

COMMENTS

RESCISSION OF A CONTRACT FOR THE SALE OF GOODS FOR INNOCENT MISREPRESENTATION

Graham v Freer

Until the recent decision of the South Australian Full Supreme Court in *Graham v Freer*¹ it was a moot point whether the equitable remedy of rescission for innocent misrepresentation applied to contracts for the sale of goods.² In deciding the issue in the affirmative, the Court followed the United Kingdom line of authority culminating in the decision of the Court of Appeal in *Goldsmith v Rodger*³ in preference to the decision of the Victorian Full Supreme Court in *Watt v Westhoven*⁴ and the New Zealand Court of Appeal in *Riddiford v Warren*.⁵

The facts of *Graham v Freer*⁶ so far as relevant to the present discussion were as follows. The plaintiff Graham was interested in buying an incomplete yacht belonging to Leslie. He was referred to the proprietor of a marine centre, Sharkey, who was handling the sale for Leslie. Sharkey represented to Graham that the keel of the yacht was approximately three hundredweight less than it should have been according to its design and that the difference in weight was made up by metal punchings in the keel. It subsequently transpired that the keel was approximately one ton less than it should have been according to its design and that the metal punchings were not sufficient to compensate for the light keel.

During the course of the negotiations for the purchase of the yacht, the defendant Freer became trustee of Leslie's estate pursuant to a deed of assignment executed under the provisions of Part X of the Commonwealth Bankruptcy Act 1966. Leslie's creditors authorized the defendant trustee Freer to accept Graham's offer for the purchase of the yacht and a deposit was paid by Graham. However, after obtaining an expert's inspection and report on the yacht Graham purported to rescind the contract of sale on the ground, *inter alia*, of Sharkey's misrepresentation of the extent by which the keel was underweight. Graham offered to purchase the yacht for a lower amount but this offer was not acceptable and Freer contended that Graham was bound by the terms of the original contract. Accordingly, Graham sought, *inter alia*, rescission of the contract and recovery of his deposit. At first instance

1 (1980) 91 LSJS 125.

2 As pointed out by the present writer in an article in this journal some years ago, although the South Australian Misrepresentation Act 1971-72 appears to have been passed on the *assumption* that a contract for the sale of goods could be rescinded for innocent misrepresentation, the Act did not specifically deal with the issue which therefore remained to be determined according to common law (including equitable) principles. See Turner, "Misrepresentation, Agency, and Contracts for the Sale of Goods in South Australia — More Effective Remedies or Increasing Confusion?" (1975) 5 Adel LR 221, 223, esp n 8.

3 [1962] 2 Lloyd's Rep 249.

4 [1933] VLR 458.

5 (1901) 20 NZLR 572.

6 (1980) 91 LSJS 125.

Graham's claim was dismissed and judgment entered for Freer, whereupon Graham appealed to the South Australian Full Supreme Court.

A good deal of the reported judgment concerned the issue of whether in the particular circumstances Sharkey was to be regarded as Freer's agent in his negotiations with Graham. The Court held in essence that on the facts this was the case and that Freer was bound by the misrepresentation made by Sharkey to Graham in relation to the purchase of the yacht.

Counsel for the defendant trustee Freer then contended that since the contract was one of sale it could not be rescinded for innocent misrepresentation, since the equitable remedy of rescission for innocent misrepresentation did not apply to a contract for the sale of goods. In support of this argument the defendant relied on the interpretation given by the Victorian Full Supreme Court in *Watt v Westhoven*⁷ and the New Zealand Court of Appeal in *Riddiford v Warren*⁸ to the corresponding provisions in those jurisdictions⁹ to s 59(2) of the South Australian Sale of Goods Act 1895-1972. The section provides:

"The *rules of the common law*¹⁰, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, *misrepresentation*,¹⁰ duress, or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods."

The expression the "rules of the common law" in the above section was narrowly interpreted by the New Zealand Court of Appeal in *Riddiford v Warren*¹¹ to mean the rules of the common law in contradistinction to the principles of equity. At common law an innocent misrepresentation did not entitle the representee to rescind the contract unless there was a complete difference in substance between what was contracted for and what was obtained so as to constitute a failure of consideration.¹² By such technical interpretation of the phrase "rules of the common law" the Court denied the application to contracts for the sale of goods of the broader equitable remedy of rescission for innocent misrepresentation.¹³ The Court justified its narrow interpretation on the ground that the equitable remedy had never applied to contracts for the sale of goods; such position had not been affected by the fusion of law and equity by the Judicature Acts since there had been no conflict between the rules of the common law and equity on the point; and that the phrase "rules of the common law" must have been used to resolve any doubt there may have been by recognizing that only the common law rules as to misrepresentation applied to contracts for the sale of goods and continuing that position. The observations of the Court on

7 [1933] VLR 458.

8 (1901) 20 NZLR 572.

9 Goods Act, 1928 (Vic), s 4(2); see now Goods Act, 1958 (Vic), s 4(2); Sale of Goods Act, 1895 (NZ), s 61(2).

10 Emphasis supplied.

11 (1901) 20 NZLR 572.

12 *Kennedy v Panama, New Zealand, and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, 587 per Blackburn J.

13 *Redgrave v Hurd* (1881) 20 ChD 1. For denial of the existence of a broader equitable principle, see *Hynes v Byrne* (1899) 9 QJLJ 154, 160-163 per Griffith CJ referred to in Turner, supra n 2 at 225.

this question were strictly *obiter* since it was held on the facts that there had been no misrepresentation. However, *Riddiford v Warren*¹⁴ was followed by the Victorian Full Supreme Court in *Watt v Westhoven*¹⁵ where it was held that the purchaser of a car had no right to rescind the contract of sale on the ground of certain innocent misrepresentations made by the seller. The Court's reasons for rejecting the purchaser's claim to rescind were essentially the same as those enunciated in *Riddiford v Warren*.¹⁶

More recently, the United Kingdom Court of Appeal reached the opposite conclusion to that arrived at by the cases just discussed. In *Leaf v International Galleries*¹⁷ and *Long v Lloyd*¹⁸ the Court of Appeal appears to have recognized, at least implicitly, that in appropriate circumstances the equitable remedy of rescission for innocent misrepresentation applied to contracts for the sale of goods, although in neither case was it found necessary to finally determine the point. Of greater significance is the decision of the Court of Appeal in *Goldsmith v Rodger*¹⁹ where it was held that the vendor of a fishing boat was entitled to rescind the contract of sale having been induced to sell the boat at a lower price because of the buyer's innocent misrepresentations as to defects in the keel. It is noteworthy, however, that in none of these cases was the Court of Appeal called upon to determine the precise issues which had led the courts in *Riddiford v Warren*²⁰ and *Watt v Westhoven*²¹ to a contrary view.

The narrow construction of the sale of goods provision in *Riddiford v Warren* and *Watt v Westhoven* has been subjected to considerable academic comment and criticism. As Zelling J pointed out in delivering the leading judgment in *Graham v Freer*²², the majority of text writers and commentators have expressed the opinion that the statutory provision did not exclude the rules of equity, although there was not unanimity on the point. The learned judge proceeded to cite the views of those commentators who, in essence, had rejected the approach in *Riddiford v Warren* and *Watt v Westhoven* in favour of the United Kingdom line of authority culminating in *Goldsmith v Rodger*.²³ Particular reference was

14 (1901) 20 NZLR 572.

15 [1933] VLR 458.

16 (1901) 20 NZLR 572.

17 [1950] 2 KB 86. See particularly the judgment of Denning LJ at 90 where he said: "I agree that on a contract for the sale of goods an innocent material misrepresentation may, in a proper case, be a ground for rescission even after the contract has been executed."

18 [1958] 1 WLR 753.

19 [1962] 2 Lloyd's Rep 249.

20 (1901) 20 NZLR 572.

21 [1933] VLR 458.

22 (1980) 91 LSJS 125, 136.

23 The text writers and commentators referred to on the point were: Treitel, *The Law of Contract* (4th edn 1975) 246-247, (see similarly, 5th edn (1979) 279-280); Benjamin's *Sale of Goods* (1974 edn) 7-8; Atiyah, *The Sale of Goods* (5th edn 1975) 301-302, (see similarly, 6th edn (1980) 356-357); Chitty on *Contracts* (24th edn 1977) vol II 873; Fleming, "Misrepresentation and the Sale of Goods" (1951) 25 ALJ 443, 446-447; Williams, "Language and the Law - III" (1945) 61 LQR 293, 302; Grunfeld (1958) 21 MLR 550, 551, n 10. Zelling J (at 136) also remarked that Sir Mackenzie Chalmers, the draftsman of the United Kingdom Sale of Goods Act 1893 had made no reference to the point one way or the other in his commentary on the corresponding United Kingdom provision (s 61(2)) in the last edition of his textbook on *Sale of Goods* which he had personally edited (10th edn 1924), and that the same was true of the latest edition of that work (16th edn 1971).

made to Treitel's contention²⁴ that the view held in *Riddiford v Warren* was untenable on four grounds, namely: (1) that the Sale of Goods Act is not a complete code; (2) that in the corresponding provision in the United Kingdom Sale of Goods Act 1893 (s 61(2)) to s 59(2) of the South Australian Act set out earlier, misrepresentation is regarded as an invalidating cause distinct from fraud and mistake. Since at common law a wholly innocent misrepresentation did not invalidate a contract for the sale of goods unless it induced a fundamental mistake, the saving of the rules as to the effect of misrepresentation could only refer to the rules of equity. Furthermore, it would be strange if the Sale of Goods Act saved the common law but not the rules of equity relating to mistake and agency; (3) the United Kingdom authorities referred to earlier, culminating in *Goldsmith v Rodger*, support the view that a contract for the sale of goods can be rescinded for innocent misrepresentation; and (4) if a contract for the sale of goods cannot be rescinded for innocent misrepresentation the injured party would have no remedy at all for an innocent misrepresentation not incorporated in the contract and such an unjust result ought not to be reached in the absence of express provision to that effect in the Sale of Goods Act.

After due consideration of the weight of academic commentary on the point²⁵ and the United Kingdom authorities referred to earlier, Zelling J in *Graham v Freer*²⁶ expressed the opinion that *Goldsmith v Rodger* correctly stated the present law and that *Riddiford v Warren* and *Watt v Westhoven* should not be followed in South Australia. He found support for the plaintiff's submissions in this regard by virtue of the applicability of equitable doctrines to contracts for the sale of goods in other respects which, he said, could not be correct if *Riddiford v Warren* and *Watt v Westhoven* were rightly decided. The equitable doctrines enumerated by Zelling J as applying to contracts for the sale of goods²⁷ were: (1) rectification²⁸; (2) injunction²⁹; (3) fraud on a third party³⁰; and (4) tracing.³¹

The learned judge concluded that there was nothing inherent in a contract for the sale of goods to take such contract outside the general rule that contracts obtained by innocent misrepresentation are voidable in

24 Treitel, *supra* n 23.

25 In view of the preponderance of academic commentary against the narrow interpretation adopted in *Riddiford v Warren* and *Watt v Westhoven*, Zelling J appears to have felt it otiose to refer to the opinions of those writers who have expressed serious doubts as to the existence of an equitable right to rescind a contract for the sale of goods for innocent misrepresentation; see, for example, Howard, "The Rule in Seddon's Case" (1963) 26 MLR 272, 282-285; Higgins, "Rescission for Innocent Misrepresentation" (1963) 5 Malaya Law Review 74, 85-90; Stoljar, "Conditions, Warranties and Descriptions of Quality in Sale of Goods - II" (1953) 16 MLR 174, 190-194. See further, Sutton, *The Law of Sale of Goods in Australia and New Zealand* (2nd edn 1974) 5-8.

26 (1980) 91 LSJS 125, 137.

27 *Ibid.*

28 *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450.

29 *James Jones & Sons, Ltd v Earl of Tankerville* [1909] 2 Ch 440.

30 Zelling J (at 137) said that this particular equitable doctrine *may* apply to contracts for the sale of goods and there seemed to be no specific reason why it should not, although the authority referred to by the plaintiff for the proposition (Meagher, Gummow & Lehane, *Equity* (1975) para 1208) did not in its express terms cover the point.

31 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676; Goodhart and Jones, "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 MLR 489, 501-510.

equity and can be rescinded.³² Accordingly, the plaintiff's appeal should be allowed on the ground that he had effectively rescinded the contract of sale and was entitled to the return of his deposit and consequential relief.³³ King CJ and Mohr J expressed concurrence with the reasoning of Zelling J.

The decision of the South Australian Full Supreme Court in *Graham v Freer*³⁴ is to be welcomed as clarifying an important and previously uncertain point, namely, that the equitable remedy of rescission for innocent misrepresentation applies to contracts for the sale of goods. Furthermore, it is in line with the basic philosophy behind the South Australian Misrepresentation Act 1971-72 of providing more flexible remedies in cases where a contract has been entered into as a result of misrepresentation. It needs to be borne in mind that the Act provides in s 7(3) that where in any proceedings before a court it is proved that a party to a contract has rescinded, or is entitled to rescind, the contract on the ground of misrepresentation, the court may declare the contract to be subsisting if it considers it just and equitable to do so and award such damages as it considers fair and reasonable in view of the misrepresentation. Such provision will apply to contracts for the sale of goods entered into as a result of innocent misrepresentation.

The judgment in *Graham v Freer* accords with recent recommendations on the issue in other jurisdictions including Victoria.³⁵ When recent legislation in that State comes into operation it will have the effect of rendering the decision in *Watt v Westhoven* nugatory.³⁶ Finally, it is anticipated that *Graham v Freer* will be followed in other Australian jurisdictions where the question of the application of the equitable remedy of rescission for innocent misrepresentation to contracts for the sale of goods remains undecided.

C Turner*

32 The authorities cited by Zelling J for this general rule were *Attorney-General for Ontario v Perry* [1934] AC 477; *Senanayake v Cheng* [1966] AC 63; and *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254.

33 In accordance with an agreement between the parties, the case was referred back to the judge of first instance for further consideration of the plaintiff's claim for damages against the defendant under the South Australian Misrepresentation Act 1971-72 (s 7), and for further consideration of the proceedings between the defendant trustee Freer and the agent Sharkey.

34 (1980) 91 LSJS 125.

35 Thus, in Report No 7, "Innocent Misrepresentation" (1978) of the Victorian Law Reform Commissioner, it was recommended that *Watt v Westhoven* should no longer express the law in that State and that rescission should be permissible in the case of contracts for the sale of goods (see paras 55, 13).

36 The Victorian Goods (Sales and Leases) Act 1981, s 100 provides: "(1) Where a buyer enters into a sale of goods after a misrepresentation that is not fraudulent is made to him and, if the misrepresentation had been fraudulent, the buyer would have been entitled to rescind the sale by reason of the misrepresentation, the buyer may rescind the sale by notice given to the seller before, or within a reasonable period after, acceptance of the goods.

(2) Sub-section (1) applies whether or not the misrepresentation has become a term of the sale."

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