹ See references cited in footnote 7, *supra*.

Finally, what is one to make of the distinction between trade association contracts and individual contracts when one learns that, in the present case, the limitation clause is not one that is individually negotiated? In Lord Denning M.R.'s words:¹² "The limitation clause here is of long standing in the seed trade. It has been in use for many years." If this is the case, there is no difference whatever between *Green v. Cade*¹³ and the present case. If the National Farmers' Union, one of the strongest pressure groups in British politics,¹⁴ is unhappy with this exclusion clause, then one might have thought that it might have sought to seek a modification of the clause, or else have persuaded the government to set up an insurance scheme.¹⁵

The Exemption Clause

It is now appropriate to examine the exemption clause since two judges found that the clause was not clear enough to exempt the defendant. The clause read in part:¹⁶

"All seeds, bulbs, corms, tubers, roots, shrubs, trees and plants . . . offered for sale or sold by us to which the Seeds Act 1920 or the Plant Varieties and Seeds Act 1964 as the case may be and the Regulations thereunder apply have been tested in accordance with the provisions of the same. In the event of any seeds or plants sold or agreed to be sold by us not complying with the express terms of the contract of sale or with any representation made by us or by any duly authorised agent or representative on our behalf prior to, at the time of, or in any such contract, or any seeds or plants proving defective in varietal purity we will, at our option, replace the defective seeds or plants, free of charge to the buyer or will refund all payments made to us by the buyer in respect of the defective seeds or plants and this shall be the limit of our obligation. We hereby exclude all liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds or plants supplied by us or for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as aforesaid. In accordance with the established custom of the

¹² *Supra*, footnote 1 at p. 1041, G.

¹³ *Supra*, footnote 9.

¹⁴ See, e.g., Peter Self and H. Storing, *The State and the Farmer* (Berkeley, University of California Press, 1963); Samuel H. Beer, *Modern British Politics*, 2nd ed. (London, Faber and Faber, 1969), pp. 111-13.

¹⁵ There are already situations for certain kinds of seed where buyers can purchase seed certified by inspectors from the Ministry of Agriculture at a small extra charge. This was the situation in *Conemesco Ltd. v. Contrapol Ltd.* (unreported), December 15, 1981, Court of Appeal (Civil Division) Transcript No. 536 of 1981, noted by Kerr L.J. at, *supra*, footnote 1 p. 1060, A-C.

¹⁶ *Supra*, footnote 1 at pp. 1041, G-42, C.

seed trade any express or implied condition, statement or warranty, statutory or otherwise, not stated in these conditions is hereby excluded. *The price of any seeds or plants sold or offered for sale by us is based upon the foregoing limitations upon our liability. The price of such seeds or plants would be much greater if a more extensive liability were required to be undertaken by us.*"

To be sure, the clause is repetitive but, perhaps, the draftsman had his eye on s. 55(5)(c) which directs the court in deciding whether a clause is reasonable to have regard to "whether the buyer knew or ought reasonably to have known of the . . . extent of the term". In any event, Lord Denning M.R. found the clause "effective to limit the liability of the seed merchants to a return of the money or replacement of the seeds".¹⁷ Moreover, "[t]he explanation they give seems fair enough. They say that it is so as to keep the price low: and if they were to undertake any greater liability, the price would be much greater".¹⁸

Oliver L.J. took a different approach. He noted that at the trial, counsel for the defendants conceded that they could not have relied on the limitation clause had they delivered beetroot seed or carrot seed. In his Lordship's view:¹⁹

On this footing, the issue was simply one of fact — was this or was it not cabbage seed? The judge's finding of fact, which was based on the evidence of the defendants' own witnesses was that this seed was not cabbage seed in any accepted sense of the term.

Later, the same judge made the same point thus: "A motor bicycle delivered in purported fulfilment of a contract to sell a car is not a defective car."²⁰ One might have thought that this kind of sophistry had been put to rest by the decision of the House of Lords in *Ashington Piggeries*.²¹ In that case, four members of the House of Lords held that poisoned food for mink was still food. The approach taken by Oliver L.J. in *Finney Seeds* would nullify all limitation clauses in all sales cases.

Kerr L.J.'s approach is equally unsatisfactory. In the first place, he lays great stress on the fact that the exemption clause makes no express reference to negligence. In his Lordship's words:²²

... a clause on the following lines would clearly have protected the defendants:

¹⁷ *Supra*, footnote 1 at p. 1042, D.

¹⁸ *Supra*, footnote 1 at p. 1042, D.

¹⁹ *Supra*, footnote 1 at p. 1049, A.

²⁰ *Supra*, footnote 1 at p. 1051, B.

²¹ *Ashington Piggeries v. Christopher Hill Ltd.*, [1972] A.C. 441 (H.L.).

²² *Supra*, footnote 1 at p. 1057, B.

“In the event of our supplying seed which, due to the negligence of our suppliers or of our own employees, turns out to be seed of the wrong kind and/or to be unmerchantable, we shall be under no liability other than to refund the contract price.”

The difficulty with this statement is, as his Lordship recognizes,²³ that it is at variance with the decision of the House of Lords in *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. and Securicor (Scotland) Ltd.*²⁴ In that case, the House of Lords held that, if the disclaimer clause was broad enough, no express reference need be made to “negligence” for the clause to be valid. Second, there is no evidence that the defendants were negligent. In his Lordship’s words, “due to some unexplained act or omission on the part of the Dutch suppliers, the seed was in fact unmerchantable even as autumn seed.”²⁵ From this, it is not clear that anyone was negligent!

Reasonableness

Although neither s. 55(3) of the Sale of Goods Act 1979, nor the Unfair Contract Terms Act 1977, directs the court to examine the availability of insurance in deciding whether a contractual provision is reasonable,²⁶ both Parker J. at first instance, and all the members of the Court of Appeal considered the insurance

²³ *Supra*, footnote 1 at p. 1058, A-B.

²⁴ 1982 S.L.T. 377 (H.L.).

²⁵ *Supra*, footnote 1 at p. 1053, H.

²⁶ Under s. 55(5) of the Sale of Goods Act 1979, c. 54, Sch. 1, para. 11., the court shall have regard to all the circumstances of the case and in particular to the following matters:

55(5)

- (a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;
- (b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;
- (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- (d) where the term exempts from all or any of the provisions of section 13, 14 or 15 above if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
- (e) whether the goods were manufactured, processed, or adapted to the special order of the buyer.

The identical guidelines are used in Schedule 2 of the Unfair Contract Terms Act 1977.

factor. Parker J. had no doubts on this matter. He stated:²⁷

I am entirely satisfied that it is possible for seedsmen to insure against this risk. I am entirely satisfied that the cost of so doing would not materially raise the price of seeds on the market. I am entirely satisfied that the protection of this clause for the purposes of protecting against the very rare case indeed, such as the present, is not reasonably required.

This view of the insurance situation was accepted by Lord Denning M.R.²⁸ and by Oliver L.J.²⁹ The sad fact is that this happy description of the insurance situation simply does not square with the realities. The fact of the matter is that the defendant had taken out insurance under the auspices of the United Kingdom Agricultural Supply Trade Association Ltd. (U.K.A.S.T.A.) which provided an *annual* cover of £20,000. The policy required the defendants to have exercised due diligence before they could recover.³⁰ Thus, in the present case, the defendants were uninsured for at least £80,000 (£100,000 - £20,000) or else they were uninsured for £100,000 if they had had to pay out in respect of another claim. They would also be liable for £100,000 if they failed to exercise "due diligence".³¹ Kerr L.J. was the only judge to point out the restricted cover the defendants had. However, his Lordship stated:³²

... I am not persuaded that liability for rare events of this kind cannot be adequately insured. Nor am I persuaded that the cost of such cover would add significantly to the cost of the seed.

This is a strong statement of faith, but, lacking as it does, any hard evidence to support it, it cannot be considered other than a statement of faith. In the present case, a defendant who is for all practical purposes uninsured, is regarded as being fully insured. Lewis Carroll, who is quoted at the beginning of Lord Denning M.R.'s judgment might have had some fun with this.³³

Conclusion

In recent years some learned commentators have urged us to

²⁷ [1981] 1 Lloyd's Rep. 476 at p. 480.

²⁸ *Supra*, footnote 1 at p. 1048, B-D.

²⁹ *Supra*, footnote 1 at p. 1052, F-G.

³⁰ *Supra*, footnote 1 at p. 1058, H.

³¹ Sometimes, the courts have said that "due diligence" means that the insurer has to prove more than negligence to defeat the insured's claim. It must prove "recklessness"; see, e.g., *Woolfall & Rimmer v. Moyle*, [1942] 1 K.B. 66 (C.A.), *Fraser v. B. N. Furman (Productions) Ltd.*, *Miller Smith & Partners (A Firm) Third Party*, [1967] 1 W.L.R. 898 (C.A.). But this interpretation may be peculiar to employers' liability policies since if "due diligence" were held to mean the same as negligence, the insurer could never be liable!

³² *Supra*, footnote 1 at p. 1058, H.

³³ *Supra*, footnote 1, at p. 1040, E.

abandon “fundamental breach” and to adopt a test of “reasonableness” or “unconscionability”.³⁴ This change, it was argued, would bring more satisfactory results since judges would be forced to articulate the reasons which persuaded them to adopt the view they did.³⁵ The present case shows that that argument is wrong. Two cases on “reasonableness” in four years have produced as much confusion as scores of cases on fundamental breach.

In my view, the best approach is not to entrust the judiciary with vague phrases such as “reasonableness”, “fundamental breach” and the like, since these phrases generate an intolerable amount of uncertainty. Instead, I would advocate three modest reforms:

- (1) Subrogation should be abolished in the field of property damage. I have argued the case for this elsewhere³⁶ so I will not elaborate on this.
- (2) I would pass a statute which prevented the courts from striking down provisions which excluded liability for consequential loss in commercial contracts. It is true, that sometimes these terms will be “imposed” by one party or another but I do not think the courts can meaningfully distinguish between “imposed” terms and “negotiable” ones. The present case is a vivid demonstration of that proposition.³⁷
- (3) Finally, I would abolish the parol evidence rule in commercial transactions. The decisions in *Bauer v. Bank of Montreal*³⁸ and *Carman Construction Ltd. v. Canadian Pacific Railway Co.*,³⁹ offend elementary principles of fairness and justice. They should be reversed by statute.

³⁴ See, e.g., R.C.B. Risk, *Contracts*, Law Society of Upper Canada Special Lectures 1966 (Toronto, Richard de Boo, 1966) 207 at p. 253; S. M. Waddams, Comment, “*Contracts — Exemption Clauses — Fundamental Breach — Unconscionability*”, 17 U.W.O.L. Rev. 295 (1979).

³⁵ *Ibid.*

³⁶ See Hasson, “Blindfolding The Courts: A Further Comment on *Photo Production v. Securicor*”, 5 C.B.L.J. 498 (1980-81).

³⁷ Even in cases where one might reasonably guess that terms have been imposed on the weaker party, it is doubtful if the courts can do much to help the weaker party: see e.g., *R. G. McLean v. Canadian Vickers Ltd.* (1970), 15 D.L.R. (3d) 15, [1971] 1 O.R. 207 (C.A.).

³⁸ (1980), 110 D.L.R. (3d) 424, [1980] 2 S.C.R. 102.

³⁹ (1982), 136 D.L.R. (3d) 193, 42 N.R. 147 (S.C.C.). The decision is criticised by Professor Hayek in 7 C.B.L.J. 328 (1982-83).

These changes will not make businessmen embrace the law and litigation, but it should reduce their hostility⁴⁰ to rules which violate well-established practices. That would be no mean feat.

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