Asif Tufal

CASES ON MISREPRESENTATION

1. FALSE STATEMENT OF FACT

Bisset v Wilkinson [1927] AC 177

The plaintiff purchased from the defendant two blocks of land for the purpose of sheep farming. During negotiations the defendant said that if the place was worked properly, it would carry 2,000 sheep. The plaintiff bought the place believing that it would carry 2,000 sheep. Both parties were aware that the defendant had not carried on sheep-farming on the land. In an action for misrepresentation, the trial judge said:

"In ordinary circumstances, any statement made by an owner who has been occupying his own farm as to its carrying capacity would be regarded as a statement of fact. … This, however, is not such a case. … In these circumstances … the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject."

The Privy Council concurred in this view of the matter, and therefore held that, in the absence of fraud, the purchaser had no right to rescind the contract.

Smith v Land & House Property Corp (1884) 28 Ch D 7

The plaintiff put up his hotel for sale stating that it was let to a 'most desirable tenant'. The defendants agreed to buy the hotel The tenant was bankrupt. As a result, the defendants refused to complete the contract and were sued by the plaintiff for specific performance. The Court of Appeal held that the plaintiff's statement was not mere opinion, but was one of fact.

Edgington v Fitzmaurice (1885) 29 Ch D 459

The plaintiff shareholder received a circular issued by the directors requesting loans to the amount of £25,000 with interest. The circular stated that the company had bought a lease of a valuable property. Money was needed for alterations of and additions to the property and to transport fish from the coast for sale in London. The circular was challenged as being misleading in certain respects. It was alleged, inter alia, that it was framed in such a way as to lead to the belief that the debentures would be a charge on the property of the company, and that the whole object of the issue was to pay off pressing liabilities of the company, not to complete the alterations, etc. The plaintiff who had taken debentures, claimed repayment of his money on the ground that it had been obtained from him by fraudulent mis-statements.

The Court of Appeal held that the statement of intention was a statement of fact and amounted to a misrepresentation and that the plaintiff was entitled to rescind the contract. Although the statement was a promise of intent the court held that the defendants had no intention of keeping to such intent at the time they made the statement.

Esso Petroleum v Mardon [1976] QB 801

Esso's experienced representative told Mardon that Esso estimated that the throughput of petrol on a certain site would reach 200,000 gallons in the third year of operation and so persuaded Mardon to enter into a tenancy agreement in April 1963 for three years. Mardon did all that could be expected of him as tenant but the site was not good enough to achieve a throughput of more than 60,000-70,000 gallons. Mardon lost money and was unable to pay for petrol supplied. Esso claimed possession of the site and money due. Mardon claimed damages in respect of the representation

alleging that it amounted to (i) a warranty; and (ii) a negligent misrepresentation.

The Court of Appeal affirmed the finding of negligence under the principle of *Hedley Byrne v Heller* (1964). On the issue of warranty, Lord Denning MR stated:

"… it was a forecast made by a party, Esso, who had special knowledge and skill. It was the yardstick (the "e a c") by which they measured the worth of a filling station. They knew the facts. They knew the traffic in the town. They knew the throughput of comparable stations. They had much experience and expertise at their disposal. They were in a much better position than Mr Mardon to make a forecast. It seems to me that if such a person makes a forecast – intending that the other should act on it and he does act on it – it can well be interpreted as a warranty that the forecast is sound and reliable in this sense that they made it with reasonable care and skill. … If the forecast turned out to be an unsound forecast, such as no person of skill or experience should have made, there is a breach of warranty."

Solle v Butcher [1950] 1 KB 671

In 1931 a dwelling house had been converted into five flats. In 1938 Flat No. 1 was let for three years at an annual rent of £140. In 1947 the defendant took a long lease of the building, intending to repair bomb damage and do substantial alterations. The plaintiff and defendant discussed the rents to be charged after the work had been completed. The plaintiff told the defendant that he could charge £250 for Flat 1. The plaintiff paid rent at £250 per year for some time and then took proceedings for a declaration that the standard rent was £140. The defendant contended that the flat had become a new and separate dwelling by reason of change of identity, and therefore not subject to the Rent Restriction Acts. This was held to be a statement of fact. (*Note*: this is a case on Mistake.)

Smith v Hughes (1871) LR 6 QB 597

The plaintiff farmer asked the manager of the defendant, who was a trainer of racehorses, if he would like to buy some oats, and showed him a sample. The manager wrote to say that he would take the whole quantity. The plaintiff delivered a portion of them. The defendant complained that the oats were new oats, whereas he thought he was buying old oats, new oats being useless to him. The plaintiff, who knew that the oats were new, refused to take them back and sued for the price. There was a conflict of evidence as to what took place between the plaintiff and the manager. The court ordered a new trial. Blackburn J stated:

"… on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought, though it does not possess that quality. And I agree that, even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him. A mere abstinence from disabusing the purchaser of that impression is not fraud or deceit, for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake which has not been induced by the act of the vendor."

Nottingham Brick & Tile Co v Butler (1889) 16 QBD 778

The buyer of land asked the seller's solicitor if there were any restrictive covenants on the land and the solicitor said he did not know of any. He did not say that he had not bothered to read the documents. The court held that even though the statement was literally true it was a misrepresentation. There were restrictive covenants and the contract could be rescinded.

With v O'Flanagan [1936] Ch 575

During the course of negotiations for the sale of a medical practice, the vendor made representations to the purchaser that it was worth £2000 a year. By the time when the contract was signed, they were untrue. The value of the practice had declined in the meantime (to £250) because of the vendor's inability to attend to it through illness. Lord Wright MR quoted:

"So again, if a statement has been made which is true at the time, but which during the course of negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances."

Therefore, the failure of the vendor to disclose the state of affairs to the purchaser amounted to a misrepresentation.

Lambert v Co-Operative Insurance [1975] 2 Lloyd's Rep 485

In 1963 Mrs Lambert signed a proposal form for an insurance policy to cover her own and her husband's jewellery. No questions were asked about previous convictions and Mrs L gave no information about them. She knew that her husband had been convicted some years earlier of stealing cigarettes and fined £25. The company issued a policy providing that it should be void if there was an omission to state any fact material to the risk. The policy was renewed from year to year. In 1971 the husband was convicted of conspiracy to steal and theft and sentenced to 15 months imprisonment. Mrs L knew of the conviction but did not disclose it and the policy was renewed. In 1972, seven items of the insured jewellery, valued at £311, were lost or stolen.

Mrs L's claim was repudiated on the grounds that she had failed to disclose her husband's first and second convictions. The judge dismissed the wife's claim on the ground that the 1971 conviction was a material fact and that a prudent insurer, knowing of it, would not have continued the risk. This decision was upheld by the Court of Appeal.

2. THE MISREPRESENTATION MUST HAVE INDUCED THE CONTRACT

Museprime Properties v Adhill Properties [1990] 36 EG 114

In a sale by auction of three properties the particulars wrongly represented the rents from the properties as being open to negotiation. The statements in the auction particulars and made later by the auctioneer misrepresented the position with regard to rent reviews. In fact, on two of the three properties rent reviews had been triggered and new rents agreed. The plaintiff company successfully bid for the three properties and discovered the true situation. They commenced an action for rescission. The defendant company countered with the defence that the misrepresentations were not such as to induce any reasonable person to enter into the contract.

It was held that the plaintiff's had established, and indeed that the defendants conceded, that misrepresentation had occurred and any misrepresentation is a ground for rescission. The judge referred, with approval, to the view of Goff and Jones: *Law of Restitution* (see Lecture p2-3), that the question whether representations would have induced a reasonable person to enter into a contract was relevant only to the onus of proof. Here the plaintiffs had established their claim to rescission of the contract on the ground of material misrepresentation because the inaccurate statements had induced them to buy the properties. They would therefore be awarded the return of their deposit, damages in respect of lost conveyancing expenses and interest.

Horsfall v Thomas [1862] 1 H&C 90

The buyer of a gun did not examine it prior to purchase. It was held that the concealment of a defect in the gun did not affect his decision to purchase as,

since he was unaware of the misrepresentation, he could not have been induced into the contract by it. His action thus failed.

Attwood v Small (1838) 6 Cl&F 232

The purchasers of a mine were told exaggerated statements as to its earning capacity by the vendors. The purchasers had these statements checked by their own expert agents, who in error reported them as correct. Six months after the sale was complete the plaintiffs found the defendant's statement had been inaccurate and they sought to rescind on the ground of misrepresentation. It was held in the House of Lords that there was no misrepresentation, and that the purchaser did not rely on the representations.

Redgrave v Hurd (1881) 20 Ch D 1

The plaintiff solicitor advertised for a partner who would also purchase his residence. The Defendant replied and during two interviews, the plaintiff represented that his business was bringing in either about £300 a year, or from £300-£400 a year. At a third interview the plaintiff produced summaries of business done, which showed gross receipts below £200 a year. The defendant asked how the difference was made up and the plaintiff produced a quantity of letters and papers which, he stated, related to other business which he had done. The defendant did not examine the books and papers thus produced, but only looked cursorily at them, and ultimately agreed to purchase the house and take a share in the business for £1,600. The trial judge came to the conclusion that the letters and papers, if examined, would have shown business of only £5 or £6 a year. Finding that the practice was utterly worthless, the defendant refused to complete the contract, and the plaintiff brought an action for specific performance. The Court of Appeal gave judgment for the defendant. Lord Jessel MR stated:

"If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had a means afforded to you of discovering its falsity, and did not choose to avail yourself of them." I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations. That, of course, is quite a different thing."

Edgington v Fitzmaurice (1885) 29 Ch D 459

For full facts, see above. The plaintiff was induced to lend money to a company by (a) the statement of intent, and (b) his mistaken belief that he would have a charge on the assets of the company. He was able to claim damages for deceit even though he admitted that he would not have lent the money, had he not held this mistaken belief.

3. TYPES OF MISREPRESENTATION

Derry v Peek (1889) 14 App Cas 337

A special Act incorporating a tramway company provided that the carriages might be moved by animal power and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by this special Act the company had the right to use steam instead of horses. The plaintiff bought shares on the strength of this statement. The Board of Trade refused to consent to the use of steam and the company was wound up. The plaintiff brought an action for deceit.

It was held by the House of Lords that in an action for deceit, it is not enough to establish misrepresentation alone; something more must be proved to cast liability on the defendant. There is an essential difference between the case

where the defendant honestly believes in the truth of a statement although he is careless, and where he is careless with no such honest belief. Fraud is established where it is proved that a false statement is made: (a) knowingly; or (b) without belief in its truth; or (c) recklessly, careless as to whether it be true or false. If fraud is proved, the motive of the person making the statement is irrelevant. It matters not that there was no intention to cheat or injure the person to whom the statement was made. The defendants were not fraudulent in this case. They made a careless statement but they honestly believed in its truth.

Hedley Byrne v Heller [1964] AC 465

Hedley Byrne were a firm of advertising agents. They intended to advertise on behalf of Easypower Ltd. They wanted to know if Easypower were creditworthy, and asked their bank, the national Provincial, to find out. The National Provincial got in touch with Easypower's bankers, Heller & Partners. Heller told the National Provincial, "in confidence and without responsibility on our part," that Easypower were good for £100,000 per annum on advertising contracts. Hedley Byrne relied on this statement in placing orders on behalf of Easypower and, as a result, lost more than £17,000 when Easypower went into liquidation. They sought to recover this loss as damages.

In the House of Lords, Lord Pearce stated that a man may come under a special duty to exercise care in giving information or advice. Whether such a duty has been assumed must depend on the relationship of the parties. Was there such a special relationship in the present case as to impose on Heller a duty of care to Hedley Byrne as the undisclosed principals for whom National Provincial was making the inquiry? The answer to that question depends on the circumstances of the transaction. A most important circumstance is the form of the inquiry and of the answer. Both were plainly stated to be without liability. The words clearly prevented a special relationship from arising.

Williams v Natural Life Health Foods Ltd (1998) The Times, May 1.

See Law Report.

Howard Marine v Ogden [1978] QB 574

The defendants wished to hire two barges from the plaintiffs. The plaintiffs quoted a price for the hire in a letter. At a meeting, the defendants asked about the carrying capacity of the barges. The plaintiffs' representative replied it was about 1,600 tonnes. The answer was given honestly but was wrong. It was based on the representative's recollection of the deadweight figure given in Lloyd's Register of 1,800 tonnes. The correct figure, 1,195 tonnes, appeared in shipping documents which the representative had seen, but had forgotten. Because of their limited carrying capacity, the defendant's work was held up. They refused to pay the hire charges. The plaintiffs sued for the hire charges and the defendants counter-claimed damages.

By a majority, the Court of Appeal found the plaintiffs liable under s2(1) as the evidence adduced by the plaintiffs was not sufficient to show that their representative had an objectively reasonable ground for disregarding the carrying capacity figure given in the shipping document and preferring the figure in Lloyd's Register.

4. REMEDIES FOR MISREPRESENTATION

(A) RESCISSION

Car & Universal Finance v Caldwell [1965] 1 QB 525

Caldwell sold his car to Norris. The cheque was dishonoured when it was presented the next day. He immediately informed the police and the

Automoblie Association of the fraudulent transaction. Subsequently Norris sold the car to X who sold it to Y who sold it to Z who sold it to the plaintiffs. In interpleader proceedings one of the issues to be tried was whether the defendant's conduct and representations amounted to a rescission of the contract of sale.It was held that the contract was voidable because of the fraudulent misrepresentation and the owner had done everything he could in the circumstances to avoid the contract. As it had been avoided before the sale to the third party, no title was passed to them and the owner could reclaim the car.

Long v Lloyd [1958] 1 WLR 753

The defendant advertised for sale a lorry as being in 'exceptional condition' and he told the plaintiff purchaser that it did 11 miles to the gallon and, after a trial run, all that was wrong with the vehicle. The plaintiff purchase the lorry and, two days later, on a short run, further faults developed and the plaintiff noticed that it did only about 5 miles to the gallon. That evening he reported these things to the defendant and the plaintiff accepted the defendant's offer to pay for some of the repairs. The next day the lorry set out on a longer journey and broke down. The plaintiff wrote to the defendant asking for the return of his money. The lorry had not been in a roadworthy condition, but the defendant's representations concerning it had been honestly made. The Court of Appeal held that the plaintiff was not entitled to rescission of the contract as he had finally accepted the lorry before he had purported to rescind. The second journey amounted to affirmation of the contract.

Leaf v International Galleries [1950] 2 KB 86

The plaintiff bought a painting after an innocent misrepresentation was made to him that it was by 'J. Constable'. He did not discover this until five years later and claimed rescission immediately. The Court of Appeal held that the plaintiff had lost his right to rescind after such a period of time. His only remedy after that length of time was for damages only, a claim which he had not brought before the court.

Vigers v Pike (1842) 8 CI&F 562

A lease of a mine which had been entered into as a result of a misrepresentation could not be rescinded as there had been considerable extraction of minerals since the date of the contract.

Armstrong v Jackson [1917] 2 KB 822

A broker purported to buy shares for a client, but in fact sold his own shares to the client. Five years later, when the shares had fallen in value from nearly £3 to 5s, it was held that the client could rescind on account of the broker's breach of duty. He still had the identical shares and was able to return them, together with the dividends he had received. McCardie J. said:

"It is only … where the plaintiff has sustained loss by the inferiority of the subject-matter or a substantial fall in its value that he will desire to exert his power of rescission … If mere deterioration of the subject-matter negatived the right to rescind, the doctrine of rescission would become a vain thing."

(B) INDEMNITY

Whittington v Seale-Hayne (1900) 82 LT 49

The plaintiffs bred poultry and were induced to enter into a lease of property belonging to the defendants by an oral representation that the premises were in a sanitary condition. In fact the water supply was poisoned and the manager fell ill and the stock died. The terms of the lease required the

plaintiffs to pay rent to the defendants and rates to the local authority and they were also obliged to make certain repairs ordered by the local council.

Farwell J rescinded the lease, and, following the judgment of Bowen LJ in *Newbigging v Adam* (1886) 34 Ch D 582, held that the plaintiffs could recover the rents, rates and repairs under the covenants in the lease but nothing more. They could not recover removal expenses and consequential loss (ie, loss of profits, value of lost stock and medical expenses) as these did not arise from obligations imposed by the lease (the contract did not require the farm to be used as a poultry farm). Had they been awarded, they would have amounted to an award of damages (ie, expenses resulting from the running of the poultry farm).

(C) DAMAGES

Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158

After buying an ironmonger's business, things turned out to be very different from what the vendors had led the plaintiff to believe. He was awarded damages for fraudulent misrepresentations and the appeal concerned, among other things, the measure of damages. Lord Denning MR said that: "The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement … It does not lie in the mouth of the fraudulent person to say that they could not have been reasonably foreseen."

Smith v New Court Securities [1996] 4 All ER 769

See Law Report.

East v Maurer [1991] 2 All ER 733

The defendant who owned two hair salons agreed to sell one to the plaintiffs. They were induced to buy, in part by a representation from the defendant that he hoped in future to work abroad and that he did not intend to work in the second salon. In fact, the defendant continued to work at the second salon and many of his clients followed him. The result of this was that the plaintiffs saw a steady fall-off in business and never made a profit. They were finally forced to sell for considerably less than they paid. The court at first instance found that the defendant's representations were false. The defendant appealed on the assessment of the award of damages.

The Court of Appeal held that the proper approach was to assess the profit the plaintiff might have made had the defendant not made the representation(s). 'Reparation for all actual damage' as indicated by Lord Denning in *Doyle v Olby* would include loss of profits. The assessment of profits was however, to be on a tortious basis, that is, placing the plaintiff in the same position he would have been in, had the wrong not been committed.

The plaintiff could recover damages in respect of *another* such business in which he would have invested his money if the representation had been made, but not the profits which he would have made out of the defendant's business, if the representation relating to it had been true. (Note: the damages were reduced by one-third, from £15,000 to £10,000).

Archer v Brown [1984] 2 All ER 267

See Law Report.

Downs v Chappell [1996] 3 All ER 344

See Law Report.

Royscott Trust Ltd v Rogerson [1991] 3 WLR 57

A car dealer induced a finance company to enter into a hire-purchase agreement by mistakenly misrepresenting the amount of the deposit paid by the customer, who later defaulted and sold the car to a third party. The finance company sued the car dealer for innocent misrepresentation and claimed damages under s2(1).

The Court of Appeal held that the dealer was liable to the finance company under s2(1) for the balance due under the agreement plus interest on the ground that the plain words of the subsection required the court to apply the deceit rule. Under this rule the dealer was liable for all the losses suffered by the finance company even if those losses were unforeseeable, provided that they were not otherwise too remote. It was in any event a foreseeable event that a customer buying a car on HP might dishonestly sell the car.

Thomas Witter v TBP Industries [1996] 2 All ER 573.

See Law Report.