In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No 434

BETWEEN:-

(1) PITT & COMPANY LIMITED
(2) BGA LIMITED

Plaintiffs

-and-

(1) GARY WHITE
(2) MICHAEL WHITE

Defendants

JUDGMENT

(In Court)

Date of hearing: 16th and 17th January 2014
Date of judgment: 5th March 2014

Mr Jai Pachai, Wakefield Quin, for the Plaintiffs
Mr SM Froomkin, OBE, QC, Isis Law Limited, for the Defendants

Relief sought

1. The Plaintiffs allege that the Defendants impliedly misrepresented the terms of a guarantee which they provided to the Plaintiffs. They claim damages in a sum to be determined but which is well in excess of $1 million.

2. By agreement of the parties, this judgment is concerned with liability only. If the Plaintiffs are successful, I shall assess damages, if not agreed, at a later date.

Factual background

3. The Plaintiffs are companies carrying on business as wholesale distributors of goods. The first Plaintiff, Pitt & Company Limited ("Pitt"), distributes tobacco related products and the Second Plaintiff, BGA Limited ("BGA"), distributes pharmaceutical and other consumer products.

4. For many years the Plaintiffs traded with the Whites group of companies ("The Whites Group"), which are sadly now in liquidation. The Group consisted of three companies, each of which ran a different supermarket. Each supermarket had a separate trading account with the Plaintiffs.

5. White & Sons Limited ("White & Sons") and Whites at Haywards Limited ("Hayward") ran two supermarkets on Middle Road in Warwick and Whites at Southside Limited ("Southside") ran a supermarket at the former US Air Force base in St David's.

6. The Defendants, Gary White ("Mr G White") and Michael White ("Mr M White"), who are brothers, were both directors of each company in the Group. Mr G White was a manager of White & Sons and Mr M White was a manager of all three companies. Their family owned the Group. They both gave evidence at trial.

7. The Group's financial difficulties began in around 2008. It was one of the many Bermudian casualties of the global recession. Its accounts with the

Plaintiffs became delinquent. During 2011, the level of delinquency became a matter of concern for the Plaintiffs.

8. These concerns were raised at a meeting of the Plaintiffs' boards of directors which took place on 11th July 2011. Wendall Brown, the Plaintiffs' Chairman, gave evidence that at the meeting he obtained a mandate from the boards to get a personal guarantee from the Defendants. He said that at the meeting the boards looked at the total amount outstanding. I infer from this that the mandate was to get a guarantee which covered the accounts receivable of all three companies.

9. As a result of the Plaintiffs' concerns, a meeting took place on 2nd August 2011 at the offices of White & Co between Mr M White and two representatives of the Plaintiffs. They were Mr Brown and John Tomlinson ("Mr Tomlinson"), the President and Chief Executive Officer of the Plaintiffs. Both men gave evidence about the meeting. They stated that its purpose was to review the accounts receivable for the Group, which owed the Plaintiffs around $1.8 million. The Plaintiffs asked the Group to give a commitment to meeting a payment plan. The Plaintiffs' evidence was that Mr M White agreed to bring the accounts to a "*current plus 30 day*" condition by 31st August 2011. Mr M White gave evidence that he had merely agreed to come up with a payment plan by that date.

10. 31st August 2011 came and went. The accounts were in no better shape and there was no payment plan. Mr M White said that he did not come up with a plan because the Group's accountant was away on holiday for four weeks.

11. The Plaintiffs called a further meeting for 11th September 2011. It was attended by Mr Tomlinson and Mr Brown for the Plaintiffs and Mr G White, who joined the meeting part way through, Mr M White and Sheena Tullock, the Group's financial controller, who left part way through, for the Group.

12. The meeting became ill tempered. The parties dispute exactly what was said. Mr Brown suggested that, as a condition of the Plaintiffs continuing to trade with the Group, the Defendants should provide a personal guarantee.

Mr M White accepted under cross-examination that he had known that the Plaintiffs were looking for a personal guarantee for the accounts receivable of all three supermarkets. The Defendants, and particularly Mr G White, were hostile to the idea of a guarantee. I am satisfied that, when the meeting broke up, Mr Tomlinson and Mr Brown believed that the Defendants had reluctantly agreed to provide the guarantee sought whereas the Defendants believed that they had not agreed to anything.

13. Following the meeting, on 3rd October 2011 Mr Tomlinson on behalf of the Plaintiffs wrote to the Defendants in the following terms:

> *White & Sons Supermarkets*
> 22 Middle Road
> Warwick WK 03
>
> Dear Michael, Gary and Sheena,
>
> Re: Accounts Receivable
>
> Thank you for taking the time to meet with Wendall Brown and me in your offices.
>
> In summary, Gary and Michael, if you can both agree to sign a personal guarantee for the amount of over 60 days, agree to be at 60 days before the end of December and agree to be at 30 days by a mutually agreed time (we would suggest end of March 2012), we see every reason to continue to work with you to build a profitable business.
>
> . . . . .
>
> To recap, and to confirm that we are all have the same take away information from the meeting, I have outlined our discussions as follows:
>
> 1. *Whites* will structure their repayments to be compliant with 60 day terms by end of December 2011.
>
> 2. *Whites* will further structure their repayments to be complaint (sic) with 30 day terms by a mutually agreed time to be confirmed (we would suggest the end of March 2012).

3. Gary White and Michael White will agree to sign a personal guarantee for any amount owed by *Whites* to BGA and Pitt for all amounts due beyond the 60 day term. The personal guarantee will reflect the full and variable amount reflected in the post 60 day statements.

4. A statement agreeing to comply with all three points listed above should be made in writing to John Tomlinson prior to close of business 7th October 2011, including an agreement to complete a co-signed personal guarantee by Gary White and Michael White, prior to close of business Friday 14th October.

5. Failure to agree to comply with points 1.2 and 3 above will prejudice the current trading relationship with BGA and Pitt & Company to the extent that BGA and Pitt & Company reserve the right to put all of the *White's Group's* associated accounts on stop, and to apply interest to the full balance of the account until it is settled in full, the interest amount not to exceed 2% per month.

I have attached a personal guarantee that should be used as a draft. I would recommend you take advice from counsel so that the personal guarantee signed meets BGA's and Pitt's expectations, as outlined in the draft, and still offers you the protection you might seek.

[Emphasis added.]

14. The relevant part of the draft guarantee enclosed with the letter read as follows:

IN CONSIDERATION OF BGA LTD ("BGA") and PITT & CO. ("PITT & CO") herein known collectively as the "Company" having made and/or continuing to make credit available from time to time to:

White & Sons Limited ("*The Customer*"),

Gary White and Michael White ("The Guarantors")

hereby agree with BGA and Pitt & Company as follows:

> 1. The Guarantors unconditionally guarantee on a joint and several basis the payment to the Company, upon demand, of all sums shown on the monthly statements of account, issued by the Company that are beyond the 60 day term; which now or shall at any time hereafter be owing *by the Customer* to the Company including all interest and other charges incurred *by the Customer* from time to time and all expenses incurred by the Company in procuring repayment of such sum of money or the enforcement of the guarantee including but not limited to legal and documentation fees on a full indemnity basis.
>
> [Emphasis added.]

15. The Defendants discussed the draft guarantee with their lawyer, Kim White ("Mr K White") of Cox, Hallett Wilkinson Limited. He negotiated various minor amendments of a technical nature with the Plaintiffs. Having taken legal advice, on 17th November 2011 the Defendants signed the guarantee.

16. The Plaintiffs aver they believed that the guarantee covered all their accounts receivable with the Group. Mr Tomlinson stated in evidence: "*We felt we had a gilt edged guarantee of receivables across all three supermarkets*". Ironically, the Plaintiffs did not take legal advice about its wording. In reliance on the guarantee they continued to trade with all three supermarkets. But the financial position of the Group did not improve. Relations between the Plaintiffs and the Group became fraught.

17. By an email dated 19th March 2012 to Mr K White, who had acted as intermediary in recent discussions between the Plaintiffs and the Group, Mr Tomlinson demanded immediate repayment of the total receivables owed to "the Company", ie BGA and Pitt, over 60 days. The amount claimed was $524,797.10 (although this was a typographical error for $524,779.10). The email mentioned: "*all White & Sons' Group accounts (White & Sons Ltd, Southside Limited, Haywards Limited)*".

18. The way in which the amount was calculated was shown in a schedule attached to the email. The schedule showed a statement of account for each

of the three supermarkets, and was in the same form as similar schedules which the Plaintiffs had produced at the meetings on 31st August 2011 and 11th September 2011.

19. On 11th June 2012 the Plaintiffs issued a writ against "*White & Sons Limited (carrying on business as White & Sons Supermarket, Southside Supermarket and Haywards Supermarket)*" and the Defendants. When the writ was served upon the registered offices of White & Sons, Mr K White informed the Plaintiffs that the Southside Supermarket and Haywards Supermarket were in fact owned by separate legal entities. It followed that, contrary to what the Plaintiffs aver they had previously understood, the guarantee only covered the accounts receivable of White & Sons.

20. The Plaintiffs amended the writ so as to pursue a claim under the guarantee against White & Sons only. On 14th August 2012 they obtained judgment by consent against that company under the guarantee in the sum of $750,859 together with costs and interest.

21. On 22nd November 2012 the Plaintiffs issued a writ in the present proceedings to recover the accounts receivable due from the two remaining companies.

The rival contentions

The Plaintiffs

22. The Plaintiffs' case is as follows. They intended the guarantee to cover the accounts receivable of all three supermarkets and the Defendants knew this. The Defendants signed the guarantee knowing that in fact it only covered White & Sons but did not draw this to the Plaintiffs' attention. In the circumstances the Defendants misrepresented to the Plaintiffs that they had guaranteed the debts of all three supermarkets whereas in fact they had guaranteed the debts of only one of them. The Defendants intended the

Plaintiffs to rely on this misrepresentation, and the Plaintiffs did so by extending, as the Defendants had intended, credit to all three supermarkets.

23. The Plaintiffs aver that they made the scope of the guarantee which they were seeking very clear at the meeting on 11th September 2011. Mr Tomlinson gave evidence that, as in the meeting on 3rd August 2011, he presented the accounts receivable for all three supermarkets, which were set out on a single piece of paper. The Plaintiffs rely on Mr M White's admission in evidence that he knew that they were seeking a guarantee in respect of all three accounts.

24. The Plaintiffs submit that there was no material change in circumstances between the date of the meeting and the date of the 3rd October 2011 letter that could have plausibly caused the Defendants to think that the terms of the guarantee which was being sought had changed. Thus, they submit that it would have been obvious to the Defendants that, in the covering letter of 3rd October 2011, "*Whites*" was used as an umbrella term for all three supermarkets. Indeed the letter was addressed to "*White & Sons Supermarkets*" in the plural. Accordingly, the reference in paragraph 3 of the letter to "*a personal guarantee for any amount owed by Whites to BGA and Pitt for all amounts due beyond the 60 day term*" was a reference to the amounts due for all three supermarkets.

25. Indeed Mr M White accepted in cross-examination that the reference at paragraph 1 of the guarantee to "*all sums shown on the monthly statements of account*" was a reference to the sums shown on statements of the kind produced by the Plaintiffs at the meetings on 2nd August and 11th September 2011. He also accepted that the reference at the end of the letter of 3rd October 2011 to a personal guarantee that "*meets BGA's and Pitt's expectations, as outlined in the draft*" was a reference to the Plaintiffs' expectations that the guarantee would cover the debts of all three supermarkets.

26. As to why the guarantee did not name all three companies, the Plaintiffs contend that they were unaware that there was no one entity with responsibility for the debts of all three supermarkets. Mr Tomlinson gave evidence that until the claim on the personal guarantee was rejected in June 2012 he was unaware that there were three limited companies.

27. He referred to a fax dated 10th January 2011 from Whites Supermarket to BGA enquiring about some missing invoices. The fax was on letterhead. At the top of the page were the words "*Whites Supermarket*", under which was written "*White & Sons Ltd*" and the company's address and contact details. At the bottom of the page were written "*Whites Supermarket*", "*Haywards Supermarket*" and "*Southside Supermarket*". Mr Tomlinson explained that this letterhead represented his understanding of the structure of the Group, namely that there was one umbrella company, White & Sons, which encompassed all three supermarkets.

28. Mr Brown gave evidence that, based upon a conversation with Mr Tomlinson, he, too, had been under the impression that the Whites Group consisted of one company not three.

The Defendants

29. The Defendants' case is as follows. They had no reason to suppose that the Plaintiffs did not appreciate that the Whites Group consisted of three different companies and every reason to suppose that they did. Thus, when the Plaintiffs asked for a guarantee for the debts of White & Sons only, the Defendants drew the reasonable conclusion that this was what the Plaintiffs wanted. They provided the guarantee on that basis. As they provided the Plaintiffs with exactly what the Plaintiffs asked for, they cannot fairly be accused of misrepresentation.

30. As to the Plaintiffs' state of knowledge, the Defendants point to a number of documents from which, they aver, the Plaintiffs would have known that the Group comprised three separate companies.

(1) BGA prepared a pro forma application for a charge account with the company, for completion by potential customers. The information required included "*Name of Company*". When the Defendants were completing the form for an account for Southside, they gave the name of the company as "*Southside Supermarket*", not "*White & Sons*". The form was dated 2nd May 2003.

(2) The cheques drawn on the Southside account to pay the Plaintiffs, which bore the printed legend "*Whites at Southside*", were endorsed "*Corporate Account*".

(3) Some of the cheques drawn on the Haywards account to pay the Plaintiffs bore the printed legend "*Whites at Haywards Ltd*".

31. The Plaintiffs' response was as follows:

(1) Mr Tomlinson said in evidence that BGA traded with hundreds of businesses that would fill in the same document, even if they were not limited liability companies. He did not accept that the entry on the application form was indicative that Southside was a separate company.

(2) Neither Mr Tomlinson nor Mr Brown accepted that the reference to "*Corporate Account*" was indicative that "*Whites at Southside*" was a separate company. Mr Tomlinson said he thought that "*Corporate Account*" meant that the account belonged to a trading entity and noted that the word "*Ltd*" did not appear after "*Whites at Southside*". Mr Brown said he thought that "*Corporate Account*" was a "*banking definition*", eg as distinct from a personal account, and that it did not necessarily denote that the account holder was a limited company.

(3) Mr Tomlinson stated that he rarely had access to the cheques that were used to pay the Plaintiffs for their goods. He noted that most of the cheques issued by Haywards did not bear the printed legend "*Whites at Haywards Ltd*" but were simply headed "*Haywards*

Supermarket". Mr Brown said that he would not have known that Haywards was a limited company, although he accepted that someone in the Plaintiffs' accounts department might have done. However he stated that in his experience people sometimes used cheques that said "*Ltd*" even when those cheques were not written on behalf of a limited company.

32. The Defendants further submitted that Mr Tomlinson and Mr Brown personally had knowledge that the Group was composed of three companies. Eg Mr Brown accepted under cross-examination that in the meeting on 11th September 2011 he had raised the possibility of the Plaintiffs buying one of the three companies.

33. Mr Tomlinson was not cross-examined about this. He was, however, questioned about an email which he had sent to Mr K White on 23rd January 2012, copied to Mr Brown, which stated: "*we confirm our agreement in principle to purchase the three operating companies subject to a number of conditions*". He accepted that prior to sending the email he would have referred to three operating companies in his discussions with the Group. However he stated that he had never understood that the "*operating companies*" were anything other than three supermarkets under the Whites umbrella.

34. The Defendants also relied on the reference to "*all White & Sons' Group accounts (White & Sons Ltd, Southside Limited, Haywards Limited)*" in Mr Tomlinson's email of 19th March 2012. When cross-examined about this, Mr Tomlinson said that it was not his remit to consider the legal status of the companies: his role was to consider whether there was a business interest.

35. Although the emails post-dated the guarantee, on Mr Tomlinson's evidence nothing happened in the interim between the signing of the guarantee and the date of issue of the writ to alter his understanding of the corporate make-up of the Whites Group. Thus, the Defendants submit, it is reasonable to

infer that the emails accurately reflect the Plaintiffs' understanding as at the date of the guarantee of the Group's composition.

36. As to why the Plaintiffs would seek a guarantee from only one company when they were continuing to provide goods to all three companies, the Defendants suggested that at the meeting on 11th September 2011 Mr Tomlinson had been keen to get the White & Sons invoices sorted first because that company owed more to BGA than the other two companies.

37. Mr Froomkin QC referred me to the statements of account which the Plaintiffs produced at that meeting. He pointed out that of the $1,523,756.52 which the Whites Group owed to BGA, 854,358.21 (56% of the debt) was owed by White & Sons. Of the $1,881,019.59 which the Whites Group owed to both Plaintiffs, White & Sons owed $961,989.32 (51% of the debt). As White & Sons was the largest debtor, he submitted, it made sense that the Plaintiffs should accept a guarantee in relation to its debts only.

The law

38. The Plaintiffs claim damages for fraudulent misrepresentation or alternatively for what is in effect negligent misrepresentation under section 3 of the Law Reform (Misrepresentation and Frustrated Contracts) Act 1977 ("the 1977 Act").

39. Fraudulent misrepresentation, which is part of the law of contract, is closely allied with deceit, which is part of the law of tort. The courts have tended to treat their ingredients as synonymous and for present purposes I intend to do likewise.

40. As stated by Rix LJ in AIC Ltd v ITS Testing Services (UK) Ltd ("*The Kriti Palm*") [2007] 2 CLC 223, EWCA, at para 251:

> The elements of the tort of deceit are well known. In essence they require (1) a representation, which is (2) false, (3) dishonestly made, and (4)

intended to be relied on and in fact relied on. Each of those elements may of course require further elaboration.

41. Section 3(1) of the 1977 Act provides:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the representation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true.

42. Section 3(1) of the 1977 Act mirrors the language of section of section 2(1) of the Misrepresentation Act 1967 in England and Wales ("the 1967 Act"). In Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] 1 CLC 701, HC, Hamblen J analysed section 2(1) thus at para 213, expressly linking the ingredients of fraudulent misrepresentation and deceit:

> The requirements for a claim under s. 2(1) are therefore the same as for a claim in deceit, subject to the important difference that under s. 2(1) it is not necessary for the claimant to prove that the misrepresentation was made fraudulently. Rather, the Act expressly provides that, where the other requirements of the tort of deceit are met, the person making the misrepresentation is liable under s. 2(1) "*notwithstanding that the misrepresentation was not made fraudulently*", unless he proves that he reasonably believed the facts represented to be true.

43. There followed an illuminating discussion at paras 215 – 224 on the nature of a representation:

> 215. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be

expected to have on a reasonable representee in the position and with the known characteristics of the actual representee: see Raiffeisen [2010 EWHC 1392 (Comm)] at [81]; Kyle Bay Ltd v Underwriters Subscribing under Policy No. 01957/08/01 [2007] 1 CLC 164, at [30]–[33], *per* Neuberger LJ.

216. In order to be actionable a representation must be as to a matter of fact. A statement of opinion is therefore not in itself actionable. However, as stated in Clerk & Lindsell para. 18-13:

"*A statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud*."

. . . . .

219. Silence by itself cannot found a claim in misrepresentation. But an express statement may impliedly represent something. For example, a statement which is literally true may nevertheless involve a misrepresentation because of matters which the representor omits to mention. The old cases about statements made in a company prospectus contain illustrations of this principle–for example, Oakes v Turquand (1867) LR 2 HL 325, where Lord Chelmsford said (at 342–3):

"*... it is said that everything that is stated in the prospectus is literally true, and so it is; but the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood.*"

220. In relation to implied representations the "*court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context*": per Toulson J in IFE v Goldman Sachs [2006] 2 CLC 1043 at para. 50. That involves considering whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged.

221. In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the

> misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary "*to show that the representor intended his statement to be understood by the representee in the sense in which it was false*" – *per* Morritt LJ in Goose v Wilson Sandford & Co [2001] Ll Rep PN 189 at para. 41. In other cases of misrepresentation this is not a requirement, but one would generally expect it to be reasonably apparent to both representor and representee that the implied representation alleged was being made.
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> 222. It is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely.
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> . . . . .
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> 224. As further observed in Raiffeisen, at [87], the claimant must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it; and that, having that understanding, he relied on it. Analytically, this is probably not a separate requirement of a misrepresentation claim but rather is part of what the claimant needs to show in order to prove inducement.

44. In Foster v Aviation Action Ltd [2013] EWHC 2439 (Comm) at para 92, Hamblen J referred to his earlier analysis and at para 93 summarised the test for an implied representation:

> The general test for whether an implied representation has been made is therefore whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged. The Claimants contended that the alleged implied representations are "*necessarily implicit*". Although necessity is not a requirement, in order to establish that an implied representation has been made, proof of necessity or obviousness will usually be important.

45. On the question of silence, I was referred to the decision of the House of Lords in Hamilton v Allied Domecq plc [2007] SC (HL) 142. Lord Rodger, giving the judgment of the House, cited with approval an extract from the

judgment of Lord Cairns in Peek v Gurney (1873) LR 6 HL 377, a case about alleged fraudulent misrepresentation concerning a company prospectus, at 403:

> Mere non-disclosure of material facts, however morally censurable … would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

46. Thus a true statement of fact, when coupled with a material omission, can give rise to an implied misrepresentation. This was the point made by Lord Chelmsford in the extract which Hamblen J cited from Oakes v Turquand. More recently, Lewison LJ gave a helpful analysis of this kind of situation in Mellor v Partridge [2013] EWCA Civ 477 at para 17:

> First, a representation which is literally true may nevertheless be a misrepresentation if relevant facts are concealed. Second, allied to this proposition is the proposition that a representation may be implicit. Often the two will overlap. A half truth may amount to deceit if it is suggestive of a falsehood and intended so to be. Thus in Nottingham Patent Brick & Tile Co v Butler (1866) 16 QBD 778 a statement by a solicitor that he did not know of any restrictive covenants (but who did not reveal that he had not looked at the deeds) was held to have been a misrepresentation. In Spice Girls Ltd v Aprilia World Service BV [2002] EWCA Civ 15 [2002] EMLR 27 an express representation that the Spice Girls were "*committed*" to a contract carried with it the implied representation that the representor did not know of any matter which might falsify the assurance. What the court must consider is what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context.

47. The context in which a representation was made is important. As Sir Andrew Morritt V-C, giving the judgment of the Court, stated in Spice Girls v Aprilia World Service BV [2002] EWCA Civ 15 at para 51:

> … the meaning and effect of a statement or of conduct must be ascertained in the light of the circumstances pertaining at the time. Those circumstances will include the course of the negotiations and any earlier representations.

48. As to the mental element of deceit, this found classic expression in the speech of Lord Herschell in Derry v Peek (1889) 14 App Cas 337, HL, at 374:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

49. This test has been applied previously in this jurisdiction, eg by the Court of Appeal in Burville and Burville v Jones Waddington Ltd and others [2000] Bda LR 4.

50. There is no defence of contributory negligence to a claim of fraudulent misrepresentation. See the speech of Lord Hoffmann, with whom the other members of the House concurred, in Standard Chartered Bank v Pakistan National Shipping Corp (No 2) [2003] 1 AC 959 at para 18. Absent "*a very special case*", there is no defence of contributory negligence to a claim brought under section 3(1) of the 1977 Act where the defendant made a representation intending that the plaintiff should act upon it and the plaintiff did so. See the judgment of Sir Donald Nicholls V-C (as he then was) in Gran Gelato Ltd v Richcliff Ltd [1992] Ch 560 at 573H – 574A and 574e:

> In principle, carelessness in not making other inquiries provides no answer to a claim when the plaintiff has done that which the representor intended he should do.

It is doubtless for these reasons that no defence of contributory negligence was pleaded.

51. The authorities on which Lord Hoffmann and Sir Donald Nicholls relied included Redgrave v Hurd (1881) 20 Ch D 1, EWCA. This was also cited with approval by Kawaley J (as he then was) in Fubler and Fubler v Thomas [2009] Bda LR 50 at para 19.

52. In order to succeed in their claim for damages, therefore, the Plaintiffs must prove:

(1) that by signing and returning the guarantee the Defendants represented to the Plaintiffs that they, ie the Defendants, had guaranteed the accounts receivable of all three supermarkets;
(2) that the Plaintiffs understood that this representation was being made;
(3) that this representation was false;
(4) that the Plaintiffs were induced by this representation to continue supplying goods to all three supermarkets;
(5) that the Defendants intended that this representation should induce the Plaintiffs to continue supplying goods to all three supermarkets.

See *mutatis mutandis* the judgment of Christopher Clarke J (as he then was) in Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland Plc 2010 EWHC 1392 (Comm) at para 80.

53. If the Plaintiffs manage to prove all of these things, then, on the facts of this case, they will succeed under section 3(1) of the 1977 Act without any need to prove the mental element of deceit. In theory it would have been open to the Defendants to defeat the Plaintiffs' claim by proving that they had reasonable grounds to believe and did believe up to the time the guarantee

was given that it covered the accounts receivable of all three companies in the Whites Group. But that was not the Defendants' case.

Findings

54. In making the findings below I have benefitted from hearing the Plaintiffs' representatives and the Defendants in person, and in particular from observing them under cross-examination and listening to the answers which they gave.

55. I am satisfied that, by signing and returning the guarantee, the Defendants impliedly represented to the Plaintiffs that they, ie the Defendants, had guaranteed the accounts receivable of all three supermarkets. That is what the Plaintiffs understood the guarantee to mean and that is what the Defendants intended that the Plaintiffs should understand it to mean. However the representation was false. As the Defendants, who had taken legal advice, well knew, the guarantee only covered the accounts receivable of White & Sons. As the Defendants intended, the Plaintiffs were induced by this representation, upon the truth of which they relied, to continue supplying goods to all three supermarkets.

56. A curious feature of this case is the fact that although the Plaintiffs only sought a guarantee in the name of White & Sons, they appeared familiar with the concept of three companies. I have in mind the discussion at the meeting of 11th September 2011 about purchasing one of them and the emails of 23rd January 2012 and 19th March 2012. It may be that the Plaintiffs, who are not lawyers and who did not take legal advice before drafting the guarantee, did not appreciate the legal significance of the concept.

57. Be that as it may, I am satisfied that the Plaintiffs sought a guarantee for the accounts receivable of all three supermarkets. That was Mr M White's admitted understanding after the 11th September 2011 meeting. The letter of 3rd October 2011 purports to summarise that meeting and contains no

suggestion that the Plaintiffs were prepared to retreat from their position at the meeting. Moreover, there would have been no commercial rationale for the Plaintiffs to seek a guarantee in respect of the accounts receivable for only one of the supermarkets if they were to continue to supply goods to all three.

58. I therefore find that, pursuant to section 3(1) of the 1977 Act, the Defendants are liable to the Plaintiffs under the guarantee for damages to be assessed. The measure of damages will be the amounts outstanding under the accounts receivable of the other two supermarkets owned by Haywards and Southside together with interest. In the circumstances it is unnecessary for me to consider further the claim for fraudulent misrepresentation. However I am satisfied that the Defendants acted only after taking legal advice and did not consider that they were doing anything dishonest or unethical.

59. I shall hear the parties as to damages and interest if figures cannot be agreed. I provisionally order that costs should follow the event, to be taxed on a standard basis. If either set of parties wishes to persuade me otherwise on the question of costs they have liberty to apply for that purpose within seven days of the date of this judgment.

DATED this 5th day of March, 2014

Hellman J