Neutral Citation Number: [2019] EWCA Civ 596

Case No: A4/2018/1922

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE TEARE
[2018] EWHC 1857 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2019

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE PETER JACKSON
and
THE RIGHT HONOURABLE LORD JUSTICE COULSON

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Between:

BV NEDERLANDSE INDUSTRIE VAN EIPRODUKTEN	**Claimant/ Appellant**
- and -	
REMBRANDT ENTERPRISES, INC.	**Defendant/ Respondent**

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Mr Guy Morpuss QC & Mr Theo Barclay (instructed by **Macfarlanes LLP**) for the **Claimant/Appellant**
Mr Gavin Kealey QC, Mr Simon Goldstone & Mr Henry Moore (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendant/Respondent**

Hearing dates: 19th & 20th March 2019

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Approved Judgment

Lord Justice Longmore:

Introduction

1. This appeal from Teare J, now reported at [2019] 1 All ER (Comm) 543, raises two quite separate issues. The first main issue relates to the requirement of inducement in a case of fraudulent misrepresentation. The questions that arise on this first issue are:-

    1) whether the normal requirement for rescission in misrepresentation cases that the representee must prove that he was induced to enter the relevant contract by the misrepresentation made by the representor is any different if the representation was made fraudulently (rather than innocently or negligently); more particularly whether the onus is on the representee to prove he was induced or on the representor to show that the representee was not so induced;

    2) whether what is to be proved is (1) that the representee would not have made the relevant contract if the misrepresentation had not been made; or (2) that the representation played a part/no part of the decision to make the contract; or (3) that the representee might not have made the contract or; indeed, (4) that he would have wished to consider his position without being able to say at trial what it is that he would have done; and

    3) whether, on the primary findings of fact of the judge, the right to rescind for misrepresentation was made out.

2. The second main issue is whether, if a contract of sale is performed partly by the seller as the contracting party and partly by a non-contractual party but with the consent of the buyer (the counter party to the contract), the contracting party can recover for both its own losses and those of the non-contracting party, in the event that the buyer, in breach of contract, refuses to perform.

3. All this arises in the context of the avian flu epidemic which struck the United States in April 2015. It was disastrous for United States' suppliers of egg products. Rembrandt Enterprises, Inc. ("Rembrandt") was one such supplier and had to destroy over 50% of its own birds. It also had to find a new source of supply of egg products in order to honour its own commitments. It found a supplier based in the Netherlands, BV Nederlandse Industrie van Eiprodukten ("NIVE"), with which on 13th May 2015 it made a contract to buy 4200 metric tons of dry whole egg, dry yolk and dry white over a two year period for prices of €6.15, €4.15 and €14.90 per kilogram respectively, provided that its procedures in the Netherlands satisfied the US regulatory authorities for supervision of the egg business. The authorities gave the required approval on 1st June 2015.

4. Before that happened, however, NIVE emailed Rembrandt on 21st May 2015 saying that there would be unanticipated extra regulatory costs and that the prices would have to be increased and on 12th June 2015 NIVE proposed a €2.50 per kilogram increase in the price "after thorough calculation". After some negotiation, Rembrandt requested a breakdown of the extra costs and on 22nd June 2015 NIVE sent Rembrandt a cost calculation of €2.59 per kilogram. Two days later Rembrandt agreed the price increase; on 25th June a new contract was made in materially the

same terms as the original contract save that all the prices had been increased by €2.50 per kilogram. Both contracts had an English law and jurisdiction clause.

5. Shipments began on 6th September 2015. Later that month NIVE informed Rembrandt that some of the egg white powder would be supplied by its sister company Henningsen van den Burg ("Henningsen") whose plant had also been approved by the US regulatory authorities; on 30th October 2015 NIVE explained that the amount of that product being supplied by Henningsen was about 50%.

6. At about this time the price of egg products began to fall from the heights achieved at the time of the avian flu outbreak. Rembrandt's solicitors in due course wrote to NIVE alleging that NIVE was failing to comply with US inspection requirements and suspending Rembrandt's continued performance of the two year contract. On 30th March 2016 NIVE began proceedings for loss of profit on the sales that would have taken place but for such suspension of performance. That claim included loss of profit on the total amount to be supplied and so included loss of profit in respect of the product supplied by Henningsen as well as in respect of NIVE's own product.

7. Rembrandt defended the proceedings not merely on the basis that, in breach of contractual warranty, the product did not comply with US regulations but also on the basis that the second contract had been procured by NIVE's fraudulent misrepresentation that the increased sale price was calculated by reference only to the extra costs incurred as a result of compliance with US regulations, whereas in truth the increased price included an element of profit as well as the increase in cost.

The judgment

8. The judge held that the product supplied by NIVE did comply with US regulation and there is no appeal against that finding.

9. He further held that the agreed increase in the sale price included an element of profit and that the representations made in the emails of 12th June 2015 (that the extra €2.50 was reached "after thorough calculation") and 22nd June 2015 (that the calculation of €2.59 was a "cost calculation") were false representations deliberately made and that Rembrandt believed the increase to be a genuine estimate of additional cost. They thus constituted fraudulent misrepresentations. He held that in law there was a presumption that Rembrandt relied on the representations and that it was for NIVE to prove that the second contract would have been made even if there had been no fraudulent misrepresentation. That NIVE could not do. The fact that Mr David Rettig, the chief executive officer of Rembrandt could not answer the question "what would Rembrandt have done" if it had known that the increased figure included an element of profit was nothing to the point. This gives rise to the first main ground of appeal.

10. The judge therefore held that Rembrandt was entitled to rescind the second contract with the result that NIVE was restricted to a claim for loss of profit based on the sale prices in the first contract.

11. He held further that NIVE could make no claim in respect of the product supplied by its sister company Henningsen, but could only claim for its own loss. This gives rise to the second main ground of appeal.

The First Appeal

(1) Relevant facts as found by the judge

12. Before considering the law, it is necessary to set out the primary facts found by the judge relevant to the question whether NIVE's misrepresentation induced the second contract. These are set out by the judge as follows:-

> "62. By 24th June 2015 Rembrandt had accepted the requested price increase of EUR 2.50 per kg. It appears that the decision was taken by Mr. Rettig. He gave evidence, which was not challenged, that he took the decision. He said his reasons for doing so were threefold. First, given the shortage of eggs in the US market he wished to secure product quickly to secure an advantage over competitors. Second, despite the requested increase in price, the pricing remained "viable". In particular the dried egg white price remained lower than the Urner Barry market price. Third, he had no reason to believe that the costs put forward by NIVE were not genuine and although they appeared higher than Rembrandt's own costs he thought they would be much the same for all Netherlands producers. Mr. Rettig also said in his witness statement that had he known that the stated costs were not NIVE's real costs of complying with US regulations but contained a very significant element of profit he would have viewed the situation very differently.
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> 63. It was suggested to Mr. Rettig in cross-examination that he was very anxious to get dried egg product from NIVE and that he "didn't really have anywhere else to go". He said that was not true; what was imported from NIVE "was less than 15% of our overall imports". He said "if we didn't end up with NIVE, we could find other suppliers, whether with Spain, Italy, Latvia, the other countries that produced." NIVE was going to be "certified first and certified to sell finished egg products". But shell eggs could be pursued elsewhere. It was suggested to him that NIVE was his best option. He replied that "short term, NIVE was the first option." He accepted that with the increase of EUR 2.50 per kg. the contract would be "commercially viable". He said he was very interested in procuring product quickly because "the customers were in deep, deep, deep need of product" and he accepted that he was "keen to lock in the deal". He was asked what he would have done had he been told that 2.50 was not a real number, that the additional costs could be between 1.50 and 2.50 but that NIVE were insistent on getting an extra 2.50 per kg. He replied: "I don't know. It's hypothetical. I can't answer." It was suggested to him that Rembrandt was sufficiently desperate for the eggs that he would have agreed to the demand. Mr. Rettig replied: "Oh my gosh. After this testimony, I mean, we had 30 other countries we were working with. We were interested in an early solution. I'll stand by my previous testimony"."

13. It is tolerably clear from this that the incidence of burden of proof may be important. If the onus of proving that the fraudulent misrepresentation induced Rembrandt to make the second contract is on Rembrandt (as it would be for non-fraudulent misrepresentations), Rembrandt's claim to rescission may fail. If on the other hand, the onus is on NIVE to prove that Rembrandt would have made the second contract even if they had known that NIVE was fraudulently representing that the increased price was solely due to increases in cost and contained no element of profit, Rembrandt's claim to rescission should "probably" succeed. I say "probably" because Mr Guy Morpuss QC for NIVE had a secondary argument that the only onus on NIVE had been discharged by virtue of the fact that Mr Rettig could not say what Rembrandt would have done if it had known the true facts.

14. It is also important to know what has to be proved by the party who has the onus of proof. Is it that the representee would/would not have acted differently but for the misrepresentation? Or is it that the representation played a part (or influenced) the decision of the representee? Or is it sufficient that the representee might/might not have acted differently?

15. It is surprising that these are still controversial questions in English law especially since the test for inducement in cases of innocent or negligent representation appears to be settled in the form that the representee has the burden of showing inducement in the sense that he has to show he would not have entered into the relevant contract had the representation not been made see Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 All ER (Comm) 140, Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501, Chitty, Contracts, 33rd edition, para 7-039.

16. Although, as far as fraud (and particularly rescission for fraud) is concerned, the test for inducement appears to be controversial, both Mr Gavin Kealey QC for Rembrandt and Mr Morpuss for NIVE submitted that the test was settled in Victorian times and that, if subsequent cases were inconsistent with the Victorian ones, the law had taken a wrong turn.

17. The judge decided the case on the basis that the burden of proof was on NIVE to show that, if the representation had not been made, Rembrandt would still have made the second contract. He said (para 104):-

> "However, the representation was made by NIVE for the purpose of persuading Rembrandt to agree the requested price increase and Rembrandt did accept the requested price increase. There is therefore a "particularly strong" presumption, or a "fair inference of fact", that the representation induced Mr Rettig to reach his decision in the sense that but for the representation he would not, or might not, have agreed to the requested price increase. The evidential burden therefore lies on NIVE to rebut that presumption or inference. That is "very difficult" to do (per Lord Clarke). It is not rebutted (per Christopher Clarke J.) if all that can be said is that the representee might have entered the contract had there been no representation. The presumption will only be rebutted, in a case of fraud, by showing that the representee would have entered the contract had there been no representation."

And (para 112):-

> "The conclusion I have reached is that, whilst Mr Rettig might have agreed to the requested price increase, NIVE cannot show that he would have agreed to the requested price increase. The fraudulent misrepresentation as to the additional costs of complying with the US regulations was made for the very purpose of persuading Rembrandt to agree the requested price increase. That end was achieved. Very strong evidence is required to rebut the presumption or inference of inducement in such a case. Whilst there is evidence that Mr Rettig, on behalf of Rembrandt, might have agreed to the requested price increase had the misrepresentation not been made I do not consider that that evidence has the clarity and cogency necessary to enable to enable NIVE to persuade the court that Mr Rettig would in fact have agreed to the requested price increase even if the misrepresentation had not been made."

18. In broad terms, Mr Kealey submitted that the judge rightly held that there was a heavy burden on NIVE to reverse the natural inference that Rembrandt had been induced to make the second contract by NIVE's fraudulent misrepresentations. He relied on Reynell v Sprye (1852) 1 De G. M.&G. 660 and Edgington v Fitzmaurice (1885) 29 Ch.D. 459; Mr Morpuss submitted that the judge was wrong to reverse the normal burden of proof which would lie on a claimant and relied primarily on Smith v Chadwick (1884) 9 App. Cas 187 for this purpose. It is therefore necessary to examine these Victorian cases with a little care.

19. Reynell v Sprye, on appeal from Sir James Wigram, was a decision of the Court of Appeal in Chancery by which we would normally consider ourselves bound even though it was a judgment of a two judge court and was given before the Court of Appeal took its present shape after the Judicature Act 1875. It was a claim to rescind an agreement between Sir Thomas Reynell, an aspiring heir, and a wily genealogist called Captain Sprye that he (Sprye) would perform services in obtaining the inheritance in return for half of what he managed to obtain. Not surprisingly the senior Lord Justice, Knight Bruce LJ, decided (as the main ground of his judgment) that the agreement could be rescinded because of its champertous nature. It was only the junior Lord Justice, Lord Cranworth, (appointed to the then new Court of Appeal in Chancery after he had been created a peer, but before he was made Lord Chancellor) who founded on the alternative case of fraudulent misrepresentation. He held that Captain Sprye had represented first that the contract was the usual course among men of business in conducting litigation of this kind and (by implication) that it was a lawful and honourable practice, secondly that an unidentified "legal man" had said that the arrangement was usual and that he would represent the heir in court, and thirdly that the case was a difficult one because there was a tenant for life with remainder to her children. These were fraudulent misrepresentations because the contract was neither lawful nor honourable but champertous, no lawyer had said that it was usual or that he would represent the heir and, as Captain Sprye came to know, the tenant for life was an illegitimate daughter who could not inherit so that there was no difficulty in the case at all.

20. At pages 707-709 Lord Cranworth LJ said:-

"Every one of these considerations would be material ingredients towards enabling Sir T Reynell to form his judgment as to whether he should or should not accede to the proposal of Capt. Sprye. If he had not received what was equivalent to an assurance that [the lawyer] considered the proposed division of the property as the usual course of conducting business on such occasions, and if he had not been led to suppose that his interest was contingent, depending on the chance of his surviving Mrs Williams Reynell, and then only to be recovered by expensive and doubtful litigation, it may well be that he would not have acted as he did; perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyse the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as to another. Where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed, to adopt a particular line of conduct, it is impossible to say of any one such representation so made that, even if it had not been made, the same resolution would have been taken, or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue, the whole contract is in this Court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed? The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may in the first instance have been the result of innocent error. If after the error has been discovered, the party who has innocently made the incorrect representation suffers the other party to continue in error and act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this Court, a fraudulent misrepresentation, even though it was not so originally.

These are all principles of such obvious justice as to require neither argument nor authority to illustrate or enforce them, and they need but to be stated in order to command immediate assent. The only question can be in each particular case, how far the facts bring it within the principle? I have already pointed out several particulars in which I think these principles apply to the present case; and, therefore, without inquiring whether there are or are not other instances of

> misrepresentation fatal to the case of Capt. Sprye, I feel bound to say that I concur with Sir James Wigram in his conclusion that the conveyance of the 15th July was obtained by fraud, and so must be set aside."

21. Lord Cranworth appears to express himself in terms of inference of law rather than inference of fact; moreover the trial before Sir James Wigram took place before the Evidence Act 1851 entitled a claimant to give evidence on his own behalf, see The Law of Evidence in Victorian England by C.J.W. Allen (1997) pages 102-3. It is also pertinent to say that the law relating to rescission for innocent misrepresentation and indeed to bars to such rescission was in its infancy. Actions at law for damages for deceit were not common and Derry v Peek (1889) 14 App. Cas. 337 had not yet been decided. The legal landscape in 1854 in this respect was very different from what it is today. But for the fact that Reynell v Sprye was (as we shall see) relied on in the duress case in the Privy Council in Barton v Armstrong [1976] A.C. 104 it might not be considered an important authority today.

22. Smith v Chadwick was a case of deceit at common law and not a case of rescission at all. It turned on the true construction to be put on a representation in relation to the turnover of an ironworks that "the present value of the turnover or output of the entire works is over £1,000,000 sterling per annum". It was untrue to the knowledge of the defendants if it meant that the works had actually in one year turned out produce worth more than a million pounds. If it meant that the words were capable of turning out that amount of produce, the statement was true. The claimant asserted in response to interrogations that he understood the meaning of the statement "to be that which the words obviously conveyed". He was asked no further questions about how he understood the words at the trial. Both the Court of Appeal and the House of Lords held that the claimant had to show that he relied on the representation in entering the contract that caused him loss and that he therefore had to show not merely that the representation had the meaning which was false but also that he understood it in that sense. Since he could not do that the claim must fail. In addressing the question of materiality of the representation Sir George Jessel MR said (1882) 20 Ch. D at page 44:-

> "… if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement, to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may shew that in fact he did not so act in one of two ways, either by shewing that he knew the truth before he entered into the contract, and therefore, could not rely on the mis-statements; or else by shewing that he avowedly did not rely upon them, whether he knew the facts or not. He may by contract have bound himself not to rely upon them, that is to take the matter at his own risk whether they were true or false (which was the conclusion to which the House of Lords came in the recent case of Brownlie v Campbell, or he may state that he did not rely upon them in the witness-box, which I think is

> so in one instance here. But unless it is shewn in one way or the other that he did not rely on the statement the inference follows."

This passage can be read to mean that, unless it was shown that the claimant knew the truth of the matter or that he "avowedly" did not rely on the representation, an inference of reliance must be drawn as a matter of law.

23. It does not appear that Reynell v Sprye was cited to the House of Lords but Mr Robert Reid QC for the defendants did make the point in argument that the claimant had to show not merely the sense in which he understood the representation but also that the defendants knew that that sense was false "or made the statement without knowing whether it was true or not". That was because an action at law could not succeed "without moral fraud" whereas in equity "moral fraud need not be proved". This is reported as eliciting the following comment from Lord Blackburn:-

> "I have often thought that perhaps the discrepancies between expressions of equity and common law judges are greatly owing to the fact that at common law questions of fact are for the jury and it is necessary for the judge to separate them clearly from the questions of law; whereas in equity the judges have to determine both law and fact, and it is sometimes impossible to understand whether their decisions were meant to be inferences of fact or of law."

24. Lord Blackburn (with whom the Earl of Selborne LC and Lord Watson agreed) returned to this consideration at page 195 of the report and then added that, though he very nearly agreed with what was said by Sir George Jessel in the Court of Appeal, he did not quite state what Lord Blackburn conceived to be the law. He then proceeded to state the law on inducement for the purposes of an action in deceit as he conceived it to be:-

> "Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when Pasley v Freeman was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into a contract, it is a fair

> inference of fact that he was induced to do so by the statement. In Redgrave v Hurd the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that being a fair inference of fact it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be proper direction to tell a jury that if convinced that there was such a material representation they ought to find that the plaintiff was induced by it, unless one of the things which the later Master of the Rolls specified was proved; nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And whenever that is a matter of doubt I think the tribunal which had to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive."

25. This to my mind shows that if a representor fraudulently intends his words to be taken in a certain sense and the representee understands them in that sense and enters into a contract, it is likely to be inferred that the representee was induced to enter into the contract on the faith of the representor's statement. It is fair to call this a presumption of inducement. But it is a presumption of fact which can be rebutted, not a presumption of law which cannot be rebutted or can only be rebutted in a particular way. The tribunal of fact has to make up its mind on the question whether the representee was induced by the representation on the basis of all the evidence available to it. If a claimant does not give evidence, or if he does give evidence which is equivocal, that is part of the overall picture but is not conclusive. It also follows that the legal burden of proving inducement/reliance is on the representee and the fact that the court may start by making a presumption of fact in his favour does not change that position. Although Smith v Chadwick was an action for damages in the tort of deceit, it would, on the face of it, be odd if the law was any different in an action for rescission on the ground of fraudulent misrepresentation.

26. That still leaves open the question of what it is precisely that the representee must prove. Is it that he would not have made the relevant contract if the representation had not been made or is it enough to show that he might not have made the contract or that the representation had some but not critical "influence" on his decision to enter the contract. Smith v Chadwick gives no direct answer to that question. The Earl of Selborne LC (page 190) said that a claimant had to establish two things in an action of deceit; first actual fraud and secondly:-

> "he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct."

He went on to say that the claimant had not satisfied the burden of proof which "under those circumstances, was incumbent upon him". I do not think that by the use of the word "influencing", Lord Selborne was intending to dilute the requirement of inducement. Edgington v Fitzmaurice (1885) 29 Ch. D. 459 did, however, give an answer to the still open question a year after Smith v Chadwick had been decided.

27. In this case the directors of a company interested in supplying cheap fish to Londoners had issued a prospectus inviting subscriptions for debentures in the amount of £25,000 for the purpose of completing additions to a newly acquired building and of purchasing its own horses and vans rather than relying on sub-contractors. In fact the money was needed to discharge other pressing commitments of which no mention was made. The claimant erroneously believed that the debentures would be a charge on the property of the company and in evidence he stated that he would not have advanced his money but for such belief but that he also relied on the statements contained in the prospectus. Denman J believed him on the basis (page 471) that the statements in the prospectus:-

> "might most seriously have entered into the consideration of a person who was subscribing money upon such bonds as these."

The Court of Appeal upheld his judgment.

28. Cotton LJ having decided that the statements in the prospectus were material said (pages 480-481):-

> "But it was urged by the counsel for the Appellants that the Plaintiff himself stated that he would not have taken the debentures unless he thought they were a charge upon the property, and that it was this mistaken notion which really induced the Plaintiff to advance his money. In my opinion this argument does not assist the Defendants if the Plaintiff really acted on the statement in the prospectus. It is true that if he had not supposed he would have a charge he would not have taken the debentures; but if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to shew that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will be still liable. Did he act upon that misstatement? He states distinctly in his evidence that he did rely on the Defendants' statements, and the learned Judge found, as a fact, that he did, and it would be wrong for this Court, without seeing or hearing the witness, to reverse that finding of the Judge. We must therefore come to the conclusion that the statements in the prospectus as to the

> objects of the issue of the debentures were false in fact, and were relied upon by the Plaintiff."

Bowen LJ (page 483) emphasised that there had to be a misstatement of an existing fact for the action to succeed, famously adding that the state of a man's mind was as much a fact as the state of his digestion, and then turned to inducement:-

> "Then the question remains – Did this misstatement contribute to induce the Plaintiff to advance his money. Mr Davey's argument has not convinced me that they did not. He contended that the Plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I have some doubt whether this contention as to the third misstatement was not an afterthought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the Plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned Judge in the Court below came to the conclusion that the misstatement did influence him, and I think he came to a right conclusion."

Fry LJ said (page 485):-

> "The next inquiry is whether this statement materially affected the conduct of the Plaintiff in advancing his money. He has sworn that it did, and the learned Judge who tried the action has believed him. On such a point I should not like to differ from the Judge who tried the action, even though I were not myself convinced, but in this case the natural inference from the facts is in accordance with the Judge's conclusion. The prospectus was intended to influence the mind of the reader. Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore it is said that the Plaintiff was the author of his own injury. It is quite true that the

> Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the Defendants are liable, even though the Plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable. The appeal must therefore be dismissed."

29. Edgington v Fitzmaurice has a certain similarity to the present case inasmuch as the representee in that case had two reasons for making the contract whereas Mr Rettig has given the three reasons set out in paragraph 64 of the judgment, although Mr Morpuss would no doubt say that his evidence on reliance was less clear-cut than that of the Reverend Charles Edgington.

30. Both Edgington v Fitzmaurice and Smith v Chadwick were followed by Stirling J in the insolvency case of In Re London and Leeds Bank, ex p Carling (1887) 56 L. J. (Ch) 321. Mr Carling issued a motion that the register of members of the company should be rectified by the deletion of his name and he be repaid the £120 he had given for his shares on the faith of statements in the company prospectus leading him to believe that the shares would form an excellent investment. When he discovered that he was given all the shares for which he had asked rather than the 25% applicants usually got on a flotation, his suspicions were aroused and he discovered that the company was not a stable one. On 24th September 1886 Mr Carling issued his notice of motion and on the same day a petition was presented for the winding up of the company. He therefore sought leave to prove in the winding up. One point taken by the liquidator was that Mr Carling was seeking to rescind the contract and that the right to rescind was lost if the company was insolvent at the time a claimant takes proceedings but this was rejected. Mr Buckley QC for the liquidator also said that Mr Carling had to prove (as he would in a common law action for deceit) that he would not have applied for shares unless he had been induced by misrepresentation; he cited Smith v Chadwick as authority for the proposition.

31. Stirling J accepted that proposition but pointed out that Edgington v Fitzmaurice said that the misrepresentation complained of did not need to be the sole inducement. He then addressed the argument that Mr Carling had not said that, if the statements had not been made, he would not have taken the shares and asked himself whether it was necessary that he should have so said. He cited the first half of the extract from the judgment of Lord Blackburn in Smith v Chadwick which I have set out above together with the last two sentences and said this (page 324):-

> "Therefore the question is one of fact which I must decide upon the evidence before me. The sole evidence as to it is contained in the affidavit of the applicant filed so far back as the 27th September 1886. And when the matter was before me in chambers the liquidator did not cross-examine him upon it, and he did not ask that the applicant might be cross-examined viva voce in Court. Upon the evidence I must come to conclusion

> that the mind of the applicant was materially influenced by the misstatements contained in the prospectus."

32. In the light of these authorities it seems to me that the law at the end of the nineteenth century had assimilated the requirement of inducement in the tort of deceit and in actions for rescission for fraudulent misrepresentation and could be stated as being that the representee had to prove he had been materially "influenced" by the representations in the sense that it was "actively present to his mind" to use Bowen LJ's phrase; that, whereas there is a presumption that a statement, likely to induce a representee to enter into a contract, did so induce him, that is merely a presumption of fact which is to be taken into account along with all the evidence. There was no requirement as a matter of law, that the representee should state in terms that he would not have made the contract but for the misrepresentation but the absence of such a statement was part of the overall evidential picture from which the judge had to ascertain whether there was inducement or not. The fact that there were other reasons (besides the representation) for the claimant to have made the contract did not mean that he was not induced by the representation made. Insofar as Reynell v Sprye had said that there was no need for evidence from the claimant or that it was sufficient if the claimant "might" have made the contract, if there had been no representation, that did not represent the law at any rate if "might" meant something different from "influencing" his decision in deciding whether to make the contract.

33. This state of the law was considered by the Judicial Committee of the Privy Council in the duress case of Barton v Armstrong [1976] A.C. 104 on appeal from the Court of Appeal of the Supreme Court of New South Wales. Barton alleged that a deed, made with Armstrong setting out the terms in which he (Barton) would buy out Armstrong's interest in a company in which they were the major shareholders, had been procured by threats of murder. There was an acute conflict of evidence on the facts and the Court of Appeal had held that Barton could not succeed in setting aside the deed unless he established that but for the threats of murder he would not have signed the agreement. The majority of the Judicial Committee held that the law of duress was the same as the law of fraud in relation to inducement and (like Stirling J in In Re London and Leeds Bank) it was not necessary for the claimant to prove that he would not have executed the deed but for the threats. Lord Cross of Chelsea giving the majority opinion said (page 118):-

> "Had Armstrong made a fraudulent misrepresentation to Barton for the purpose of inducing him to execute the deed of January 17, 1967, the answer to the problem which has arisen would have been clear. If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief even though the representation was designed and known by Barton to be designed to affect his judgment. If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed, for in this field the court does not allow an examination into the relative importance of contributory causes."

That with respect seems to me to be an orthodox exposition of the law of fraudulent misrepresentation. He cited as authority one sentence from Lord Cranworth LJ in Reynell v Sprye at page 708 of the report of that case:-

> "Once make out that there has been anything like deception and no contract resting in any degree on that foundation can stand"

and other cases cited in the then current (8th) edition of Cheshire & Fifoot, Law of Contract (1972) and continued (page 119):-

> "Their Lordships think that the same rule should apply in cases of duress and that if Armstrong's threats were "a" reason for Barton's executing the deed he is entitled to relief even though he might well have entered into the contract if Armstrong had uttered no threats to induce him to do so."

34. Mr Kealey relied on the word "might" in this last sentence to submit that it was sufficient for a claimant if the judge at trial decided that he might have been influenced to make the relevant contract. But there is a dangerous ambiguity in that submission. In ordinary language a decision that something might have happened is hypothetical and downgrades the onus of proof. I do not think Lord Cross used the word "might" in that sense. It is necessary for a claimant to show that his decision to make the relevant contract was "influenced" or "affected" by the representation as shown by the first citation from Lord Cross's opinion set out in the previous paragraph. The representee must show that as a matter of fact not as a hypothesis. So understood, Barton v Armstrong has not changed the law on inducement in relation to fraudulent misrepresentation save perhaps as to the incidence of the burden of proof.

35. In the 28th edition (1999) of Chitty on Contracts, no distinction was drawn in respect of the requirement of inducement between cases of fraudulent misrepresentation and innocent misrepresentation. Para 6-039 merely said that where rescission was sought for misrepresentation it was not necessary for the representee to prove that if the misrepresentation had not been made he would not have made the contract, citing In re London and Leeds for that proposition.

36. This changed in the 29th edition (2004) which said (para 6-034) that the normal rule was that a representee would not have a remedy if it was shown that he would have made the contract in any event citing Pan Atlantic v Pine Top but that the position was different in cases where rescission was claimed for fraud citing In re London and Leeds (see now 33rd edition (2018) para 7-040). The editors added that it was sufficient if there was evidence to show that the representation had some impact on his thinking or, citing the judgment of Bowen LJ in Edgington v Fitzmaurice, "was actively present to his mind". The editors then referred to Barton v Armstrong for the first time in the chapter on misrepresentation (as opposed to duress).

37. It seems that the emergence of Barton v Armstrong into the text of misrepresentation may have been due to the industry of Professor Andrew Burrows who in the second edition (2002) of his Law of Restitution described it (page 46) as "the leading case" and in his third edition (2011) points out that it "controversially" placed the onus of proof on the defendant rather than the claimant. That is because when it came to the discussion of the facts, the majority judgment said:-

> "If Barton had to establish that he would not have made the agreement but for Armstrong's threats, then their Lordships would not dissent from the view that he had not made out his case. But no such onus lay on him. On the contrary it was for Armstrong to establish, if he could, that the threats which he was making and the unlawful pressure which he was exerting for the purpose of inducing Barton to sign the agreement and which Barton knew were being made and exerted for this purpose in fact contributed nothing to Barton's decision to sign."

38. This is perhaps less controversial than it sounds, since the factual presumption of which Lord Blackburn speaks in Smith v Chadwick is another way of expressing the same concept.

39. This can be seen from two more recent authorities of the House of Lords and the Supreme Court. In Pan Atlantic v Pine Top [1995] 1 A.C. 501 it was argued that there was no requirement in insurance law for an underwriter to show that he had been induced to write the contract by any relevant non-disclosure or misrepresentation. The House of Lords rejected this argument since it was contrary to the general common law approach. Lord Mustill said (542A):-

> "Take the case of misrepresentation. In the general law it is beyond doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid, although the task of proof may be made more easy by a presumption of inducement. The case of innocent misrepresentation should surely be a fortiori"

This was, in my opinion, part of Lord Mustill's ratio since he used fraud as an essential stepping stone to determine the existence of a requirement of inducement for innocent misrepresentation. Barton v Armstrong was not cited but Smith v Chadwick was before the House since it was cited in argument (505G) and in Lord Lloyd's speech agreeing on this point with Lord Mustill (507C).

40. The later case of Zurich Insurance v Hayward [2017] A.C. 142 was the main case relied on by the judge. Insurers had settled a personal injury case despite doubts about the claimant's injuries. They later discovered that the claimant had fully recovered a year before the settlement had been reached and brought an action in deceit claiming that he had fraudulently misrepresented the extent of his injuries. The Court of Appeal held that the insurers had not relied on the representation in reaching the settlement agreement because they had always had their suspicions about the claim. The Supreme Court allowed the insurers' appeal holding that the fact that the insurers had not wholly believed the claimant did not preclude them from having been induced to reach the settlement by the claimant's misrepresentation; they only had to prove that the misrepresentation had been "a material cause" of their reaching the settlement. Since the judge had held that it was a material cause, his order in their favour would be restored.

41. The question to be resolved was whether a representee had to show he believed the representation to which the Supreme Court returned a negative answer and, in one

sense, the case is no more than an example of the principle set out in Edgington v Fitzmaurice that the representee only has to show that the representation was "a cause" of his entering the relevant contract. Indeed, Lord Clarke of Stone-cum-Ebony (with whom Lord Neuberger PSC, Baroness Hale DPSC and Lord Reed JSC agreed) cited Barton v Armstrong for that very proposition. More importantly, for the present purpose, Lord Clarke relied on the existence of the presumption of inducement and agreed with the insurers' submission that the presumption would have little value if the representee had to show that he believed the misrepresentation. He cited the relevant paragraph of Chitty (now para 7-041 of the 33rd edition) to the effect that it was a fair inference of fact though not of law that the representee will have been influenced by the representation:-

> "and the inference is particularly strong where the misrepresentation was fraudulent."

He then relied further on extracts from Pan Atlantic and a decision of Briggs J in Ross River Ltd v Cambridge City Football Club Ltd [2008] 1 All ER 1004 para 241 in which the judge referred to the requirement that the representation was "actively in the mind of the recipient when the contract came to be made".

42. Lord Clarke said further that it was not necessary to address differences in the authorities about what was required to rebut the presumption but he would simply say "it is very difficult to rebut the presumption". He concluded this part of his judgment by approving a passage in the Hon. K. R. Handley's "impressive" article entitled "Causation in Misrepresentation" (2015) 131 LQR 277, 284:-

> "The representor must have decided to make the misrepresentation because he or she judged that the truth or silence would not, or might not, serve their purposes or serve them so well. In doing so they fashioned an evidentiary weapon against themselves, and the court should not subject the victim to "what if" inquiries which the representor was not prepared to risk at the time."

43. It seems to me, therefore, that overall the modern authorities do not add much to the conclusions that I drew from the Victorian authorities in para [32] above. I do not think that Barton v Armstrong intended to reverse the legal burden of proof but, if it did, this court must prefer the later analysis of the House of Lords and the Supreme Court that there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent representation intended to cause him to enter the contract and that the inference will be "very difficult to rebut" to use the words of Lord Clarke.

44. There remains the question whether, if it be the case that the burden of proof is on the representee to show that he was induced (albeit with the help of the presumption which is very difficult to rebut), it is sufficient for him to show that he might have acted differently. Both Christopher Clarke J in Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm) and Hamblen J in Cassa di Risparmio della Republica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm) have obiter given some support for this being an appropriate test in cases of fraudulent misrepresentation, see paras 196-199 and 232-233 respectively.

45. I have already pointed out the ambiguity in the word "might" which was in fact used in Barton v Armstrong. If it means no more than being actively present in the mind of the representee to repeat the phrase of Bowen LJ, it is perhaps a convenient shorthand. But if it means that the court cannot make up its mind on inducement and therefore decides as a matter of law to give the representee the benefit of the doubt, it is not a helpful concept because that would be contrary to the law as I conceive it to be, see para 32 above, which requires the representee to prove inducement albeit with the assistance of a presumption that "will be very difficult to rebut". To some extent this is a matter of terminology but terminology can be important in some cases.

The Facts

46. I turn then to consider whether that presumption was rebutted on the facts of the present case. The judge held that it was not and this court must necessarily be reluctant to differ from the judge on what is essentially a question of fact.

47. Mr Morpuss submitted that it was sufficient for him to point to the passage in cross-examination in which Mr Rettig, in response to being asked what he would have done if he had been told that €2.50 was not the real number which reflected cost because it included an element of profit, said:-

> "I don't know. It's hypothetical. I can't answer."

But as Hobhouse LJ said in Downs v Chappell [1997] 1 WLR 426, 433:-

> "The judge was wrong to ask how they [the representees] would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful…"

48. Once the irrelevance of this answer of Mr Rettig is clear, the other submissions of Mr Morpuss to the effect that Mr Rettig was very keen to obtain the product because his customers were "in deep deep deep need" and that he was "keen to lock the deal" were matters of fact considered by the judge. So also was the absence of any positive evidence from Mr Rettig that he would not have agreed (or even that he might not have agreed) to the new contract because the question was hypothetical (paras 105-110).

49. Having reminded himself of the strength of the presumption that a representee will have acted on a fraudulent statement intended to be acted upon, the judge said (para 112) that Mr Rettig's evidence established that he might have agreed to the increase in price if the representation had not been made, but he did not think that the evidence overall had sufficient clarity and cogency to persuade him that Mr Rettig would have agreed to the requested price increase, even if the representation had not been made. He is not there relying on any rule of law (see para 111) and he has not reversed the burden of proof. He is merely saying that the factual presumption has not, on the evidence, been rebutted. Like Denman J in Edgington v Fitzmaurice, he accepted (paras 101-102) the evidence that the representation was one of the reasons why the representee made the relevant contract. The Court of Appeal did not consider they

should interfere with Denman J's decision. Similarly, I do not think we should interfere with the decision of Teare J and I would reject the first appeal.

The second appeal

50. I agree with Coulson LJ that, for the reasons he gives, we should also reject the second appeal.

Lord Justice Peter Jackson:

51. I agree with both of these incisive judgments. I pay particular tribute to Longmore LJ's masterly exegesis of the Victorian cases on inducement in cases of fraudulent misrepresentation, which illuminates how much the modern law owes to those classic authorities.

Lord Justice Coulson:

52. I agree that, for the reasons given by my Lord, Lord Justice Longmore, the first appeal (inducement in a case of fraudulent misrepresentation) should be dismissed.

53. The second appeal (transferred loss) arises out of the judge's conclusion that NIVE could not recover the loss of profit suffered by Henningsen, and said to arise from Rembrandt's breach of contract. Henningsen is another supplier of egg products who, like NIVE, is part of the Interovo Group. The companies have common owners, who are part of the same family. They are separate legal entities and the evidence was that they traded with one another on commercial terms. NIVE now says that it always intended that some of the egg white powder that it was contractually obliged to provide to Rembrandt would in fact be provided by Henningsen, although it was common ground that at no time prior to the making of the contract did NIVE ever communicate that intention to Rembrandt.

54. Rembrandt subsequently agreed to accept some egg white powder from Henningsen and to be invoiced by it directly. But it is agreed that Henningsen had no contractual rights against Rembrandt, or vice versa. Thus, if there were defects in the egg white powder supplied by Henningsen, Rembrandt would have had no right of redress against it: it (Rembrandt) would have had to have looked to NIVE, pursuant to the terms of its sub-contract. Similarly, if there were any payment issues, it was not suggested that Henningsen could have looked to Rembrandt for payment: because there was no contract between them, Henningsen could only have sought payment from NIVE.

55. To all intents and purposes therefore, Henningsen was a sub-contractor to NIVE, without any rights or liabilities under NIVE's contract with Rembrandt. When Rembrandt repudiated that contract, it meant that Henningsen was not going to make the profits which it had anticipated. Henningsen could not pursue Rembrandt for such losses because there was no contractual vehicle to permit it to do so. Was there some way that NIVE could itself claim those losses from Rembrandt?

56. It appears that this possibility only occurred to NIVE late in the litigation. In April 2018, NIVE sought to make significant amendments to its claim relying, amongst other things, on a settlement agreement it had concluded with Henningsen.

Permission to make the bulk of those amendments was refused. The only amendment which was permitted was a claim for 'transferred loss', in accordance with the decision of the House of Lords in Linden Gardens Trust v Lenesta Sludge Disposals [1994] 1 AC 85, as discussed and explored in subsequent cases.

57. At the trial, Teare J rejected the claim for transferred loss. Having referred to some of the relevant authorities, he summarised his reasons in relatively short order:-

> "161. It is apparent from the decision in that case, as summarised in paragraph 17 of the judgment of Lord Sumption, that in order for the principle of transferred loss to apply there must have been an intention, known to the defendant, to benefit the third party. The argument failed in that case because "it was no part of the object of the engagement of HMT [the defendant] or indeed of any other aspect of the 2006 transaction to benefit Mr Hunt [the third party]." This reflects the account given by Lord Browne-Wilkinson in Panatown of the essential feature of the principle upon which NIVE relies:
>
> "The essential feature of the broader ground is that the contracting party A, although not himself suffering the physical or pecuniary damage sustained by the third party C, has suffered his own damage being the loss of his performance interest, ie the failure to provide C with the benefit that B had contracted for C to receive. "
>
> 162. I note in particular the description of A's performance interest as "the failure to provide C [the third party] with the benefit that B had contracted for C to receive."
>
> 163. In the present case it is not said that Rembrandt had contracted for Henningsen to receive any benefit or that it was part of the contract to benefit Henningsen. In those circumstances it must follow that, just as Swynson was unable to recover Mr. Hunt's losses in Lowick Rose LLP v Swynson, so NIVE is unable to recover Henningsen's losses in the present case.
>
> 164. Counsel for NIVE has sought to argue, with reference to other passages in the judgments in Panatown, that there is no requirement that both parties to the contract must have intended, pre-contract, to confer a benefit on the third party. For the reasons I have given, derived from the decision in the most recent Supreme Court case and the judgment of Lord Browne-Wilkinson in Panatown (which counsel for NIVE said was the most useful summary of the principle) I am unable to agree."

58. The concept of transferred loss can be traced back to the decision of the House of Lords in The Albazero [1977] AC 774. That was concerned with a lost cargo, and the principal issue was who owned the cargo at the time of the loss. Lord Diplock's

formulation of the legal foundation for a claim for loss suffered by a third party was in the following terms:-

> "…where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."

59. This principle was applied in Linden Gardens and, in particular, the case heard and decided at the same time, St Martins Property Corporation Limited v Sir Robert McAlpine Limited. In the St Martins case, which was concerned with a defective building, Corporation had the benefit of the contract with McAlpine but no longer owned the building; a related company called Investments owned the building but had no cause of action against McAlpine. Four of the five members of the Court dealt with this conundrum on the basis of what was subsequently referred to as "the narrow ground", encapsulated by Lord Browne-Wilkinson at 114G – 115C as follows:-

> "In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract *could* not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.""

60. Lord Griffiths, however, dealt with the issue in a different way, in what has come to be known as "the broader ground". He said:-

> "In my view neither of these considerations provide McAlpine with a defence to Corporation's claim. I cannot accept that in a contract of this nature, namely for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract is dependent upon the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach. In everyday life contracts for work and labour are constantly being placed by those who have no proprietary interest in the subject matter of the contract. To take a common example, the matrimonial home is owned by the wife and the couple's remaining assets are owned by the husband and he is the sole earner. The house requires a new roof and the husband places a contract with a builder to carry out the work. The husband is not acting as agent for his wife, he makes the contract as principal because only he can pay for it. The builder fails to replace the roof properly and the husband has to call in and pay another builder to complete the work. Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder. To put this simple example closer to the facts of this appeal—at the time the husband employs the builder he owns the house but just after the builder starts work the couple are advised to divide their assets so the husband transfers the house to his wife. This is no concern of the builder whose bargain is with the husband. If the roof turns out to be defective the husband can recover from the builder the cost of putting it right and thus obtain the benefit of the bargain that the builder had promised to deliver.
>
> It was suggested in argument that the answer to the example I have given is that the husband could assign the benefit of the contract to the wife. But what if, as in this case, the builder has a clause in the contract forbidding assignment without his consent and refuses to give consent as McAlpine has done. It is then said that neither husband nor wife can recover damages; this seems to me to be so unjust a result that the law cannot tolerate it."

61. These different formulations were considered by the House of Lords in Alfred McAlpine Construction Limited v Panatown Limited [2001] 1 AC 518. That was similarly a case about a defective building that had been sold on and the real issue, which was ultimately decisive of the appeal, was the existence of a deed of warranty that gave the third-party building owner a direct right to claim against the contractor.

In those circumstances, it was held by a majority of 3:2 that the original employer (Panatown) was not entitled to anything other than nominal damages. The members of the House of Lords displayed varying degrees of support for (or rejection of) Lord Griffiths' broader ground. Perhaps the most helpful summary can be found in the speech of Lord Browne-Wilkinson (who assumed the broader ground was right without expressly endorsing it):-

> "I turn now to the broader ground on which Lord Griffiths decided the St Martins case. He held that the building contractor (B) was liable to the promisee (A) for more than nominal damages even though A did not own the land at the date of breach. He held in effect that by reason of the breach A had himself suffered damage, being the loss of the value to him of the performance of the contract. On this view even though A might not be legally liable to C to provide him with the benefit which the performance of the contract by B would have provided, A has lost his "performance interest" and will therefore be entitled to substantial damages being, in Lord Griffiths's view, the cost to A of providing C with the benefit. In the St Martins case Lord Keith of Kinkel, Lord Bridge of Harwich and I all expressed sympathy with Lord Griffiths's broader view. However, I declined to adopt the broader ground until the possible consequences of so doing had been examined by academic writers. That has now happened and no serious difficulties have been disclosed. However, there is a division of opinion as to whether the contracting party, A, is accountable to the third party, C, for the damages recovered or is bound to expend the damages on providing for C the benefit which B was supposed to provide. Lord Griffiths in the St Martins case, at p 97G, took that view. But as I understand them Lord Goff of Chieveley and Lord Millett in the present case (in agreement with Steyn LJ in Darlington Borough Council v Wiltshier Northern Ltd [1995] 1 WLR 68, 8OH) would hold that, in the absence of the specific circumstances of the present case A, is not accountable to C for any damages recovered by A from B.
>
> I will assume that the broader ground is sound in law and that in the ordinary case where the third party (C) has no direct cause of action against the building contractor (B) A can recover damages from B on the broader ground. Even on that assumption, in my judgment Panatown has no right to substantial damages in this case because UIPL (the owner of the land) has a direct cause of action under the DCD.
>
> The essential feature of the broader ground is that the contracting party A, although not himself suffering the physical or pecuniary damage sustained by the third party C, has suffered his own damage being the loss of his performance interest, i.e. the failure to provide C with the benefit that B had contracted for C to receive…"

62. It is possibly unhelpful to identify in too much detail the differing views of the remaining members of the Court. Lord Goff and Lord Millett both adopted the broader ground, although they were in the minority as to the result of the appeal. As noted above, Lord Browne-Wilkinson did not expressly endorse the broader ground but assumed it to be correct. Lord Clyde and Lord Jauncey did not endorse it and offered different formulations which appear to be based closely on the narrow ground.

63. In identifying the principles underpinning the broader ground, Lord Goff said at 538G that it applied in the situation "in which a party contracts for a benefit to be conferred on a third party…", and later at 538H he said:-

> "It would be an extraordinary defect in our law if, where (for example) A enters into a contract with B that B should carry out work for the benefit of a third party, C, A should have no remedy in damages against B if B should perform his contract in a defective manner."

He later repeated this analysis of the broader ground, saying at 544E that what Panatown was concerned with was "the case of a contract which is intended to confer a benefit on a third party but not to confer on the third party an enforceable right"; and at 545D noting that Lord Griffiths was not concerned with the problem of privity of contract: "on the contrary, he was concerned that a contracting party who contracts for a benefit to be confirmed on a third party should himself have an effective remedy".

64. The Supreme Court considered this issue again in Swynson v Lowick Rose LLP [2017] UKSC 32; [2018] AC 313. The case concerned loans made by Swynson to borrowers based on due diligence reports produced by HMT, a firm of accountants. Swynson was owned by a Mr Hunt. When the borrowers defaulted, Mr Hunt repaid the unpaid sums to Swynson. In Swynson's claim for negligence against HMT, the accountants argued that Swynson had suffered no loss. The Supreme Court held that HMT's duty was owed to Swynson but the loss had been suffered by Mr Hunt. Lord Sumption pointed out in the first paragraph of his judgment that "the distinct legal personality of companies…has never stopped businessmen from treating their companies as indistinguishable from themselves. Mr Hunt is not the first businessman to make that mistake and doubtless he will not be the last".

65. The claim based on the transferred loss principle failed for the reasons explained by Lord Sumption. His summary of the principle is important:-

> "14. The principle of transferred loss is a limited exception to the general rule that a claimant can recover only loss which he has himself suffered. It applies where the known object of a transaction is to benefit a third party or a class of persons to which a third party belongs, and the anticipated effect of a breach of duty will be to cause loss to that third party. It has hitherto been recognised only in cases where the third party suffers loss as the intended transferee of the property affected by the breach*."*

66. Then, having dealt with the Albazero and Linden Gardens, he went on:-

> 16. It is, however, important to remember that the principle of transferred loss, whether in its broader or narrower form, is an exception to a fundamental principle of the law of obligations and not an alternative to that principle. All of the modern case law on the subject emphasises that it is driven by legal necessity. It is therefore an essential feature of the principle that the recognition of a right in the contracting party to recover the third party's loss should be necessary to give effect to the object of the transaction and to avoid a "legal black hole", in which in the anticipated course of events the only party entitled to recover would be different from the only party which could be treated as suffering loss: see Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518, 547-548 (Lord Goff), 568 (Lord Jauncey), 577-578 (Lord Browne-Wilkinson), 582-583 (Lord Millett). That is why, as the House of Lords held in this last case, it is not available if the third party has a direct right of action for the same loss, on whatever basis.
>
> 17. In the present case the relevant duty was owed to Swynson but the loss has in the event been suffered by Mr Hunt. Since Mr Hunt did not suffer his loss in his capacity as the owner of property, only the broader principle of transferred loss could be relevant to his case. Like others before me, I consider that there is much to be said for the broader principle. But it is not necessary to decide the point on this appeal because it is plain that the principle cannot apply in either form to the present facts. The reason is that it was no part of the object of the engagement of HMT or indeed of any other aspect of the 2006 transaction to benefit Mr Hunt. That is the main reason why no duty of care was owed to him. It is also one reason why the engagement letter was unassignable without consent. Mr Hunt's loss arises out of the refinancing of December 2008, which had nothing to do with HMT and did not arise out of their breach of duty."

67. Lord Mance and Lord Neuberger reached the same view: at [104], when explaining the broader ground, Lord Neuberger characterised the underlying contract as one which "can be seen as having been entered into by B partly for C's benefit".

68. Unsurprisingly, perhaps, the principles underlying a claim for transferred loss have been considered in a number of other decisions. It is unnecessary to deal with them in any detail. I note just three:-

i) In And So To Bed Limited v Dixon [2001] FSR 47, ASTBL were franchisors, and the second claimant was a manufacturer of bedsteads. ASTBL had a franchise agreement with the defendant, but when the defendant defaulted, the loss was suffered not by ASTBL but by the second claimant. David Donaldson QC, sitting as a Deputy High Court Judge, rejected ASTBL's claim for transferred loss:-

> "54 However, it does not appear to me that Lord Griffiths' approach assists ASTBL in the present case. The "performance interest" of party A to a contract, as envisaged by Lord Griffiths in Linden Gardens and by Lords Goff, Jauncey and Millett in Panatown, is no more than the obverse of the positive obligations assumed by the other party B. It is the benefit inherent in the performance of those obligations itself to the exclusion of any further consequential loss. Even if that were not right, A's "performance interest" cannot, in my judgment, encompass benefits which a third party C can anticipate in consequence of steps taken by B to put himself in a position to perform the positive obligations owed by B to A. More concretely in the present case the positive obligations of the Licensee under the Agreement were, in essence, to sell bedding and associated products under the franchised name from the agreed premises. The correlative "performance interest" of the Licensor did not extend beyond that to the benefits which would enure to C under future contracts of sale by C to the Licensee of bedding products merely because the motive for their purchase by the Licensee was to resell them from the franchised premises…Loss of profit suffered by the second claimants in respect of the anticipated sales cannot therefore constitute a loss to ASTBL inherent in the defendants' non-performance of the Agreement and is not recoverable by ASTBL as damages for repudiation under Lord Griffiths' alternative approach."

ii) In Smithkline Beecham PLC & Others v Apotex Europe Limited & Others [2006] EWCA Civ 658; [2007] Ch 71, Jacob LJ stressed that none of the speeches in either Linden Gardens or Panatown "begin to regard, as within the concept of 'performance interest', anyone who might be adversely affected by a breach of contract".

iii) In DRC Distribution Limited v Ulva Limited [2007] EWHC 1716 (QB), Flaux J (as he then was), considered Linden Gardens and Panatown and said:-

> "76. As Mr Norbury submitted in his analysis, there may be some difficulty in identifying the precise ratio decidendi of the majority decision in Panatown and the extent to which more general observations of their Lordships represent the law. As I have already stated, it does seem clear that the majority were rejecting the broader ground put forward by Lord Griffiths in the St Martin's case".

69. When outlining the sub-issues between the parties on the second appeal, Mr Morpuss accepted that the narrow ground simply did not apply on the facts so that, in order for NIVE to succeed in its claim for transferred loss, they needed to bring themselves within the broader ground. He said that there were three sub-issues:-

a) Whether the broader ground requires that, at the time that the underlying contract was made, there was a common intention and/or a known object to

benefit the third party, or a class of persons to which the third party belonged. For shorthand purposes only, I shall refer to this as "the known third party benefit";

b) Whether the broader ground applies to contracts for the sale of goods;

c) Whether this was a 'black hole' case at all, given that Henningsen could recover from NIVE.

70. Mr Morpuss assumed that, contrary to the indication of Flaux J in DRC Distribution Limited, the broader ground was still good law, notwithstanding what was said about it in Panatown. Mr Kealey did not suggest to the contrary. Following the clear guidance in Swynson, I consider that it is.

71. I also agree that the first of the sub-issues outlined by Mr Morpuss, namely whether the broader ground requires a known third party benefit, is much the most important sub-issue. Mr Morpuss properly accepted that, if he was wrong to suggest that this was not a component of the broader ground, NIVE's claim for transferred loss must fail.

72. In my view, based on the authorities summarised above, the known third party benefit is an essential component of the broader ground. It is a consistent feature of the authorities to which I have referred:

(a) In Linden Gardens, in Lord Griffiths' example of the builder installing a new roof, the builder would have known that he was benefitting the owners of the house, even if he was unaware of their specific identity. Thus, he would have known that it was for the benefit of the wife, whether she legally co-owned the house with her husband or not, and even if all the builder's dealings had been with her husband.

(b) In Panatown, Lord Browne-Wilkinson referred to this essential component at 577H as "the failure to provide C [the third party] with a benefit that B [the contract-breaker] had contracted for C to receive".

(c) Also in Panatown, Lord Goff talked about the broader ground requiring a contract having to be "for the benefit of a third party" (538H); "a contract which is intended to confer a benefit on a third party but not to confer on the third party an enforceable right" (544E); and "a contracting party who contracts for a benefit to be conferred on a third party should himself have an effective remedy" (545B).

(d) In Swynson, Lord Sumption described the rule as one "where the known object of a transaction is to benefit a third party or a class of persons to which a third party belongs" (paragraph 14), and he referred to "the benefit that the third party was intended to have" (paragraph 15). Lord Sumption rejected the application of the principle of transferred loss in that case because "it was no part of the object of the engagement of HMT or indeed of any other aspect of the 2006 transaction to benefit Mr Hunt" (paragraph 17). Lord Neuberger said the same at [104-105].

73. Accordingly, I have no hesitation in concluding that, as a matter of law, for a successful claim for transferred loss that seeks to rely on the so-called broader ground,

as explained in Linden Gardens and Panatown, the claimant must show that, at the time that the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged.

74. On that basis, as Mr Morpuss accepted, NIVE's claim for transferred loss must fail. At the time of the making of the contract, Rembrandt was not even aware of the existence of Henningsen, let alone the possibility that Henningsen might be providing some of the egg white powder on behalf of NIVE. NIVE therefore cannot bring itself within Lord Griffiths' broader ground. Of all the authorities noted above, the present claim for transferred loss is perhaps closest to the claim for loss of profits in And So To Bed. It must fail for the same underlying reasons.

75. It is perhaps worth pausing a moment to reflect on the consequences if Mr Morpuss was right, that this component was not required for a claim for transferred loss. As I have already pointed out, Henningsen was a domestic sub-contractors to NIVE, being used to fulfil some of NIVE's own contractual obligations to Rembrandt. Its involvement was entirely a matter for NIVE: Rembrandt had no knowledge of Henningsen. So, if Mr Morpuss was right and the known third party benefit was irrelevant, it would mean that a main contractor would always be able to claim against the employer the losses suffered by his sub-contractor, even if the employer had no knowledge of the sub-contractor, or even that a sub-contractor was going to be used at all. That would not only be contrary to the general rule, referred to by Lord Diplock in Albazero and Lord Sumption and Lord Neuberger in Swynson, that a party can only recover the losses that it has itself suffered, but it would also turn transferred loss, which is supposed to be a narrow exception to that rule, into a commonplace route of recovery. In my view, that would go far beyond even what Lord Griffiths had in mind in St Martins, and I do not consider that it is a correct analysis of the law.

76. During the course of his oral submissions, Mr Morpuss suggested that it was a relevant factor that both NIVE and Henningsen were companies within the same group and were owned by the same family. In support of this contention, he referred to Lord Clyde's speech in Panatown when he said at 535H – 536A that the problem that arose in that case "is most likely to arise in the context of the domestic affairs of a family group or the commercial affairs of a group of companies".

77. But, certainly on the facts of this case, I do not consider that it makes any difference that NIVE and Henningsen are owned by members of the same family. First, as Mr Kealey pointed out, the evidence was that, not only were these companies separate legal entities, but they traded with each other on commercial terms. Secondly, it was obviously in the interests of the family members who owned these companies to use their separate legal entities for their own purposes. They cannot rely on the separate nature of those companies when it suits them, and then seek to break down the barriers when it creates difficulties. That comes uncomfortably close to what Mr Hunt was trying to do in Swynson.

78. In the light of my conclusion on this critical sub-issue, it is unnecessary, and possibly unwise, to express concluded views on the other sub-issues. I will confine myself to saying that, although I consider that, on the face of the authorities, the argument that the broader ground does not arise in sale of goods contracts has some force, it may be difficult to justify treating different types of contracts in a different way. Ultimately,

it will depend on the analysis of the particular contract in question. Similarly, the fact that this was a claim for loss of profit, rather than the sort of claim addressed in the principal authorities (which were largely concerned with the cost of necessary remedial work) may also be a reason to find that the broader ground did not apply although, since a claim for loss of profit is a recognised head of loss in claims under or for breach of commercial contracts, it may again be difficult to exclude the principle of transferred loss merely because of the nature of the damages claimed.

79. As to the final sub-issue, namely whether or not this was a claim which was otherwise disappearing into a black hole, I have some sympathy with Mr Kealey's argument that it was not. After all, it appears to have been agreed that Henningsen could look to NIVE to recover its losses, which is what one would expect. This is not therefore a situation in which the party who has suffered the loss has no means of redress against anyone. On the other hand, I can see that, since NIVE could not have recovered from Rembrandt any sums paid out to Henningsen, that could be said to establish the necessary black hole for these purposes. But although Mr Morpuss supported this submission by saying that, in St Martins, Investments could have recovered from Corporation but that did not prevent the finding by the House of Lords of a black hole, that is not actually what happened: there, it was Corporation who paid for the remedial works, and "for financial reasons beneficial to Corporation and Investments" (96F), Investments then reimbursed Corporation. So, the position is far from clear-cut. As it is, however, that is not a question which this court needs to decide on this appeal.

80. For the reasons that I have given, I consider that the transferred loss claim must fail because, on the facts, the claim lacks a critical component. The contract between NIVE and Rembrandt was not (even in part) for the benefit of Henningsen; it was not for the transfer of any right to Henningsen; any possible benefit to Henningsen was not a known or intended object of the contract; Henningsen was not known to Rembrandt at the time that the contract was made; and NIVE's intention to use Henningsen as a sub-contractor was similarly unknown to Rembrandt. There was no known third party benefit.

81. In consequence, I conclude that Teare J was right to reject the transferred loss claim in the succinct terms that he did. The second appeal is also dismissed.

Overall Conclusion

82. This appeal will be dismissed.