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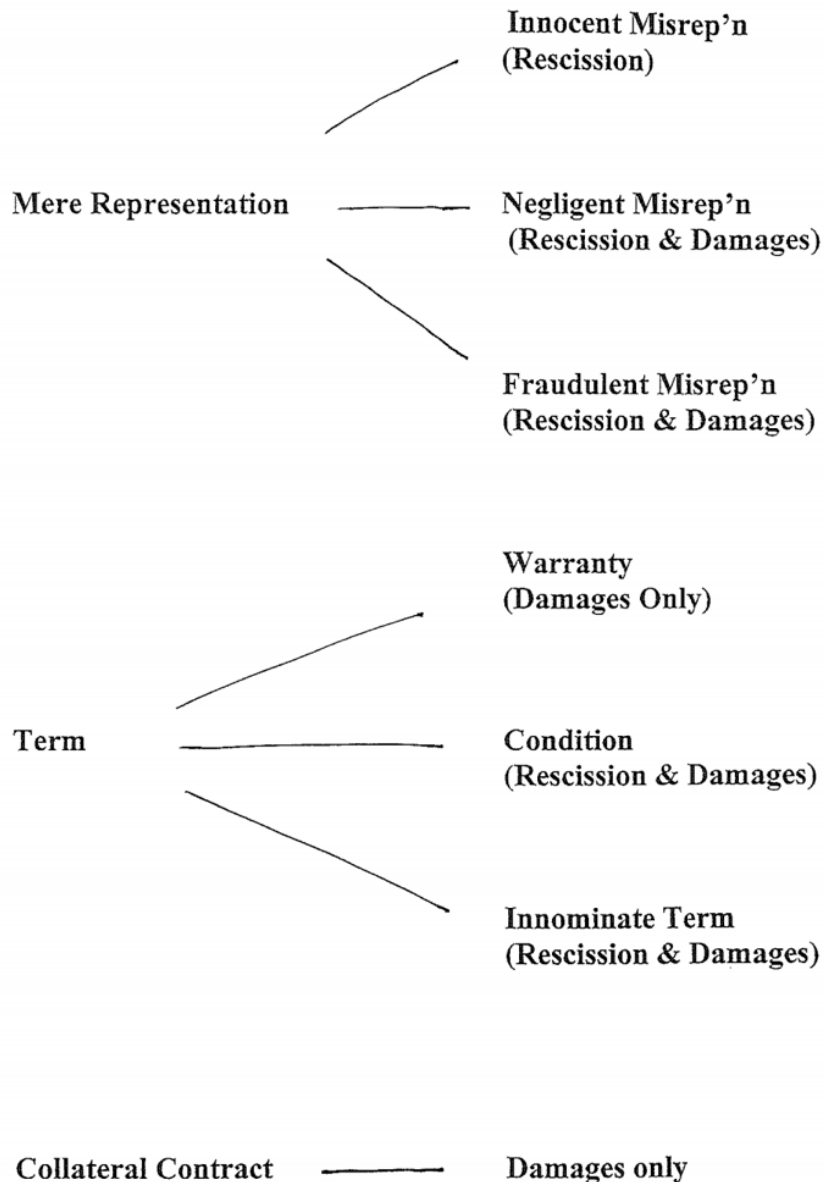
## Overriding objective principle per *Smith v Hughes*

### Common law

- (a) If statement as part of the contract – which depended on whether the parties intended it to be so – *BoK*, can terminate in serious cases
  - a. See also: collateral K. You would want this when a *promise*, not a misrep

### Term

- Warranty (damages only)
    - Warranty = is breach of this breach not sufficiently central that no cancellation. Naming it as such is a good indicator
  - Condition (rescission and damages)
    - Sufficiently serious that breach means right to cancel K.
  - Innominate term (rescission and damages)
    - Name comes from Lord Diplock in *Hong Kong Fur*: means term/clause if between a warranty and a condition. Breach may entitle to cancel, depends on circumstances. How much time/effort/money to rectify the breach?
    - E.g. this boat is seaworthy, if just a piston, then warranty, conversly if requires fully overhaul then condition.
  - Collateral contract
    - Damages only, can't cancel the main K.
- (b) If it was a mere representation, remedies more restricted
    - a. If the rep had been made *negligently*: *Hedley Byrne* tort
    - b. If the rep had been made *fraudulently* (knowingly or recklessly): tort of deceit. Allowed to rescind or set aside the K
    - c. If the rep was *innocent*: can't consent to K, can't consent to falsehood. Damages were not available, but rescission was.



n.b. rescission is subject to laches. Rescission doesn't include running losses. Restores status quo ante [just have to return purchase price, and liabilities incurred by V (e.g. council rates)]

Common law was complicated and unsatisfactory in several ways:

- Strange amalgam of law and equity, and of contract and tort
- Distinction between "term" and "mere representation" often artificial
- Intervention of equity, although filled a gap left by common law, led to anomaly that sometimes rescission would lie for a very minor misrep.
  - o Odd as people arguing that not a term of the K (warranty) so they could get rescission. Paradoxical in the sense that K terms are meant to be of higher order than mere representation.

Barriers to getting statements as terms of the contract

- Historically, barriers to enforcing these promises, especially when orally and not included
- *S 24 Property Act*
  - o Sale of land must be in writing, can't have oral terms. (circumvented by collat K)

- *Parol evidence rule*
  - Common law rule to all written Ks that has often barred the enforcement of oral promises
  - Anything extrinsic to the document
  - Evidence is inadmissible to add to, vary or contradict the terms of a written K
  - Has given rise to unjust results, allows written documents to be instruments of fraud
- *Courts sought way around Parol evidence rule*
  - Resorting to equitable doctrine
    - Equitable remedy of rectification: allowed K to be rectified/changed. When you meant to do it in writing but didn't do so. Gives effect to common expectations.
    - But rectification not available if parties didn't think about the need to put it in. This often happened.
  - Common law (1): Collateral K
    - A K, the consideration for which is the making of some other K
    - Legal fiction, treated as two contracts
    - A collateral was not supposed to contradict the terms of the main K. But this rule has been relaxed in NZ and other jurisdictions. Can vary
  - Common law (2): K was partly written and partly oral
    - No reason in principle why parties weren't allowed to do this
- *Ultimate parol evidence rule*: Rule doesn't apply to every bit of writing that evidences a K, rather it only applies to a written K that contains the entire agreement between the parties.
  - The rule is a shadow of its former self. Practically it is just a rebuttable presumption
- Counter-swing against the weakened rule
  - Commercial community didn't like it, decreased certainty
  - Attempt to get around it: "entire agreement clause"
    - "this document contains all of the terms in the contract between the parties"
    - Effect of this clause at common law has been contentious
    - We have a statutory provision that such clauses are only conclusive when fair and reasonable. CRA s 4; CCLA s 50.

## CRA 1979 / CCLA 2017

### Reform

CRA 1979; the content of which now found in pt 2 of the CCLA 2017.

The law on remedies for pre-contract statement is thus now substantially governed by statute in New Zealand.

- Purpose: rationalise and simplify the law of contract, principally by giving the same remedies for misrep, inducing the making of a K, and BoK.
- *Doesn't draw distinction*
- Damages for misrep are recoverable on the same basis as BoK: s 6: key provision of the act
- Ss 7-8: govern a set of rules when you can cancel on grounds of misrep or breach. They set the same requirements for both.
- S 9: courts given broad power to grant relief according to the justice of the case for misrep or breach. Threw away 200 years of case law

- S 4: control clauses in Ks that say "parties acknowledge no representations were made/relied on". "whole agreement" clauses, not necessarily conclusive. Parliament decided to not let people hide behind these clauses.

### Critique of the reform

Enactment of s 6, well intentioned, was misguided: two main reasons

- decision to allow damages to assessed same basis for BoK and Misrep bad bc:
  - (1) s 6 - essential complain of victims of misrep, is that they have been wrongfully induced into Ks they otherwise wouldn't have entered into (tort justification)
    - Award of damages should aim to provide reparation for resulting harm, so if not a term of the K, the complaint is 'your misrep induced me to action I otherwise wouldn't taken, that action is my loss, you should pay for my reliance'. The complain is not that you broke your promise
    - Yet it is that latter aim which is implemented by s 6
    - Although this will lead to greater recover (unfairly) in some occasions will result in the denial of any compensation
  - (2) allow all misreps give rise to K damages imposes unfair burden on defendant
    - Insolvent real estate agent example. So could say award of 100k is unfair burden on def, they might have no idea that the misrep was even made. Would have got nothing in tort.

Now much less damages available than if duty of care or deceit were established

P is induced to buy a block of land from D by D's misrepresentation that half of the land is covered with millable timber. P buys the land for \$100,000. It transpires that there is only a one-quarter coverage of millable timber. As a result, the land is worth \$60,000. However there is evidence that, if the representation had been true, it would still only have been worth \$80,000. Prima facie P might previously have recovered damages of \$40,000 under the tort measure, but she now recovers only \$20,000 under the contract measure embodied in s 6.

Such damages will result in unfair burden imposed on defendant

P is induced to buy a block of land from D by the negligent misrepresentation of D's (now insolvent) real estate agent that half of the land is covered with millable timber. P buys the land for \$100,000. It transpires that there is only a one-quarter coverage of millable timber. The land is still worth \$100,000, but, if the representation had been true, it would have been worth \$200,000. In the absence of a proven lost opportunity to pay less for the land, P would previously have recovered no damages under the tort measure, but she now recovers the substantial sum of \$100,000 under the contract measure embodied in s 6.

- Counter: P could possibly get the same amount at common law if collateral K, *but not in this case.*
  - Because it was D's agent who made the misrep: they are insolvent.
  - Agents don't have apparent authority to bind principals contractually.
- So could say award of 100k is unfair burden on def, they might have no idea that the misrep was even made

See *Altmarloch*: Dmac's concerns

- Can lead to unfair burdens on defs
  - Negligent agents who were joined as third parties to the action, were ordered to indemnify the vendors (they in effect paid loss of bargain damages for negligent misrep). If they alone had been sued their liability would have been the modest sum of PP-AV (tort) - arbitrary if vendors were insolvent or not
- What if insolvent agent:
  - then vendors who were completely innocent, would have to pay more than a mil from their own pocket, nearly half of their asset they had sold. Giving purchasers benefit of bargain they never made

- Elias CJ: award of 1mil unjust in circumstances. She referred to the disparity between the 1mil damages and both the price paid vs AV & AV vs RV. Why big discrepancy? Bc finding of AV, RV made in the HC, years before reached SC. Cost of building dams in Marlborough had risen heaps. Really need to revisit the RV value figure, that would surely take into account the increased costs of compliance (cost of cure) with the misrep.
- No a case where courts have denied cost of cure, substantial difference in value means not like *Ruckley Electronic*. Not wholly unreasonable to award cost of cure.
- But... The real fault lay in the statute
  - Too much of a burden on innocent vendors.
  - Judges would be better off, for a call for a reconsideration by Parliament of s 6.
  - Better off: in the statute to get K measure of damages you have to establish a term of the K. Parliament in effect abolished distinction between term of K and a representation

## The provision

*Damages for misrepresentation*

**35 Damages for misrepresentation**

(1) If a party to a contract (A) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (B),—

(a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and

(b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

(2) Subsection (1) applies to contracts for the sale of goods—

(a) despite sections 197 and 201(2); but

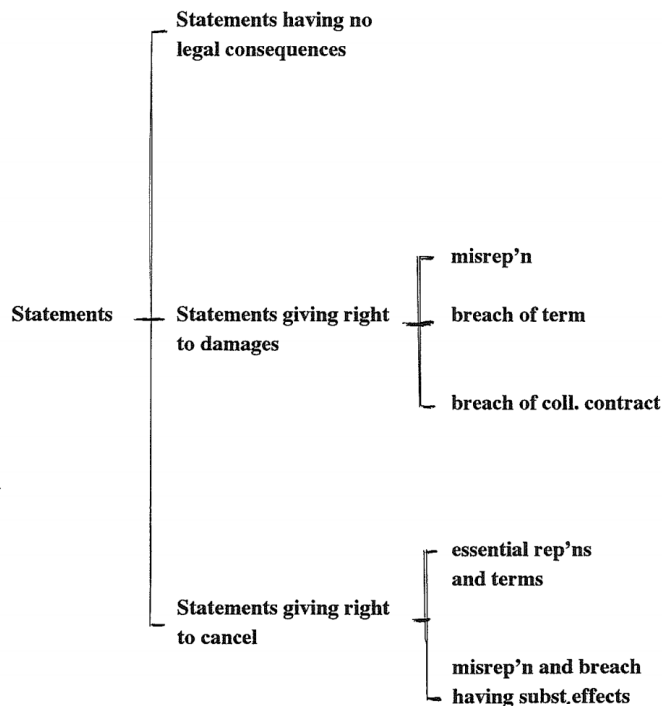
(b) subject to section 34.

**Simple rule: any misrep inducing entry into a K is redressable in damages as if it were a term of the contract.**

This action for damages is exclusively a contract action, the old common law action in tort for fraudulent and negligent misrep being abolished by s 35(1)(b)

Rescission is no longer available. **Cancellation** replaces it for essential matters, or has substantial consequences for the innocent party (s 37).

- Cancel - essential reps and term. Essential misrep??? If it is essential and would not be a K if not true then isn't it a term?
- Cancellation just halts K, not automatically entitled to back to previous position: up to discretion of court



Collateral K cause of action would have to be at common law.

### “A misrepresentation”

Since “misrepresentation” was not defined in the Act, it has been assumed that it bears the meaning it had under the old law.

Not every false pre-contractual statement between parties amounted to an actionable misrepresentation.

**Misrep: a rep of past of present fact that is false or misleading.**

Excludes statements of:

- intention
- opinion

The intention of the representor is irrelevant; what matters is the meaning that it conveys.

#### (a) The nature of the representation

Statement made explicitly by words, whether written or oral.

- Can be implied: see opinion.
- Can be inferred from a party’s conduct.

Must assume an active form.

- Silence?
- Is there ever a duty to disclose facts that are within their knowledge?
- General rule: no.
- Some exceptions, but which involve some positive words or conduct from the party.

(b) Statements of intention

**Intention: a promise to undertake or refrain from doing something in the future.**

Impliedly: asserts that the intention genuinely exists.

- If it does not, then there is a clear misrep of an existing fact.
- The state of mind is not what it is represented to be

Impliedly: asserts that they have reasonable grounds for making the statement.

- I.e. the intention also conveys that the present situation is such that it might reasonably support the intention being fulfilled.

(c) Statements of opinion

**Opinion generally: when, to the knowledge of the representee, the representor cannot be certain of its truth.**

- Inherently contestable, e.g. statement of taste/preference
- Circumstances as understood by representee, the representor is not in position to actually know the truth of the statement they are making

*Bisset v Wilkinson*

- "in my judgment the carrying capacity of the land was 200 sheep"
- Held to be honest statement of opinion
- On basis that land had not previously been used as a sheep farm.
- Lord Merrivale factors: "the material facts of the transaction, the knowledge of the parties, their relative positions, the words used, the actual condition of the subject-matter (last factor goes to the truth)."

Impliedly: opinion is honestly held

Impliedly: reasonable grounds for the opinion

Statements of personal preference/personal taste prima facie opinion... but reas grounds?

*Smith v Land and House Property Corp*

- "a most desirable tenant"
- No reasonable grounds for this
- Bowen LJ's dicta

Where the facts are better known to one party (knowledge or means of knowledge), then, it is more likely that a statement made by that party will be found to be a statement of fact rather than a statement of opinion (*Smith; Bisset; Brown*).

- e.g. Subject matter of statement cannot by itself determine whether fact or opinion
  - Even very positive statements
  - Mutually known respective position of parties – reasonably regarded as expressing opinion
  - *Oscar Chess Ltd v Williams*: private seller to motor dealer about car. Said 1948 model when in fact 10 years older. Held statement of opinion. Seller just looked at log book which was falsified. The buyer in question was arguably in better position to tell than seller
  - 1951: silver mine, issued a prospectus seeking to raise capital from the public, stated the mine contained several very valuable claims, and some of them were in full operation, and creating daily returns. Transpired the mine was worthless.



The sellers didn't do much at all, just going off what original vendor said to them, they weren't fraudulent, but still asserted like they knew so guilty of misrep.

Statements of future fact: representor is making a statement the truth of which is clearly unable to be authoritatively asserted.

- Implied: reasonable ground (see *Esso Petroleum*)
  - E.g. budget forecast implies that the present state of the company is such that the forecast followed logically.
  - K for charter of a ship. Charter contained a term, for benefit of charter, that the ship was "expected ready to load" by a certain date. This was not an undertaking that a ship would be ready to load, only that this was the shipowner's expectation. Nonetheless, the statement implied there were reasonable grounds for the expectation. Because not such reasonable grounds, the shipowner was in breach. Further, it was held to be an essential term, so charter was entitled to cancel the K. Same principle applies to pre-K representations.

Exaggeration which is 'puffery' is simply what salespeople do.

(d) Silence: half-truths and correcting misconceptions

General rule: silence cannot amount to misrep

Not obliged to correct misrep as long as they don't contribute to that view.

But if representor ventures to make a rep, it must be a full and frank statement.

- A half-truth may in fact create a misleading impression because of what it leaves unsaid
- E.g. if you say property is let, must say further fact tenants have given notice to quit
- e.g. *Com Com v Hiba and Barfoot*: "splendid harbour views", but knew of planning permission issued for new apartment block. Under duty to say extent of views.
- e.g. *Gengo Investments Ltd*: sale of restaurant, "seating capacity of 120". Was literally true, but only could seat 84 people lawfully due to fire-escape laws.

Silent conduct can be construed as positively affirming a misconception formed in the mind of the other party

Contracts of utmost good faith. Certain Ks where parties have to say everything relevant: law imposes duty to speak. E.g. insurance K – duty to disclose all material facts.

"Made by or on behalf of another party"

Vendor is liable for agent's misreps.

"induced"

But for test

e.g. "it would still have collapsed even if Ms X had invested"

## FTA 1986

### Reform and critique

- imported Australian consumer law
- BUT basically undermined the purpose of the Contractual Remedies Act
- No attempt made to harmonise this new scheme of remedies with the general reform of K law only 7 years previously by the CRA
  - o Undermines attempt to simplify the law

### The provision

#### **9 Misleading and deceptive conduct generally**

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

#### (a) “may”

Unlike under the Australia Trade Practices Act (which we broadly copied), there is no statutory right to recover damages for misleading conduct.

- o That was deleted from our Bill by Departmental officials responsible for our bill
- o Officials misread a reference to the equivalent of our s 43 and the provision giving statutory right to damages, in a textbook talking about overlaps
- o They thought it was superfluous so cut it out, wrongly
- o If you are suing, then have to go under s 43
- o Important change as courts say they have broad discretion under s 43, not just if a monetary award but to its quantum: *Goldsbro v Walker*. Bc don't have explicit right (absolute) entitlement to full recovery of loss suffered.
- o Normally u will get it, have to be something special to displace full comp

#### (b) In trade

- Conduct must be in a business context
- Not a private individual
- Senior manager or director in a one man company in trade?
- Selling owner-occupied property vs portfolio of property.
  - o For our purposes it will be clear.
- Note: Body corps s 45(2) & (4)

#### (c) Misleading or deceptive conduct

#### (d) Suffered or likely to suffer loss as a result of the breach

#### (e) Mental element

Intention not relevant. Akin to 'strict liability' tort.

#### (f) Remedies

If s 9 is breached, remedies may be available through s 43.

Discretionary, wide range of remedies available.

(g) Accessory liability for people not in trade

S 43(1)(d) being in any way *directly or indirectly knowingly concerned in, or party to, a* contravention of a relevant provision

- Owner of a home *knowingly* gives false information knowing it will be passed onto a purchaser of property
- *Means a person under this provision doesn't have to be 'in trade' can be sued here*
- *Also alt cause of action under s 6 CRA (doesn't get double damages ofc)*

(h) What measure of damages?

The earlier cases on the equivalent Australian section tended to apply a tort and not a contract measure.

*Cox & Coxan*: damages by analogy to tort.

Majority: Expectation damages are not appropriate under the FTA

- The Act gives a remedy for loss resulting from a misrep, not a remedy based on what the position would have been
- Does not require representor to make a misrep good.

Minority: Expectation damages still available

- When expectation prima facie available: when not 'readily substitutable'
- the open-ended description of the remedy in the Act should not be fettered by importing concepts derived from the compartmentalised categories of the common law.

Has been subsequently endorsed.

## CCLA vs FTA

Misrepresentation	Misleading and deceptive conduct
Applies to pre-contractual statements	Applies to conduct in trade
Claimant must establish misrep	Claimant must establish conduct that is/is likely misleading or deceptive
Misrep must have induced the contract	A person must have suffered, or be likely to suffer, loss or damage by this conduct
Claimant entitled to damages as of right	Court may make order for payment of the amount of the loss or damage suffered. Order thus at discretion of court.
Only party to contract may sue for damages	Any person may apply; the person who suffered loss need not be a party to the action
Damages may only be awarded against the party to the contract	Order may only be made against the person who engaged in the misleading or deceptive conduct, or accessory
Damages on K measure. Expectation loss recoverable.	Damages analogy to tort measure: <i>Cox &amp; Coxan</i> . Expectation loss not recoverable.

Causes of action	vs Vendor	vs Agent
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CCLA, s 35. S 6 CRA	<b>Yes</b> , a party can be liable for misrep by or on behalf (assume within apparent authority)	<b>No</b> , "by or on behalf of another <i>party</i> to that contract"
FTA, s 9	<b>Probs not</b> , depends if 'in trade'. Depends also if they pass on information falsely knowing s 43(1)(d) - as accessory	<b>Yes</b> , RA practice is done 'in trade'  No right to damages.
Tort	<b>No</b> , precluded by s 35 CCLA	<b>Yes</b> , not precluded by s 35 CCLA as not a party If innocent, rescind If fraud or negligence, damages or rescission.  Remember here you have full right to damages.
Breach of term/Coll K (contract)	Might there be circumstances where P is upset by a statement made to them in pre-K negotiations where plaintiff would want to argue collat K?  CCLA, s 35 only covers <i>misreps</i> . S 35 only covers statements of fact, not promises that are honestly made but subsequently broken So can nab them if it's a <i>promise</i> not a <i>statement regarding past or present fact</i> Have to show, although it wasn't written down, it gave rise to a collat K, gets around statutory writing requirement and parole evidence rule.	<b>No</b> , cannot sue non-party for BoK. RA can't bind contractually.

## Damages

### Contract

**Principle:** Contract damages should give effect to the promised bargain; it should give effect to the expectations of the agreement.

### Diminution

The loss of value from the promised position.

- Breached vs Non-breached
- $RV - AV$
- PP is not a factor.

## Cost of cure

Can choose this (*Altmarloch*)

- But is it out of proportion? *Ruckley electronics*
- See Dmac's critique in case brief

## Tort

**Principle:** Tort damages should give reparation for the harm done. Put in position as if wrong had not occurred.

- Prima facie: has there been a loss?
  - PP – AV
  - Consequential damages?
- Proven lost opportunity for a better price? Or better contract? (*Clef Aquitaine*)
  - Status quo ante is not no contract, it is a different better contract.
  - Can be with same party or a third party (*East v Maurer*)
- Damages reduced by alternate losing contract? (*Yam Seng*)
  - Is this in principle relevant? Can we allow them argue it as partial defence?
    - (1) Purpose of tort is to put claimant in position if wrong hadn't occurred. But if the wrong hadn't occur then they would have had this loss anyway. There is an issue of overcompensation.
    - (2) Argument from symmetry, if we are allow claimant to increase their damages. Then should also allow def to show that claimant would've taken another bad opportunity.

## Can be better off under tort measure sometimes

- Sometimes the pltf will recover less in K this could be bc she was induced to enter into losing K irrespective of the misrep
- That will reduce the K damages whereas it won't reduce damages in tort

## Cases

*Esso Petroleum v Marden*: reasonable grounds for opinion

*HB tort*: Essentially based on Lord Denning's dissent in *Chandler v Crane*.

- It is a statement made without reasonable grounds for believing it to be true
- In breach of a duty of care owed to the representee by the representor
- Special relationship that give rise to duty of care at common law, can exist between parties that are negotiating a K
- E.g. a professional property developer makes careless reps to potential purchasers
- *Esso petroleum v Marden* per Lord Denning:
- Esso was leasing out petrol stations, franchisees would get them, Marden was induced to take a lease by a representative by Esso, estimate throughput in station by 3rd year 200,000 gallons, this was hopelessly astray.
- This petrol station was on main rd, but planning permission meant could only enter from a side road, esso had been informed of this planning permission.
- Representation never became a warranty, never a term of the K.
- Looked at literally, just a statement of opinion (estimate), but look at the status of the person giving the misrep - are they holding themselves as an expert, is it reasonable to do so?

## *Marlborough District Council v Altimarloch Joint Venture Ltd: cost of cure*

### Facts

- A rep was made by agents who had no authority to bind principals contractually.
- Altimarloch purchased block of land in Marlborough for 2.675mil
- Land was purchased with view to establish viticulture business
- Were assured negligently that land had resource consents enabling company to extract from neighbouring stream at 1500 L<sup>3</sup>/day
- BUT only half that: 750 L<sup>3</sup>/day
  - They forgot that half of a larger block of land, so half the water rights

### Evidence established that

- PP 2.675m
- AV 2.550m
- RV 2.950m
  - Tort damages prima facie: 125k
  - K damages: 400k
- They had started planting grapes, issued proceedings against vendor (who was innocent)
- NZSC 3-2: upheld the award by lower court of \$1m
  - Cost of purchasing additional water rights that covered some of the shortfall
  - Cost of building dam to store water for the future
    - This was the only way to secure the shortfall
- There are some diff measures for BoK
  - We have been using diminution of value (RV vs AV)
  - You can claim cost of cure/reinstatement
- Courts have said you can choose between those two BoK measures, you can't always get it bc such damages are not recoverable when the cost is out of all proportion to the benefit gained.
  - E.g. *Rucksley electronics* - swimming pool a few inches too short, HoL said out of all proportion being gained. Refused to allow tearing the pool down.

See Dmac's critique.

## *Clef Aquitaine v Laporte Materials (Sovereign): lost opportunity in tort damages*

### Case in one sentence

- Whether or not a contracting party under the tort of deceit receives damages for their actual loss in reality (which was zero, good bargain), or can the court award damages for their loss in the hypothetical scenario where they would have got an even better bargain.
  - TDLR: can u be said to make a loss on a transaction if you still made a profit

### Is this case relevant?

- Prima facie can't sue for tort of deceit v Vendor in NZ bc s 35 CCLA
- But still get tort damages under FTA: *Cox v Coxen* FTA damages to be assessed **by analogy** to tort damages

### Facts

- CA (French company) entering into a long-term K to sell Sovereign's products in France
  - Marketing and distribution agreement re building materials
- K induced by a fraudulent misrep concerning the discounts available to Sovereign's UK customers

- Didn't want to be undercut by UK trade customers and selling at lower prices to France
- CA became locked into an agreement with Sovereign, it turned out to be profitable but not as profitable if it was negotiated according to the truth
- Price list annexed to K was incomplete and they knew that (deceit). There were further discounts.
- Dispute concerned whether Clef could establish that they had suffered a loss remediable by damages for the tort of deceit

## Judgement

### • Held

- Trial Judge: both held that they could recover damages for the tort of deceit
  - There was a **loss** remedial via damages
    - Damages: price they did pay (induced) vs price they could have paid (but for the deceit)
      - But for the deceit, they would have paid less and *therefore have made more profits* (dangerous to talk in terms as the claim being for the difference of profits)
      - Awarded \$370K UKD (over \$1M NZD)
  - **Misrep**: director of Sovereign (G) represented that the discounts negotiated were discounts from the lowest unit prices available to Sovereign's UK customers; in reliance upon the truth the claimants contracted
    - *Representation dishonestly made*: the representation of Sovereign was false, and known by him to be false (lower prices 'Bulk Price List' available - and discounts from these)
      - Q: did Mr D just think he was negotiating a hard bargain? People may regard lying as the normal behavior of contractual negotiation
      - Law doesn't care if you think lying as part of business, you are liable.
- Court of Appeal: agreed with trial judge

### • Claimants Case

- Two heads of loss for the fraudulent misrep
    1. Lost opportunity to make profits (Mr D; but for the higher costs committed, would have reduced his prices by a margins sufficient to stimulate sales)
      - **No basis in the evidence**
      - **Charging a markup in any event; did not establish they would have increased profits**
    2. The difference between the prices the claimants committed to and the prices they would have probably have been able to negotiated if the misrep's had not been claimed
      - **Trial judge found for claimants = Sovereign appealed**
      - **CA crucial facts (repeated from trial judge)**
        - **Mr D would have achieved a discount on bulk price lists between May '78 of 10% and the discount of UK trade customers at 25%**
          - **"I can do no more than take the midway point of 17.5% of the discount probably achieved"**
- = On balance of probabilities; but for the deceit they could and would have entered the same agreement but on more favorable terms as price, loss was diff between paid and would have paid*

### • Defendants (Sov) Case: Mr Bannister

- There is no relevant term in the K; 'uncovenanted benefit' - benefit/stipulation not provided for by a term in the K, they didn't earn it
- [pg 5] Claimants had suffered no loss; benefited from the transaction (profited) so they cannot be compensated under the tort of deceit
  - Challenge against second head of claimant's argument
  - Would be to give an *uncovenanted benefit*: awarding contract damages for loss of a bargain which are not available for the tort of deceit = CA making *illegitimate attempt* to recover loss of bargain damages which would only be available in an action for BOK
    - CA did not establish the representation was a term of the K
    - [pg 8] CA did not establish a loss (only they would have made even more profit)
      - No overvalue of products in the ordinary sense
    - BOK: obliged to the representation
    - Tort: no claim arises unless actual loss results (none here) = **powerful arguments** but completely wrong
      - [pg 11] not sufficient to show other agreements would have given them greater profit
- **Judges Findings**
  - Difficulties with defendants argument
    - Q: what is the assumption underlying this argument that we have challenged?
      - *Coffee bar example*: no damages in tort because you're better off but if plaintiff could establish lost opportunity there would be recoverable damages in tort
        - Assumption underlying this: sensibly said to be a loss here because investing your money somewhere, you've lost money to choose to invest somewhere else
          - *Argument assumes where a person has more money in the pocket, there is no loss = ignores the opportunity cost of being deprived of your money*
            - Courts not adverse to taking account of realistic economic indicators
        - Lost opportunity claim = theoretically distinct from loss of bargain claim
          - Object = restoration of status quo prior to the wrong
          - P establishes lost opportunity to conclude another K which would have resulted in other benefits to me
            - Worse off than if the misrep had not occurred
            - Compensation for future benefits = may appear to resemble loss of bargain claim but there is no necessary relation between them
    - Damages CA might have got in BOK (if rep was a term)
      - [pg 14]: not clear what the BOK measure would have been, would have depended on whether the warranty was that Sovereign's UK customers pay what they said or that the claimants would be charged 25% less than UK customers (if that was true, judge would have had to have taken 25% off bulk price list prices not 17.5%) ... difficult to show loss of bargain damages would lead to any recovery
      - Thus, claim in tort for loss opportunity would lead to refund of 17.5% for goods whereas, if there were a warranty they would always be charged



25% less than the damages would be 25% of the total amount they paid for the goods ordered = no necessary co-relation between lost opportunity and loss of bargain claim

- Where proved P would have entered a different and more favorable transaction loss can be measured on loss opportunity basis
- Contrast with true loss of bargain: P seeks benefits of particular K entered into
  - Not concerned what would have happened like there is a concern in lost opportunity claim
- Ordinary tort case: not any loss at all because P may still be better off prior to reliance on the conduct (potential to be grateful for the deceit)

#### **Lord Steyn's statements in *Smith New Court***

- Tort damages do not equal K damages.
- Not for positive interest in bargain.
- Only for **negative interest** in bargain.
- The aim is to put P in position he would have been in if no false rep had been made.
- **Treitel, Damages for Deceit**
  - Actual loss directly flowing from transaction
  - 'But for' position
- Actual loss *flowing from* the transaction
- Squarely based on ***overriding compensatory principle***
  - Watch out: Same phrase is used to describe loss of bargain damages. Here means: reparation damages.
- **Don't** hypothecially reconstruct of what the parties would have agreed. Direct financial loss flowing from misrep

#### ***East v Maurer***

- P bought hairdressing salon from D who falsely represented that he would not be working another of his salons in the area. Ps couldn't make a profit and struggled to sell salon.
- Mrs East was a very experienced hairdresser, had run several successful businesses. Loss was because of Maurer taking all his business with him.
- Awarded damages: difference between its purchase and sale price, the expenses of buying and selling it, the cost of improvements to try to make it profitable, trading losses, general damages for disappointment and inconvenience, **and damages for representing the loss of profit the plaintiffs could reasonably have anticipated had they bought not the salon they were induced to buy but a different hairdressing business bought for a similar sum (lost opportunity - third party, upheld by CA, but reduced it from UK15k to UK10k)**
  - But for deceit, they would have bought a different hairdressing salon.
- This was approved by Lord Steyn in *Smith New Court*
- Mr Bannister says this is diff to these current facts
  - Bc *East v Maurer* was to do with a losing bargain with lost opportunity with third party. This is different, this is a winning bargain.
- Clef's counsel run a symmetry argument + is consistent with compensatory principle of tort. Doesn't matter if it would have been from third party or the defendant.
- The judge below did no more and no less than compensate them for having thereby worsened their position.

## Cox & Coxon v Leipst: measure of damages under FTA

### Facts

- Lifestyle block in Hastings
- Cox & Coxon (appellant) acted as agents for the vendor.
- Mr and Mrs Leipst (respondent) purchaser
- Misrep over income and production of pears. Previous year: 58 bins of pears sold to Watties for \$1200. But in fact, had only fetched \$8,800.
- Document with production and income of the property in prior year. Was appendix to contract.

All **Leipst** wanted was loss of future profits, if the misrep had been true.

### How to calculate expectation damages?

*This didn't concern Court of Appeal because...*

- Parties had agreed that 16k if expectation were allowed under FTA

*What if you had to calculate?*

- Diminution in value measure: normal
- Lost profit measure: the lost income they expected to derive based on the past represented performance.
  - This presented difficulties for turnover for *20 years*
  - This was calculated as NPV of an annuity for 20 years at 10% for difference between represented pear sale and actual (3000ish)
  - No promise that existing price level would be maintained in the future, let alone 20 years!!
    - Most that could be said on the P's behalf was a statement of existing fact, and that there was a reasonable inference, that all things being equal, a similar profit level would continue in the immediate future.
  - Duration of recoverable loss? Quantum?
  - Duration will involve the nature of the environment and reasonable efforts to mitigate.
    - Duration: business environment, scope of any duty to mitigate losses (you must take reasonable steps to mitigate loss, e.g. diversification)
- Should have just claimed diminution of value

**Sole focus:** can you get expectation damages under s 43 FTA for breach of s 9.

**Majority: no.**

- Because of that, the P not entitled to damages at all, because they hadn't pleaded they suffered any out of pocket loss (still profitable), didn't plead genuine lost opportunity. P 23 line 27.

**Gault J**

- Australian case of *Marks* p 21 line 3
  - "The bare fact that a contract has been made which confers rights or imposes obligations that are different from what one party represented to be the case *does not demonstrate that the party that was misled has suffered loss or damage ...*
  - A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of *greater benefit or less detriment* to it than the course in fact adopted."
    - Approved this principle in quotation

- When is there loss? Second paragraph. "greater benefit or less detriment"
- S 9 of the act prohibits conduct, it does not render representations binding. It is s 6 of CRA which in NZ has that effect. P 22 line 44
  - Implication of allowing expectation damages: non-parties such as agents could be required to pay substantial expectation damages
  - I do not accept that it calls for orders requiring non-contracting parties to make good promises they have not made

### Henry and Blanchard JJ

- "To complete this background, it can be noted that the common law measure of damages in tort for deceit or fraudulent misrep, and also for neg misrep, is to put the wronged party in the same position as if the rep had not been made - not as if it had been true." P 25 line 1
  - "A purchaser fraudulently or negligently induced to enter into a contract of sale and electing not to rescind it could recover from the representor the difference between the price and the (lower) actual value of the property. This was the measure of the detriment to the purchaser resulting from the inducement of the purchase. Loss of bargain, or expectation losses, were excluded."
    - Unless of course the statement was a term of K or collat k
    - *East, Clef*
- S9 creates a duty not to mislead...
  - *East, Clef*
  - Or some other direct out of pocket consequence
  - S 9 never said should honour promise, just not to deceive.
  - It says there is liability for loss or damage *resulting* from the representation. The difference is real and substantive.
  - To hold that misrep inducing a K can give rise to a claim for expectation losses under s 43(2)(d) is to turn on its head the whole rationale of the measure of damages.
- P 28 line 20
  - "There is in our judgment a further for declining liability as a matter of principle. In the case of parties to a contract, the effect of the approach in the HC is to make a term of the K, that's achieved by CRA, words don't support that in the FTA."
    - Makes an agent a promissor!

### Minority

#### Tipping J

- Where appropriate, the court may award expectation damages.
- He mentions throughout the judgement that such an award of expectation damages is appropriate where it is necessary to do justice to everyone involved.
- The judgement contains numerous broad and unsubstantiated assertions:
- P 40 line 34
  - "Rejects majority view as an inappropriate fetter based on the law of K"
  - Line 25: "FTA introduced a new and flexible approach"
- P 32 line 27
  - "It would be wrong to maintain the historical tort and K classification for assessing damages. The discretion should be flexible, both as to measure and amount."
  - "diminished profitability, was *clearly* loss or damage suffered by the respondent"
- P 38 line 33
  - "It is conceptually reasonable and in accordance with policy of the act to allow expectation damages" – what is the policy of the act? Parliament didn't think about measure of damages

- “Denial of such recovery, rests on historically notions derived from the law of contract” - this is not correct, the principles behind it matter, it is derived from the fundamental principles behind compensation, the remedy must fit the wrong.
- P 40 line 35
  - “involves putting into the FTA privity of contract when it shouldn’t”
  - Privity - but it is substantially qualified. But even so, denial of expectation damages has nothing to do with concept of privity. Privity is about who has rights, but we are talking about what remedy you get
- “FTA is a move away from traditional contract theory”
  - No, that happened in the CRA, which equated representations and terms. Parliament didn't intend damages to be enforce so as to enforce representations.

Tipping makes lots of mistakes

- Several comments are made in the judgement concerning the then leading HCA case *Gates v City Mutual Life Assurance Society Ltd*
- Facts of the case:
  - Plaintiff took out insurance policy
  - Did so relying on statements from the D's agent
  - Total disability benefit provided for in the policy would be payable in the event he was incapable of carrying on his occupation as a self-employed builder
  - Actually, benefit was only payable when was incapable of *any* work
  - Plaintiff sought breach of collat K, aus equivalent to s 9
  - Collat K: failed because agents reps were just a mere representation, in any event, the misrep wasn't consistent with the terms of the K
    - Not the law any more in NZ, collat can vary terms of K
  - S 9 claim:
    - Failed because no proof of damage
    - Plaintiff had not established that cover actually provided was worth less than premiums paid or that there was some other consequential loss. No evidence that by relying on the agents statement, that he could've taken with other company or same company (lost opp).

Re Gates he says some 'whoppers'

- 'quotes' Gibbs CJ: “while the appellant was entitled to recover the difference in value between the policy as represented and as written (the classic tort measure), also consequential loss if it was foreseeable.”
  - That is not the classic tort measure. It is actually the classic contract measure
  - Gibbs CJ actually said PP - AV
  - That case was then the leading case for their version of the FTA
- “That extension of the ordinary tort seems to me to reflect the discretionary nature of the excise and to tell against any strict categorisation”
  - Consequential damages are part of the classic tort measure. No extension.
  - Judges in *Gates* actually said PP - AV is just the prima facie measure. The starting point is status quo ante.
- “The present case is different. Here the agent's representation was indirectly of a promissory kind”
  - It either is or isn't of a promissory kind. Direct vs indirect?
- “Judges in *Gates* may have taken diff view if misrep had been seen as promissory and consistent with K”

- No basis for saying they might have decided differently.
- The judges talking about mere representations was expressed solely about *alt arg re collat K*, in fact they accepted it was misleading conduct, but found no damage.
- "two established measures compete for acceptance"
  - There doesn't appear to be any other alternatives, either reparation for harm done due to reliance, or basis of defeated expectations.
- "Tipping said it was hypocritical of the Majority to refuse damages for the represented benefits of the policy but to allow for a claim of loss of opportunity (if available). As a critique Tipping argues that the purchaser can claim expectation losses for a contract not entered into but no such losses for a contract actually entered into as a result of a misrepresentation."
  - Tipping is very confused about expectation damages versus consequential damages. If it is a misrep and contractual, then get the benefit of the promise. If it is a wrong done, but not promissory, then get consequential damages and can use *Clef Aquitaine* to show consequential losses.
- "Refers to other misleading conduct cases in *Aus, Sellers*. Misleading conduct caused them to break off conduct with a third party. Damages for loss of opportunity awarded. Tipping said this was akin to expectation damages:
  - Incorrect - we know from *Clef Aqu*

#### The circumstances where Tipping would allow expectation damages

- He doesn't say such expectation damages should always be available. The availability of promissory relief under the Act is one thing; whether it is appropriate to measure the loss in that way in a particular case is another.
  - Question of fact in each case
- Factors:
  - Nature of conduct creating liability
  - Nature of any associated transaction and its subject matter
  - Promissory or not?
  - Culpable or not?
  - Readily substitutable?
- When don't give expectation damages: when **readily substitutable**
  - So they can resell and crystalize the loss: PP – AV: tort
  - E.g. Car sale agent. Mileage misrep. Purchaser can be expected to sell the car.
  - When on discovery of the truth, not reasonable to expect the plaintiff to dispose of the property, then we will consider award of expectation damages.
  - *If it is not reasonable to sell, and the purchaser does not actually do so, then they are allowed to get expectation damages.*
- Is there merit in that distinction?
  - If in the ordinary case the representee is entitled to have its promises made good, why should it matter that it is readily substitutable?
  - If the purchaser does in fact actually resell, then (regardless of whether it is readily substitutable or not) damages are pinned back to tort measure
  - If they did sell up, they don't get expectation damages - this doesn't make sense
  - Applied facts of the case: Reasonable for the purchasers not to sell the property once they knew of the misrep 43 line 11
    - Property was both their home and an income-producing venture. It was not readily substitutable.
  - Resellability shouldn't come into it - get the benefit of the bargain!

Essentially

- we questioned validity of distinction drawn by Tipping J: readily substitutable
  - If not RS, prima facie you could recover (subject to discretion) expectation damages
  - If yes RS or in fact sold, it would only be recovery of damages per tort measure
    - Doesn't make sense: also considering he says regardless of whether they actually sold it or not, if RS, then no expectation damages.

Taps into Building and Structural damage cases

- 'There is a conceptual link with the contrast in building and structural damage cases between diminution in value and reinstatement.'
- 'In that area, the reasonableness of reinstatement usually guides the Court's decision.'
  - Looks fair enough on the surface. BUT the conceptual link is a tenuous one.
  - Dim in value and cost of reinstatement and competing measures of the same loss. Either for tort or contract measures.
  - N.b. cost of reinstatement must be reasonable: pool swimming case.
  - Same applies in tort cases, suppose negligent damage of house. There, both ways measuring harm done.
  - Compare that with what Tipping J said. He was comparing different bases for different kinds of loss. Doesn't support readily substitutable distinction.

Has to be promissory – how to balance?

- Draws distinction between promissory misrep and other (non-promissory) misreps p. 30 line 30: "when the defendant to a claim under the FTA is not a party to any relevant contract, it is appropriate to inquire whether the misleading conduct had a promissory connotation, either directly or indirectly." If promissory, then expectation damages prima facie
  - Difficulty – what is a representation that has a 'promissory connotation'?
  - Bear in mind representation is an affirmation of a fact You could say in a loose sense a promissory connotation, but not legally. Traditionally, assumed contractual responsibility - i.e. was it a term?
  - Why talk about it in context of statutory cause of action?
  - Aren't all unequivocal statements of fact promissory?
  - "indeed, with most reps it may be perfectly reasonable to take the view that the representor is at least implicitly promising the representee that the facts stated are true and the representee may act accordingly." P. 41 line 2
    - Doesn't it depend on the strength of their language – then back at common law deciding what is a misrep vs opinion

Additional factor: culpability of the representor!

"The culpability of the representor may well be a factor in deciding what is fair and reasonable between the parties both as to *measure* and *amount*" 34 line 40.

- We know amount is discretionary
- But culpability weighs into determining whether expectation damages should be awarded!

## *Bisset v Wilkinson*: what is a misrep?

Privy Council

### **Misrepresentation:**

- Statement of existing or past fact.
- We distinguish from a statement of intention: to do something in the future

General rule: statement of opinion is not actionable as misrep if opinion turns out to be erroneous.

### **Facts:**

*These were stated unduly favourably to the vendors, the appellants.*

- In 1919, respondents (W) and business partner bought from the appellant (B) two adjoining blocks of land.
- Known as Homestead and Hogan's block.
- Homestead was big, Hogan was small.
- PP: 13,260 pounds sterling (1.3 mil NZD)
- 2000 pounds was paid immediately and balance due about 5 years later. Interest was payable half yearly on the balance.
- W bought land for sheep farming. Tried for 2 years This didn't work out, it was a disaster for them
- W didn't pay interest payments - brought action to bring arrears
- And counter claim that mr B had said misrep that it could carry 2000 sheep

### **Case through the courts**

- Defence failed at first instance at the supreme court (now high court) per Sim J
  - Statement was one of opinion and honestly held
- Court of Appeal: 4-1, allowed appeal
  - Dissenting judge found the statement was true, by defendant's own evidence that given proper management could hold 2000 sheep
  - But Majority per Stout CJ: was a statement of fact, it would surely be improbable that a seller asked about the carrying capacity he would give his estimate.
- Appeal to PC
  - Decision of trial judge was reinstated

### **The alleged misrepresentation: the carrying capacity**

180 last para: "the appellant made these admissions at the hearing: I told them that if the place was worked as I was working it, with a good six-horse team, *my idea was* that it would carry 2000 sheep"

What does carrying capacity mean?

- Carrying capacity is widely used in farming industry to indicate year round stock that could be wintered.
- Commonly known in farming industry to mean that.

**Held**: statement of opinion. "My idea" = opinion.

### **Alt facts: what if this was held as statement of fact?**

The defendants failed to prove the farm if properly managed was not capable of carrying 2k sheep. So buyer would have lost even if one of fact.

Would there be difficulty for rescission because of delay (laches)

Affirmation? If with knowledge of misrep you elect to carry on with the K, you are held to have affirmed.

**Was this an overt statement of opinion with an *implicit* statement of fact?**

Found there had not been an implied statement. 183-184

- They had an equal playing field regarding fact (not like *Smith v Land and House Property*)
- **No one had at any time carried on sheep-farming upon the unit of land in question**
- Trial judge's view endorsed: Sim J: Ordinarily there would be reasonable grounds, but the defs knew all about Hogan's block and knew also what sheep the farm was carrying when they inspected it. Nothing more than an expression of opinion

We could question that finding on the facts (p. 197)

- Bisset vendor had practical farming experience
- Had bought in 1907 and after sundry works of reclamation and improvement had in 1911 sub-divided for sale
- He retained the homestead block which he used for his business of a sheep-farmer and sheep dealer until 1919.
  - The major part of the land had been used as a sheep farm before
- In lower court - evidence in addition to statement made, Bisset produced his wool returns for the previous year, they showed he had shawn 1700 sheep - "you see where I get my 2000 estimate from". He said Hogan's block (better land) will carry 300 sheep even though he wasn't then working it. He sought to verify his statements.
- Also, only one of the purchasers had any experience sheep farming at all 'one of them had no experience' the other didn't necessarily have good experience. Maybe mitigated by father who had lots of experience
- ***Sure the precise blocks of land in combination had not been used as a sheep farm. But most of it had been, and the extra block added on was 'better land'***
  - If we were to conclude that Bisset had greater knowledge or means of knowledge, this wouldn't have affected the result if never proved the opinion was erroneous.

But even so: what would Wilkinson need to prove?

Both scenarios have Bisset with superior knowledge

- If stated *strongly*
  - Would be statement of fact
  - Simply upon proof that the statement was false
- If stated as *belief* "it is my idea that"
  - Statement of opinion, but might be interpreted as fact due to superior knowledge
  - Have to show reasonable grounds were not there: implied statement of fact false.
  - Also show farm didn't have carrying capacity

Both scenarios have parties on equal footing as to the facts (actual finding)

- If stated *strongly*
  - Might not be statement of fact, might be opinion: *Oscar Chess Ltd v Williams*
- If stated as *belief* "it is my idea that" **[Actual decision of the PC]**
  - Statement of opinion
  - Have to show reasonable grounds were not there: implied statement of fact false.
  - Also show farm didn't have carrying capacity



## *Brown v Raphael*

English Court of Appeal

### **Facts**

- Contract formed at an auction
- Of an absolute reversion in a trust fund
  
- “Lot 11: by 8,000 2.2 per cent. Consols (govt bonds, secure debt obligation), of estimated value 5,210”
  
- Reversion: a property right subject to earlier lesser interest.
  - Govt bonds were owned by an original settlor, put on trust, to pay initially an annuity of 200 pounds to Mrs Richie, and upon her death, the full property right was to pass to a sister, Mrs Heath.
  - Mrs Heath has beneficial ownership.
  - Once the annuitant (Mrs Richie, older sister), the full property right, reverted to that beneficial owner (Mrs Heath).
    - At that time Mrs Heath could keep them and earn interest, or sell them (absolute - no other interests in property)

What was being sold was this contingent beneficial ownership. They were taking a gamble to when the annuitant (Mrs Richie) died.

The seller is referred to as the 'trustee in bankruptcy' (Raphael). The person who would become the ultimate owner (Mrs Heath), couldn't pay her debt so was declared bankrupt, and assets went to sale.

- So this sale of the trust fund was one of the few valuable assets she had. Creditors wanted to sell it

Two trustees involved - public trustee, who was administering the trust, and the trustee in bankruptcy.

Plaintiff (Brown) purchased the interest at the auction. But didn't fulfil his promise. Almost a year later sought to have it rescinded due to misrep.

### **Alleged misrep**

*"Estate duty will be payable on the death of the annuitant who is believed to have no aggregable estate"*

Aggregable estate: Mrs Richie did have aggregable estate, then this would increase the rate of duty. This would be payable on the capital of the trust.

- 843: the rate will be affected by the circumstance that the annuitant has other considerable means, disposable capital of his or her own, which for duty purposes will be aggregated with the amount passing, namely, the sum providing the annuity.
- Rate of duty affects the value of what is being purchased.

Purchaser wasn't in a position (knowledge or means of knowledge) to find out about Aggregable Estate.

- Alleging implicit reasonable grounds (and thus they were false).

Vendor was arguing that even if opinion has reasonable grounds it was true

- Court found it was false, because solicitors had negligently put a litigation clerk

What did they argue then?

- Agency argument
- Defendant accepted and ratified what had been done by his agents 646

**What was the misrepresentation made?**

- (implied statement of fact) That there were reasonable grounds for the belief (that the annuitant had no aggregable estate)

**Alt facts: Position if auction said - "the annuitant had no aggregable estate"**

- This is no prima facie opinion - this *is* the misrep - statement of fact prima facie
- To succeed, have to prove that it is untrue.

Court assumed she had no aggregable estate (implicit in judgment)

639 Argument by Lindner QC: "he has not even shown that in fact the annuitant has or will have aggregable estate" ... he needs to prove no aggregable estate

- You surely can't be in a stronger position that there was aggregable estate if the statement is expressed as an opinion. How can you be worse off if opinion is actually true?

**Issue: Is that implied statement expressed in the same words throughout the judgment?**

- Either "I have reasonable grounds" or "I have reasonable grounds *and being competently advised*"
- 644 middle para: "the further representation that he, *being competently advised*, had reasonable grounds for supporting that belief."
  - The difference here is - impliedly represents to you that he had been competently advised and reas grounds
  - But the advice given was incompetent.
    - On the surface it is false, as solicitors were negligent
    - But this is going further than any of the cases would suggest, normal implication would simply be reasonable grounds!
    - Vendor did have reasonable grounds - reputable solicitor

**Issue: who made it – who was the representor??**

- Vendor OR solicitor? Court gets confused
- Conflicting passages
  - 636 Case notes: "statement as to material fact by well-known solicitors to induce purchase
  - 636 case note: "that belief was made honestly by solicitors for the vendor"
  - 636 case note: "the vendor was in a far stronger position ... further representation that he [vendor] being competently advised, had reasonable grounds supporting that belief.
  - 639 Mr Lindner: the issue was whether the def honestly believed what he said
  - 639 judge interjection: "the trustee had been competently ...
  - 640 judge interjection: whether he [the clerk] was justified in making this misrep
  - Now the judgment
  - 641: referring to Upjohn J "in other words he had held that the defendant through his agent did believe that the annuitant had no AE"
  - 643: in heavy bold type: Solicitors as to lot 11 - Messrs Oscar Mason & Co. They thought they were authors and conducted a sale.

- Commonly in SPA agreement - just to tell who the solicitors are. Not necessarily indication they were acting as agents.
- Four lines further down "[solicitors] were expressing the belief [opinion]"
- 644: "vendor entertained the belief ..."
- 646: solicitors doing everything (then later in judgment) the defendant, the trustee in bankruptcy, is the vendor who asserts the belief.

### These issues manifest on 646

"But Mr Lindner put forward the argument that ... it would suffice for the vendor, to say: "I made no inquiries myself. I relied on a competent firm of solicitors, and, I having so relied and they having done this draft for me, I reasonably, accepted it." *I am bound to say, after hearing the argument, that I am still, for my part, quite unable to apprehend it at all.* ... The defendant accepted and ratified what had been done by his agents, as he was entitled to do; but he must abide by the consequences. All that they put forward he must be treated as having put forward himself.

- Judge is saying solicitors were negligent so the Vendor had no real grounds.
- Vendor is accountant - well versed in estate duty matter
  - "the def, the trustee in bankruptcy, very naturally and very properly left the matter to the solicitors to do the work for them"
  - Also solicitors were well known of standing or repute.
  - So: every reason to be confident!

### Lets say prior to auction Vendor was asked did he has real ground

- He got great lawyers!
- Judge said 646 "he was quite unable to apprehend" that arg

### "the defendant accepted and ratified what had been done by his agents, as he was entitled to do"

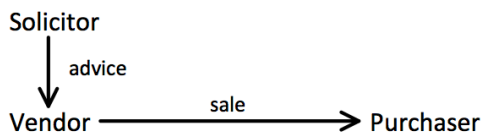
- "all that they put forward he must be treated as having put forward himself"
- This is internally consistent - they are saying the solicitor is saying the statement. This is not what they said before. Agency case or vendors simply acting on the advice.

Put forward to who - to the purchaser. Another illustration of solicitor vs vendor. Was this an agency case or vendors simply acting on the advice?

### 646 Middle para

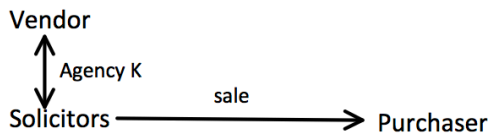
- Starts off talking about the *vendor* to the solicitors
- Third of the way down: vendor naturally and properly relied on the work done
- Judge thought arg that had got good advice from solicitors so had real grounds
- "all that they put forward he must be treated as he put forward himself"
  - Acting under advice vs agency
  - This suggested agency relationship
  - What did they put forward? If, a few lines before, the defendant is the vendor who asserted the belief
- "the defendant accepted and ratified what had been done by his agents"
  - Suggesting solicitors are agents
  - Only call them agents if they were conducting transaction on behalf of the vendor. Not giving advice.
- "ratified"
  - Law of agency - employed where person has purported to act as an agent but hasn't have authority. But then the principal ratifies conduct.
  - Seems out of place here, no question that they had apparent authority to say things in the auction particulars

### First scenario



*In which case it is almost impossible to say vendor had no reasonable grounds.  
Hard to justify decision if that is what happened.*

### Second scenario



*What is being said: agent on behalf of the vendor: we believe and we have (by inference) reasonable grounds.*

*They did not have reasonable grounds.*

*That statement is attributed to the Vendor by the rules of agency - vicariously liable. It is as if the vendor says my solicitors believe and they had reasonable grounds for their belief.*

- Maybe this is why Lord Evershed said at one point the misrep was "I, being competently advised, have reasonable grounds", to make sense of the second scenario
- On the other hand, why did he confuse the matter on p. 646 that it was the vendor who expressed the belief
- **If situation arose today in scenario one**
  - Where def has reasonably relied on advice from third party. Could argue facts are distinguishable from those in *Brown v Raphael*
  - They could say it is *true*, not a misrep, as they relied on solicitors so had reasonable grounds
- **Important factor that explain willingness of court to find a misrep in this case for which the V was responsible**
  - Sympathy for purchaser here
  - If decision went other way, the negligent solicitors would have got off scott-free
    - A. Breached their K with the vendor, didn't take due care. Breach of K at common law would give no right to claim to the purchaser, as they were a third party so not privy. So purchaser would have no rights to claim for breach
    - B. At the time, the tort of negligent misstatement had not been developed, *Hedley-Beryn* case had not been decided.
  - Nowadays the court would allow the purchaser to sue the solicitor in tort.
    - That claim in tort would be especially important in NZ due to law changes.

### If arose today in NZ

- S 7(1) CRA - effectively abolishes right to rescind in equity and common law.
- Cancellation (is different)
- Two bases
  - (4)(a) the parties have expressly or impliedly agreed that the truth of the representation is essential to him
    - *Extremely difficult to justify for an implied representation to be impliedly essential*

- (4)(b) substantially reducing the benefit/increasing the burden/substantially different
  - *How does lack of reasonable grounds for an opinion, not that it is true, change the nature of the burden/benefit?*
  - *Doesn't follow that if there were reasonable grounds, the plaintiff would have received the benefit the subject of the statement of opinion. Could have been well-founded but wrong.*
  - *Shows law reform committee didn't give weight to these types of cases.*
  - *645 "that" representation was true*
  - *Could have difficulties getting damages if purchaser tried to affirm*

### Putting this into an example: how to assess damages?

Pp: 50k

Av: 30k

Opinion value: 70k

How do you assess damages in a case like this? No representation that subject matter had this quality. So hard to say RV. The damages should at least be abated/reduced to take into account if the rep had been true, the plaintiff would still have suffered the loss.

Court might so no, no damages, no sufficient causal connection between that and the particular loss, you didn't have a bargain for the truth of the opinion

For safety, the purchaser would sue the negligent solicitor in tort.

### Reconciling *Brown* and *Bisset*

- Why would this issue arise? **Both are prima facie opinions**
  - In *Bisset* there was no implied statement of reasonable grounds. Mere statement of honest opinion. **No liability**
  - In *Brown* there was an untrue implied statement of fact (that reasonable grounds) **legal liability**
- We look for a material factual difference
  - Equal playing field of fact in *Bisset*, non-equal playing field in *Brown* - per *Smith v Land and House Corporation*
    - Did they know a common fact, or far superior means of knowledge.
  - This allows us to find an implied statement of fact - that they had reasonable grounds.

## Anderson v Marine Insurance

### Facts

- Plaintiff's ship (Clarendon) had been chartered to recover and deliver to London the cargo of a ship (Gibraltar) that had sunk at RV Point.
- Captain informed plf as owner that he had entered into a chartered party (K about the party itself) and to implement the appropriate marine insurance policy (this one related to the chartered freight).
  - In this letter he wrote to the owner: "RV point is considered by the pilot here as a good and safe anchorage and well sheltered, I have seen the place and consider it quite safe"
- Immediately the owners sent the clerk (Mr Bruce) with the letter to the insurance company. He dealt with an agent (Mr Drummond).
  - He just produced the letter and read the extract, *adding no statement of his own*.
- Drummond was a bit wary about accepting the proposal, wasn't sure whereabouts and what sort of place RV Point was. Accepted next day at a higher than usual premium.
- What actually happened:
  - RV point was actually dangerous place for a vessel to anchor during the hurricane months.
  - Ship was dashed against the reef.
- Assurance of captain was honest: bone fide.

### Jury Direction

1. Was the letter of the 3rd of December 1870 read to Drummond?
2. Did the captain and the pilot consider the RV point was a safe anchorage (honest)?

### Trial result

- No misrep

### Letter statement of opinion or statement of fact?

- The issue here was that the captain wasn't in any sense the agent making the contract.
  - Odd to talk about the captain
- Real issue: whether the agent of plaintiff (Bruce) made a misrep.
  - Last two lines of 67: Trial judge gets it
    - Brett J: the question is, did Bruce assert it was a safe anchorage, or only that the pilot and captain thought it so?
  - If it is the latter, then it is only to be read as opinion that is genuinely held. That genuine fact is true.
- *Much of the discussion focuses around the captain, should focus on the agent.*

### FTA

- Mere conduit defence
- "the previous information passed on"
- E.g. "my solicitors believe that the annuitant has no aggregable estate"

## WARD LJ's whopper e.g. in *Clef Aqu*

*Example: Represented as Manet, but actually a shit fake.*

PP: 1m

AV: 1000

RV: 2m

Issue: "B is induced to believe it is a Manet but he believes that as such he can sell it for 2m".

*Not enough to believe you can sell it. Have to show you can sell it, show that is its market price.*

*Show that there is willing buyer(s) to pay that higher price.*

Tort:  $PP - AV = 1m - 1000 = 999,000$

Issue: "if a contractual warranty had been given, then the measure of damages is the difference between the price paid and the value if it had been genuine".

*No its not  $RV - PP = 1m$*

*It is  $RV - AV = 2m - 1000 = 1.999k$*

*Judge here is shortchanging her 999k*

*Alt example: Represented as Manet, But actually a Degas*

AV: 1.5m

Issue: "b might not have acquired what he thought he was acquiring but nonetheless he suffered no loss" Suggesting no loss.

*K damages =  $RV - AV = 2 - 1.5 = 0.5m$*

*Judge is wrong in saying no loss. That is correct in tort. But not in K.*

*Alt example (Dmac):*

Still a fake, but even if genuine, it was one of Manet's lesser works.

PP: 1m

AV: 1000

RV: 700,000

Tort:  $PP - AV = 1m - 1000 = 999k$

K damages:  $RV - AV = 700k - 1000 = 699k$

*Alt example (Dmac):*

A proves that if misrep had not been made, B would have brought Degas on display for 1m and that painting was only worth 800k

Is this in principle relevant? Can we allow them argue it as partial defence?

(1) Purpose of tort is to put claimant in position if wrong hadn't occurred. But if the wrong hadn't occur then they would have had this loss anyway. There is an issue of overcompensation.

(2) Argument from symmetry, if we are allow claimant to increase their damages. Then should also allow def to show that claimant would've taken another bad opportunity.

Confirmed by the *Yam Seng* case

If so, what would the damages be?

$999 - 200k = 799$