IN THE COURT OF APPEAL [1995] QCA 018

SUPREME COURT OF QUEENSLAND Appeal No. 82 of 1994

Brisbane

Before Fitzgerald P.
Davies J.A.
Pincus J.A.

[Neill v. Fallon & ors]

BETWEEN:

JAMES NEILL
(Plaintiff) Appellant

AND:

LYNDA GAY FALLON, RUSSELL JOHN FALLON and ANDREW WATERS
(Defendants) Respondents

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 20/02/1995

This is an appeal from a judgment in the District Court on 11 April 1994 dismissing the appellant's claim against the respondents and ordering him to pay their taxed costs. There is no dispute as to damages, which the trial judge assessed at $28,485.00. Further, although the respondents submitted that the trial judge's finding that they had been negligent "cannot be sustained" because the appellant "failed to prove this aspect of his case", there was evidence to support the findings that the appellant's injury resulted from the negligence of the respondents, which was the sole basis for the appellant's claim as it was pleaded.

In view of the manner in which the appeal was conducted in this Court, it is satisfactory to take the trial judge's description of events. His Honour's reasons for judgment state:

> "The [appellant's] claim is for damages for personal injuries and their consequences. It is alleged that he was injured whilst he was a member of the Bodyshape Fitness Centre. This was an establishment owned and controlled by the [respondents].
>
> I have carefully considered the witnesses in this action as they gave evidence. I have come to the conclusion that the [appellant's] evidence as to what transpired is more credible than the evidence called by and on behalf of the [respondents].
>
> I find that the [appellant] wanted to enter into competitive body building. This was to be a Master's body building because of his age. He had been to previous gymnasiums to investigate their facilities. Some were too expensive. He came to the [respondents'] gymnasium. It was economically attractive. There was a lady, then on the staff, who had been a competitive body builder. The [appellant] had been injured about 1983. He hurt his back playing indoor cricket. He went to the Royal Brisbane Hospital for a few days and then went home. His back got better. He continued to play indoor cricket and he also played golf. He played golf every week with a foursome. Occasionally, when he played indoor cricket, he suffered a twinge in his back. He went to see a chiropractor at Caboolture. He thereby got relief. When he started at Bodyshape his fitness status was pretty good. He was proud of the fact.
>
> When he first went to Bodyshape he had an interview with the lady whom he believed was the [respondent] Lynda Gay Fallon. The only thing he was interested in was body building. He conveyed this during the course of the interview. Membership was also discussed. A membership agreement (Exhibit 1) came into being. The [appellant] wrote his name, address and phone number at the top of page 2. He did not strike out the word 'aerobic' and insert 'gym'. He signed just under an exemption clause. He then ticked four items out of a list of items. Underneath this list of items is an asterisk followed by the words in capitals:
>
> > 'PLEASE SEE MANAGER IF FOUR OR MORE ITEMS ARE TICKED PRIOR TO PARTICIPATION IN THE CLASS.'

Under that end, I find separate and distinct from it is another asterisk followed by:

> 'I HEREBY AGREE TO UNDERTAKE A MEDICAL EXAMINATION AND/OR FITNESS EVALUATION PRIOR TO THE COMMENCEMENT OF CLASSES AT BODYSHAPE FITNESS CENTRE.'

He then signed and dated the agreement at the bottom of the form on page 2.

I find that he was never asked at any time to undertake a medical examination or a fitness evaluation. He was never at any time asked for a medical certificate. I refer in passing to the exemption clause. I will deal with this in more detail later in this judgment. There was a discussion concerning this clause. The [appellant] was told '...that this third paragraph was just to cover the gym in case somebody dropped a weight...' (p.11 l.14) and later (p. 12 l.5):
'It was fairly brief. It was just basically to say that it covered the owners of the gym in case somebody did something stupid like dropping a weight on my foot.'
At p. 12. l. 12:
'Did you yourself form any view as to the sorts of contingencies that that clause was to deal with at the time? - No it was just as discussed. That it was to cover a stupid accident caused by another member or something like that. It was very lightly touched on.'

Thereafter the [appellant] for six weeks did 'warm-up' exercises. A program was devised for him for these exercises. At the end of the six weeks period, he asked for a body building program. At this stage, he had avoided exercises involving squats. These put a strain on his back. He avoided them in training. He came into contact with a staff member we now know to be Kate Hall. She was to devise his body building program. The female staff member whom the [appellant] had first met had left the gymnasium. A discussion took place between the [appellant] and Kate Hall. There was a discussion about weights - that was to make sure that the [appellant] did not overtrain or undertrain. However, there was no assessment of the [appellant] by Kate Hall during these discussions. There were no testing processes by Kate Hall of the [appellant] during these discussions. I find that the [appellant] pointed out to Kate Hall that he avoided doing squats because it

was dangerous for his back and that he knew of other exercises that could achieve the same result without actually putting that sort of strain on his back. Miss Hall told the [appellant] that if he did the squats exactly as she told him to do, he would have no trouble. He demurred. She threw down her pen on the table and told him: 'Well, if you don't do them you may as well leave'. However, the [appellant] had, as a result of unsatisfactory results with previous body building episodes, made a mental commitment that he would follow the instructions of the staff to the letter as they were the experts and they knew what they were doing and he would achieve the results that he wanted.

Therefore he did not disobey the instructions of Kate Hall but when he did the squats he told her that he was not happy doing them.

His training was split into A Section and B Section. He was to do A Section on Monday night; B Section on Tuesday night; Wednesday night would be free; A Section again on Thursday night; B Section again on Friday night and then the weekend would be 'days off'. Time has gone by and the [appellant's] memory has suffered accordingly. Kate Hall supervised him on his first A Section and B Section. The [appellant] found that he was having trouble with the squats. He told Kate Hall:

'If I'm having trouble, I mustn't be doing them right because you assured me that I would have no pain or trouble doing the squats if I did them the way you told me. So, can you come and check to see if I have subconsciously or inadvertently changed your instructions?'

She agreed. They made an appointment. She did not keep it. Earlier than this, when he told Kate Hall that he was having trouble with his back, she told him: 'Basically, just keep on doing it.'

He says that he was following instructions from Kate Hall to the letter and I accept this. He did not deviate from those instructions. On the last occasion he exercised, that is when Kate Hall did not keep the appointment, he performed the warming up exercise but then did not complete the prescribed exercises. He felt a sensation in his back. He had never felt it before. It was more a sensation that something had just gone, something had just given way. He ceased exercising. Someone told him to go to a physiotherapist with the Mt Gravatt Australian Rules

Football Club. This person was unable to help him. The [appellant] went home and spent a lot of time in bed. A friend drove him to a Dr de Bhal. She gave him an epidural to relieve the pain. This was a week after he had finished the program. He had tried to work but a couple of days after the program, the pain got worse and worse. He could not go to work. He went home and tried to stay in bed the whole weekend to try to rest and get rid of the pain.

He was in bed a bit over a week. He could shower and do some cooking. However, any activity over a few minutes brought severe pain. On the Saturday he had a fall. At this time he suffered excruciating pain. The painful consequences are set out in the evidence. Ultimately he was admitted to Logan Hospital. He was there for eleven days and was then taken to QEII. A myelogram took place and after six days he was operated on for a protruding disc.

The operation took the pain away. However, he was very weak. For six weeks after his discharge he had to lie down on a couch or stay in bed and keep his movements to a minimum. For the first couple of weeks he was at his sister's home. His parents came over and did everything for him except to dress him. After ten days or so he could do more for himself. He then went home and went back to work six weeks after his operation.

...

I find that the injury and its consequences resulted from the negligence of the [respondents] their servants or agents in that:

(1) They failed to take any or any adequate notice of the information given by the [appellant] as to his back condition to their servants or agents;
(2) They failed to cause to be devised a program of exercise for the [appellant] which was commensurate with his physical status and appropriate to safeguard his physical status;
(3) They, through their servants or agents, advised the [appellant] that it was alright for him to engage in an exercise program including squats in circumstances where a reasonably prudent person would not have so advised and in the circumstances where the [respondents] knew or ought reasonably to have known, there [was] a danger of injury to the [appellant];
(4) They failed to adequately or at all supervise

> the continuation of the program of exercise devised by their servants or agents and in particular to check the [appellant's] methods of performing the exercise after he had sought assistance from their servant or agent.

...

I now pass to the consideration of the exemption clause. The clause in question is in the third (un-numbered) paragraph on p. 2 of the application form (Exhibit 1). It is as follows:

'I acknowledge that during all such times whilst on the premises both my property and my person shall be at my own risk and I will not hold Bodyshape Fitness Centre or instructors liable for any personal injury or loss of property whether caused by the negligence of Bodyshape Fitness Centre, its servant or agents.'

During evidence in chief, this appeared:
'What was the discussion about that clause? - It was fairly brief. It was just basically to say that it covered the owners of the gym in case somebody did something stupid like dropping a weight on my foot.'
'Did you form any view as to the sorts of contingencies that the clause was to deal with at that time? No, just as was discussed. That it was to cover a stupid accident caused by another member or something like that. It was very lightly touched on.' (p. 12 l. 5 et seq)

Earlier:
'Did you have any discussion about any of the contents of paragraphs 1, 2 and 3 on that document when you signed it? - Generally speaking just the fact that we were going to do a body building exercise as opposed to an aerobic and that this third paragraph was just to cover the gym in case somebody dropped a weight.' (p. 11 l. 7)

In cross examination this appears:
'His Honour - that is what someone told you; it wasn't something you worked out by yourself by reading it? - That is for sure. I didn't work it out for myself.
Mr Morton: Do you remember who told you - No I don't'

The [appellant] could not say who told him these things. He maintained that 'Somebody explained that as I signed it'. (p. 73 l. 34).

On the same page (p.73 l. 48):-
'You can't remember - you can't tell me it was Mrs Fallon who said it to you; you don't remember that? - No.'

With reference to his claim that 'somebody explained it as he was signing it' at p. 73 l.45 this occurs:
'It could have been before could have been after? Yeah'.

Of course, if he was told this after he had signed the contract, it has then no relevance.

When the [appellant] gave evidence of the examples given to him about the operation of the clause by whoever gave the examples, I have no doubt that what was said was literally true.

The clause does cover those examples. However, I do not see anything in the evidence of the [appellant] which suggests that the [respondents] were limiting the operation of that clause to those instances and examples. I do not see any evidence which convinces me that the [appellant] is justified in coming to the conclusion that the negligent activities of the [respondents'] servant or agent was not covered by the clause in question.

...

I find the meaning of the clause is quite clear. The meaning of 'at my own risk' and similar wordings admits of no doubt. See <u>McCawley v. The Furness Railway Company</u> (1872) L.R.Q.B. Vol. 8, Vol.7, <u>Gallin v. The London and North West Railway</u> (1875) L.R. 10 Q.B. 212, and <u>Rutter v. Farmer</u> (1922) 2 K.B. 87.

I find that the remainder of the clause is effective to exclude liability on the part of the [respondents] their servants or agents. However, because of the exemption clause, his action fails. There will be judgment for the [respondents] against the [appellant] on the action with costs to be taxed."

The appellant argued, on the authority of <u>The Council of the City of Sydney v. West</u> (1965) 114 C.L.R. 481, that the respondents' negligence was not covered by the exclusion clause because it was not negligence "in carrying out the obligations

created by the contract", but "negligence in relation to acts ... which are neither authorised nor permitted by the contract": pp. 488-489. The latter assertion was based on a submission that the respondents' material negligence was a failure "to do the very thing which, by the terms of the [contract], they undertook to do". Reference was made to failures:

(i) " 'to identify the small number of adults for whom physical activity might be inappropriate or those who should have medical advice concerning the type of activity most suitable to them' ";

(ii) "to take any or any adequate notice of the information given by the Appellant as to his back condition"; and

(iii) "to devise a programme of exercise for the [appellant] which was commensurate with his physical status and appropriate to safeguard his physical status".

It was also said that the respondents were negligent in "expressly telling" the appellant, through their agent, Kate Hall, that " 'if he did the squats exactly as she told him to do, he would have no trouble' ". However, subject to the appellant's further arguments, referred to below, Kate Hall's advice to the appellant, accepting that it was negligent, plainly cannot be placed outside the operation of the exclusion clause on the basis of what was said in West. The advice which Kate Hall gave was given "in carrying out the obligations created by the contract".

Nor, in my opinion, does West assist the appellant in relation to the respondents' "failures". The conduct which was placed outside the exclusion clause in West was conduct which was not contemplated by the contract, and in relation to which it had no intended operation. If a contract is not otherwise applicable to an activity alleged to be a breach, it is readily comprehensible that an exclusion clause, framed in general terms, should not be held to extend to such activity. Here, the acts which the respondents failed to do were, on the appellant's own case, not only "authorised" and "permitted" but required by the contract. In substance, the respondents' negligence was their failure to perform the contract correctly, and was not related to activity outside the contract.

In any event, West does not establish that an exclusion clause cannot have "application to negligence in relation to acts done ... which are neither authorised or permitted by the contract". The contract there under consideration was an example of a contract in which the exclusion clause did not have that operation, as will often, perhaps ordinarily, be the case, when due weight is given to the nature and object of the contract.

Indeed, the appellant accepted that the exclusion clause relied on by the respondents is to be construed in accordance with the following statement from the judgment of the High Court in

Darlington Futures Ltd v. Delco Australia Pty Ltd (1986) 161 C.L.R. 500, 510:

> "... the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract and, where appropriate, construing the clause contra proferentem in case of ambiguity."

Adopting that approach, I can identify no reason why the clause did not apply to the respondents' negligence, subject at least to the appellant's further arguments.

The appellant's subsidiary argument involved some verbal gymnastics related to the words "on the premises" in the exclusion clause, which were said to give rise to an ambiguity. If the clause was reasonably capable of two meanings, either of which is favourable to the appellant, it is not disputed that that meaning should be adopted.

The first aspect of this argument was based on Kate Hall's negligent advice. While it was given on the premises "whilst [the appellant was] on the premises", it was argued that these words are "appropriate" to injury "arising out of presence on the premises", not "arising from negligent misstatements". The only justification advanced for this distortion of what the clause says is that there would otherwise be "obvious absurdity"; the respondents would be protected by the exclusion

clause from injury suffered by the appellant while doing squats "on the premises" but not while performing similar exercise at home.

Such a consequence, assuming it to be correct, indicates that the exclusion clause could have been more widely drafted, but is in no sense absurd. The language of the clause simply does not admit of the restricted meaning which the appellant seeks to give it. The exclusion's operation is limited in point of time, measured by reference to the appellant's presence on the premises, but makes no attempt to limit exclusion to injuries "arising from" that presence.

The second aspect of this argument was that the parties, in their "contemporaneous discussions", had agreed on the meaning of the "ambiguous provision", and that the discussions could be used to "resolve [the] ambiguity" or "as negating the meaning which the Respondents seek to imply". Alternatively, in their discussions, "the parties effectively adopted their 'own dictionary' as to the meaning of the words in contention". Other considerations aside, there is no ambiguity, the respondents are not seeking to imply any meaning but to rely on the exclusion clause's ordinary meaning, and there is neither a pleading nor a sufficient evidentiary basis for a conclusion that the discussions preceded, or were simultaneous with the appellant's signature of the contract, or that the person with

whom he had the discussions, whom he could not identify, had actual or ostensible authority to agree to a special contract with him, that he thought she did, or that he himself adopted what she said as an exhaustive statement of the exclusion clause's operation.

None of the appellant's arguments in relation to the exclusion clause seem to me correct, and I agree with the trial judge's conclusion that that clause provides an answer to the appellant's claim for damages for negligence.

The appellant also sought to have the appeal upheld and to obtain judgment in his favour on an alternative basis which was not pleaded, after amending his plaint if necessary. However, he preferred to avoid that step, because of "a possible limitation problem". The new claim was based on s. 38 of the Fair Trading Act 1989, and part of the appellant's argument involved the proposition that the exclusion clause could not operate to defeat such a claim.

Other difficulties aside, the case now sought to be advanced for the first time by the appellant asserts, as the "relevant representation", i.e., that which was "misleading or deceptive, or likely to mislead or deceive", a statement which was "expressly pleaded" in para. 8 of the plaint, "namely that 'the said Kate ... informed the [appellant] that she ... could devise

a program containing exercises which would not harm the [appellant] in any way'." Arguably, as asserted by the appellant, "reliance on that 'advice' is expressly pleaded" in para. 10 of the plaint, although, on another view of para. 10, the "reliance" relates to advice concerning what was an appropriate exercise program which was later given to the appellant by Kate Hall. Next, it is submitted for the appellant that "paragraphs 11 and 14(b) and (c) plead the material facts to support a conclusion that the representation was misleading or deceptive, or likely to mislead or deceive". However, that is plainly incorrect; those paragraphs, and the associated findings, are related to deficiencies in the exercise program, not the "relevant representation" that Kate Hall "could devise" a satisfactory program. There is no finding that Kate Hall made the "relevant representation", or that Kate Hall could not "devise a program containing exercises which would not harm the [appellant] in any way", or was otherwise misleading or deceptive, or likely to mislead or deceive. Indeed, on one view, such a pleading might have been inconsistent with a premise which is perhaps implicit in the appellant's primary case, that such a program could have been devised and a failure to do so was negligent.

In any event, the alternative claim based on the <u>Fair Trading Act</u> was not pleaded or the subject of findings, and I do not consider that, at this late stage, an attempt ought be made to

investigate whether a still different case based on the Fair Trading Act could have been advanced on the basis of the negligent advice which was given with respect to the appellant's exercise program.

In my opinion, the appeal should be dismissed with costs.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND — Appeal No. 82 of 1994

Brisbane

[Neill v. Fallon & ors]

BETWEEN:

JAMES NEILL
(Plaintiff) — Appellant

AND:

LYNDA GAY FALLON, RUSSELL JOHN FALLON and ANDREW WATERS
(Defendants) — Respondents

FITZGERALD P.
DAVIES J.A.
PINCUS J.A.

Judgment delivered 20/02/1995

SEPARATE REASONS FOR JUDGMENT OF FITZGERALD P., DAVIES, AND PINCUS JJ.A., ALL CONCURRING AS TO THE ORDER MADE.

APPEAL DISMISSED WITH COSTS.

CATCHWORDS: **DAMAGES - PERSONAL INJURIES - whether injury and consequences resulted from the negligence of the respondents or their servants or agents**

EXEMPTION CLAUSE - whether negligent activities of the respondents' servants or agents was covered by the clause in question

Fair Trading Act s. 38 - negligent advice - whether misleading or deceptive

Counsel: A. Morris Q.C. with him R. King for the Appellant
P. Keane Q.C. with him R. Morton for the Respondents

Solicitors: Cranston McEachern & Co. for the Appellant
Wheldon & Associates for the Respondents

Date of Hearing: 21 September 1994

IN THE COURT OF APPEAL

SUPREME COURT QUEENSLAND

Appeal No. 82 of 1994

Brisbane

Before Fitzgerald P.
Davies J.A.
Pincus J.A.

[Neil v. Fallon]

BETWEEN:

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(Plaintiff) Appellant

AND:

LYNDA GAY FALLON,
RUSSELL JOHN FALLON
and ANDREW WATERS
(Defendants) Respondents

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered the 20th day of February 1995

The facts are set out in the President's judgment and I shall not repeat them. The appellant appeals from a judgment of the District Court, denying him damages for personal injuries suffered as a result of the alleged negligence of the respondent. The basis of that denial was the existence of an exclusion clause in the contract between the parties, which excluded the respondent's liability for negligence.

The grounds of appeal are as follows:

1. That the trial judge erred in failing to find that the exclusion clause -

(a) applied only to circumstances falling within the "four corners" of the contract, and therefore did not apply to these circumstances; or

(b) was limited in its application to personal injury or loss of property arising from the appellant's presence "on the premises" of the respondent, and was not applicable to personal injury or loss of property arising from negligent mis-statement;

2. That the trial judge ought to have found that the exclusion clause was intended by the parties to operate in accordance with the discussions which took place between them around the time at which the contract was being signed. This discussion should have resulted in the exclusion clause applying in respect of personal injury or loss of property arising from the physical presence of the appellant on the premises of the respondent, and not from the negligent mis-statement of the respondent or its servants and agents.

3. That s.38 of the Fair Trading Act ought to have applied.

Ground 1(a) relied on Sydney Corporation v. West (1965) 114 C.L.R. 481. The contract in that case was one for bailment of a car in a city carpark and the negligent act consisted of permitting a thief to steal the car from the carpark. It was said that the exclusion clause in that case, on its proper construction, did not apply because it contemplated only loss or damage occurring by reason of negligence in carrying out the

obligations created by the contract; and the act of permitting the thief to take the car was not the negligent performance of those obligations but an act "neither authorised nor permitted .. by the terms of the contract": at 488-9.

It may not always be easy to apply the ratio of that case. But here there is no difficulty. The acts and omissions found to be negligent were:

1. Failing to take any or any adequate notice of the information given by the appellant as to his back condition;
2. Failing to cause to be devised a program of exercise for the appellant which was commensurate with his physical status and appropriate to safeguard his physical status;
3. Advising the appellant that it was alright for him to engage in an exercise program including squats in circumstances where a reasonably prudent person would not have so advised and in circumstances where the respondents knew or ought reasonably to have known that there was a danger of injury to the appellant; and
4. Failing to adequately or at all supervise the continuation of the program of exercise designed by them and, in particular, to check the appellant's method of performing the exercise after he had sought assistance.

These were all negligent acts or omissions which occurred in the performance by the respondent of its obligations stated in or plainly contemplated by the contract. The ratio of <u>Sydney</u>

Corporation v. West therefore has no application to the facts of this case.

In order to explain my conclusion with respect to ground 1(b) it is necessary to set out the exclusion clause in full:

> "I acknowledge that during all such times whilst on the premises, both my property and my person shall be at my own risk and I will not hold Bodyshape Fitness Centre or instructors liable for any personal injury or loss of property whether caused by the negligence of BODYSHAPE FITNESS CENTRE, its servants or agents."

This argument construes the phrase "whilst on the premises" as importing the notion of causation: that the injury must arise from the appellant's presence on the premises. But in its ordinary meaning it is a limitation only as to location "whilst (I am) on the premises". This may mean a negligent act or statement made whilst the appellant was on the premises or an injury occurring whilst the appellant was on the premises. Although the latter is the more probable construction both occurred here and neither construction results in any absurdity. The argument should therefore be rejected.

As to ground 2, as the President has pointed out, the evidence does not establish that the discussions relied on occurred before or even contemporaneously with the making of the contract. In any event what the appellant was seeking to do here was not to construe the contract in the light of background facts but to contradict its plain terms by reference to something said by the parties. That is, of course, impermissible and for those reasons this ground must also fail.

Ground 3 also fails, in my view, for the reasons given by

the President.

I agree that the appeal should be dismissed with costs.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 82 of 1994.

Brisbane

Before Fitzgerald P.
Davies J.A.
Pincus J.A.

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REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 20/02/1995

I have read the reasons of the President and agree with his Honour's conclusions.

The main argument advanced was that the exclusion clause, properly construed, did not cover the circumstances found. The whole document needs to be studied in the process of considering the agreement, but the immediately relevant clause is as follows:

> "I acknowledge that during all such times whilst on the premises, both my property and my person shall be at my own risk and I will not hold Bodyshape Fitness Centre or instructors liable for any personal injury or loss of property whether caused by the negligence of BODYSHAPE

FITNESS CENTRE, its servants or agents".

Counsel for the appellant argued that the words "on the premises" imply that an injury arising out of negligent mis-statement is not covered. It should be noted that not all of the four grounds on which the primary judge found negligence are allegations of negligent mis-statement; one, or perhaps two, of them fall into that category. But leaving that difficulty aside, it is my view that to read "whilst on the premises" as importing a limitation other than with respect to time and place is not a tenable construction. One way in which the argument was put was that the clause covers, it was said, only injury which results from presence on the premises; but the answer to that is merely to point out that the words are "whilst on", not "as a result of my presence on".

Then it was contended that the exclusion of liability did not apply unless the respondents identified "the small number of adults for whom physical activity might be inappropriate", an expression which appears in the document. It was contended that the exclusion clause did not apply to remove liability for breach of the very obligation which the respondents undertook and reference was made to The Council of the City of Sydney v. West (1965) 114 C.L.R. 481.

That case does not decide that any breach of contract by a party seeking to take advantage of an exclusion clause makes the clause unavailable. In West's case the respondent's parked car was taken away by a person who had not produced the appropriate ticket. To apply the doctrine of West here, one would have to postulate that the purpose, or an important purpose, of the contract was the identification of

people for whom physical activity might be inappropriate. But that was merely the purpose of the form; the contract was one for the provision of services, namely gym sessions.

A different version of the submission just mentioned was that, according to counsel for the appellant, it was implicit in the contract that, having identified people for whom physical activity might be inappropriate, the respondents would do whatever was necessary in consequence of obtaining that information. But that obligation is simply an aspect of the general obligation the respondents undoubtedly had, to take reasonable care for the appellant's safety, when carrying out their part of the contract; in doing so they would necessarily have to take into account the information they had about him, in particular that the appellant had previously had trouble with his back. Acceptance of this submission would lead one towards the conclusion that the exclusion clause would not cover negligence connected with any of the matters disclosed by the form; but so various and (as to some) general are those matters that such a construction seems quite implausible.

The last contention which was pressed was that the Court should consider a case which was neither pleaded nor argued below, based on the *Fair Trading Act* 1989. On that aspect of the case I wish to add nothing to what has been written by the President; I agree with his Honour's views about it.

The appeal should be dismissed with costs.