Surfstone Pty Ltd & Anor v Morgan Consulting Engineers Pty Ltd

Surfstone Pty Ltd & Anor v Morgan Consulting Engineers Pty Ltd [2016] QCA 213
Supreme Court of Queensland (Court of Appeal)
16 May 2016 and 26 August 2016

Contracts – construction and interpretation of contracts – Whether ancillary document can be incorporated into a contract – Meaning of “generally in accordance with” – Effect of limitation of liability provision – Whether a limitation of liability provision on a proper construction, operates to bar a party from commencing proceedings – Objective approach taken by the Courts in respect of incorporation of terms – Whether a term is “unusual and onerous” – When a party must draw an exemption clause to the other party’s attention – Whether a party is “reasonably entitled to conclude” that the other party has accepted the terms of a document.

Evidence – Admissibility of evidence – Evidence of industry practice – relevance.

The appellants were owners of certain land and retained an architect to design a warehouse distribution building on the land. The architect sought assistance from the respondent and requested it to submit a fee proposal for the civil and structural engineering services on the project.

The fee proposal submitted by the respondent included the scope of works and a fee structure. After setting out the fees for each division of the services, the proposal stated:

The commission would be generally in accordance with the ACEA Guideline Terms of Agreement, with terms of payment being 30 days from the date of invoice.

The Association of Consulting Engineers Australia (ACEA) (now Consult Australia) Guideline Terms of Agreement included clause 4.3 which limited liability:

The Consulting Engineer shall be deemed to have been discharged from all liability in respect of the Services, whether under the law of contract, tort or otherwise, … on the expiration of one year from the completion of the Services, and the Client … shall not be entitled to commence any action or claim whatsoever against the Consulting Engineer … in respect of the Services after that date.

The respondent did not provide a copy of the ACEA Guideline Terms of Agreement to the owners or to the architect. The architect did not himself have a copy of the ACEA Guideline Terms of Agreement (nor did he request a copy from the respondent). It was not disputed that the respondent was retained and did carry out the services.

Several years later, some signs of problems with the concrete floors became apparent. The internal concrete floors of the centre had been subject to rotation and deflection caused by settlement of compressible soft-firm clay beneath the floors.

The owners commenced proceedings against the respondent claiming that it was negligent in carrying out the work. In response, the respondent pleaded that the ACEA Guideline Terms of Agreement were incorporated into the retainer, and liability was excluded because of the period of time that had passed since the respondent completed the services (being a period greater than one year).

Specific questions were ordered to be determined before the trial in respect of the ACEA Guideline Terms of Agreement, namely:

(a) were they incorporated in full into the contract between the owners and the respondent?
(b) if so, did cl 4.3 on its proper construction operate to bar the owners from bringing proceedings against the respondent?

The respondent relied on the evidence of the two witnesses in the form of expert reports, but ultimately the respondent conceded that those reports really contained factual evidence based on the experience of the authors. The objection to their receipt was then pressed on the basis that the evidence was irrelevant. The primary judge overruled the objection and admitted the evidence as being relevant to the question whether cl 4.3 of the ACEA Guideline Terms was incorporated by the
reference in the fee proposal to those Guidelines; that is, whether, for the period leading to the retainer in question, other engagements of consultant engineers, civil or structural, usually or commonly, were on the terms of the ACEA Guidelines. The respondent relied upon the evidence of a third witness. The primary judge held that that evidence was based on a mixture of first-hand knowledge and hearsay, which (in the latter case) affected its weight but did not make it inadmissible. The primary judge held that the balance of the evidence of the third witness went to the use of the particular version of the Guideline Terms and whether cl 4.3 should be regarded as an unusual clause in the relevant sense.

The primary judge held that the ACEA Guideline Terms of Agreement were incorporated, in full, into the contract and that the owners were barred (by virtue of cl 4.3) from bringing a claim against the respondent.

The owners appealed.

**Held,** dismissing the appeal:

(1) The evidence of these three witnesses was not irrelevant because:

(i) One of the central issues to be decided, as part of the consideration as to whether cl 4.3 was incorporated in the retainer, was whether the clause was unusual or onerous. The fact that it was part of a set of terms that was commonly used in retainers of engineers in the years leading to when this retainer was made, was plainly relevant to that assessment. The fact that the witnesses could not speak beyond their own practices may have affected the weight of the evidence, but did not make it inadmissible.

(ii) As the learned primary judge found, the Reply put in issue which version of the Guideline Terms was in use as at the date of the retainer of the Respondent. The evidence was relevant to that.

(iii) Evidence that could be seen to go to that issue was led by the owners, from the architect. The architect swore that at the time of the retainer he did not have any knowledge of the Guideline Terms, or their content, and was not aware of the existence of cl 4.3. Similar evidence was led from one of the owners.

(iv) An objection was taken at first instance to evidence from an employee of the respondent, in so far as he deposed to the common use of the Guideline Terms. That objection was overruled (Morrison JA at [18]–[25], [56], [57], [65], [71]; Margaret McMurdo P at [1] and Atkinson J at [78], agreeing).

**Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd** [1998] 4 VR 559, referred to.

(2) The test of whether the Guideline Terms were incorporated into the contract is an objective test. In examining whether the words used to incorporate the document are too general or imprecise, the Court should adopt a commercial approach in resolving any uncertainties in the language, and give a meaning to words where that is possible, without being unduly pedantic or narrow (Morrison JA at [38]–[43]; Margaret McMurdo P at [1] and Atkinson J at [78], agreeing).


(3) Applying these principles, there were a number of features of the fee proposal that made it clear that it incorporated the Guideline Terms (Morrison JA at [41]–[50]; Margaret McMurdo P at [1] and Atkinson J at [78], agreeing).

(4) The words “generally in accordance with” do not introduce such a degree of uncertainty which would preclude the incorporation of the Guideline Terms into the contract (Morrison JA at [47]; Margaret McMurdo P at [1] and Atkinson J at [78], agreeing).

(5) The following propositions determine whether an offeree is bound by a term set out or incorporated in an unsigned document which the offeror has provided to the offeree in circumstances which show the offeror intends the document to identify terms of the contract:

(a) it is not always the case that the offeree is not bound by an exemption clause, unless the offeror directs attention to the clause;

(b) the fundamental question is whether the offeror is reasonably entitled to conclude that the offeree has accepted the terms in the document, including the exemption clause;
(c) that conclusion should be reached where the offeree has had a reasonable opportunity to consider the terms, including the exemption clause, and has behaved in a way which manifests acceptance of the document as recording contractual terms;
(d) in other cases, where the clause is one reasonably to be expected in contracts of the kind in question, acceptance of the document makes the clause binding, even if the offeree does not know its terms, or even that it is contained in the document; and
(e) if the clause is not one reasonably to be expected, then something more is required by way of provision of information about the clause to the offeree before the contract is formed; what information will be required will depend on the circumstances, but particularly on the terms of the clause (Morrison JA at [51]–[61], [65]; Margaret McMurdo P at [1] and Atkinson J at [78], agreeing).


(6) The contention that clause 4.3 was unusual or onerous, cannot be sustained. The evidence demonstrates that such a clause is not onerous or unusual. It is part of a standard set of terms that have been promoted for use by structural and civil engineers for many years, and adopted by many such engineers over the years. Many of those retainers, while made between the project owners and the engineers, were brought about by architects acting on the owners’ behalf. The promotion and adoption of those terms, including cl 4.3, over many years by architects and engineers, weighs very heavily against a conclusion that the clause is onerous or unusual (Morrison JA at [72]; Margaret McMurdo P at [1] and Atkinson J at [78], agreeing).

(7) Expressions such as “more than ordinarily onerous”, or “extremely onerous” or “particularly onerous” present some difficulty. They posit a level of burden which is ordinary or common, against which the burden imposed by the clause in question is to be measured. Nevertheless, the evidence in the present case makes it possible to apply them. There is evidence demonstrating that the ACEA promoted the use of the Guideline Terms. There is also evidence from witnesses about their experience of the incorporation of these terms in contracts for the provision of engineering services. Such evidence represents extensive experience. There is no evidence to suggest that the experience of these individuals is unusual, nor that the recommendations of the ACEA about the use of the Guideline Terms were usually disregarded. The evidence permits a conclusion that the use of the Guideline Terms is sufficiently common to make it unnecessary for the Respondent to have taken particular steps to draw the attention of the owners to clauses such as cl 4.3 (Morrison JA at [73]; Margaret McMurdo P at [1] and Atkinson J at [78], agreeing).

K Wilson QC with D de Jersey, instructed by Thynne & Macartney Lawyers, for the first and second appellants.

DB O’Sullivan QC with SR Eggins, instructed by Moray & Agnew Lawyers, for the respondent.

JUDGMENT

[1] MARGARET McMURDO P: I agree with Morrison JA’s reasons for refusing this appeal and with the orders he proposes.

[2] MORRISON JA: Mr Meredith was an architect commissioned in 2003, by the owners of certain land,1 to design a distribution warehouse building. He retained Morgan Consulting Engineers Pty Ltd2 to perform civil and structural engineering services, including design and documentation of the building structure and internal works, and inspection and certification services.

[3] Before being retained, Morgan was asked to submit a fee proposal. It did so, listing the scope of works to be done and the fee structure. After setting out the fees for each division of the services, the proposal stated: “The commission would be generally in accordance with the ACEA Guideline Terms of Agreement, with terms of payment being 30 days from the date of invoice”.

1The appellants, Surfstone Pty Ltd and Corkdon Pty Ltd, hereafter referred to as “the owners”.
2Hereafter referred to as “Morgan”.

(2016) 32 BCL 311
The ACEA Guideline Terms of Agreement included clause 4.3 which limited liability:

The Consulting Engineer shall be deemed to have been discharged from all liability in respect of the Services, whether under the law of contract, tort or otherwise, … on the expiration of one year from the completion of the Services, and the Client … shall not be entitled to commence any action or claim whatsoever against the Consulting Engineer … in respect of the Services after that date.

In April 2009 some signs of problems with the concrete floors became apparent. The internal concrete floors of the centre had been subject to rotation and deflection, caused by settlement of compressible soft-firm clay beneath the floors. The rotation and deflection accelerated by about 2010.

The owners commenced the present proceedings in November 2014, claiming that Morgan was negligent in carrying out the work. Morgan pleaded that the ACEA Guideline Terms were incorporated into the retainer, and liability was excluded under clause 4.3.

Specific questions were ordered to be determined prior to the trial. They were:

(a) Were the ACEA Guideline Terms of Agreement incorporated, in full, into the contract between the [owners] and [Morgan]?
(b) If so, does clause 4.3 of the ACEA Guideline Terms of Agreement, on its proper construction, operate as a bar to the [owners] bringing this proceeding against [Morgan]?

The learned primary judge determined those questions in Morgan’s favour. The owners appeal that decision.

The issues raised by the appeal are:
(a) whether the ACEA Guideline Terms were incorporated, in full, into the contract;
(b) should it have been found that:
   i. Morgan did not draw the ACEA Guideline Terms to the attention of Mr Meredith or the owners;
   ii. Clause 4.3 was unusual and onerous; and
   iii. Morgan had not done all that was reasonably necessary to draw clause 4.3 to the attention of Mr Meredith or the owners, and should have specifically done so;
(c) did the learned primary judge err in admitting the evidence of three witnesses, Motto, Cox and Quigley;
(d) did the learned primary judge err in finding that:
   i. a reasonable person in the position of each party would have concluded that Morgan intended to contract only on the basis of clause 4.3, and the owners agreed; and
   ii. clause 4.3 was a clause appropriate to the type of contract entered into, and was not a clause that was not reasonably to be expected by the owners; and
   iii. the ACEA Guideline Terms were sufficiently common to make it unnecessary for Morgan to do more to draw clause 4.3 to the attention of the owners.

It will be apparent in the reasons which follow, that several issues overlap.

RELEVANT FACTS

As at 2003 Mr Meredith was an experienced architect, having provided architectural services to a business named City Beach since at least 1995. The warehouse distribution building was constructed by the owners for City Beach, and Mr Meredith was the architect retained to design the building.

Mr Meredith sought the assistance of Morgan to identify a suitable geotechnical engineer for the building project. In time that led to a request from Mr Meredith to Morgan, to submit a fee proposal for the civil and structural engineering services on the project.

The fee proposal referred to the ACEA Guideline Terms. Mr Meredith did not have a copy of those terms, had never read them, and did not seek a copy. Morgan did not provide a copy to Mr Meredith or the owners.

The fee proposal was sent on 27 August 2003, attached to a facsimile sheet which said: "Attached is the fee proposal for the above project as requested". It commenced with the statement

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3 Order of Martin J, 13 March 2015.
4 AB 160.
that it was a proposal for “… services to be provided and fees to be charged on this project.” It then
set out the “Scope of Works” for the design, documentation and inspections of the project.

[15] It then made representations about Morgan’s quality assurance system and insurance cover. It
nominated a total fee of $49,000 (plus GST), split into three areas. There then appeared the following:

These fees will remain valid for a period of six months from the date of this letter. The commission
would be generally in accordance with the ACEA Guideline Terms of Agreement, with terms of
payment being 30 days from the date of invoice.

Invoices will be submitted at the end of each month during the project, with the invoiced amount being
proportional to the amount of work completed at that time.\footnote{Emphasis added.}

[16] The fee proposal concluded with the following: “If you require any further information, or wish
to discuss the fee structure or any aspect of this proposal, please do not hesitate to contact the
undersigned.”

[17] There was no evidence as to any formal acceptance, oral or otherwise, but it was not in dispute
that Morgan was retained and did carry out the services. A total of five invoices were rendered,\footnote{Commencing on 17 December 2003 and ending on 5 July 2005.} and paid. The first was for “25% of agreed fee”,\footnote{AB 166.} and the second noted it was for “80% Completion of
design and documentation of structural and civil works for the above project”.\footnote{AB 167.}

THE EVIDENCE OF COX, MOTTO AND QUIGLEY

[18] The evidence of Mr Cox and Mr Quigley was drawn in the form of expert reports. Objection
was taken to the admission of those reports, on the basis that it was not truly expert opinion. The
admission of them was initially pressed as expert reports, but ultimately Senior Counsel for Morgan
conceded that they really contained factual evidence based on the experience of the authors.\footnote{AB 28 line 39.}

[19] The objection to their receipt was then pressed on the basis that the evidence was irrelevant. Relying on Maxitherm Boilers Pty Ltd v Pacific Dunlop Pty Ltd\footnote{(1998) 4 VR 559, 562 (Calloway JA); 569–570 (Buchanan JA). (Maxitherm)} the learned primary judge overruled
the objection and admitted the evidence as being relevant to the question whether clause 4.3 of the
ACEA Guideline Terms was incorporated by the reference in a fee proposal to those Guidelines; that
is, whether, for the period leading to the retainer in question, other engagements of consultant, civil or
structural, engineers usually or commonly were on the terms of the ACEA Guidelines.\footnote{AB 40.}

[20] As for Ms Motto’s affidavit, objection was taken on the basis that the whole of it was irrelevant,
and paragraph 12 was impermissible hearsay and lacked detail. The objection to paragraph 12 was
overruled on the basis that what it contained was based on a mixture of first-hand knowledge and
hearsay, which (in the latter case) affected its weight but did not make it inadmissible. The learned
primary judge held that the balance of the affidavit went to: (i) the use of the particular version of the
Guideline Terms,\footnote{A matter put in issue in the Reply.} and (ii) whether clause 4.3 should be regarded as an unusual clause in the sense
described in the preceding paragraph above.\footnote{AB 49.}

[21] Before this Court, the challenge to the admission of the evidence of Ms Motto, Mr Cox and
Mr Quigley (relevant parts of which are set out below) was pressed, on the basis that the evidence was
irrelevant. For several reasons I do not accept that contention.

[22] First, one of the central issues to be decided, as part of the consideration as to whether
clause 4.3 was incorporated in the retainer, was whether the clause was unusual or onerous. The fact
that it was part of a set of terms that was commonly used in retainers of engineers in the years leading
to when this retainer was made, was plainly relevant to that assessment. The fact that the witnesses
could not speak beyond their own practices may have affected the weight of the evidence, but did not
make it inadmissible.

[23] Secondly, as the learned primary judge found, the Reply put in issue which version of the
Guideline Terms was in use as at the date of the Morgan retainer. The evidence was relevant to that.

[24] Thirdly, evidence that could be seen to go to that issue was led by the owners, from
Mr Meredith. In his second affidavit he swore that at the time of the retainer he did not have any
knowledge of the Guideline Terms, or their content, and was not aware of the existence of clause 4.3.14 Similar evidence was led from one of the owners.15

[25] Fourthly, an objection was taken at first instance to evidence from Mr Thomas (an employee of
Morgan), in so far as he deposed to the common use of the Guideline Terms. That objection was
overruled.

[26] It is useful to set out a synopsis of the relevant parts of their evidence.

Motto

[27] Ms Motto was the Chief Executive of Consult Australia, a firm that was previously named
ACEA. Her evidence included these points:
(a) in 2003/2004 ACEA was the industry association for consulting engineers, with approximately
300 member firms, ranging from the largest in Australia to sole practitioners;16
(b) the Guideline Terms had been in existence since October 1983;17
(c) many members of ACEA used the Guideline Terms in their contracts, with many simply referring
to them in fee proposals; she knew this from having seen “a number of the ACEA members’ fee
proposals over the years including in 2003/2004 and having had discussions with members
regarding the ACEA Guideline Terms…”;18
(d) in 2003/2004 the Guideline Terms were available for purchase from ACEA, by members of
ACEA and non-members;19 and
(e) the ACEA had actively promoted the use of the Guideline Terms by consulting engineers, by way
of seminars, newsletters and advertisements.20

[28] Ms Motto was not cross-examined.

Cox

[29] Mr Cox’s evidence was presented as an expert report. The essential parts of his written
evidence were:21
(a) he had been an architect since 1976; during that time he was involved in a large number of
building projects involving the engagement of civil and structural engineers and the delivery of
fee proposals by engineers to clients;
(b) based on his experience since then, it was common for fee proposals put forward by consulting
civil and structural engineers to state that their engagement would be on the terms of the ACEA
Guidelines; further, it was common for the fee proposals to simply refer to the ACEA Guidelines
and not attach a copy; and

14 AB 262.
15 Affidavit of Mr Hicks, [5]; AB 264–265.
16 Affidavit of Motto, [10], AB 127.
17 Affidavit of Motto, [11], AB 127.
18 Affidavit of Motto, [12], AB 127.
19 Affidavit of Motto, [13], AB 127–128.
20 Affidavit of Motto, [15], AB 128.
21 AB 194–195.
(c) the version used was usually that current at the time of the fee proposal.

[30] Mr Cox was not cross-examined.

Quigley

[31] Mr Quigley was an architect whose evidence was prepared in the form of an expert report, based on his experience as an architect since 1973, and specifically between 1989 and 2003 when he was director of a national firm of architects. Essential features of his evidence were:

(a) between 1989 and 2003 he was responsible for negotiating the terms of retainers with consulting engineers;22

(b) his experience, up to and including 2004, was that where a client engaged civil or structural engineers for a project of this type, it was usual and common for the engagement to be under the terms of the ACEA Guidelines;23 while it was usual and common it was not invariable;24

(c) whilst he could not comment on what other architects did, his experience included being on the practice committees of the Institute of Architects, “where this particular matter was discussed regularly”;25

(d) his experience with the practice committees of the Royal Australian Institute of Architects at both the Victorian and NSW chapters, and as the Victorian representative on the national practice committee in the period up to 1998, was that the use of the ACEA Guidelines to engage consulting engineers was common within the profession;

(e) on the occasions when the ACEA Guideline Terms were not used, it was usually a larger, more complex, project than this one;26

(f) where clients did not have their own set of standard terms, the engineers would generally be engaged on the basis of the ACEA Guideline Terms;27

(g) the ACEA Guidelines were published by the ACEA, a national industry body representing the business interests of consulting engineers; the Guidelines were usually referred to in a consulting engineer’s fee proposal, and a copy of the Guidelines was not provided with the fee proposal;28

(h) the version used in a retainer was the current version at the time.

The evidence of Mr Meredith

[32] Mr Meredith swore several affidavits and was cross-examined. In his first affidavit he said:

(a) prior to requesting a fee proposal from Morgan, he sent them a letter attaching a “geotechnical brief” containing geotechnical information for the site;

(b) at that time he knew that apart from a structural engineer, a geotechnical engineer would be required to “undertake investigations of the subsurface conditions of the Land”;29

(c) the letter revealed a number of features of what was said to Morgan:

i. it attached a “Geotechnical Investigation Brief”;

ii. the geotechnical brief comprised, in part, a report from GHD30 as to the neighbouring allotment to that with which Mr Meredith’s clients were concerned;

22 AB 135.
23 AB 134.
24 AB 58.
25 AB 59.
26 AB 135.
27 AB 135–136.
28 AB 136.
29 AB 115, [7].
30 Gutteridge, Haskins & Davey.
iii. the geotechnical brief drew attention to “the significant depth of soft compressible clays discovered in close proximity to this site”;\textsuperscript{31}

iv. the geotechnical brief listed further information required from a geotechnical report, including the soil strata, foundation systems, bearing capacities, soil reactivity, and estimates of anticipated settlement;\textsuperscript{32}

(d) the letter referred to a “significant point” identified by Mr Meredith from the GHD report, namely the fact that there were “compressible clays” near the site, and that settlement had occurred, “but there is still a chance of additional significant settlements”;\textsuperscript{33}

(e) Mr Meredith suggested that Morgan “check with GHD\textsuperscript{34} whether there is (sic) similar clays on Lot 8\textsuperscript{35} and whether there has (sic) been earthworks carried out, monitoring of settlements, etc”;\textsuperscript{36}

(f) the letter also suggested alternative geotechnical engineers that might be consulted by Morgan, apart from the author of the geotechnical brief; and

(g) the fee proposal referred to the ACEA Guidelines but that he did not have a copy, nor was he provided with one by Morgan.

[33] In his second affidavit he said that he was not aware of the ACEA Guidelines at any time in 2003–2006.\textsuperscript{37}

[34] Part of his oral evidence includes these passages:

It’s right to say, isn’t it, that you knew that Morgans had quoted a price on the basis that the commission would be on the terms of the ACEA guideline terms of agreement?–Yes. I would have read that.

And you understood that the price that [was] offered was on the basis that the commission would be on the ACEA terms?–I think generally on the terms is what’s been written there.

Yes. It’d be right to say you didn’t ask Morgans what the price might be if the commission was to be done on different contractual terms?–No. I did not.

And you didn’t ask James Thomas, or any of your other contacts at Morgans, whether Morgans would be prepared to do the work for you on different contractual terms?–No.

It’s right that you didn’t ever put forward to Morgans any alternative set of contractual terms for their engagement?–No. I did not.\textsuperscript{38}

and

Well, what did you think those words meant?–I thought that the – the – the guidelines terms of agreement may have been a document that dealt with operational matters, like paying of fees and – and those sort of issues.

But my question – my suggestion to you was that you understood that, whatever was in them, they were a set of standard terms for engaging engineers?–A set of standard terms. Yes. All right.

Why do you say, “Yes. All right”?–Well, then I would say – I would say I did know that they would form part of the contractual arrangement.

And you believe, at the time, they formed part of the contractual arrangement because you understood that they were a set of contractual terms. Whatever was in them, they were contractual terms?–Yes.\textsuperscript{39}

[35] As to the interval between when the fee proposal was obtained and when instructions were

\textsuperscript{31} AB 119.

\textsuperscript{32} AB 119.

\textsuperscript{33} AB 118.

\textsuperscript{34} The author of a report in the geotechnical brief.

\textsuperscript{35} The land upon which the City Beach warehouse was to be built.

\textsuperscript{36} AB 118.

\textsuperscript{37} AB 262, [3].

\textsuperscript{38} AB 20–21.

\textsuperscript{39} AB 21–22. Emphasis added.
given to Morgan to proceed, Mr Meredith said:40

It’d be right to say, Mr Meredith, wouldn’t it, that after you received the fee proposal in August 2003 that you had enough time to ask James Thomas to give you a copy of ACEA guideline terms of agreement before you gave him instructions to proceed?—I would have had enough time to fit – to actually do that. Yes.

And there would have been enough time for your clients to obtain advice on the suitability of those terms before Morgans were instructed to proceed had they wanted to do so?—There would have been enough time for that. Yes.

THE EVIDENCE OF MR THOMAS

[36] Mr Thomas was the representative of Morgan who had dealings with Mr Meredith. His evidence-in-chief was by affidavit and he was cross-examined. Relevant parts of his evidence were as follows:

(a) he had been in Morgan’s employ since 1988, as a structural engineer; in 2003 he was a senior structural engineer there;
(b) Mr Meredith asked him if Morgan would design aspects of the new City Beach warehouse; they had a meeting at which Mr Meredith supplied architectural drawings;
(c) his only contact was with Mr Meredith;
(d) he sent the fee proposal to Mr Meredith as the architect, as was standard practice;
(e) Morgan did the work and invoiced on five occasions; the first invoice was in December 2003 and after that Morgan was given a “verbal go-ahead to proceed with the remainder of the project”;41
(f) the ACEA Guidelines were commonly used in Australia over the period between 1989 to 2003 and beyond, in various engineering fields;
(g) in his time with Morgan, and as an engineer, his work involved preparing fee proposals, his experience since 1989 was that Morgan’s fee proposals always referred to the ACEA Guidelines;
(h) his experience, based on his contact with other engineers and at seminars and conferences with other engineers, was that some used the ACEA Guidelines;42 he was not aware of engineers that did not do so;43
(i) he could not recall discussing the fee proposal with Mr Meredith;44
(j) the ACEA Guidelines were not discussed between he and Mr Meredith;45 and
(k) it was his practice to simply refer to the Guidelines in correspondence, not require them to be completed, and require no written confirmation that the client was abiding by those terms and conditions.46

WERE THE ACEA GUIDELINE TERMS INCORPORATED IN THE FEE PROPOSAL?

[37] The learned primary judge found they were incorporated in the fee proposal. The essential steps in that reasoning were as follows:

(a) on a construction of the natural meaning of its language, the fee proposal, at least prima facie, incorporated the Guidelines;47

40 AB 24 lines 6–14.
41 AB 52 lines 1–5.
42 AB 52 line 46 to AB 53 line 20.
43 AB 53 lines 22–24, 40–41.
44 AB 51 line 37.
45 AB 52 lines 24–28.
46 AB 54 lines 10–12.
47 Reasons [32].
(b) the use of the term “generally” in the phrase “generally in accordance with” in the fee proposal, meant “for the most part” but did not have the effect that none of the terms in the Guideline Terms were incorporated. 48

(c) a reasonable person in the position of the owners, reading the fee proposal, would understand that the basis on which Morgan was offering to provide its services was, for the most part, in accordance with the terms of the ACEA Guidelines, and that the expression “generally in accordance with” was used because not all matters were finally dealt with in the Guideline Terms. 49

(d) the reference to the “ACEA Guideline Terms of Agreement” in the fee proposal appeared amongst provisions relevant to the fees to be charged, and their payment; however, the incorporation was not limited to those matters, but related to “the commission”, a reference to the engagement of Morgan to provide engineering services to the owners, 50 and

(e) therefore, as a matter of construction, the fee proposal incorporated the ACEA Guideline Terms of Agreement. 51

[38] On appeal, as at first instance, the owners contended that the words used in the fee proposal were too general and imprecise to incorporate the Guideline Terms. Senior Counsel for the owners pointed to the fact that the words “generally in accordance with” suggested that not all of the Guideline Terms were incorporated, and if that was so, one could not confidently say which ones were, and which ones were not, incorporated. Then attention was drawn to the location of the words that referred to the Guideline Terms, namely in a section dealing with fees. From that it was submitted that a reasonable person would not read that reference as going beyond the issue of fees. Therefore, the argument would follow, if anything at all was incorporated it might be the terms as to fees, but no more, and certainly not a liability exclusion clause like clause 4.3. It was submitted that if the language was imprecise the correct conclusion should have been that none of the Guideline Terms were incorporated.

Discussion

[39] The central question on this issue is one of construction of the proposal letter. Guidance is given by the decision in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd: 52

This Court, in Pacific Carriers Ltd v BNP Paribas, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.

[40] In examining that issue an objective approach is taken, rather than looking at any subjective opinion or expression by the parties. Further, the Court should adopt a commercial approach in resolving any uncertainties in the language, and give a meaning to words where that is possible, without being unduly pedantic or narrow. 53

The fee proposal letter

[41] There are a number of features that are apparent from the fee proposal letter that make it clear, in my respectful view, that the learned primary judge was correct in his conclusion and the owners’ contentions cannot be accepted.

48 Reasons [33].
49 Reasons [34].
50 Reasons [35].
51 Reasons [36].
First, the proposal was for the full range of engineering design services to be performed by Morgan. It included structural design, civil design of things like earthworks and pavements, and the inspection regime. Thus it dealt with matters beyond the question of fees, detailing the scope of the engineering design services, quality assurance and insurance. It was thus a proposal covering the professional services to be provided, not just a proposal about the fees.

Secondly, the fee proposal excluded some matters, specifically geotechnical engineering services and environmental engineering services. That was significant because it was provided in the context of Morgan’s having received the letter from Mr Meredith which attached the geotechnical brief, and raised issues as to settlement of the land because of compressible clays: see paragraph [32] above. Mr Meredith had raised a “significant point”, namely that there were “compressible clays” near the site, and that settlement had occurred, “but there is still a chance of additional significant settlements”. Those are matters which, on any reasonable view, would potentially impact upon the structural and civil design services.

Thirdly, the fee proposal was only sent six days after the letter from Mr Meredith. Given that Mr Meredith had enclosed a geotechnical brief that was obviously to provide instructions to a geotechnical engineer (Morgan did not provide those services) to investigate the particular land, there was not enough time to have resolved the issues raised by Mr Meredith in that letter. So much is clear from Morgan’s exclusion of geotechnical engineering services, and the fact that there was no suggestion of any other report having been done or relied upon.

Fourthly, the phrase “generally in accordance with” qualifies the word “commission”. In other words, it was the “commission” that was to be “generally in accordance with” the ACEA Guideline Terms. The ordinary meaning of the word “commission” includes: the command or instruction to someone to perform duties; the entrusting of authority to perform some act; and (more accurately here) the matter entrusted to be performed, or the task or matter committed to one’s charge. The task or matter committed to Morgan’s charge was the whole of the services to be performed by them. The word “commission” therefore refers to the contract for the whole of the services to be provided by Morgan, and does not refer to only the fees.

Fifthly, the letter used the phrase “the commission would be generally in accordance with”. Plainly that signifies that if the proposal is accepted and Morgan is engaged to perform the services, Morgan expected that the resulting commission would be “generally in accordance with the ACEA Guideline Terms”. Morgan was offering to perform the commission on one basis, namely that the ACEA Guideline Terms would apply. If the owners rejected that aspect then the ACEA Guideline Terms would not apply, but if they accepted, then they would.

Sixthly, I do not consider that the phrase “generally in accordance with” introduces such a degree of uncertainty that the contract formed by Morgan’s retainer was one which did not incorporate the ACEA Guideline Terms. Once it is understood that the phrase refers to the “commission”, the proposal meant that the contract would be generally in accordance with the ACEA Guideline Terms. That is, if the proposal set some term that did not accord with, or was in addition to, the Guideline Terms then the proposal’s term would apply; otherwise the ACEA Guideline Terms applied.

In my view, a reasonable person would read the proposal as meaning that Morgan’s offer to perform the structural and civil engineering was on the basis that their contract would be governed by the ACEA Guideline Terms, as well as, or modified by, any terms set out in the proposal. When one considers Mr Meredith’s evidence that conclusion is fortified: (i) he read the reference to the ACEA Guideline Terms in the proposal letter; (ii) he knew that they were a standard set of contractual terms for engaging engineers; and (iii) he knew they would form part of the contract.

55 Macquarie Online Dictionary.
56 Emphasis added.
57 See [34] above; AB 21–22.
That conclusion is one reached by the learned primary judge, first as a matter of pure construction of the words, and then as a result of looking at what a reasonable person would understand as to the offer:

I would therefore conclude, as a matter of construction, that the Fee Proposal incorporated the Guideline Terms, including clause 4.3. In dealing with this question, I have assumed that the Fee Proposal is a contractual document. Otherwise, the answer does not matter. Whether a reference in a contractual document is effective to incorporate terms found elsewhere will generally depend, it seems to me, on the language used in the contractual document, construed according to the ordinary rules of construction, and not, at least in a case like the present case, on the nature of the terms referred to. The cases to be discussed later in these reasons appear to me to show that where it is held that a term referred to in a document does not become contractual, that is a result of other circumstances, principally related to the nature of the term. It is not a result of the inadequacy of the incorporating language.\[58\]

and

In my view, a reasonable person in the position of [the owners] would have concluded that, at the time that the Fee Proposal was accepted, [Morgan] intended to enter into a contract to provide the relevant engineering services, only on the terms identified in the Fee Proposal; and a reasonable person in the position of [Morgan] would have concluded that [the owners] agreed to contract on those terms.\[59\]

**WAS IT NECESSARY TO DRAW MORGAN’S ATTENTION TO CLAUSE 4.3?**

The learned primary judge, having conducted a thorough review of the authorities in this area, adopted the following propositions for determining whether an offeree is bound by a term set out or incorporated in an unsigned document which the offeror has provided to the offeree in circumstances which show the offeror intends the document to identify terms of the contract:

(a) it is not always the case that the offeree is not bound by an exemption clause, unless the offeror directs attention to the clause;
(b) the fundamental question is whether the offeror is reasonably entitled to conclude that the offeree has accepted the terms in the document, including the exemption clause;
(c) that conclusion should be reached where the offeree has had a reasonable opportunity to consider the terms, including the exemption clause, and has behaved in a way which manifests acceptance of the document as recording contractual terms;
(d) in other cases, where the clause is one reasonably to be expected in contracts of the kind in question, acceptance of the document makes the clause binding, even if the offeree does not know its terms, or even that it is contained in the document; and
(e) if the clause is not one reasonably to be expected, then something more is required by way of provision of information about the clause to the offeree before the contract is formed; what information will be required will depend on the circumstances, but particularly on the terms of the clause.

His Honour then applied those principles to the present case, and concluded that it was unnecessary for Morgan to have specifically drawn clause 4.3 to the owners’ attention, nor were they required to do more in that regard. His Honour expressed his conclusion as part of the finding that the fee proposal letter would have been understood by a reasonable person as signifying that Morgan was offering to contract on the basis of the terms identified in it.\[61\]

Those conclusions extend to the Guideline Terms, including clause 4.3. In the circumstances of this case, it was unnecessary for [Morgan] to do more, and in particular, it was not necessary for [Morgan] specifically to draw the attention of [the owners] to that clause.

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58 Reasons [36].
59 Reasons [74].
60 Reasons [70].
61 Reasons [74].
The owners submitted on appeal, as they did below, that clause 4.3 was of such a character that it was required to be specifically drawn to their attention, and that Morgan should have done more than they did to achieve that. Reliance was placed on several sources of authority.

The first was a passage from *Cheshire & Fifoot*:

In the case of a limiting term contained in an unsigned document, such as a ticket, docket, note, receipt, invoice or notice, the party denying liability by relying on such a term must show that reasonable notice was given of its existence (citing *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197).

It was submitted that the above statement receives support from the second authority, the judgment of Brennan J in *Oceanic Sun Line Special Shipping Company Inc v Fay*:

If a passenger signs and thereby binds himself to the terms of a contract of carriage containing a clause exempting the carrier from liability for loss arising out of the carriage, it is immaterial that the passenger did not trouble to discover the contents of the contract. But where an exemption clause is contained in a ticket or other document intended by the carrier to contain the terms of carriage, yet the other party is not in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier cannot rely on that clause unless, at the time of the contract, the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger’s notice … In differing circumstances, different steps may be needed to bring an exemption clause to a passenger’s notice, especially if the clause is an unusual one.

The third was from the judgments of Ormiston JA and Buchanan JA in *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd*:

Where terms are explicitly referred to by an offeror, it can be rare that an apparent acceptance by the offeree should not carry with it the offeree’s assent to the whole of the terms described, but I would agree that, where a term is so onerous or is otherwise of a kind such as to suggest that it might not reasonably be expected to be part of the terms of the contract, the issue is whether the accepting party can reasonably be taken to have assented to the particular term.

and

I do not intend to convey that express acceptance of an offer which incorporates other terms by reference necessarily connotes acceptance of all those terms. In a case where the person expressing consent has not read the terms, his consent may be taken to be a consent to those terms which are appropriate to a contract of the type in question. If the terms include provisions which no one would anticipate in a contract of the type in question, it would not be appropriate to assume consent to those provisions. The basic enquiry remains whether it is reasonable to assume that a contracting party has assented to the terms put forward by the other party.

As I have said, in my opinion the inclusion of an unusual term, at least in an unsigned document, may require its proponent to take special steps to bring it to the attention of the other party, for otherwise it may not be reasonable to assume consent to the term. Whether special steps are required, and what those steps must be, will depend upon the circumstances of each case. Further, I think that a term may be unusual because it is more than ordinarily onerous. However, I do not consider that the mere fact that a provision is onerous entitles a court applying the common law to reject it as a term unless special steps have been taken to draw attention to it. The relevant question is whether a contracting party can be reasonably taken to have assented to a particular term, not whether a contracting party should be subject to an unreasonable term.

The owners contended that clause 4.3 was unusual and onerous, and therefore of a type that required Morgan “to give reasonable notice of its contents, rather than merely identifying its existence.

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64 [1998] 4 VR 559. *Maxitherm*
65 *Maxitherm*, 561 (Ormiston JA).
66 *Maxitherm*, 568–569 (Buchanan JA).
(by in turn only referring to the ACEA Terms);67 In oral argument that was expressed to include a term that no one would anticipate in a contract of the type in question, relying on the judgment of Buchanan JA in Maxitherm.

58 The contentions for Morgan placed reliance upon Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd68, a case where the ACEA terms (and in particular clause 4.3) were incorporated into a contract between an engineering firm and the owners of land to be developed, the engineers having been retained by the owner’s architect. The fee proposal referred to the ACEA Guideline Terms but the engineer did not, when requested, forward a copy of the ACEA Conditions. The Court held that the terms were incorporated as part of the contract of engagement.

59 Meagher JA said:69

The case which most clearly deals with this problem to which we were referred was Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523, when McHugh JA pointed out that where an offeree takes the benefit of a contract in circumstances indicating that the offeror will be paid for his services in accordance with the offer, the inference is open that the offer was accepted according to its terms; and, in the present case, I find such an inference to be irresistible.

60 Giles JA, with whom Sheller JA agreed, said:70

In Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523 a developer declined to sign a building contract, but let the work proceed and received the benefit of the work. It was held that it should be found that the offer made by the builder by proffering the contract had been accepted by the developer by its conduct, and that there had been an acceptance of the work on the terms and conditions offered by the builder.

In my opinion the same should be found here. By the letter of 8 February 1994 the engineer offered to provide engineering services on the ACEA Conditions of Engagement. If the offer was not accepted by the architect’s letter of 11 February 1994 because of a qualification that the ACEA Conditions of Engagement had first to be approved by Mr Northausen, when the engineering services were provided and the benefit of the services was taken by the owner without prior approval by Mr Northausen there was acceptance of the offer by the owner without that qualification: there was acceptance of the services on the terms and conditions offered by the engineer, including the ACEA Conditions of Engagement.

…

The owner further submitted that it should not be found that it had by its conduct, and without actual notice of the conditions, agreed to be bound by the ACEA Conditions of Engagement when they included such an important provision as cl 4.3, and together with it cl 4.2 providing for the engineer’s maximum liability. It said that the question was whether it could reasonably be taken to have assented to these provisions (citing Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd & Anor (1998) 4 VR 559 at 569), and that where limitation provisions were involved express consent or reasonable notice was called for (citing Baltic Shipping Co v Dillon (“Mikhail Lermontov”) (1991) 22 NSWLR 1 at 8–9 and 24–25). The test is objective, and in my opinion the nature of the provisions did not preclude the finding: it was not only a reasonable finding, but in the circumstances all but compelled.

Discussion

61 The way in which the issue was framed and argued by both parties on appeal (see paragraph [57] above) makes it unnecessary to enter upon an analysis of the various authorities referred to by both parties. The learned primary judge did so exhaustively, at Reasons [39] to [69], and on that basis distilled the principles set out in paragraph [51] above.

62 Clause 4.3 (set out in paragraph [4] above) provides a discharge from “all liability in respect of the Services”, at the expiration of one year from the completion of those services. It also provides that the client cannot commence an action in respect of the services, after the one year period. The term “Services” means the professional services provided, or agreed to be provided, by the engineer.

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67 Appellants’ outline on appeal, [26], [27] and [41].
68 [2001] NSWCA 313. (Hyder)
69 Hyder, [16].
70 Hyder, [79]–[80] and [85].
Clause 4.3 occurs in the Guideline Terms, in a section entitled “Scope of Liability”. It is not the only clause providing for limits upon the engineer’s liability. Clause 4.1 limits liability to the cost of rectifying the works, and clause 4.2 caps liability at $300,000 if no figure is inserted in the relevant schedule. Clauses 4.4 and 4.5 deal with limits upon the warranties given by the engineer.

The owner’s contention was that clause 4.3 had to be specifically drawn to the attention of the owners because of its unusual or onerous nature, or simply that it was of such a type that no one would anticipate its presence in the contract terms.

Was clause 4.3 a clause that no one would anticipate in a contract of the type in question? That question is posed because of this passage from Buchanan JA in Maxitherm:71

If the terms include provisions which no one would anticipate in a contract of the type in question, it would not be appropriate to assume consent to those provisions.

The type of contract is one between a structural and civil engineer and the owners of land, whereby the engineer is retained to design the structural and civil elements of a building project, but is not responsible for the geotechnical analysis of the land conditions.

The evidence of Cox, Motto and Quigley provide ample evidence that this is a clause that might be expected in such a contract. Their evidence can be summarised this way:

(a) the ACEA Guideline Terms had been in existence for many years prior to the retainer of Morgan;
(b) the ACEA Guidelines were commonly used in Australia at the relevant time, in various engineering fields;
(c) many structural and civil engineering firms used the Guideline Terms in their fee proposals; and
(d) it was common for such fee proposals to simply refer to the ACEA Guidelines and not attach a copy.

However, there is more to the context of this particular contract. This contract was being made in circumstances where the owner’s representative had highlighted matters of significance concerning geotechnical matters. They related to questions of the land’s being susceptible to compressible clay leading to settlement issues. Further geotechnical work was to be done. They are matters which almost certainly would have had an impact on the engineer’s exposure once the design services were rendered. In my view, those circumstances mean it would not be surprising at all to find that the design engineer wished to insert clauses in the contract, limiting the design engineer’s liability and the scope of warranties.

In that context Mr Meredith’s evidence becomes important. He said that at the time he received the fee proposal letter he read the reference to the ACEA Guideline Terms. He understood that they were a set of standard terms intended to form part of the contractual arrangement.72 The learned primary judge made a finding to this effect, which was not challenged.73 The learned primary judge identified that Morgan did not contend that Mr Meredith’s knowledge bound the owners to clause 4.3, and held that his evidence of his knowledge did not go so far as to permit a finding that he was aware that an exemption clause was intended to be incorporated.74 However his evidence permits at least two conclusions to be drawn. First, Mr Meredith understood that there was a standard set of terms. Secondly, he understood that Morgan intended to have that standard set of terms incorporated into the contract between it and the owners. Thirdly, that intention was manifested in the same document that excluded geotechnical engineering services from the proposal.

Prior to receiving the fee proposal, Mr Meredith recognised that the geotechnical engineering issues were a significant point that might impact upon Morgan’s design, and the building itself, because of possible settlement of the land. In those circumstances his knowledge that the design engineer intended to incorporate standard terms into the contract makes it difficult to find that there were terms so unusual or onerous that they needed to be drawn specifically to the owners’ attention.

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71 Maxitherm, 568.
72 See [34] above.
73 Reasons [78].
74 Reasons [78].
The learned primary judge rejected the owners’ contentions in the following passages, with which I respectfully agree:

One of the submissions for [the owners] relied on the passage from the judgment of Buchanan JA in *Maxitherm*, referring to the question whether the terms “are appropriate to a contract of the type in question”. No specific submission was made to demonstrate that this clause was inappropriate to a contract for the provision of engineering services. The fact that the clause forms part of standard terms of engagement recommended by the professional body representing engineers throughout Australia supports a contrary conclusion, though this does not seem to me to be decisive. A clause which limits the time in which claims may be made against an engineer for the provision of engineering services seems to me, in principle, to be appropriate, because damage to property which might lead to such a claim can arise from a variety of causes, and with the passage of time it will become more and more difficult for the representatives of the engineer effectively to investigate the cause of the damage for the purpose of responding to a claim. Amongst matters supporting this conclusion are the fact that the property will usually not be in the control of the engineer nor will the engineer have access to it; and events may have happened which have caused or contributed to the damage, for which the engineer was not present and of which the engineer would have no knowledge.

The effect of the incorporation of clause 4.3 would mean that [the owners] would have had to make a claim against [Morgan] within one year from the completion of the engineering services. No specific submissions were addressed to the length of this period. I do not consider that this has the effect that the clause, which would otherwise be appropriate if a longer term were included, should not be so regarded.

Accordingly, I conclude that clause 4.3 is an appropriate clause for a contract of the type in question.

In my view, the contention that clause 4.3 was unusual or onerous, cannot be sustained. The evidence of Cox, Motto and Quigley, referred to above, demonstrates that such a clause is not onerous or unusual. It is part of a standard set of terms that have been promoted for use by structural and civil engineers for many years, and adopted by many such engineers over the years. Many of those retainers, whilst made between the project owners and the engineers, were brought about by architects acting on the owners’ behalf. The promotion and adoption of those terms, including clause 4.3, over many years by architects and engineers, weighs very heavily against a conclusion that the clause is onerous or unusual.

In my respectful opinion, expressions such as “more than ordinarily onerous”, or “extremely onerous” or “particularly onerous” present some difficulty. They posit a level of burden which is ordinary or common, against which the burden imposed by the clause in question is to be measured. Nevertheless, the evidence in the present case makes it possible to apply them. There is evidence from Ms Motto and Mr Thomas demonstrating that the ACEA promoted the use of the Guideline Terms. There is also evidence from Mr Quigley, Mr Cox and Mr Thomas about their experience of the incorporation of these terms in contracts for the provision of engineering services. Although in each case this is the evidence of an individual, it nevertheless represents somewhat extensive experience. There is no evidence to suggest that the experience of these individuals is unusual, nor that the recommendations of the ACEA about the use of the Guideline Terms were usually disregarded. In my view, the evidence permits a conclusion that the use of the Guideline Terms is sufficiently common to make it unnecessary for [Morgan] to have taken particular steps to draw the attention of [the owners] to clauses such as clause 4.3.

This ground of appeal fails.

The conclusion reached above means that it is not necessary to consider Morgan’s notice of contention. In any event the distinguishable factual circumstances in *Hyder* mean that it is of no assistance in resolving the issue raised in that notice.

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75 Reasons [84]–[85]. Internal footnotes omitted.
76 See Motto at [27] above.
77 See Cox at [29] above, and Quigley at [31] above.
78 Reasons [87].
CONCLUSION AND ORDERS

[76] For the reasons above the appeal must be dismissed. There is no reason why costs should not follow the event.

[77] I would propose the following orders:
   1. The appeal is dismissed.
   2. The appellants are to pay the respondent’s costs, to be assessed.

[78] ATKINSON J: I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

   Michael O’Callaghan