



Précis Paper

Incorporation into Contract: Terms and Conditions Contained in Separate Documents

This discussion reminds us about requirements of proof when enforcing an agreement, in this case a guarantee. The terms of the guarantee could not be proved. It's a valuable discussion and worth watching – 28 minutes.

Discussion Includes

- Incorporation by reference of separate terms and conditions
- Disposal and electronic retention of company records – Evidentiary implications
- Legal consequences of incorrectly scanning documents
- Correcting errors in affidavits and annexures
- Trial by ambush – putting a plaintiff to proof

Précis Paper

Incorporation into Contract: Terms and Conditions Contained in Separate Documents

1. In this edition of BenchTV, Roger Marshall SC (Barrister) and Hagen Jewell (Barrister) discuss the decision of the NSW Court of Appeal (McColl, Leeming & Payne JJA) in *Toyota Finance Australia Ltd v Gardiner* [2016] NSWCA 162, which considered the difficulties that can be involved in proving guarantors. Mr Marshall SC and Mr Jewell acted for the successful respondent, Gardiner, both in the initial trial and in the Court of Appeal.

Background & Material Facts

2. Gardiner was the director of a company that owned several service stations. The company leased 6 vehicles from Toyota Finance and it was alleged that Gardiner was a guarantor to those leases. The company did not perform the contract and Toyota sought to enforce the lease agreement against Gardiner. Although, Toyota Finance conceded that the vehicles had been returned and then sold, the dispute surrounded the \$140,000 which made up the short-fall between the contract price and the recoupment from sale.
3. At the trial, Gardiner's defence was to put Toyota Finance to proof. He did not go in to evidence himself. The evidence in the trial was 6 sets of contracts with 6 sets of signatures, pertaining to each car leased. There was no oral evidence and the legal argument spanned 3 days.
4. For each vehicle, there were two relevant documents. There was a document called a "Term Purchase Schedule and Tax Invoice" (one page) which mentioned a price and contained Gardiner's signature on behalf of the company. Gardiner's signature also appeared under a heading labelled guarantor. Above this second signature, there was also a one sentence passage which stated "I acknowledge that I have received from the Supplier a copy of this Schedule, and a copy of the Booklet 'Terms and Conditions' [the second document]." Significantly, this sentence DID NOT include language to the effect of "...and I agree to be bound..."

First Instance Trial

5. Mr Marshall SC considered that Toyota Finance had a significant problem at the trial in trying to incorporate by reference the contents of the Terms and Conditions booklet as forming a guarantee.

6. Aside from the legality of incorporating such a document, there was also a practical issue when the document that was put into evidence at trial was the wrong document. It was entitled "Term Purchase Agreement" instead of "Booklet Terms and Conditions". The document did contain a sub-heading, "Terms and Conditions", however, the Term Purchase Agreement document was in fact produced in 2009 when the 6 contracts had been signed in 2007. Accordingly, it was not possible to submit that Gardiner had received the document in 2007, when the contract was signed.
7. In 2011, a re-jigging of the contracts was signed by Gardiner. It was the same form of documents. The only differences were price and timing of payments alterations, with the word "Variation" stamped with a rubber stamp near the name of the document. It contained the same acknowledgment of receipt clause as above. However, Toyota Finance again failed to put into evidence the "Booklet Terms and Conditions" as at 2011.
8. Accordingly, there was no evidence before the District Court (or for that matter, the Court of Appeal) of the contents of any documents referred to as "Booklet Terms and Conditions".
9. Toyota Finance led evidence by way of an affidavit taken from a member of the in-house finance team who indicated that Toyota had scanned the original documents and then destroyed the hard copies. It seemed that Toyota Finance had only scanned the 1-2 page document and not the Booklet Terms and Conditions which was multiple pages long and was identified by customer name and number.
10. Mr Marshall SC objected to the following paragraph from the affidavit:

"Each of the First Agreement, the Second Agreement and the Third Agreement incorporated a booklet of "Terms and Conditions" (Booklet). A copy of the Booklet is at tab 'L'."

11. The objection was raised because what was being impermissibly advanced in the first sentence, was a legal conclusion, that the booklet was "incorporated". The judge determined that the paragraph was admissible but no weight would be assigned to it. Furthermore, as regards the second sentence reference to tab L, it emerged that the document was misnomered in the affidavit. In Marshall SC's view, the document could not simply be corrected because an affidavit is a sworn document. Nevertheless, the correction was made and the paragraph was admitted. However, it was still necessary for Toyota Finance to show the connection between the signed document and any booklet which contained a purported guarantee clause.

12. The trial judge ultimately found that Toyota Finance had not proved that Gardiner was the guarantor. Mr Gardiner also received a costs order in his favour.
13. The matter was taken very seriously by both sides because the debt was sizeable to Gardner but also because this was a typical matter for Toyota Finance and an adverse ruling would affect countless other matters they ran.

Court of Appeal

14. Toyota Finance appealed the matter to the Court of Appeal. The matter crystallised as whether or not Toyota Finance could prove Gardiner was bound by a document he had not signed.
15. McColl JA found in favour of Gardiner, rejecting the arguments of Toyota Finance that they could prove a link between the documents. Payne JA agreed with McColl JA's findings but for slightly different reasons. Leeming JA agreed with Payne JA.

Implications

16. An important feature of this case was the problems that arise when one disposes of paper records. Everything in each file must be scanned. There is no room for abbreviating the process. The Court of Appeal appreciated that the physical document itself had integrity at [7-14] of the judgment.
17. Draftsmen should be aware that language of "I have received another document" means scarcely little unless it is followed by "and I agree to be bound by the terms of the further document".
18. Plaintiffs should always be aware of the specific requirement that they must prove their case. Furthermore, putting the plaintiff to proof does not constitute an ambush.

BIOGRAPHY

Roger Marshall SC

Senior Counsel, Ground Floor Wentworth Chambers, Sydney

Roger Marshall has over 20 years' experience including in corporations, equity, land law and insolvency matter. He was appointed Senior Counsel in 2016. Roger also practises in equity, with significant experience in partnership disputes, trusts, succession and land law, and appears regularly in other areas of commercial litigation.

Hagen Jewell

Barrister, Ground Floor Wentworth Chambers, Sydney

Prior to being called to the Bar, Hagen practised as a solicitor in insolvency at Blake Dawson, now Ashurst, and was tipstaff to the Hon Palmer J AM QC.

BIBLIOGRAPHY

Focus Case

Toyota Finance Australia Ltd v Gardiner [2016] NSWCA 162

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_13-07-2016_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/577de08de4b058596cb9d343>