Inter Export LLC v. Jonathan Townley, Yaroslavna Lasytsya
Case No: A3/2017/0985
Court of Appeal (Civil Division)
21 September 2018

[2018] EWCA Civ 2068

2018 WL 04509998

Before: Lady Justice Arden Lord Justice Kitchin and Mr Justice Birss
Date: 21/09/2018

Analysis

On Appeal From the High Court of Justice Chancery Division

The Hon Mrs Justice Proudman

[2017] EWHC 530 (Ch)

Hearing date : 21 June 2018

Representation

- John Robb (instructed by Stephenson Harwood LLP) for the Appellant.
- Hugh Jory QC and Joe-Han Ho (instructed by CLP Solicitors) for the Respondent.

Approved Judgment
Lady Justice Arden:

Summary of this Appeal

This is an appeal by the second defendant in this action ("D2") from the judgment of Proudman J dated 17 March 2017 holding that D2 was liable in damages for deceit in the sum of US$1,203,099.30 and dismissing the claim against her former husband ("D1"). The deceit arose out of representations which were made by D2 to a director of the respondent in July 2012. The principal issues on this appeal are (1) what factual findings were made by the judge and whether they are supported by sufficient reasons, and (2) whether the damages were correctly assessed at the market value of the commodity sold (which was sunflower oil, or oil for short). D2's case is that the market value was not required to compensate the respondent or to put it in the position it would have been in had the representations not been made because at the date the representations were made it had not then acquired the oil. It only acquired the oil later.

For the reasons given below, I consider that the appeal should be dismissed. In summary, on careful analysis the judge made sufficient findings and her reasons are apparent from the totality of her judgment. As a matter of law, she came

to the correct conclusion on the measure of loss. The representations were clearly continuing representations, and the judge found that that the respondent relied on them when releasing the oil to the purchaser.

Outline of the Relevantfacts

Between 2009 until December 2011, the respondent (the claimant in this action), to which I shall hereafter refer as C, a Ukrainian company, sold to Nerida Trading Limited ("NTL"), a UK registered company of which D2 was a director, edible oils totalling about 3,000 metric tonnes ("mts").

D2 and D1 were each 50% shareholders of NTL. They were originally both directors but D1 resigned as a director on 1 August 2010 and D2 ran NTL thereafter until its liquidation in February 2016. D1 and D2 were married until their divorce in April 2014.

NTL was financed by Arkley (UK) Limited ("Arkley"), of which D1 was the sole director between 1997 and 13 March 2013. The shareholders of Arkley included Chelpipe Plc, whose share capital was as to 70% owned by Mr Andrey Komarov, a wealthy Russian businessman. D2's parents had founded Agro-Klass LLC ("AK") and FLAS&K LLC ("FLASK"), both registered in Ukraine. AK owned a storage transhipment terminal at Berdyansk Commercial Port ("BCP") and was engaged in surveying the quality and quantity of the oil.

In July 2012, when a new contract for the sale of oil was in contemplation, Mr Oleg Karachevtsev ("Mr Karachevtsev"), a director of C, sought assurance from D2 as to NTL's ability to pay for a proposed further shipment of oil. C's case at trial was that D2 made seven oral representations ("the July Representations"), including representations that (1) NTL had funds available to pay for such a large shipment because the first defendant had negotiated a financing deal for NTL with Andrey Komarov, and (2) that Mr Komarov had agreed to provide funds to NTL, specifically for the purpose of paying for the transaction with C.

By contract number NTL/01/13 made on 21 September 2012, C agreed to sell to NTL a further 1,000 mts or thereabouts of sunflower oil. Delivery was to be made between 27 September 2012 and 15 October 2012. Payment was to be made within three banking days of delivery of the oil to FLASK, the freight forwarder. Mr Karachevtsev's evidence was that he would not have entered into the contract with NTL had D2 not made the representations relied on (Judgment, [5]). It appears that only after the contract was made did C acquire the sunflower seeds, from which the oil which was delivered, was extracted. The crushing of the sunflower seed happened in early October 2012 and 1,028.29 mts of oil were then delivered to FLASK at the port and loaded on to *The Vindemia* on about 13 October 2012.

NTL did not pay C for this oil. C started arbitration proceedings in Ukraine against NTL. NTL went into administration on 28 July 2015 followed by liquidation on 20 February 2016. In April 2016, C brought the claims in this action against D1 and D2.

The judge went on to find that a number of these representations were false, notably the representation that NTL had sufficient funds to pay C for the price due under contract NTL/ 01/13. On this appeal D2 accepts that that is the critical representation, but D2's challenge to the judgment is on the basis that the judge's judgment did not find that D2 made the representations relied on or that she had made them dishonestly.

Between 3 and 11 October 2012, C raised three separate invoices with NTL representing the delivery to BCP of sunflower oil. On 18 October 2012, a number of messages via the SWIFT international payment network, purporting to be issued by Nordea Bank, were sent to C saying that significant sums had been transferred to C from NTL (I will refer to these messages as "the SWIFTs"). D1 and D2 accepted that the SWIFTs were forged. C argued that they were forged by D1 and D2, whereas D1 and D2 contended that they were forged by the Medvedenko family so that the

present claim could be made. The Medvedenko family are a Ukrainian family for whom, according to D1 and D2, the claim is being run due to business interests in C.

There was another seller of sunflower oil, Lauffer Group ("Lauffer"). By a contract numbered NTL 25/09/12, entered into on 25 September 2012, NTL agreed to buy from Lauffer 2,000 mts of sunflower oil. D1 and D2 contended that this contract was for a lesser quantity of oil, namely 1,000 mts. Lauffer delivered oil to BCP under this contract and received messages similar to the SWIFTs sent to C. Lauffer's terms of sale required payment before delivery was made, whereas C's terms of business only required payment on delivery. Lauffer released its oil to NTL following its receipt of the messages.

C was unable to get confirmation from its own bank about whether the payments had been received until 22 October 2012, when it was confirmed to it that the SWIFTs were not genuine. Due apparently to Lauffer not supplying the full quantity of oil it had contracted to deliver, the bill of lading was not signed, and this had prevented *The Vindemia* from leaving BCP, but she was able to leave on 22 October 2012. *The Vindemia* had been chartered by Glencore Grain BV, a Dutch company, which had purchased the disputed oil from NTL. The result was that C was unable to stop the oil from leaving BCP and so lost its title to its sunflower oil.

C brought these proceedings against D1 and D2 for damages in deceit as a result of the July representations. As explained, the judge upheld the claim against D2 but dismissed that against D1. There were originally six grounds of appeal but only Grounds 2, 3 and 6 now remain. Ground 1 sought to raise a new case, not raised at the trial and this Court refused permission for this ground for the reasons given at the start of the hearing of the appeal. The appellant did not proceed with grounds 4 and 5 as the parties had agreed that C had not advanced a case at trial that forged SWIFT messages dated 18 October 2012 ("the October representations") were fraudulent misrepresentations on which it based its case in deceit. Mr John Robb, who appears for D2 on this appeal and has argued with skill and vigour every point that could have been taken on her behalf, did not appear at the trial.

Judgment of Proudman J

The judge began by directing herself as to what had to be proved in an action in deceit. There is no dispute as to the requirements of the tort of deceit so I can summarise the elements of this tort. They are (1) a representation, which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on: see, for example, per Rix LJ in AIC Ltd v ITS Testing Services Ltd [2006] EWCA Civ 1601 (" *The Kriti Palm* "), [251].

At the outset of her judgment, the judge also addressed the law on the correct measure of loss if the claim in deceit succeeded. She recorded that D1 and D2 contended that the aim of any award of damages for deceit was to put the claimant in the position that he would have been in if the contract induced by the deceit had never been performed. On this basis the correct measure of loss was, on the submission of D1 and D2, the cost of the seeds from which the oil delivered to NTL had been extracted plus the costs of extraction, giving credit for any by-products of extraction which C was able to sell. The judge rejected this contention and held, having considered authorities such as Smith New Court Securities Limited v Scrimgeour Vickers (Asset Management) Ltd [1997] AC 254 , that the correct measure of any damages would be the market value of the sunflower oil obtained by D2 as a result of the deceit. This was, she held on the facts, the same as the sale price to NTL. The value was confirmed by the price payable in respect of the contemporaneous sale by Lauffer.

The first task of the judge was to consider the evidence as to whether the representations which C alleged had been made. The judge heard oral evidence from, among others, Mr Karachevtsev and D2. Mr Karachevtsev's evidence was clear: he had sought reassurance that C would be paid within three working days and D2 "constantly reassured [him] that she had sufficient funds to pay and that [C] would receive payment within three working days" (Transcript, Day 2 page 136). Mr Karachevtsev accepted that Arkley might have been providing funds to NTL but C was never paid. D2,

on the other hand, stoutly denied having given any assurances. It was not her case that she had said anything which Mr Karachevtsev might have misinterpreted. It would have been apparent to the parties that the question whether representations would be found to have been made in the terms alleged by C would turn on which version of events the judge accepted.

The judge dealt with these matters in a very summary fashion:

> 21. The claimant says that Mr Karachevtsev wanted comfort about NTL's ability to pay (the total was about US$2,340,000) so, the claimant alleges, the second defendant orally made various representations to him:
>
> (1) NTL had funds available to pay for such a large shipment because the first defendant had negotiated a financing deal for NTL with Andrey Komarov, a wealthy Russian businessman,
>
> (2) Mr Komarov had agreed to provide funds to NTL specifically for the purpose of paying for the transaction with the claimant,
>
> (3) Funds would come from Arkley, where the First Defendant had been a director since the late 1990s,
>
> (4) NTL would therefore have sufficient funds to pay for the oil,
>
> (5) Arkley was a subsidiary of Chelpipe, of which Mr Komarov was a major shareholder,
>
> (6) The first defendant had been in business with Mr Komarov for some time and there was no risk that NTL would not make the payment.
>
> (7) NTL had other resources anyway.
>
> 22. (1) and (2) were incorrect, the last part of (6) was also incorrect in that Mr Komarov was not concerned with a "small person" such as the first defendant. (7) was also incorrect. (4) is now incorrect but is the only instance where it could be said that the representation was true at the time.

I shall need to return to these paragraphs when I discuss the parties' submissions.

Before the judge set out her assessment of D2's evidence, she considered the subsequent SWIFTs in some detail (Judgment, [23] to [26]). It was common ground that the documentation was forged and that Lauffer had received similar forgeries. The judge did not make any findings as to who had issued the forged instruments to Lauffer, but later in her judgment she held that the forged instruments received by C were forged by D2 (Judgment, [47]).

The judge did not make this finding until after she had considered the rest of D2's evidence and the defendants' case (Judgment, [27] to [46]). D1 and D2 contended that C had not paid the processor of the oil and that the oil which left on *The Vindemia* was not C's oil but Lauffer's. D2 also contended that Mr Karachevtsev was in BCP when *The Vindemia* sailed two days before it in fact left, and that he knew that the oil was on board. D2 was wrong on this date but the judge did not accept that this was simply the result of confusion on her part ([Judgment, [28]). The judge did

not accept that the load on *The Vindemia* did not contain C's oil because of its dispute with the processor and found that all the 3,000 or thereabouts mts supplied by C and Lauffer were aboard *The Vindemia* and that this ship did not leave BCP until 22 October 2012 (Judgment, [34]).

The judge did not consider that either party had given the whole truth about the transaction in issue but the judge directed herself that she should test the witnesses' evidence by reference to contemporaneous documents. She held that on this basis D2's story "[did] not hang together", giving some fourteen reasons for this unambiguous conclusion. For example, the judge noted that D2 denied knowledge of arbitration proceedings started by NTL in Ukraine even though on three occasions documents had been served on NTL in connection with the arbitration by courier in circumstances in which the judge found she must have known about them (Judgment, [36 (iii)]). The judge considered that all the contemporaneous documentation was consistent with C's case (Judgment, [36 (xi)]).

The judge gave separate consideration to D1's position and concluded that C had not shown that he had anything to do with the transaction with C. The judge accordingly concluded that he was not liable. In stating her conclusion on this issue, the judge expressly stated that D2 had made the representations:

> 45. I do not therefore find the first defendant liable to the claimant, nor for the avoidance of doubt do I find conspiracy. The claimant said that the first defendant gave his evidence in the same way that he ran NTL, behind the second defendant. However, it is not just that the second defendant made the representations; the first defendant had no contact with the claimant or Lauffer at all.

The judge began the next paragraph of her judgment:

> "[D2] is a very different matter."

The judge observed that D2 accused "the Medvedenko family of concocting documents in order to implicate her. She kept trying to score points off counsel" (Judgment, [46]). The judge found:

- i) Mr Karachevtsev was not cross-examined about many of the documents challenged as fraudulent…;
- ii) The Medvedenko family did not have access to the template dated 24 October 2012 for the forged email. Her assertion that her email was hacked is not supported by any of the experts… (Judgment, [46])

The judge held, on the balance of probabilities, D2 forged the SWIFT documents and sent the relevant emails. She drew on the expert evidence for this conclusion (Judgment, [47]).

The judge gave her reasons for concluding that Mr Karachevtsev had not provided that court with the whole truth (Judgment, [48] to [51]). However, the judge was satisfied that C could in practice have prevented *The Vindemia* from sailing by not paying customs duty between 12 and 18 October and that the SWIFTs prevented it from doing so (Judgment, [52]).

The judge concluded that D2 was liable in damages in deceit in a sum equal to the market value of the oil (Judgment, [56]).

Consideration of the grounds of Appeal

Grounds 2 and 3 – inadequate findings and reasons for findings?

Submissions

At the request of the Court, the parties agreed a list of the issues arising and the issues in relation to each Ground. Ground 2 challenges the judge's findings on the pleaded allegations that D2 had represented to C that "NTL had funds available to pay for such a large shipment [as that purchased under contract NTL/01/13] because [D1] had negotiated a financing deal for NTL from Andrey Komarov, a wealthy Russian businessman, and that NTL "would therefore set aside" sufficient funds to pay for the oil [being purchased from C]." D2 does not in the list of issues contend that the judge's findings were not open to her but formulates the issues almost as if an appeal were a construction summons to determine the meaning of the judgment and which particular evidence supported which particular finding. This is not the appeal process.

It is the appellant's task on Ground 2 to persuade this Court that the judge did not make any finding that the pleaded representations were made, or, if she did make such findings, that they were against the weight of the evidence. I propose to approach the submissions on Ground 2 on that basis. I also propose to approach the submissions on the basis that attention can in reality be confined to the question whether it was represented to C that NTL would have funds to pay for the oil being purchased from C. The representation that D1 had been in business with Mr Komarov for a substantial period of time and that therefore there was no risk that NTL would not be paid is immaterial to Ground 2 because the only case for D2 was that none of the representations was made, not that what she said bore some different meaning from that pleaded or was true.

The representation that NTL had funds to pay C for delivering oil under the contract which was made in September 2012 was, as C submits, self-evidently a representation that it was the present intention of NTL to pay the amount due to C and such a representation made no sense unless it was one which operated from day to day unless it was corrected: see generally Briess v Woolley [1954] AC 333 . In other words, it was a continuing representation. There is no need for me to go to that case because after the hearing Mr Robb brought the Court's attention to the recent decision of the Supreme Court in Cramaso LLP v Ogilvie-Grant [2014] AC 1093 , to which he had intended to refer the Court at the hearing, and in particular to the speech of Lord Reed, with whom Lord Mance, Lord Clarke, Lord Carnwath and Lord Toulson agreed, at [16] to [23]. Lord Reed there explained the nature of a continuing representation:

> 16 The law relating to the effect of representations on a contract proceeds on the basis that a representation made in the course of pre-contractual discussions may produce a misapprehension in the mind of the other party which continues so as to have a causative effect at the time when the contract is concluded. It is on that basis that a misrepresentation may lead to the setting aside of the contract as being vitiated by error or fraud.
>
> 17 The capacity of a representation to have a continuing effect was noted by Lord Cranworth, when rejecting what he described as "a very desperate argument" that a representation could not justify the setting aside of a bond because it was made some time before the bond was executed, in Smith v Kay (1859) 7 HL Cas 750 , 769:
>
> > It is a continuing representation. The representation does not end for ever when the representation is once made; it continues on. The pleader who drew the bill, or the young man himself, in stating his case, would say, Before I

> executed the bond I had been led to believe, and I therefore continued to believe …

18 A similar explanation can be found in the judgment of Lord Wright MR in With v O'Flanagan [1936] Ch 575 , which was another action for the rescission of a contract. Under reference both to English authorities concerned with the law of contract, and to a Scottish authority concerned with the law of reparation (Brownlie v Campbell (1880) 5 App Cas 925 , which I shall discuss shortly), his Lordship observed at p 584 that "a representation made as a matter of inducement to enter into a contract is to be treated as a continuing representation", and added at pp 584–585:

> This question only occurs when there is an interval of time between the time when the representation is made and when it is acted on by the party to whom it was made, who either concludes the contract or does some similar decisive act; but the representation remains in effect and it is because that is so, and because the court is satisfied in a proper case on the facts that it remained operative in the mind of the representee, that the court holds that under such circumstances the representee should not be bound.

19 [His Lordship then discussed reparation for harm and continues]. Where a misrepresentation does not have a continuing effect, for example because it is withdrawn or lapses, or because the other party discovers the true state of affairs before the contract is concluded, it cannot induce the other party to enter into the contract and therefore cannot affect its validity or give rise to a remedy in damages for any loss resulting from its conclusion. As Lord Brougham observed in Irvine v Kirkpatrick (1850) 7 Bell App 186 , 237– 238, in order that the misrepresentation may be of any avail whatever, it must inure to the date of the contract. If the other party discovers the truth before he signs the contract, "the misrepresentation and the concealment go for just absolutely nothing".

21 Whether the remedy sought is reduction of the contract or damages for the loss suffered as a result of entering into it, in either case a representation may therefore be treated by the law as having a continuing effect, rather than as being an event whose legal consequences are necessarily fixed at the time when the statement in question was made.

22 The continuing effect of a pre-contractual representation is reflected in a continuing responsibility of the representor for its accuracy. Thus a person who subsequently discovers the falsity of facts which he has innocently misrepresented may be liable in damages if he fails to disclose the inaccuracy of his earlier representation: Brownlie v Campbell 5 App Cas 925 , 950 per Lord Blackburn. The same continuing responsibility can be seen in the treatment of representations which are true when made, but which become false by the time the contract is entered into: see, for example, Shankland & Co v John Robinson & Co 1920 SC (HL) 103 , 111, per Lord Dunedin.

> 23 The law is thus capable, in appropriate circumstances, of imposing a continuing responsibility on the maker of a pre-contractual representation in situations where there is an interval of time between the making of the representation and the conclusion of a contract in reliance on it, on the basis that, where the representation has a continuing effect, the representor has a continuing responsibility in respect of its accuracy.

Lord Reed's conclusion in paragraph 23 of his speech is directly applicable to this case if D2 made a continuing representation. Mr Robb's argument fastens on the words in paragraph 16, which indicate that the basic quality of a continuing representation made in the course of pre-contractual negotiations is that it "may produce a misapprehension in the mind of the other party which continues so as to have a causative effect at the time when the contract is concluded". Mr Robb submits that that was not the case here. But Mr Karachevtsev's evidence had been to contrary effect: he would not have entered into the contract had he not been given the reassurance he sought. The judge made it clear that she read the pleading as treating the representations as applying on a continuing basis (see Judgment, [5]) and she understood C's case to be to that effect as she made a finding at [52] of her judgment that the SWIFTs had prevented C from stopping the customs duty payment as a means of preventing the removal of the oil. Her approach was consistent with common sense. It is difficult to see why C should have been eager to have reassurance as to payment unless it was a reassurance to continue up to the date for payment. It is also difficult to see why D2 should have gone to the lengths of forging the SWIFTs unless she realised that C was concerned to have reassurance about payment.

I therefore reject the appellant's submission that the reassurance given to C would not be a continuing representation unless it was shown that D2 was aware that it was a continuing representation.

If it was a continuing representation, C would still succeed even if it was true that NTL intended to pay C when that representation was made but subsequently that representation became false and was not corrected: see generally per Lord Reed in Cramaso , at [22], set out in paragraph 30 of this judgment.

I also reject the submission by Mr Robb that it was a mere statement of intention, which would not be actionable, and not a statement of existing fact: the contrary conclusion would again lack common sense. While Mr Robb accepts that what mattered in this case was the representation that NTL would pay for the oil to be supplied by C, he submits that this statement of intention could not found a holding in deceit. In answer to this, it is sufficient to refer here to the following passage in *Chitty on Contracts* , 32nd edition incorporating supplements, which makes it clear that a statement of intention can contain within it various statements of fact:

> **Statement of intention not honestly held**
>
> 7-012 A statement of intention may be looked upon as a misrepresentation of existing fact if, at the time when it was made, the person making the statement did not in fact intend to do what he said or knew that he did not have the ability to put the intention into effect; for the promisor's state of mind was not what he led the other party to believe it to be. Thus, where a man ordered goods having at the time the intention not to pay for them, he was held to have made a fraudulent misrepresentation. Equally, if a person makes a statement of an intention that he should have known he was not able to carry out, in appropriate circumstances he may be held to have made an implied representation that he did have that ability. There is no doubt that a statement as to the intentions of a third party is a statement of fact and can constitute a misrepresentation in the ordinary way.

Statement as to future may carry implication of fact

7-013 A statement of intention or as to the future may carry the implication that the party making it does not know of facts that will make it impossible to carry out the intention. But "there is no rule of law that any particular statement carries with it any particular implication. All depends upon the particular statement in its particular context". (footnotes omitted)

The judge's treatment of the representation as a statement of fact and as a continuing representation cannot, in my judgment, be faulted in the context of this case. Her conclusions were open to her on the facts and were well within the bounds of established authority.

Mr Robb also submits on Ground 2 that the various elements of the deceit claim had to be distinctly pleaded and proved. This proposition is not in doubt, but the representations found by the judge were indeed all pleaded. Mr Robb's point is that it should have been pleaded that the representation as to intention to pay was a continuing representation but in my judgment that allegation was implicit in the pleading and the judge was similarly satisfied (see Judgment, [5]). If there was any doubt about the scope of the pleading that should have been raised with the judge.

Mr Robb submits that there was no clear finding that D2 had made the alleged fraudulent misrepresentations. On his submission, [21] and [22] of the judgment merely set out the representations alleged to have been made, and the judge's conclusions as to their correctness. In oral submissions, Mr Robb was constrained to accept that the third sentence of [45] of the judge's judgment (see paragraph 22 of this judgment) is a finding that the D2 made the representations in issue. He argues, however, that there is no reasoned analysis by the judge as to why these representations were false. There was no comparison with the pleaded particulars of falsity. There was no consideration of how C's case was made. There was no discussion as to whether they should be treated as continuing representations. Mr Robb submits there was a considerable risk that the judge based her finding at [56] on the October representations and not the July representations. It must be noted, however, that it is now common ground that the respondent did not rely on the October representations at trial.

These last submissions lead to Ground 3, which contends that the judge gave no sufficient reasons for the findings which she made. In the normal way parties are expected to ask the trial judge to supplement reasons if they wish to challenge reasons as inadequate. In this case, the appellant asked the judge for further reasons, but the judge considered that any further reasons were unnecessary. On this Ground, Mr Robb submits that a judgment must also clearly identify the reasons for a finding of dishonesty (see English v Emery, Reimbold & Strick [2002] 1 WLR 2409 at [12], [17], [19], [21], [26] and [118], and also the Kriti Palm at [288] to [290]). The judge must engage with relevant principles. There is a heightened burden of proof. Without adequate findings, the finding of dishonesty could not stand. On Mr Robb's submission, the judge did not engage with those matters. There was no explanation for finding that there was conscious knowledge of dishonesty or that there was any particular representation made. The judge had to consider D2's state of mind.

Mr Robb further submits that it was not put to D2 that, when she made the representations to C, NTL had to her knowledge no intention of paying C. On Mr Robb's submission, D2 was expecting to make a back-to-back deal to enable NTL to pay C. She gave evidence that this was her practice.

However, as I see it, in her evidence in cross-examination D2 also accepted that, if the back-to-back deal did not provide the necessary funds, there was a problem in paying the supplier. So knowing she could make a back-to-back deal would not justify an unqualified assurance of payment to the supplier. Moreover, as the representation was a continuing one, she would be obliged to correct it if NTL's intention changed, and the judge was entitled to draw the inference from the SWIFTs and the fact that C never received any payment from NTL that NTL did indeed intend as at 22 October 2012 at least to acquire the oil without payment. Furthermore, as D2's case was that she never made the representations in the first place, it is difficult to see why it should have been put to her in cross-examination that, when she made them, she knew NTL had no intention of making payment and/or that the representation was a continuing one.

Finally, submits Mr Robb, there was no finding that any of the July representations were dishonestly made. The numerous instances in [36] of the judgment do not deal with the July representations at all. Mr Robb accepts that the October representations could in theory be relied on as having continued the July representations, which is the respondent's case on this appeal. The respondent, on Mr Robb's submission, fails to identify which representation was being maintained or how it was maintained. There is a grave risk of a change of case to relying on events in October, which had not been pleaded.

Mr Hugh Jory QC, for the respondent, submits that the crucial pleaded representation was that there was no risk that C would not be paid. That is the context in which D2 was cross-examined. The judge's conclusions are at [22] of her judgment. D2 would not have said, as she did under cross-examination, that Mr Komarov would not have entered into the funding arrangement because he did not deal with small enterprises like NTL unless she knew in July that that was the position. Her conduct could not be anything but dishonest. The judge qualified her statement as to the correctness of [21(4)] of her judgment because if the first three representations were correct then the fourth representation was also correct because of the word "therefore". But the critical representations were the first, second and second half of the sixth. The judgment can only be read on the basis that the judge found that the representations were made and were incorrect. This is supported by the third sentence of [45] of the judgment. She clearly had it in mind that the representations were made.

In this case, Mr Jory submits, the question is whether the judge directed her mind to which bits of evidence she accepted. It was inconceivable that D2 could have said that she believed she had the money to pay C when she sent the false SWIFTs. D2 was extremely dishonest: the facts as found showed that she went beyond simply making a fraudulent representation herself because the SWIFTs constituted a false representation purporting to be from the bank. The SWIFTs were fabricated. D2 played the same trick on Lauffer.

As to D2's submission that the judge appeared to have relied on the October representations, the correct interpretation of the judge's judgment is that the misrepresentations set out in [21] were continuing representations. That explains [52] of the judgment, which records that D2's case was that Mr Karachevtsev or some other director of C had been present at the port on 22 October (which was not the case).

Mr Jory further submits that if this Court is in any doubt as to whether the representations were continuing representations, it should not interfere because that question was one of fact and an appellate court should give weight to the view which the trial judge took on this (compare Smith New Court Ltd v Citibank NA [1997] AC 254 at 278H).

Had C been told in October 2012 that the representations were untrue, it would have recovered the oil. The judge expressly found that it was the fraudulent SWIFTs which stopped C from doing so (Judgment, [52]).

As to Ground 3, Mr Jory submits that the judge's reasoning was perfectly clear to the parties. The Kriti Palm was distinguishable because the judge had assumed knowledge on the part of the alleged tortfeasor without investigating whether he had known of the matter at the relevant time. D2 would have no difficulty in understanding why the judge

held her liable. If she wanted to say the representations were true she would have brought Mr Komarov as a witness and she did not do that. All the elements for deceit can be found in the judgment and the parties knew what they were.

My conclusions on Grounds 2 and 3

In the course of summarising the key submissions cogently made by Mr Robb, I have already set out some of my conclusions. This section contains some important matters I have not yet addressed.

In my judgment, there is not the shadow of a doubt but that the judge found that D2 had made the representations set out in [21] of her judgment: that finding was implicit in the remainder of her judgment and was made express in passing in [45] of her judgment. It would have been clearer by far to have set out the finding that D2 made the representations which C alleged to have been made immediately after [21] of the judgment or in a separate paragraph elsewhere in the judgment, but the deficiencies in the organisation and articulation of this conclusion do not undermine the sense of the judgment and the finding that D2 made the representations is entirely consistent with the rest of the judge's conclusions.

The next question is the effect of the judge's statement in [22] of her judgment that [21(4)] of her judgment was incorrect at the date of her judgment but "is the only instance where it could be said that the representation was true at the time."

I have referred above to the fact that the evidence referred to funds coming from Arkley, and the only way of giving meaning to the judge's quoted observation may be that provided by Mr Jory, namely that the judge considered that, if it had been the case that Arkley had agreed to provide the funds needed to pay C, NTL would have had the money to pay for the oil which C was selling to it. The judge, however, clearly does not find it proved that Arkley had so agreed. Moreover, Arkley was only a vehicle for channelling funds from Mr Komarov to C: the question remained whether Mr Komarov had agreed to provide these funds. There was no basis on which the judge could find that this had been agreed because D2's case throughout was simply that she had not given any assurances to Mr Karachevtsev, in direct conflict with Mr Karachevtsev's witness statement and oral evidence, and the fact that on her own evidence Mr Komarov would not have entered into the funding arrangement because he did not deal with small enterprises like NTL.

That said, I have found the relevant part of [22] of the judge's judgment extremely puzzling and unclear. However, the judge only made this observation in relation to the representation in [21(4)] of her judgment and not in relation to any other representation, such as [21(1)]. On that basis I do not think that the ambiguity here is fatal to the rest of her reasoning.

The judge plainly preferred the evidence of Mr Karachevtsev to that of D2, although she was concerned by the unexplained fact that C continued to trade with D2 and FLASK despite the events which formed the basis of the action. The judge's preference for Mr Karachevtsev is abundantly clear from the judgment read as a whole and forms the fundamental reason why the judge held D2 liable. She was entitled to draw inferences from the evidence. The fact that D2 had found it necessary to forge the SWIFT messages and so trick C into taking no step to stop the oil from leaving its control supported the case that NTL had no intention of paying C for its oil and that the failure to correct the assurance given in July was dishonest. The judge also considered that there were other instances in which D2 had given versions of events which she must have known were untrue: see [36] of the judge's judgment and the numerous instances there set out. That paragraph shows that the judge considered D2's evidence from every possible angle before she found her liable in deceit: she searched for situations in which D2 had acted deliberately. The judge also correctly directed herself that she should examine the oral evidence in the light of contemporaneous documents. These matters demonstrate that the judge was well aware that the evidence, necessary to show that a matter as serious as dishonesty is more likely than not to have occurred, has to be cogent.

As to the reasoning, the key question is whether it would have been clear to the parties why they won or lost. That is the test to be found in the leading decision of this Court in English v Emery, Reimbold & Strick at [21]: " *The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision.*" In my judgment, the key reason is that the judge preferred the evidence of Mr Karachevtsev to that of D2. I have explained how the judge reached her conclusion on this issue with great thoroughness and care.

In terms of the judicial process, however, a judgment also has to be comprehensible to an appellate court. As this Court said in English v Emery , Reimbold & Strick :

> 19 It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

I ask myself whether, if the judgment had been expressed as would conventionally be done in clearer and more structured terms, there would have been any need for this appeal to be launched or heard. Parties should not have to bring appeals because there are as many gaps and ambiguities as there are in the judgment below in this case, nor should appellate courts have to go through a lengthy process, as in this case, of working out what a judgment is actually saying. In the present case, even the events related by the judge in her judgment are difficult to follow without external knowledge of the case. The judge had of course to deal with matters of detail in an area which is not usual or common, but that is not a justification for this Court accepting or condoning any lowering of standards below the norm. While I have no doubt that the judge's reasons can be deduced by this Court in the end and that the judge diligently applied her mind to her judicial duty to find the facts according to the evidence, I also have no doubt that this was not a judgment whose structure and manner of expression met the standards normally to be expected of the High Court.

It is, I consider, useful to repeat the two lessons which this Court set out in its postscript to its judgment in English v Emery, Reimbold & Strick (which concerned three appeals raising "reasons" challenges) at [118]:

> There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision.

Ground 6 – erroneous assessment of damages?

Submissions

In relation to this Ground, the list of agreed issues provided by the parties has proved most useful as it helpfully identifies the point at issue here, and so I set out the following extract (as renumbered and omitting footnotes):

> • 1. It is common ground that the correct measure of damages in the tort of deceit is an award which puts the claimant in the position he/she/it would have been in if the deceit had not been perpetrated. [This reflects the decision of the House of Lords in Smith New Court .]
> • 2. There is a dispute as to how that test is to be applied on the facts of this case:
>
> > • a. D2 submits that if the deceit had not been perpetrated, C would not have incurred the expense that it did in purchasing, processing and transporting sunflower seed and otherwise performing its contract with NTL; that C would have been entitled (in principle) to be compensated for those reliance expenses (though in the event it failed to prove any at trial); and that C cannot recover the sale value of the sunflower oil because it would never have acquired and sold the oil if the deceit had not been perpetrated.
> > • b. C submits that the Judge was right to conclude that its loss was to be measured by the market value of the sunflower oil supplied by C to NTL by reason of the fact that the misrepresentations were continuing up to the time when it ceased to be able to stop the ship from leaving and for the reasons set out in paras 40-45 of its skeleton argument.
>
> • 3. C submits that, if D2's submission on Ground 6 is correct, then the assessment of damages should be remitted to the court below with directions for evidence. D2 resists this (i) because C did not adduce that evidence at trial and (ii) because C has filed no respondent's notice seeking the relief sought.

The common ground in paragraph 1 of this extract reflects the decision of the House of Lords in Smith New Court , where Lord Steyn held at 283:

> The logic of the decision in Doyle v. Olby (Ironmongers) Ltd . justifies the following propositions.
>
> (1) The plaintiff in an action for deceit is not entitled to be compensated in accordance with the contractual measure of damage, i.e. the benefit of the bargain measure. He is not entitled to be protected in respect of his positive interest in the bargain. (2) The plaintiff in an action for deceit is, however, entitled to be compensated in respect of his negative interest. The aim is to put the plaintiff into the position he would have been in if no false representation had been made. (3) The practical difference between the two measures was lucidly explained in a contemporary case note on Doyle v. Olby (Ironmongers) Ltd .: G. H. Treitel, "Damages for Deceit" (1969) 32 M.L.R. 556, 558-559. The author said:
>
> > If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure. If, on the assumption that the representation was true, his bargain would have been a good one, he will do best under the first contractual measure (under which he may recover something even if the actual value of what he has recovered is greater than the price).

> (4) Concentrating on the tort measure, the remoteness test whether the loss was reasonably foreseeable had been authoritatively laid down in The Wagon Mound in respect of the tort of negligence a few years before Doyle v. Olby (Ironmongers) Ltd . was decided: Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388 . Doyle v. Olby (Ironmongers) Ltd . settled that a wider test applies in an action for deceit. (5) The dicta in all three judgments, as well as the actual calculation of damages in Doyle v. Olby (Ironmongers) Ltd ., make clear that the victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction induced by the wrongdoer. That includes heads of consequential loss. (6) Significantly in the present context the rule in the previous paragraph is not tied to any process of valuation at the date of the transaction. It is squarely based on the overriding compensatory principle, widened in view of the fraud to cover all direct consequences. The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement.
>
> Doyle v. Olby (Ironmongers) Ltd . was subsequently applied by the Court of Appeal in two Court of Appeal decisions: East v. Maurer [1991] 1 W.L.R. 461 and Smith Kline & French Laboratories Ltd. v. Long [1989] 1 W.L.R. 1 . East v. Maurer is of some significance since it throws light on a point which arose in argument. Counsel for Citibank argued that in the case of a fraudulently induced sale of a business, loss of profits is only recoverable on the basis of the contractual measure and never on the basis of the tort measure applicable to fraud. This is an oversimplification. The plaintiff is not entitled to demand that the defendant must pay to him the profits of the business as represented. On the other hand, East v. Maurer shows that an award based on the hypothetical profitable business in which the plaintiff would have engaged but for deceit is permissible: it is classic consequential loss. Turning to the Smith Kline case it has been suggested that the Doyle v. Olby (Ironmongers) Ltd . rule was wrongly applied: *Burrows, Remedies for Torts and Breach of Contract* , 2nd ed. (1994), pp. 173-174. The correctness of that comment I need not examine. In my view it is sufficient to say that the principles emerging from Doyle v. Olby (Ironmongers) Ltd . are good law.

The passage from the work of Professor Andrew Burrows QC, to which Lord Steyn also refers, is as follows:

> Doyle v Olby was also applied but, it is submitted, the wrong result reached in the earlier case of Smith Kline & French Laboratories . The claimant was induced by the deceit of the defendant, the managing director of Swift Exports Ltd, to sell to Swift 16,800 packs of tablets at a price of £56.66 per pack. The fraudulent representation was to the effect that Swift would sell the tablets in Central Africa. In fact they were sold in Holland. Swift paid all but £157,028 of the agreed contract price but then became insolvent, [Whitford J] dismissed the claim on the ground that the claimant had suffered no loss as a result of the fraud. The Court of Appeal reversed that decision and awarded £157,028.
>
> That award would only have been correct if the claimant would have sold the tablets at the same price to someone else had it not been induced to sell to Swift. Yet the claimant conceded that it

> could have supplied whatever quantity of tablets was needed to meet demand (and that it could be assumed that the tablets had cost nothing to produce). It should. have followed that the contract with Swift could not be treated as having deprived the claimant of the opportunity to sell those tablets (at the same price) to someone else: and that there was no true analogy with cases on wrongful interference with goods which have awarded damages based on the value of the goods.

Mr Robb's first argument is that the victim of the tort of deceit is to be put into the position he was in immediately before the false statement was made. In this case, when the July representations were made, C had not acquired any oil. If he is entitled to recover any loss at all, he should give credit for the net amount he has received as a result of selling the meal created by pressing the seeds.

The difficulty about Mr Robb's approach is that he is adding to what Lord Steyn held. Lord Steyn did not say that the position to which the victim was to be restored was that immediately before the false statement was made. That indeed would have been inconsistent with the compensatory principle explained by Professor Sir Guenter Treitel QC in the passage which Lord Steyn cites with approval where (as here) the loss flowed directly from the false statement. That was on Mr Karachevtsev's evidence the only basis on which he was prepared to proceed.

As Mr Jory points out in his oral submissions, in Smith New Court , Lord Steyn, with whom the other members of the House agreed, held at 284 D:

> There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants.

Lord Steyn does not in any way indicate that the "alteration of position" is confined to the position as it stood immediately before the contract was made.

C submits that this case is analogous with that of Smith Kline & French v Long which Lord Steyn cites. But, as Mr Jory and Mr Joe-Han Ho point out, in their lucid and concise post-hearing written submission requested by this Court, the decision in Smith Kline turned on its very special facts summarised in the second sentence of the second paragraph of the passage which I have set out from Professor Burrows' work. On those very special facts, it could not be shown that the plaintiff would have sold the tablets produced (at no cost) to anyone else. The sale to the defendant was thus a pure bonus so far as the plaintiff was concerned. This Court adopted a solution which allowed the market value to be taken as the measure of loss, by analogy with the assessment of damages for conversion.

The point that Professor Burrows QC makes is that this Court reached the wrong result in so far as it sought to apply Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 (see [59] above). What is clear, however, that Lord Steyn, and the other members of the House who agreed with his speech, considered that the point did not have to be resolved on that occasion and they were clearly unwilling to say that Smith Kline was rightly or wrongly decided or rightly decided for the wrong reasons. Mr Robb, by contrast, reads into Professor Burrows' passage that this Court in Smith Kline should have valued the "opportunity to sell those tablets (at the same price) to someone else", but this matters not because Lord Steyn was not prepared to express his opinion on the point. Therefore, the decision in Smith Kline remains binding on this Court unless and until the Supreme Court decide otherwise. As the judge pointed out in her

judgment, citing the recent decision of the Supreme Court in Zurich Insurance Company plc v Hayward [2017] AC 142 , in the case of deceit different rules as to reliance apply. There may, therefore, be special rules which apply to matters surrounding the measurement of loss in the case of deceit which do not apply in the case of a negligent misstatement. That analysis may be indicated by the observations of this Court in OMV Petrom SA v Glencore International AG [2016] EWCA Civ 651 , [39], c.f. [73], cited by the respondent. But that is all for another day.

However, that leaves the analogy which Mr Jory and Mr Ho seek to draw with Smith Kline . The special facts of that case do not exist in this case, and so it is not directly applicable. Anything that this Court were to say about it would be obiter. In this case, because the July representations were continuing representations, the loss can properly be assessed when C relied on them, namely when it failed to take any steps to prevent the removal of the oil on *The Vindemia* on the last occasion on which it was open to it to do so (see [26] and [31] above). As Mr Jory and Mr Ho point out, if at that point, D2 had corrected the representations, C would have had to mitigate its loss in the normal way. I do not accept Mr Robb's submission that damages fall to be assessed even where the July representations are continuing representations as if the representations had not been continuing ones. That submission would if accepted deprive the concept of continuing representations of much of its potency.

For those reasons I would dismiss Ground 6.

Overall Conclusion on Grounds 2, 3 and 6

If my Lords agree, I would dismiss this appeal for the reasons given above.

Mr Justice Birss

I entirely agree.

Lord Justice Kitchin

I agree.

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