



**IN THE ROYAL COURT OF GUERNSEY  
ORDINARY DIVISION**

**Between**

**LONGPORT PROPERTIES LTD.**

**Plaintiff**

**-v-**

**TRINITY INVESTMENT LTD.**

**First Defendant**

**and**

**CHARROTERIE DEVELOPMENTS LTD.  
(No. 2)**

**Second Defendant**

**Judgment of the Bailiff on the exception de fonds raised by the Defendants.**

Hearing dates: 7<sup>th</sup> 8<sup>th</sup> and 11<sup>th</sup> March, 2002  
Judgment to be delivered: 14<sup>th</sup> June 2002

Advocate for the Plaintiff: J.P.Greenfield  
Advocate for the Defendants: P.T.R.Ferbrache

**1     Introduction**

This is the second action pending between the parties. Both actions arise out of an abortive contract between the Plaintiffs and the Defendants for the Plaintiffs to acquire land at La Charroterie for development purposes. The first action which is still pending is basically for the return of the deposit which was paid and which the Plaintiff claims is returnable because the condition precedent to fulfilment of the contract and completion of the purchase of the premises by the Plaintiff was not fulfilled. This second action started after the first and is a claim for damages involving the expenses to which the Plaintiff claims that it was put in working on the proposal to acquire the Charroterie site which the Plaintiff claims results from the negligent misrepresentations made by the Defendants which induced the Plaintiff to enter into the conditions of sale in the first place.

2. The Plaintiff's pleaded case

In its amended Cause of December, 2001, at paragraph 9 it is alleged that the representation was made for and on behalf of the Defendants that:-

- “(a) That the IDC had already granted permission for the development of 58,000<sup>2</sup>ft of residential accommodation; and/or
- (b) That the IDC had already, or would, grant permission for the above-mentioned 58,000<sup>2</sup>ft of residential accommodation to comprise seventy one two bedroom flats and nine one bedroom flats.

Particulars

- (a) The said inquiry was made orally on around 18 October 1999 in a telephone conversation between Mrs. Mason and Mr. ~~Clancy~~Downey. The said inquiry was also made on around 22 October 1999 in a further telephone conversation between the said Mrs. Mason and the said Mr. Clancy.
- (b) The said representations were made in writing ~~on or around the 23 October 1999~~ by Mr Clancy and/or the Advocates acting for the Defendants on Mr Clancy's instructions, and are contained in:-
  - (i) the draft Conditions of Sale sent by the Advocate acting for the Defendants to the Advocate acting for the Plaintiff on 20 October 1999;
  - (ii) all further drafts passing between the said two Advocates; and
  - (iii) in the final Condition of Sale dated 23 October 1999 as executed between the Plaintiff and the Defendants (“the Contract”).

Reference will be made at trial to the Contract for its full terms and effects.”

It can be noted from this that the Plaintiffs are relying on misrepresentations made in the few days immediately preceding the entry into the Conditions of Sale. One point that can be noted at this stage, although it is also raised in the exception de fonds of the Defendant, is that the alleged misrepresentation is not stated in so many words in the final Conditions of Sale as alleged by the Plaintiff in paragraph (b) of its particulars. To that extent Mr. Greenfield's pleadings may be defective leaving him only with the allegation of an oral misrepresentation in paragraph (a) of his particulars.

3. The exception de fonds

The claim is that the Plaintiff's pleadings disclose no cause of action and the Defendants rely on the contents of the conditions of sale which according to the Plaintiff contain the misrepresentations upon which the Plaintiff's cause of action is based. It is necessary that I should set out paragraphs 2 and 3 of the exception which in turn quote two relevant parts of the Conditions of Sale:-

4 The crux of the dispute

In the skeleton arguments and the initial submissions before me the argument on each side was somewhat widely drawn and it was not entirely clear as to what stance the Plaintiff was taking. At one stage the idea was being floated that the Court, following the principles of Morton v. Paint 1996, should be investigating a course of judicial law making to take account of changes in the Law of England relating to misrepresentation. At the end of the day, however, the Plaintiff's case, that there was imposed on these Defendants a duty of care not to make misrepresentations of the kind alleged, was distilled into a claim that in the particular circumstances of this case the Defendants owed a duty of care not to give the Plaintiffs misleading information on the lines of Hedley Byrne & Co Ltd. v. Heller & Partners Ltd. (1963) A.C. 465. The rationale of that case can be summarised by quoting from the head note where it was said:-

*“Held, that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that the reliance was being placed on his skill and judgment”.*

5. Background to the dispute

In determining the issue in this case I have to assume the factual background will be established as being that pleaded by the Plaintiff. It appears that for the Plaintiff, which was a company engaged as developers of commercial property, this was its first excursion into possible residential property development in Guernsey. The two Defendant companies are special purpose vehicles owned by a Jersey company called Dandara Holdings Limited. Prior to the 23<sup>rd</sup> October, 1999, the Plaintiff was considering purchasing the land owned by the two Defendants which forms a site at La Charroterie for which development permission was forthcoming. The original negotiations contemplated what was called “a buy back” provision whereby if the Plaintiff decided it did not wish to proceed with the residential part of the development the Defendants would buy back the area set aside for residential development. This provision was for some reason removed from the deal. According to the Plaintiff this meant that it was essential for it to be able to rely on its own appraisal of the overall economic viability of the project. The Plaintiff claims that the appraisal which it made was specifically made on the basis of the representations of the Defendants which I have already detailed in paragraph 2 above.

6. The basis for the “Hedley Byrne” claim

The Plaintiff alleges that had not those representations been made they would not have entered into the contract on Conditions of Sale of 23<sup>rd</sup> October, 1999. It further alleges that the Defendants intended and knew or ought to have known that the representations would be relied upon by the Plaintiff which would thereby be induced into entering into the contract. Hence a duty of care is imposed on the Defendants. As a result of entering into the contract the Plaintiff alleges it undertook certain works as required by the contract, if it were to complete it, and thereby incurred certain expenses, namely professional fees from advocates, architects, etc. and the time and travelling expenses of its own staff. The Plaintiff further

alleges that the Defendants, in making the representations complained of, made them negligently. From this it will be seen that the Plaintiff is alleging a separate duty of care owed to it in respect of the representations which transpired in the negotiations which led up to the formalisation of the bargain between the parties which was incorporated into Conditions of Sale dated the 23<sup>rd</sup> October, 1999. As is often the case in Guernsey these conditions were not very happily drafted, but they contained a condition precedent which imposed on the Vendors, the obligation to obtain the necessary approvals from the Island Development Committee and others to enable development of the kind described therein to proceed. However, the parties went on to record their agreement to work together to get permission for the contemplated development. As soon as this was obtained the conveyance was to be completed. If the necessary permissions were not obtained, then the Conditions of Sale were null and void and the deposit was to be returned. It will be seen, therefore, that the very matters which purportedly formed part of the representations that were made antecedent to the entry into the Conditions of Sale were included in the Conditions of Sale as being matters that were to be established to the satisfaction of the Purchaser prior to completion.

7. Condition L

In order, apparently, to circumvent the kind of argument that has now arisen in this case arising, Condition L of the standard Conditions of Sale of the Guernsey Bar provides:-

“Acknowledgment

The Purchaser acknowledges that in entering into these Conditions of Sale the Purchaser has not relied on any statement made by or on behalf of the Vendor except a statement made or confirmed in writing.”

This raises another apparent difficulty in the path of the Plaintiff who, as I have indicated, seems to be relying principally on an oral misrepresentation. It has expressly contracted out being able to make this kind of claim in contract. However, Mr. Greenfield argues that whatever the contractual position there is a separate duty owed by the Defendants not to

make negligent misrepresentations and that the claim for its breach rests in tort and not contract. The response of Mr. Ferbrache to this, is to rely on the reasoning of the Board in the Privy Council decision in Tai Hing Ltd v. Liu Chong Hing Bank Ltd. 1986 1 AC 80. The basis for his rejection of Mr. Greenfield's argument is to be found in the judgment on page 107:-

“Tort

Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action.

...

Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract.”

I respectfully agree with this reasoning but I do not read this decision as more than deprecatory of finding a separate tortious remedy in this class of commercial case. I am accordingly driven back to considering whether in any event Mr. Greenfield can succeed on a tortious claim. I therefore revert to looking at the situation of a special relationship giving rise to an assumption of a duty of care on the part of the Defendant.

#### 8. Conclusion – An extension to Hedley Byrne

If the entry into the Conditions of Sale was indeed to be on the basis of the representations which were made it would have been the simplest thing to include in the Conditions of Sale

an antecedent warranty that the planning position was as the Defendants are alleged to have represented it to be. Alternatively, would not the Plaintiff's then Advocate, with the assistance of an Architect if necessary, have independently checked at an early stage the then extent of the outline planning permission if only to avoid months of expensive and potentially unnecessary preliminary work.

However, that all is by the way as the issue for me is as I have said a fairly narrow point. The Plaintiff alleges that it was an innocent abroad when it came to the mysteries of building houses in Guernsey and relied on the special expertise of the Defendants in telling it what the planning consent said. However, the Plaintiff appears to be in no different position from the vast number of newcomers, businessmen and others who arrive here to trade in property every year. Independent expertise can clearly be brought in. Can such a situation give rise to the special relationship imposing a tortious liability on the Defendants as authors of allegedly negligent misstatements? The principles of the Hedley Byrne decision are to be found in the speech of Lord Morris of Borth-y-Gest. at page 502/503:-

“My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.”

These principles have been revisited in a number of cases in the forty years since that case was decided. In Esso Petroleum v. Mardon 1976, QB 801, it was applied in favour of a man who was being sued for failures to meet obligations to an oil company under the lease of a petrol station. He claimed to have been induced into entering the lease in reliance on the special expertise of the oil company in the making of forecasts of likely levels of sales at a petrol station in this particular locality. This was a case that arose before the

Misrepresentation Act of 1967. Lord Denning M.R. explained the basis of liability of the oil company in these terms on page 820 of the Report.

“It seems to me that *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages.

...

Applying this principle, it is plain that Esso professed to have – and did in fact have – special knowledge or skill in estimating the throughput of a filling station. They made the representation – they forecast a throughput of 200,000 gallons – intending to induce Mr. Mardon to enter into a tenancy on the faith of it. They made it negligently. It was a “fatal error.” And thereby induced Mr. Mardon to enter into a contract of tenancy that was disastrous to him. For this misrepresentation they are liable in damages.”

. Special skill relationships giving rise to tortious in addition to contractual liability were also recognised in the highly complex litigation between certain Lloyds underwriters and their underwriting agents (Henderson v. Merrett Syndicates Ltd 1995 2 A.C. 145). None of the cases cited extend the principles anywhere near the situation we are faced with here. No special skills can be identified in the case of a property owner who is merely relaying on to a prospective purchaser what he understands the position to be concerning the planning permission as indicated by the planning authority. As I have already indicated it is hard to think of a clearer case where the prospective purchaser must take his own counsel on that particular issue. In my judgment this action based wholly on Hedley Byrne principles is doomed to failure and the exception de fonds is accordingly upheld.