Most Negative Treatment: Distinguished
Most Recent Distinguished: Kimta Holdings Ltd. v. Ziva Holdings Ltd. | 1988 CarswellBC 1394, [1988] C.L.D. 1237, [1988] B.C.W.L.D. 2325, 10 A.C.W.S. (3d) 267 | (B.C. C.A., Jun 13, 1988)

1986 CarswellBC 2
British Columbia Court of Appeal

Kingu v. Walmar Ventures Ltd.

1986 CarswellBC 2, [1986] B.C.W.L.D. 3554, [1986] B.C.J. No. 597, 10 B.C.L.R. (2d) 15, 38 C.C.L.T. 51

KINGU and KINGU HOLDINGS INC. v. WALMAR VENTURES LTD. et al.

Taggart, Aikins and McLachlin JJ.A.

Judgment: July 24, 1986
Docket: Vancouver No. CA003367

Counsel: *B.J. McConnell*, for appellants Walmar Ventures Ltd. and P. Chmilar.
R. Ellison and *B.L. Fisher*, for appellant S. Poloway.
K.N. Brayley and *I. Caldwell*, for respondents.

Subject: Torts; Contracts; Corporate and Commercial
Related Abridgment Classifications
Torts
VII Fraud and misrepresentation
VII.3 Negligent misrepresentation (Hedley Byrne principle)
VII.3.c Particular relationships
VII.3.c.ii Sale of business
Torts
VII Fraud and misrepresentation
VII.5 Remedies
VII.5.b Rescission
VII.5.b.i Availability of remedy
VII.5.b.i.E Partial rescission
Headnote
Fraud and Misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Particular relationships — Sale of business
Fraud and Misrepresentation --- Remedies — Rescission — Availability of remedy — Partial rescission
Contracts — Misrepresentation — Reliance on representation — Plaintiff claiming to have made hotel purchase based on oral representations of defendants with respect to hotel clientele and earnings — Trial judge awarding plaintiff damages and partial rescission for negligent misrepresentation — Reversed on appeal — Plaintiff acting unreasonably in making $525,000 investment in reliance on unsupported statements.
Negligence — Negligent misrepresentation — Plaintiff claiming to have made hotel purchase based on oral representations of defendants with respect to hotel clientele and earnings — Trial judge awarding plaintiff damages and partial rescission for negligent misrepresentation — Reversed on appeal — Plaintiff acting unreasonably in making $525,000 investment in reliance on unsupported statements.

Contracts — Remedies — Rescission — Trial judge granting partial rescission and damages where plaintiff claiming misrepresentation inducing contract — Reversed on appeal — Partial rescission not a remedy known at common law or in equity.

The plaintiff had taken a course in hotel management but had no other experience in the business when he contacted the defendants, who were offering a hotel for sale. The defendant C., the listing agent and one of the owners, advised the plaintiff that the hotel had recently been renovated, had a good clientele and should net the plaintiff $35,000 per year. Later, when the plaintiff made more serious inquiries, C. advised the plaintiff to direct his questions concerning the financial aspects of the operation to the defendants' accountants. The plaintiff did not do so, but decided to purchase the hotel for $525,000. Of that sum, the defendants took back a mortgage for $425,000. The plaintiff found that business was slower than he expected and the clientele in the hotel pub proved to be rowdy. The plaintiff made unsuccessful efforts to sell the hotel. Payments to the defendants under their mortgage fell into arrears and the defendants foreclosed, eventually obtaining an order absolute. The plaintiff sued the defendants, alleging misrepresentation and claiming for rescission and damages. The trial judge granted partial rescission and damages on the basis of negligent misrepresentation. The defendants appealed.

Held:

Appeal allowed.

Partial rescission is not a remedy known at common law or in equity and the plaintiff did not satisfy all requirements for a claim for complete rescission.

As for damages, a plaintiff suing on pre-contractual representations is not as a matter of principle confined to his remedies in contract but may sue in tort for negligent misrepresentation. However, in the present case the requirements of tort liability on the basis of *Hedley Byrne* were not satisfied. The circumstances did not give rise to a duty of care on behalf of the defendants, as neither possessed detailed knowledge of hotel management nor held himself out as an expert in the field. In addition, reasonable people in the defendants' position would not expect the plaintiff to rely on their statements. The plaintiff should have confirmed the information he received from the defendants. Finally, a reasonable purchaser investing over $500,000 would not be expected to be acting in reliance on unsupported statements. In establishing tort liability for negligent misrepresentation, the criterion to be used should not be far removed from the contractual one of apparent intention to be bound. In this case there was no apparent intention to be bound. The obverse side of that conclusion was that the plaintiff did not reasonably rely on the statements in question and the lack of reasonable reliance was fatal to his claim in tort.

Table of Authorities

Cases considered:

Anderson v. Pac. Fire & Marine Ins. Co. (1872), L.R. 7 C.P. 65 — *referred to*

Andronyk v. Williams, [1986] 1 W.W.R. 225, 21 D.L.R. (4th) 557, 36 Man. R. (2d) 161 (C.A.) — *considered*

Babcock v. Lawson (1880), 5 Q.B.D. 284 (C.A.) — *referred to*

Bango v. Holt, [1971] 5 W.W.R. 522, 21 D.L.R. (3d) 66 (B.C.S.C.) — *referred to*

Bisset v. Wilkinson, [1927] A.C. 177 (P.C.) — *referred to*

Can. Western Natural Gas Co. v. Pathfinder Surveys Ltd. (1980), 12 Alta. L.R. (2d) 135, 12 C.C.L.T. 211, 21 A.R. 459 (C.A.) — *referred to*

Clough v. L.N.W. Ry. (1871), L.R. 7 Exch. 26 — *referred to*

Consumers Glass Co. v. Foundation Co. of Can./Cie Foundation du Can. Ltée (1985), 51 O.R. (2d) 385, 33 C.C.L.T. 104, 13 C.L.R. 149, 30 B.L.R. 87, 1 C.P.C. (2d) 208, 20 D.L.R. (4th) 126, 9 O.A.C. 193 (C.A.) — *referred to*

Dodds v. Millman (1964), 47 W.W.R. 690, 45 D.L.R. (2d) 472 (B.C.S.C.) — *referred to*

Esso Petroleum Co. v. Mardon, [1976] Q.B. 801, [1976] 2 W.L.R. 583, [1976] 2 All E.R. 5 (C.A.) — *distinguished*

Friesen v. Berta (1979), 100 D.L.R. (3d) 91 (B.C.S.C.) — *referred to*

Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 3 W.L.R. 101, [1963] 2 All E.R. 575 (H.L.) — *considered*

Heilbut, Symons & Co. v. Buckleton, [1913] A.C. 30 (H.L.) — *referred to*

John Maryon Int. Ltd. v. N.B. Tel. Co. (1982), 141 D.L.R. (3d) 193, 43 N.B.R. (2d) 469, 113 A.P.R. 469 [leave to appeal to S.C.C. refused 43 N.B.R. (2d) 468, 113 A.P.R. 468, 46 N.R. 262] — *referred to*

Kragh-Hansen v. Kin-Com Const. & Dev. Ltd. (1979), 13 R.P.R. 22 (B.C.S.C.) — *referred to*
Laskin v. Bache & Co., [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A.) — *referred to*
McLaughlin v. Colvin, [1941] 4 D.L.R. 568, affirmed [1942] 3 D.L.R. 292 (S.C.C.) [Ont.] — *referred to*
Peek v. Gurney (1873), L.R. 6 H.L. 377 — *referred to*
Redgrave v. Hurd (1881), 20 Ch. D. 1 (C.A.) — *referred to*
Redican v. Nesbitt, [1924] S.C.R. 135, [1924] 1 W.W.R. 305, [1924] 1 D.L.R. 536 [Ont.] — *referred to*
Rempel v. Parks, 53 B.C.L.R. 167, [1984] 4 W.W.R. 689 (C.A.) — *referred to*
Schlote v. Richardson, [1951] O.R. 58, [1951] 2 D.L.R. 233 (H.C.) — *referred to*
Shortt v. MacLennan, [1959] S.C.R. 3, 16 D.L.R. (2d) 161 [Ont.] — *referred to*
Sodd Corp. v. Tessis (1977), 17 O.R. (2d) 158, 25 C.B.R. (N.S.) 16, 2 C.C.L.T. 245, 79 D.L.R. (3d) 632 (C.A.) — *referred to*
Timmins v. Kuzyk (1962), 32 D.L.R. (2d) 207 (B.C.S.C.) — *referred to*
Wallbridge v. W.H. Moore & Co.; W.H. Moore & Co. v. Baldry (1964), 48 W.W.R. 321 (B.C.S.C.) — *referred to*

Authorities considered:

Blom, "The Evolving Relationship Between Contract and Tort" (1985), 10 Can. Bus. L.J. 257, pp. 293-94.

Waddams, The Law of Contracts, 2nd ed. (1984), p. 262.

Appeal from judgment of Boyle L.J.S.C., [1984] B.C.W.L.D. 3646, granting partial rescission of contract and damages for negligent misrepresentation.

The judgment of the court was delivered by *McLachlin J.A.*:

Introduction

1 This is an appeal from a judgment holding Walmar Ventures Ltd. ("Walmar"), Mr. Steve Poloway ("Poloway") and Mr. Paul Chmilar ("Chmilar") liable in tort to Avo Kingu ("Kingu") for negligent misrepresentations in the sale of the Peninsula Hotel on the Sunshine Coast of British Columbia [[1984] B.C.W.L.D. 3646].

2 In August 1979 Kingu was employed by C.P. Air, earning approximately $25,000 a year. Having acquired some equity in his family home in North Vancouver, he decided that the time had come to realize a dream which he had long cherished — that of owning and operating his own hotel. Apart from a course in hotel management and what he had learned about catering, marketing and sales with C.P. Air, Kingu had no experience in the hotel business. The trial judge described him variously as "naive" and "an innocent abroad".

3 Kingu saw an advertisement in a newspaper offering for sale a hotel on the Sunshine Coast. In August 1979 he contacted the listing agent, Chmilar. He told Chmilar about his current earnings and his experience. He stated that he had a down payment of $100,000 and that he wanted to "promote a property and have a really nice hotel". Chmilar in turn told Kingu that the hotel was in a good location on the Sunshine Coast, that it had a good clientele and that, based on figures from the current operator's experience, Kingu should be able to net $35,000 per annum from the hotel. Chmilar also told Kingu that over $100,000 had been spent on renovation of the hotel, that the property was zoned for commercial development, and that it consisted of five acres.

4 Within a week of his meeting with Chmilar, Kingu went to view the hotel. He introduced himself to its manager, Poloway, who showed him around. Poloway told him that the pub had been redone and that things like the water system were in good condition.

5 Kingu returned to view the hotel again in September 1979. At that time, Poloway, in response to direct questions from Kingu, told him that the roof was in good shape, that the septic system had been overhauled and was in good shape; that the water, sewer and electrical had been redone; that he had no problems with rowdyism and that the hotel had a good local clientele; and that everything was in tip-top shape and met all regulations.

6 Kingu decided to purchase the hotel. Negotiations took place, and a price of $525,000 was agreed. Kingu retained a solicitor to act on his behalf in respect of the purchase. This solicitor prepared all documentation, including the sale agreement. Before the agreement was drawn up, Kingu discussed it with Chmilar in the solicitor's office. During these discussions, Kingu must have learned that Chmilar, Poloway and Walter Poloway were the shareholders of Walmar, the company which owned the hotel, since he instructed his solicitor to make them parties to the agreement so that they would be personally liable on the covenants contained in it. Kingu read the purchase agreement before he signed it, which was done in the presence of his solicitor.

7 Pursuant to the agreement, Kingu's company, Kingu Holdings Inc., purchased the hotel on 12th October 1979, on the following terms:

(a) $10,000 deposit upon the execution of the agreement;

(b) $90,000 payable upon the completion of the sale of Kingu's house, together with interest at the rate of 11 per cent per annum computed from November 1979;

(c) $425,000 secured by a mortgage in favour of the vendor.

The agreement set out a number of specific representations, warranties and covenants by the vendor and its shareholders, and contained an exemption clause which stated that there were no other representations, warranties, guarantees, promises or agreements other than those contained in the agreement.

8 Kingu Holdings took over the hotel 15th November 1979 and commenced to run it. Kingu realized in the first few months that business was slower than he expected, but was assured by Chmilar that business should pick up in the summer. He hired rock bands and strippers to increase revenue in the beer parlour. He borrowed further money to improve the hotel and to start a car rental business. Revenues increased, but so did costs. The beer parlour clientele proved rowdy. While Poloway had been able to handle them, it appeared that Kingu could not. In late 1980 or early 1981, Kingu decided to sell the business, listing it with Chmilar. Several offers were rejected; several were accepted but failed to close. In July 1982 Kingu Holdings was in default on its mortgage. Walmar obtained judgment and an order nisi of foreclosure on 25th January 1983, and an order absolute on 26th April 1983.

9 Kingu and Kingu Holdings sued Walmar, Chmilar, Poloway and Walter Poloway, as well as Chmilar's company, Sea-Land Realty Ltd. The statement of claim alleged that the defendants had made representations which were false and untrue, recklessly without caring whether they were true or not — the usual pleading for fraudulent misrepresentation — and claimed rescission of the agreement and damages. The statement of claim does not plead innocent misrepresentation or negligence. However, the parties have argued the appeal as though they had been pleaded, and I shall consider it on that basis.

10 The trial judge dismissed the action against Walter Poloway and Sea-Land Realty Ltd. He concluded that the plaintiffs had not established fraud against the other defendants. He went on, however, to grant the plaintiffs partial rescission of the agreement and damages on the basis of negligent misrepresentation.

11 Three main issues are raised on appeal:

12 (1) Whether the trial judge erred in holding that the agreement should be rescinded for misrepresentation;

13 (2) Whether the trial judge erred in finding the defendants Walmar, Poloway and Chmilar liable in damages for misrepresentation;

14 (3) Whether the trial judge erred in his method of assessing damages, including his conclusion that the plaintiffs had mitigated their loss.

15 I will consider each of these issues in turn.

Discussion

(1) Rescission

16 The trial judge found that the agreement between the plaintiffs and Walmar was cancelled. He went on to say that he need not deal with the mortgage which was foreclosed except to say that the plaintiffs were no longer liable on the personal judgment.

17 In effect, this appears to be only a partial rescission of the agreement. Rescission, as that term is used in the law of contract, is based on a finding that the contract is void ab initio and contemplates putting the parties in the position they would have been in had the contract not been made. To do that would require the defendants to pay back to the plaintiffs all payments they made under the agreement and the plaintiffs to restore to the defendants the hotel in the condition it was in at the time the contract was entered into. The trial judge neither considered nor ordered such payment or restoration.

18 Clearly the trial judge erred in granting partial rescission. No such remedy is known at common law or equity. The remaining question is whether grounds for complete rescission are made out. Rescission may always be obtained for fraudulent misrepresentation which induced the plaintiff to enter into the contract. But it may be obtained for innocent (non-fraudulent) misrepresentation only in cases where the plaintiff establishes the following requirements:

(a) A positive misrepresentation must have been made by the defendant. (Where the defendant owes a fiduciary duty to the plaintiff, as it may be contended Chmilar did to the plaintiffs in this case, failure to disclose material facts may suffice: *Laskin v. Bache & Co.*, [1972], 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A.); Waddams, The Law of Contracts, 2nd ed. (1984), p. 262.

(b) The representation must have been of an existing fact: *Anderson v. Pac. Fire Marine Ins. Co.* (1872), L.R. 7 C.P. 65; see also *Bisset v. Wilkinson*, [1927] A.C. 177 (P.C.).

(c) The representation must have been made with the intention that the plaintiff should act on it: *Peek v. Gurney* (1873), L.R. 6 H.L. 377.

(d) The representation must have induced the plaintiff to enter into the contract: *Shortt v. MacLennan*, [1959] S.C.R. 3, 16 D.L.R. (2d) 161 [Ont.].

(e) The plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract: *Clough v. L.N.W. Ry.* (1871), L.R. 7 Exch. 26; *Wallbridge v. W.H. Moore & Co.; W.H. Moore & Co. v. Baldry* (1964), 48 W.W.R. 321 (B.C.S.C.); *Dodds v. Millman* (1964), 47 W.W.R. 690, 45 D.L.R. (2d) 472 (B.C.S.C.); *Bango v. Holt*, [1971] 5 W.W.R. 522, 21 D.L.R. (3d) 66 (B.C.S.C.); *Timmins v. Kuzyk* (1962), 32 D.L.R. (2d) 207 (B.C.S.C.).

(f) No innocent third parties must have acquired rights for value with respect to the contract property: *Babcock v. Lawson* (1880), 5 Q.B.D. 284 (C.A.).

(g) It must be possible to restore the parties substantially to their pre-contract position: *Redgrave v. Hurd* (1881), 20 Ch. D. 1 (C.A.); *Schlote v. Richardson*, [1951] O.R. 58, [1951] 2 D.L.R. 233 (H.C.); *McLaughlin v. Colvin*, [1941] 4 D.L.R. 568, affirmed [1942] 3 D.L.R. 292 (S.C.C.) [Ont.]; *Friesen v. Berta* (1979), 100 D.L.R. (3d) 91 (B.C.S.C.); *Andronyk v. Williams*, [1986] 1 W.W.R. 225, 21 D.L.R. (4th) 557, 36 Man. R. (2d) 161 (C.A.).

(h) An executed contract for the sale of an interest in land will not be rescinded unless fraud is shown: *Redican v. Nesbitt*, [1924] S.C.R. 135, [1924] 1 W.W.R. 305, [1924] 1 D.L.R. 536 [Ont.]; *Shortt v. MacLennan*, supra; *Kragh-Hansen v. Kin-Com Const. & Dev. Ltd.* (1979), 13 R.P.R. 22 (B.C.S.C.).

Requirements (e), (f), (g) and (h) are fatal to the plaintiffs' claim for rescission. They did not bring their action promptly upon learning of the alleged misrepresentations. It is true that they complained to Chmilar in the winter of 1980 and were assured that things would improve in the summer. But that does not explain why an action was not taken in the summer of 1980, instead of 2 1/2 years later in December 1982. Nor can the parties be restored to their pre-contractual position. The property has been foreclosed and sold to others; the plaintiffs have nothing left to give. Finally, this being an executed sale of real property, it is doubtful whether rescission would ever have been available.

(2) The claim for damages

19 The first question which must be addressed is the basis on which damages can be claimed for misrepresentations in the course of pre-contractual negotiations.

20 At one time a plaintiff suing on pre-contractual representations was confined to his remedies in contract. If the representation was fraudulent, the plaintiff could obtain rescission and damages. If it was not fraudulent but "innocent", the plaintiff could obtain rescission if the conditions discussed earlier were established but could not obtain damages. The only way for the plaintiff to obtain damages for a non-fraudulent or innocent representation was on the basis of collateral warranty, or a separate contract collateral to the main contract. This remedy, however, was not available in cases where the pre-contractual representation contradicted the main contract: *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 (H.L.).

21 I digress to say that in the case at bar, collateral warranty was neither pleaded nor argued. A claim on this ground would probably not have succeeded in any event because the written contract expressly excludes any representations or warranties other than those set out in it.

22 The remaining question is whether the establishment of a cause of action for negligent misrepresentation in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 3 W.L.R. 101, [1963] 2 All E.R. 575 (H.L.), has added yet a further remedy to the traditional remedies available for misrepresentations inducing a party to enter a contract. To put it another way, does the fact that the statement was made in pre-contractual negotiations between the plaintiffs and the defendant, and from which a contract resulted, exclude the duty of care in negligence?

23 In *Hedley Byrne* itself there was an indication that the remedy was not available for pre-contractual representations: see Lord Reid at p. 483. However, the proposition that a plaintiff in such circumstances is confined to his contractual remedies was rejected in *Esso Petroleum Co. v. Mardon*, [1976] Q.B. 801, [1976] 2 W.L.R. 583, [1976] 2 All E.R. 5 (C.A.). In Canada, the same view has been taken without much discussion: see, for example, *Sodd Corp. v. Tessis* (1977), 17 O.R. (2d) 158, 25 C.B.R. (N.S.) 16, 2 C.C.L.T. 245, 79 D.L.R. (3d) 632 (C.A.); *Kragh-Hansen v. Kin-Com Const. & Dev. Ltd.*, supra; *Andronyk v. Williams*, supra. Generally, the right to bring concurrent actions in contract and tort for the same wrong has been affirmed in Canada, subject to the limitation that the contract may limit the scope of the duty of care: *John Maryon Int. Ltd. v. N.B. Tel. Co.* (1982), 141 D.L.R. (3d) 193, 43 N.B.R. (2d) 469, 113 A.P.R. 469 (C.A.); *Consumers Glass Co. v. Foundation Co. of Can./Cie Foundation du Can. Ltée* (1985), 51 O.R. (2d) 385, 33 C.C.L.T. 104, 13 C.L.R. 149, 30 B.L.R. 87, 1 C.P.C. (2d) 208, 20 D.L.R. (4th) 126, 9 O.A.C. 193 (C.A.); *Can. Western Natural Gas Co. v. Pathfinder Surveys Ltd.* (1980), 12 Alta. L.R. (2d) 135, 12 C.C.L.T. 211, 21 A.R. 459 (C.A.); *Rempel v. Parks*, 53 B.C.L.R. 167, [1984] 4 W.W.R. 689 (C.A.).

24 I conclude that a plaintiff suing on pre-contractual representations is not as a matter of principle confined to his remedies in contract, but may sue in tort for negligent misrepresentation. However, the question of whether a duty of care in tort arises must be carefully scrutinized in the light of all the surrounding circumstances, including the rights and obligations which the parties have themselves established by their contract.

25 The question then is whether the requirements of tort liability on the basis of *Hedley Byrne* are satisfied in the case at bar. Those requirements may be summarized as follows:

26 (1) A false statement negligently made;

27 (2) A duty of care on the person making the statement to the recipient. A duty of care does not arise unless:

28 (a) the person making the statement is possessed of special skill or knowledge on the matter in question, and

29 (b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;

30 (3) Reasonable reliance on the statement by its recipient;

31 (4) Loss suffered as a consequence of the reliance.

32 With respect to the first requirement, various misrepresentations were alleged. However, the material ones, in the trial judge's view, were those concerning the revenue which the hotel would produce, the nature of its operations and its condition. The trial judge found Chmilar's statement to Kingu that the hotel should produce $35,000 per annum to be a negligent misrepresentation. He also referred to Chmilar's comment as to the nature of the hotel's operations, presumably a reference to Chmilar's statement that the hotel had a good clientele. His reasons suggest concern on the question of whether Poloway's representations as to the condition of the hotel might, taken alone, constitute negligent misstatements. However, he concluded that Poloway was responsible for such misstatements as he found to have been made, on the basis that he was working together with Chmilar.

33 The appellants take strenuous objection to these findings of the trial judge. They argue with some force that Chmilar's statements as to the revenue the hotel would produce and its clientele were valid and that it was Kingu's management that led to the hotel's difficulties. They further assert that it is wrong in law to hold one man liable for misrepresentation on the basis of his association with another. I find it unnecessary to decide whether the appellants' objections to the trial judge's conclusions on these matters are well-founded, in view of my conclusion that the other requirements of tort liability on the basis of *Hedley Byrne* are not established.

34 It is my view that the circumstances in the case at bar do not give rise to a duty of care on Chmilar and Poloway with respect to their statements to Kingu. As noted earlier, before a duty of care arises with respect to a gratuitous statement, it must be established that the maker is possessed of special skill or knowledge and that a reasonable person in his position would have realized that the recipient of the statement was relying on it.

35 Neither of these criteria are met in the case at bar. First, it is not clear that the defendants possessed the requisite degree of skill or knowledge on the questions on which they volunteered information. Chmilar and Poloway had been running the hotel for a relatively short period of time — some eight months. As such, they might have been expected to have knowledge of its clientele and revenue, as well as of renovations undertaken by them. On the other hand, the shortness of their tenure could not reasonably be thought to have given them detailed knowledge of what the hotel might be expected to earn over a longer term or what its overall condition was apart from the renovations they themselves had undertaken. Neither Chmilar nor Poloway held himself out as an expert in the soundness of buildings or the economics of running hotels. On the other hand, the plaintiff introduced himself as having taken a course in hotel management and having some experience in marketing and catering. On these facts, it is doubtful whether Chmilar and Poloway can be said to have the degree of superior skill and knowledge requisite to establishing a duty of care under the principles flowing from *Hedley Byrne*.

36 Second, this was clearly not a case where a reasonable person in the position of Chmilar and Poloway would have expected Kingu to rely on their statements as he appears to have done. I deal first with Chmilar's statement as to the revenue the hotel could generate. Of primary importance is the time the statement was made — in August on the occasion of Kingu's first inquiry into the possibility of purchasing the hotel in response to a newspaper advertisement. Some time later, when it was apparent that Kingu was seriously interested in purchasing the hotel, he again directed

inquiries concerning the earnings of the hotel to Chmilar. This time Chmilar did not give a casual, offhand response. He told Kingu to direct any questions he might have to the defendants' accountants. The trial judge accepted that Chmilar had so advised Kingu, but stated that in the circumstances he did not place much weight on that event. In my view, he erred in so doing. These events reveal that both parties treated Chmilar's statement of prospective earnings at their first meeting as a rough opinion given to someone who might or might not be interested in considering the matter further. When Kingu decided to take matters further, he felt the need of further inquiries as to the earnings of the hotel, and Chmilar, treating this as a serious inquiry which might reasonably be relied on, declined to express an opinion.

37 The circumstances surrounding Chmilar's making of the statement lead to the same conclusion. Kingu advised Chmilar that he would expect the hotel to earn more than $25,000 per annum, his income at the time. Chmilar replied that the hotel should earn $35,000 per annum. He offered Kingu no financial statements, but gave him a sheet showing sales and costs of supplies for about five months during which renovations were carried out. This statement was stated to be incomplete and unrepresentative of the most recent months. The statement was obviously incomplete because it showed no expenses other than the cost of some of the things sold. As will appear from the reference to Mr. Kingu's testimony which appears later in these reasons, he was told by Chmilar that for the period during which Walmar had operated the hotel "cost might be a couple of thousand over profit". It must have been clear from these circumstances that Chmilar's statement was not a careful estimate.

38 Finally, it may be inferred from the nature of this transaction — an investment of over $500,000 in an active business — that a reasonable purchaser would before buying make further inquiries into the financial status and earnings potential of the hotel and would not rely on the real estate agent's unsupported casual comment at the initial meeting.

39 Equally, a reasonable purchaser would not have relied blindly on the statements that the hotel had a good clientele and had been recently renovated and was in good shape, without making further inquiries. It is not disputed that in one sense these statements were true. The hotel had many patrons (howbeit largely of its beer parlour) and produced considerable revenue. Poloway had been able to handle difficult patrons, with the result that rowdyism was not a problem. Extensive renovations had, in fact, been done. Kingu, however, read more into the statements than was warranted. Apparently he took them to mean that the hotel had a large resort clientele and would require little renovation in the future. Chmilar and Poloway could not reasonably be supposed to have known that Kingu would draw these inferences, particularly in view of Kingu's personal inspections of the hotel and its operations before purchase.

40 On the basis of these considerations, I conclude that the plaintiffs have failed to establish a duty of care owed to them by the defendants as vendors. The facts are far different from those in *Esso Petroleum Co. v. Mardon*, supra. There Esso had very special skills and knowledge based on what its experts had concluded from the traffic volume and throughput at comparable stations; here we find limited knowledge acquired over a few months' operation. There Esso had made a detailed and careful calculation; here the information given was obviously vague, offhand and incomplete. There, Esso gave the information clearly knowing that Mardon would reasonably rely on it; here, no such inference can be drawn.

41 The facts in this case are closer to those in *Andronyk v. Williams*, supra, where the court concluded that no duty of care in tort lay on the defendant vendor in advising a prospective purchaser of the quality of the land he was buying. At p. 247, O'Sullivan J.A., speaking for the court, stated:

> In the case now before us, the only relationship between *Andronyk and Williams* was that of pre-contract negotiators. In my opinion, such a relationship did not give rise to an actionable duty of care in making statements which were not incorporated into the contract. Hence, while equity would have due regard to any misrepresentations of fact inducing the contract, there was no right of action in tort for negligent misrepresentation.

42 In my view, the fact that Chmilar, in addition to being a pre-contract negotiator, was a real estate agent does not make this statement any less applicable in the case at bar. Whether or not he is regarded as a fiduciary (see *Bango v. Holt*, supra) does not alter the fact that when he made the statements complained of, he could not have reasonably expected Kingu to rely upon them as he did.

43 I am confirmed in my conclusion that the facts in this case do not disclose a duty of care, by the comments of Professor Joost Blom, in a recent article: "The Evolving Relationship Between Contract and Tort" (1985), 10 Can. Bus. L.J. 257. After pointing out the close relationship between contractual warranty and tort liability for negligent misrepresentation, Professor Blom suggests that mere foreseeability is insufficient to found a duty of care for negligent misrepresentation; there must, in his view, be something to establish an undertaking on the part of the person imparting the information. At pp. 293-94, he states:

> We all rely routinely on many things we are told, without being justified in assuming that some legal liability would attach if the information turned out to be negligently given. The question is not so much whether a reasonable person would rely, as whether a reasonably prudent and sceptical person would think that the information or advice carried conviction, not only of its quality, but also of a certain legal weight. This is not to say, as the Privy Council did in *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt*, [[1971] A.C. 793], that only professional advisers can be held to a standard of reasonable care in tort. *It is suggested, however, that the criterion to be used should be not far removed from the contractual one of apparent intention to be bound.* [emphasis added]

44 In the case at bar, I am satisfied that there was no apparent intention to be bound. It follows that no duty of care is established.

45 The obverse side of this conclusion is that Kingu did not reasonably rely on the statements in question and that the third requirement of tort liability for misstatements is not established.

46 First, Kingu knew that Chmilar was a real estate agent, not an investment advisor.

47 Second, he knew or ought to have known that the basis for Chmilar's estimate was questionable, given that he was told that the financial statement he was shown was for a period when renovations were under way and given that the statement on its face was not up-to-date. The trial judge drew adverse inferences from the incomplete nature of the sheet. However, it is apparent from Kingu's evidence that he understood that the sheet was incomplete and not representative of what could be earned after all expenses were taken into account. In these circumstances it must have been clear to him that Chmilar's statement was not a careful opinion based on an analysis of the hotel's financial records, but was rather a casual opinion designed to indicate to Kingu that this might be the hotel he was looking for. Notwithstanding the very rough and incomplete nature of the financial information, Kingu did not make further inquiries. He said:

> I didn't ask for any further documentation than the Statement (Ex. 2/1). Chmilar said that part of the time they had been doing renovations, as he noted on there and that this was the statement — cost might be a couple of thousand over the profit but ... that I would make my $35,000 net and as a real estate agent — I thought, well it looks good and I believed. I thought, well, it was sufficient.

48 In my view a reasonable purchaser would not have taken this as sufficient, but would have asked to see full financial statements for the hotel's operations.

49 Third, Kingu should have been alerted to the need for further investigation of the hotel's finances when at a later date he made further inquiries of Chmilar and was told to take his questions to the defendants' accountants. Kingu's failure to do so was unreasonable.

50 Finally, the trial judge's conclusions support the view that Kingu, in relying on Chmilar's estimate of earnings at their first meeting, acted unreasonably. The trial judge did not direct his attention expressly to the question of whether Kingu acted reasonably. However, he stated:

> He made no independent inquiries, neither from local authorities, police, neighbours, accountants, experts in the business nor from persons qualified to survey the structure.

> He is not a man without intelligence but he was naive. His vision of reality was obscured by his dream. His blindness would have been no more apparent had he been carrying a white cane.

51 The trial judge's reasoning amounts to this. Kingu did not act reasonably; however, that is of no matter since his naivete and poor judgment would have been apparent to those dealing with him. I cannot accept that conclusion. First, there is no evidence that Kingu's naivete was apparent to the defendants. Rather, he presented himself as having taken a course in hotel management and with experience in marketing and catering. Second, the law of negligent misrepresentation is based on the premise that both parties are expected to act reasonably. Kingu's foolish approach might be relevant were fraud, undue influence or duress at issue. But it does not advance his claim for damages for negligent misrepresentation.

52 The appellants also contended that the fact that the parties in the case at bar signed a contract excluding all representations other than those set out in the contract negated any liability which might otherwise arise in tort. On the view I take of the case, it is unnecessary to consider this submission. I note only that it has considerable force in circumstances such as these where the parties expressly agreed by their contract on those pre-contractual representations which they considered material and excluded all others.

53 For these reasons I conclude that the plaintiffs have not established the legal requirements of negligent misrepresentation, with the result that their claim for damages must fail.

Conclusion

54 The legal requirements for cancellation of the agreement for sale and for damages for negligent misrepresentation are not satisfied. It is unnecessary in these circumstances to consider the appeal on the question of damages.

55 The appeal is allowed and the action is dismissed. It will be necessary to amend one or other or both of the formal judgments since, although the judge dismissed the action against Sea-Land Realty Ltd. and Walter Poloway, neither of the two judgments records that fact.

Appeal allowed.

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