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Judgment: approved by the Court for handing down | *Delivered:* **02/06/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION
2007 No 67262

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Between:

ODYSSEY CINEMAS LIMITED

Plaintiff/Appellant;

AND

VILLAGE THEATRES THREE LIMITED
Defendant/Respondent;

AND

AND SHERIDAN MILLENNIUM LIMITED

Third party.

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

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GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] The appellant, the plaintiff in the action, brings this appeal from the judgment of Deeny J ("the trial judge") delivered on 2 February 2010 relating to certain preliminary questions which arose in the action. In its appeal the appellant challenges the trial judge's conclusions that a misrepresentation

which he found had been made by the respondent , the defendant in the action, was not made fraudulently but was made negligently; that the remedy which should be awarded to the appellant in respect of the respondent's negligent misrepresentation should not be rescission but damages; and that the appellant was guilty of contributory negligence.

[2] Mr Reynolds QC appeared with Mr Park on behalf of the appellant. Mr Orr QC appeared with Mr Coghlin on behalf of the respondent. The court is indebted to counsel for their helpful and carefully formulated submissions.

[3] At the conclusion of the oral submissions made by counsel the court informed the parties that it concluded that the trial judge had correctly decided that the appellant had not established that the respondent was guilty of fraudulent misrepresentation but that his finding in relation to contributory negligence on the part of the appellant was erroneous. It informed the parties that the matter would have to be remitted to the trial judge to reconsider in the light of the judgment of this court the question whether rescission should be ordered or whether the contract should be declared subsisting and the appellant awarded damages in lieu of rescission. Mr Orr on instructions informed the court that the respondent no longer sought to argue that the appellant had lost its right to rescission by reason of affirmation of the relevant contract. Accordingly that is no longer a relevant issue in the proceedings. We indicated to the parties that we would give reasons for our decision and we set those reasons out in this judgment.

Background to the appeal

[4] Within the entertainment complex known as Odyssey Centre, of which the third party Sheridan Millennium Limited is the head landlord ("the head landlord") there is a substantial cinema complex with twelve screens. These premises were demised for 25 years from 14 May 2001 to the respondent. The respondent operated the cinema in conjunction with Warren Village Cinemas Limited and later with VUE Entertainment Limited ("VUE"). The respondent is a member of a group based in Australia which has worldwide interests in entertainment complexes including cinemas. On 26 May 2006 the respondent entered into an under-lease of the premises with the appellant which operates the cinema under the trading name Storm Cinemas. It is in relation to the contractual negotiations leading to that under-lease that the dispute giving rise to this litigation arises.

[5] The appellant's case is that the cinema had been the subject of long standing noise problems emanating from licensed premises and a nightclub beneath the cinema complex. These problems, it was alleged, had not been properly disclosed to the appellant before the under-lease was entered into. The appellant alleged that this non-disclosure was fraudulent on the part of the respondent. The noise of which the appellant complains emanates from

premises known as Bar 7, a subsidiary of an associate company within the head-landlord's group. Those premises opened in March 2002, the cinema complex having previously opened in 2001. Noise also emanates from premises which had been operated as a night club under various names and latterly it is known as "The Box".

[6] The trial judge found that the noise problems were intermittent to a degree and recurrent but, at least until May 2006, were not constant. They had occurred from as early as 2002. The problems were limited to the areas in screens 1, 6 and 7 within the cinema complex and they were more likely to occur if there was a quiet sound track in the film being displayed in the relevant screen. The problems were operational in nature. If the club and bar were properly operated problems did not occur. They occurred when loud music was being played in the licensed premises and night club. This occurred after 9.00 pm particularly on Wednesdays, Fridays and Saturdays. The judge noted that neither Warren Villages nor VUE ever applied for an injunction restraining the club or bar from operating in such a way as to cause a noise nuisance. Nor had solicitors' letters ever been written. The evidence satisfied the judge that the acoustical requirements for lessees of the premises at ground and upper ground level in the Odyssey Pavilion were described and fixed at NR30L10 and these had been breached on a number of occasions.

[7] The misrepresentation case put forward by the appellant against the respondent turns on the information supplied by the respondent to the appellant in relation to the question of disputes and complaints outstanding, likely or past which affected the cinema premises relating to premises near the cinema property.

[8] In the course of the contractual negotiations Ms Carson in the appellant's solicitors Carson and McDowell submitted to the respondent's solicitors Memery Crystal (Ireland) LLP a document entitled the Commercial Property Standard Enquiries (General Enquiries for all Property Transactions) ("CPSE1") which, as the title indicates, set out standard pre-contract enquiries the answers to which were intended to provide information of relevance to the intending under-lessee. Paragraph 30 was in the following terms:-

> "Except where details have already been given elsewhere in replies to these enquiries, please give details of any disputes, claims, actions, demands or complaints which are currently outstanding, likely or have arisen in the past and which:
>
> (a) relate to the property or to any rights enjoyed with the property or to which the property is subject; or

> (b) affect the property but relate to premises near the property or any rights enjoyed by such neighbouring premises or to which such neighbouring premises are subject."

The answer given by Ms Carson was "None to the best of the seller's knowledge".

[9] After that reply was sent but before any contract was concluded Ms Carson received from Mr Paul Tunney of VUE a letter containing replies to enquiries that he had co-ordinated and collected from various parties within Vue and outside. By letter of 2 May 2006 Miss Carson wrote to the appellant's solicitors stating that when she had previously sent replies to CPSE1 there was some outstanding information which the respondent had to obtain from VUE. Paragraph 8.11 of CPSE1 had asked the question whether any defects had become apparent or claims made by any third party that might give rise to a claim under any of the agreement's guarantees, warrantees or insurance policies referred to. The answer which had been provided to that question was "Not to seller's knowledge". In her letter of 2 May 2006 Ms Carson modified that answer to read:-

> "We are not aware of any defects other than the roof problems – see summary sheet attached."

However, the summary sheet at paragraph (2) went further than what had been contained in the body of the letter and it referred to noise complaints. It was expressed in the following terms:-

> "2. Intermittent problems have been experienced recently from Precious and Bar 7 – mainly on Friday and Saturday nights. Centre management has spoken to both bar operators and a meeting is due to be heard between the centre management, the sound consultants and representatives from Bar Seven and Precious and the cinema.
>
> There have been no problems for the last couple of weekends."

The appellant's solicitors omitted to bring the appendix to the attention of their client.

The trial judge's analysis

[10] The trial judge in his judgment dealt with the appellant's misrepresentation claim by, firstly, considering the extent of the noise problem

between 2002 and the date of the under-lease. He next considered whether and what representations were made by the respondent and whether they induced the appellant to enter into the contract. He then considered whether any relevant misrepresentation was made recklessly innocently or negligently. He considered whether, if there was a reckless misrepresentation, rescission should be ordered and, if the misrepresentation was negligent, whether the court should award damages rather than rescission.

The extent of the noise problem

[11] The trial judge's conclusions on the nature and extent of the noise problems were not challenged in this appeal. As noted at paragraph [6] he found that there were long standing noise issues that went back to 2002. Complaints emerged in the course of 2002, in May 2003, July 2003, October 2003, December 2003, April 2004 and August 2004. There appeared to be a cessation of problems from December 2003 to April 2004 and from August 2004 to August 2005. The trial judge concluded that the noise problem was intermittent and to a degree recurrent; was not merely a recent problem; was operational in nature but limited to screens 1, 6 and 7; only occurred when loud music was being played; and was more likely to be noticeable if there was a quiet film being shown in an affected screen. He concluded that the problem did not appear to be sufficiently serious to lead to litigation or even solicitors' letters and it seemed inconceivable to him that if the problem was a continuous and serious problem nobody would have sought legal redress.

The judge's findings on misrepresentation

[12] The trial judge concluded that there had been sufficient complaints from the operation of the cinema to the home tenants and the head landlord to require a different answer to question 30 of CPSE1 which had sought details of complaints and disputes. The answer given, namely that there were no disputes to the seller's knowledge, was unjustified. In the sale agreement the respondent warranted to make all reasonable enquiries. The answer was not in fact accurate and full to the best of the seller's knowledge, information and belief. The contents of paragraph 2 of the appendix were not in themselves a full and fair representation of the factual position. It gave the impression that the issue of complaints about noise was recent whereas it was much more long standing. The trial judge concluded that if Mr O'Sullivan, who had been dealing with the matter on behalf of the appellant, had been aware of the recurring nature of the noise problem he would have not proceeded with the transaction or would, at the least, have negotiated an indemnity or a commercial adjustment. He was satisfied that if he had read the appendix he would have made enquiries before committing himself. He concluded on a balance of probabilities that those enquiries would have revealed the full factual position.

[13] The trial judge concluded in the light of the evidence that the misrepresentation which he found had been made by the respondent was not fraudulent and that it had been made negligently. The fraud on which the appellant sought to found its case was fraud of the reckless kind, that is to say the misrepresentation was made recklessly by agents of the respondent in the sense of not caring whether the answer given to paragraph 30 of CPSE1 was true or false. The trial judge had heard evidence from the relevant agents of the respondent namely Ms Carson, the solicitor who had drafted and sent the answer to paragraph 30; Mr Phillipson, the General Counsel of Village Roadshow Limited who exercised oversight over the contractual negotiations between the respondent and the appellant in respect of the under-lease of the cinema; and Mr Tunney who was head of property in VUE, the company managing company the cinema. The trial judge rejected the suggestion that Mr Phillipson shut his eyes to the facts or purposely abstained from enquiring into them. He concluded that Mr Phillipson was not saying "Oh, tell them anything" and he did try to make enquiries in relation to areas of the questions raised. He was enquiring of the right people at a proper level. Ms Carson had drawn attention to question 30 in an email to Mr Phillipson and he had not given an answer to the question. The trial judge accepted that when he was in communication with Ms Carson about CPSE1 he did not recollect issues about noise in the cinema which was only one of a large number of entertainment complexes within the group for which he had responsibility. He was not turning a blind eye to matters of which he was actually conscious. Ms Carson drafted the answer "None to the best of the seller's knowledge" because that was her albeit erroneous interpretation of Mr Phillipson's silence on the point, he having neither provided information about any dispute nor indicated that he was still seeking information from VUE on the point. She was not aware that he had been communicating with VUE on the point. The trial judge concluded that this was a case of understandable confusion, not a case of an answer being given with indifference to the truth.

[14] Mr Reynolds sought to challenge the trial judge's conclusion by effectively asserting that the judge had applied the wrong legal test of fraud in this context and or that no reasonable tribunal of fact could on the evidence have reached any other conclusion but that the respondent's answers evidenced an indifference to the truth or accuracy of what was being asserted in the reply. Mr Orr in seeking to resist that argument pointed out that in the case of alleged fraud the trial judge is particularly well placed to reach a conclusion on whether a case of reckless fraud had been made out and an appellate court should be particularly slow to interfere with a decision reached in the light of the evidence of witnesses seen and heard by the trial judge. He argued that the judge clearly applied the right test.

The meaning of fraud in law

[15] Derry v. Peek [1889] 14 AC 337 is the locus classicus, setting out the grounding legal principles applicable in actions for fraud. It clearly established that if fraud is to be proved a plaintiff must show that a false representation has been made knowingly or without belief in its truth or made recklessly without caring whether it is true or false. While the fact that a false statement is made without reasonable grounds for believing it to be true may be evidence pointing to fraud it does not necessarily amount to fraud. If the maker of the statement honestly believes it to be true it is not a fraudulent misrepresentation and it does not render the person making it liable in an action for deceit. Lord Bramwell pointed out at 552 that it is necessary to avoid confusing unreasonableness of belief as evidence of dishonesty and unreasonableness of belief as of itself a ground of action. Lord Herschell stated the position thus at 369:-

> "I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important matter in ascertaining whether the belief was readily entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable grounds for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges . . . A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he made a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which the word was used in all the cases from Pasley v. Freeman down to that with which I am now dealing . . . Even when the expression "fraud in law" has been employed, there has always been present and regarded as an essential element, that the deception was wilful because the untrue statement was known to be untrue or because belief in it was asserted without such belief existing."

[14] In Angus v. Clifford [1891] 2 Chancery 449 Bowen LJ at 471 said:-

> "The old direction, time out mind, was this – did the defendant know that the statement was false, was he conscious when he made it that it was false, or if not, did he make it without knowing whether it was false

> and without caring? Not caring, in this context did not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth and unless you keep it clear that that is the true meaning of the term you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn – evidence which may consist in a great many cases of gross want of caution – with the inference of fraud or of dishonesty itself which has to be drawn after you have weighed all the evidence."

Lindley LJ at 469 stressed that an action of this kind cannot be supported without proof of fraud, an intention to deceive and that it is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness by which is meant a wilful shutting of one's eyes.

[15] As Devlin J pointed out in Armstrong v Strain [1951] 1 LTR at 871 the conclusion to be drawn from the authorities is that for a court to make a finding of fraud it must make a finding of conscious knowledge and dishonesty. Devlin J went on to point out that what is required is conscious knowledge, whether it is called mens rea, a wicked mind or a dishonest purpose. Where there is a division in thought processes between different agents and between the principal and the agent there is no way of combining the minds of an innocent principal and an innocent agent so as to produce a dishonest intent.

Conclusions on the issue of fraud

[16] This latter point is of significance in the instant case. The trial judge concluded that Mr Phillipson was not dishonest in his communication with Ms Carson about question 30. He was clearly entitled on the evidence to so conclude. Likewise he concluded that Ms Carson had misunderstood Mr Phillipson's response and concluded that there had been no complaints or disputes when she answered question 30. This was an honest and innocent misinterpretation of the situation. The judge had evidence on which he was entitled to reach the conclusion that she had not acted dishonestly. The innocent state of mind of Mr Phillipson and of Ms Carson as so found by the trial judge could not be converted into a dishonest state of mind on the part of the respondent because objectively the answer given was wrong and on better and proper investigation would have been revealed to be erroneous. No matter how careless Ms Carson may have been in reaching her conclusion which the trial judge found to be an honest but mistaken one that did not make the statement a dishonest one.

[17] We are satisfied that the trial judge properly identified and applied the correct legal test for fraud. He addressed the question whether he was satisfied that it had been shown that the respondent acting through its relevant agents dishonestly misrepresented its belief in the truth of the answer given to question 30 of CPSE1. In reaching his conclusion that dishonesty had not been proved he had the benefit of hearing witnesses and seeing their demeanour and he had an advantage not available to this court. As this Court has repeatedly stated a trial judge is in a better position to assess the credibility of witnesses and a trial judge's decision should not be disturbed if there is evidence to support it (see for example Northern Ireland Railway v Tweed [1982] NIJB per Lowry LCJ and Murray v Royal County Down Golf Club [2005] NICA 52 per Kerr LCJ). We have carefully considered the transcripts of the relevant witnesses and can detect no error in the trial judge's assessment of the evidence and credibility of the witnesses. Accordingly, we conclude that the trial judge was correct in rejecting the appellant's case of fraudulent misrepresentation.

The issue of contributory negligence

[18] The trial judge categorised as contributory negligence on the part of the appellant by its solicitors in relation to the respondent the failure of Ms Deehan of the appellant's solicitors to furnish to her client the appendix to the letter of 2 May 2006. He considered that the information about the noise complaints, limited and incomplete though it was, would have alerted the appellant to the need to make further enquiries which on a balance of probabilities would have revealed the correct factual position. In coming down in favour of the view that the appropriate remedy to be granted to the appellant should be damages rather than rescission the judge concluded that a factor which put the matter completely beyond peradventure is the issue of contributory negligence. If the court granted rescission the loss of the bargain would fall in its entirety on the respondent which could not in the trial judge's view be equitable. If the court awarded damages in lieu of rescission then just and fair allowance could be made for the contributory negligence.

[19] In Gran Gelato Limited v Richcliff (Group) Limited [1992] Ch 560 the Court of Appeal considered the question whether a defence of contributory negligence was available as a defence to a claim under the Misrepresentation Act 1967, the equivalent of the Misrepresentation Act (Northern Ireland) 1967. It considered that it could in appropriate circumstances. A claim under the Misrepresentation Act is essentially formulated in negligence and by parity of reasoning with Vesta v Butcher [1989] AC 852 relating to contributory negligence being available as defence in concurrent claims in negligence and contract in an appropriate case damages awarded for negligent misrepresentation may be reduced for contributory negligence on the part of the representee.

[20] The question of contributory negligence in relation to the assessment of damages is unlikely to be of real significance in the present case when it comes to the question of the assessment of damages. The respondent is, as the trial judge held, liable for breach of warranty in relation to the correctness of the answers given to the pre-contract enquiries. He accepted, without challenge in this appeal, that there was a breach of paragraph 11.2 of Schedule 3 of the agreement between the respondent and the appellant because of the failure to make full and accurate replies to CPSE1. That liability arises from an express and strict contractual term which is not itself dependent on fault on the part of the party entering into the warranty. Contributory negligence, accordingly, is not relevant to that contractual liability (see Vesta v Butcher [1989] AC 852.) This point, which the court raised with both parties and which both parties now accept as correct, was not drawn to the attention of the trial judge. Damages for the respondent's negligent representation and breach of warranty are likely to be assessed on the same basis.

Conclusions of the issue of Contributory Negligence

[21] Although the trial judge treated the solicitor's failure to disclose the information and the appendix as a matter going to the issue of contributory negligence, the situation falls to be somewhat differently analysed. The contents of the appendix were known to the agent of the appellant and were directed to the appellant. The appendix qualified the answer already given to question 30 of CPSE1. The answer given to question 30 and the content of the appendix, which should have been brought to the attention of the appellant, must be read together in determining what representation had in fact been made by the respondent before the conclusion of the contract. Reading the two together, the effect of the representation in relation to complaints about noise emanating from other premises affecting the cinema was that there were no complaints other than recent intermittent problems from the nightclub and Bar 7 mainly on a Friday and Saturday night with no problems occurring for the last couple of weekends. As the trial judge concluded this was not an accurate description of the extent of the problem. Mr Orr argued that it was that representation on which the appellant should be treated as relying even though Mr Sullivan may have effectively relied on the even more inaccurate representation contained in the unqualified answer to question 30. Since the appellant must be deemed to have known of the contents of the appendix the modified representation must represent the extent of the misrepresentation to be taken into account in determining the proper remedy. What emerges from Gran Gelato following Redgrave v. Hurd [1881] 20 Ch D 1 at 14 is that generally a defendant cannot claim that carelessness on the plaintiff's part should reduce the damages since the representor has made a representation that he is assuming the plaintiff will rely on. It would normally thus not be just and equitable to reduce the damages. Sir George Jessel put the matter thus:-

> "Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as thus, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself can be produced at the sale, or might have been opened to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say "you are not entitled to give credit of my statement". It is not sufficient therefore to say that the purchaser had the opportunity of investigating the real state of the case but did not avail himself of that opportunity."

Likewise in Nocton v. Lord Ashburton [1914] AC 932 at 962 Lord Dunedin said:-

> "No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction."

[22] Mr Orr in his submissions did not strenuously strive to uphold the trial judge's conclusion that damages for misrepresentation should be reduced for contributory negligence. We conclude that the judge was wrong to conclude that the damages for misrepresentation should fall to be reduced by reason of contributory negligence. In view of the irreducible claim for damages for breach of warranty, the point, so far as it relates to the assessment of damages for misrepresentation, is probably academic in any event.

[23] Section 2(2) of the Misrepresentation Act (Northern Ireland) 1967 provides:-

> "Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the

> misrepresentation and the loss that would be caused by it if the contact were upheld, as well as to the loss that rescission would cause to the other parties."

[24] It is clear that in exercising its discretion under Section 2(2) the court is bound to have regard to the nature of the misrepresentation and that will involve consideration of the circumstances relating to the misrepresentation. The issue of the extent of the appellant's own failure to properly protect his interests when entering into the contract, albeit as a matter of law that does qualify as contributory negligence under the 1945 Act, is something to which the court is entitled to look when considering whether it would be equitable under Section 2(2) to decide that an order of rescission would be inappropriate and that an award of damages should be made instead. To that extent the trial judge, while wrong in concluding that damages would fall to be reduced by reason of contributory negligence, would be entitled to have regard to all the circumstances relating to the manner in which the contract was concluded when considering whether rescission is appropriate or not.

Disposal of the Appeal

[25] In view of our conclusions we remit the action to the trial judge to reconsider the question whether rescission should be refused having regard to the contents of this judgment. In considering that question he will also have to take into account the fact that damages for breach of warranty and misrepresentation will not now fall to be reduced, a factor which he may consider strengthens the argument in favour of granting damages rather than rescission since damages will be unabated so far as the appellant is concerned. He may conclude that before reaching a conclusion on the issue he should hear evidence as to the proper measure of damages for breach of warranty and misrepresentation and as to the loss which will be suffered by the respondent if rescission were ordered. Both those issues require to be addressed by the court under Section 2(2) when it is exercising its discretion whether to award or refuse rescission.

[26] The Court reserved the question of the costs of the appeal until the outcome of the trial.