Page 322 refers to the decision of the High Court of Australia in *Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd* (2004) 219 CLR 165 (a full transcript of which is available at http://www.austlii.edu.au/au/cases/cth/HCA/2004/52.html). The interest of the case lies in the strong affirmation given to the rule laid down in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. The facts of the case were as follows.

Alphapharm were the exclusive distributors of an influenza vaccine in Australia. The vaccine was imported into Australia and arrangements had to be made for the transportation of the vaccine within Australia. Care had to be taken in relation to the storage of the vaccine because it had to be stored at a certain temperature. Alphapharm employed Richard Thomson Pty Ltd to make the transportation arrangements. Richard Thomson suggested that the appellants, Finemores, be used to collect the vaccine, store it and transport it from the warehouse to the purchasers. Alphapharm consented to this suggestion. At a meeting between a representative of Richard Thomson (Mr Gardiner-Garden) and Finemores (represented by Mr Cheney), a form entitled an 'application for credit' was given to Mr Gardiner-Garden. The application form stated 'please read Conditions of Contract (Overleaf) prior to signing.' Mr Gardiner-Garden signed the form but did not read the conditions. The conditions included an exclusion clause (clause 6) and an indemnity clause (clause 8) requiring the customer to indemnify the carrier. The vaccine was damaged as result of exposure to the wrong temperatures in storage and in transportation. Alphapharm brought a claim for damages against Finemores who relied upon clause 6 of the contract by way of defence to the claim. Alphapharm claimed that they were not bound by clause 6 for two reasons. First, they asserted that clause 6 had not been incorporated into the contract between Richard Thomson and Finemores. Second, they denied that Richard Thomson had contracted as agent for them. We are here concerned only with the first of these points.

The trial judge and the New South Wales Court of Appeal both found that clause 6 had not been incorporated into the contract between Richard Thomson and Finemores. There was no suggestion that Mr Gardiner-Garden had been tricked into signing the document. He chose to sign it without reading it. The High Court of Australia allowed Finemore's appeal and held that the clause had been incorporated into the contract. In so doing, it affirmed the importance of signature in robust terms. The essence of the reasoning is to be found in the following passage taken from the judgment of the court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [45]):

> It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents….whatever they might be. That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it.

In reaching its conclusion, the court relied upon the work of Professor Atiyah (in particular his essay 'Form and Substance in Legal Reasoning: The Case of Contract' in MacCormick and Birks (eds), *The Legal Mind: Essays for Tony Honoré*, (1986), Ch 2). In his essay Professor Atiyah emphasised the important role played by signature as a 'formal device'; that is to say, it signifies that the party signing has agreed to the contents of the document and that the other party can be treated as having relied upon the signature.

In so concluding, the High Court affirmed the importance of a signature in clear and unequivocal terms. On this basis a clear line of distinction must be drawn between cases in which the party alleged to be bound signs the contract and cases where there is no such signature. The reasoning in this case applies to the former category and the reasoning in the latter category cannot be transplanted across to the former. A factor in the decision may have been that the parties to the case were all substantial commercial organisations. But it would appear that it was not an important factor. In cases where the party seeking to challenge the term is a consumer, the court indicated (at [48]) that it would look to any applicable legislation to regulate a term which is alleged to be unfair terms and that it will not modify the rule on signature to deal with any perceived unfairness in the term sought to be incorporated into the contract.

The present decision is not binding on an English court but it is important in that it provides support for the rule in *L'Estrange v Graucob*. It can also be contrasted with the decision of the Court of Appeal of Ontario in *Tilden Rent-A-Car Co v Clendinning* (1978) 83 DLR (3d) 400 (see **page 320** of the textbook).

