JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 88/91

COR: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

BETWEEN	VERNA MADDEN	PLAINTIFF/APPELLANT
AND	FRANCIS ELLIOTT	DEFENDANT/RESPONDENT

Mrs. M.E. Forte instructed by Gaynair & Fraser
for Plaintiff/Appellant

David Batts instructed by Livingston, Alexander & Levy
for Defendant/Respondent

January 26, 27, 28, 29 & May 31, 1993

ROWE, P.

I have read in draft the judgment of Patterson, J.A. (Ag.). He has set out the facts fully and I will not repeat them.

In this action sounding in deceit the appellant, pleaded that the respondent falsely and fraudulently refused to complete an agreement to sell and transfer to her an undetached dwelling house at 8 Gwendon Park Avenue, Norbrook, St. Andrew and identified as the particulars of fraud the four following matters:

(i) that he represented to the appellant that he had the authority to and would sell to the appellant the dwelling house at Gwendon Park Ave;

(ii) that he induced the appellant to sell her own dwelling house in order to purchase 8 Gwendon Park Ave;

(iii) that he contracted to sell the said dwelling house to a third-party when he knew or ought to have known that the appellant had divested herself of her own dwelling house for the sole purpose of purchasing 8 Gwendon Park Ave;

(iv) that he induced or procured the appellant to expend money or incur expenses when he knew or ought to have known that she was acting to her detriment in this regard.

By paragraph 12 of the Defence the respondent denied that he had contracted to sell the disputed property to a third person, claimed that it was still in his possession and that was the last salvo fired in relation to the third and potentially most blameworthy allegation of fraud made in the Statement of Claim.

Paragraph 10 of the Defence sought to deal inter alia, with the first particular of fraud in that the respondent stated

> "The Defendant had every intention of selling the property to the Plaintiff. The Defendant had the authority of his wife at that time (she being a joint owner of the property with the Plaintiff) to enter into the oral agreement.
> The Defendant did not change his mind until early March 1981 when his wife indicated that she was not prepared to sign the Contract for Sale she having taken a dislike to the Plaintiff."

Harrison J. in his written judgment at page 9, accepted the respondent's allegation contained in the Defence and supported by the viva voce evidence of the respondent and his wife that initially the respondent had intended to sell and in addition had his wife's permission to contract on her behalf in the sale. He said:

> "The defendant Francis Elliott entered into an oral contract along with his wife, with the plaintiff for the sale of the Gwendon Park Property; this contract was not enforceable. The defendant was therefore initially making a true representation of fact, namely that his wife and himself intended to convey the legal estate in the said property to the plaintiff and that he and his wife had the power to so convey it."

There was some variation between the evidence for the appellant and that for the defence but in all material respects the appellant and the respondent agreed upon the sequence of events and the nature and content of the oral conversations which passed between them.

In summary, the situation which arose amounted to this. The respondent and his wife had agreed to sell their dwelling house to the appellant but there was no written agreement or payment of a deposit. Afterwards the respondent's wife voiced to her husband her unwillingness to consummate the sale. They were arguing about the matter. The wife had an emotional attachment to the house. The husband was undergoing financial strain in maintaining the house and there had been problems with tenants. He was confident, he said, that the wife's reservations would be overcome. This confidence he said was born out of his experiences with her during their marriage and specifically when he tried to sell the former matrimonial home in Harbour View. He considered himself the dominant partner in their business relationships as in the past she had acquiesced in his management of their financial and business affairs. In consequence of this confidence in his ability to win over his wife to his way of thinking, he stated and re-stated to the appellant that the sale of 8 Gwendon Park Avenue would proceed. He instructed his lawyers to prepare the Contract of Sale and gave them all the necessary information to do so. At the last moment he was faced with a rebellion. His wife's ultimatum was that if she was forced to sign the contract, their marriage would be at an end. She would wish a divorce. Then and only then, according to the respondent, did he realise that his wife had indeed taken up an intractable position.

Lord Herschell in giving his opinion in Derry v. Peek (1886-90) All E.R. Rep 1, expressly approved of the statement of Cotton, L.J. when he said:

> "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of anyone to whom it was addressed, or anyone of the class to whom it was addressed and who was materially induced by the mis-statement to do an act to his prejudice."

Having regard to the assertions and the conduct of the respondent, Harrison J, was faced squarely with the question as to what was the state of mind of the respondent between the date of the oral contract of sale and the cancellation of the agreement in March 1981. Lord Herschell gave some guidance in his speech at page 25 of the Report as to the appropriate approach of a Court to this question. He said:

> "I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold; the probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form, and by asking ourselves whether a reasonable man would be likely under the circumstances so to believe."

In my opinion Harrison J, did not embark upon this essential enterprise in order to evaluate the state of mind of the respondent. There was evidence from the appellant herself that the respondent's wife had been quite agreeable to the sale of the property to her and had shown little regard for the incumbent tenants. A husband might well have believed that this favourable impression of the

appellant could be restored. In my opinion Harrison J, focussed on one aspect only of the respondent's defence and consequently deprived himself of the opportunity to view the defence as a whole and to determine whether a reasonable man placed in the position of the respondent would be likely to hold the belief which he asserted.

I find that the appellant's case fails because she was unable to prove an essential ingredient in the tort of deceit, viz, that the representation made by the respondent was false to his knowledge or that he did not believe it to be true, or that he was reckless in making the alleged representations.

Having regard to the decision to which I have arrived, I decline to consider the question of damages which was so exhaustively discussed during the arguments.

I would dismiss the appeal. I would allow the cross-appeal and enter judgment for the respondent with costs both here and in the Court below to be agreed or taxed.

DOWNER J.A.

Verna Madden, the appellant has made a claim against the respondent, Francis Elliott. Her claim was that in November 1980, the respondent Elliott agreed orally to sell her a semi-detached dwelling house in the fashionable suburb of Norbrook. The agreed price was $56,000. It emerges from the evidence that the joint owner, Elliott's wife, Patricia, was against the sale almost from the beginning and expressed her continuous opposition to her husband in no uncertain manner. Yet in response to the appellant's repeated enquiries, the respondent Elliott continued to give unqualified answers that he was selling the property. Not once did he disclose Patricia's vehement opposition to the transaction. The appellant secured a valuation and arranged a mortgage. She further signed a contract prepared by the lawyers for respondent Elliott. Then she sold her modest town-house in Calabar Mews in reliance on the respondent's assurances. Yet, when the appellant paid her deposit it was returned and the sale withdrawn.

In those circumstances, the appellant averred that the respondent Elliott made false and fraudulent representations to her and in reliance on them, she suffered loss and damage. Harrison J. agreed with her contention and found the respondent Elliott liable for deceit and ordered him to pay damages. The appellant was dissatisfied with the very low award of damages and so invoked the jurisdiction of this Court. Elliott cross-appealed by way of a respondent's notice both on the issue of liability and on quantum.

How the case of fraudulent mis-representation was pleaded and presented

Since Hedley Byrne v. Heller [1964] A.C. 465 there can be no doubt that at common law, when a special relationship is averred and proved, an obligation to be careful may arise and if there is a breach of such duty, then a defendant may be liable

for negligent misstatement and an award of damages will be ordered. Earlier in **Pasley v. Freeman** 100 E.R. 450 and as subsequently explained in **Derry v. Peek** 14 App. Cas. 337, there is a duty to be honest and if actual fraud is alleged and proved, damages will be awarded on the basis that the defendant suffered loss and is therefore liable for deceit. In the court below and on appeal, the case was contested on the basis of fraud but the pleadings and the evidence ought to be examined as they were, in **Nocton v. Lord Ashburton** [1914] A.C. 937 to determine if, apart from fraud, the appellant also either expressly or impliedly alleged and proved in the alternative negligent misstatement.

The starting point for the allegations of fraudulent misrepresentation and negligent misstatement was the endorsement on the writ which reads:

> "ENDORSEMENT
>
> The Plaintiff's claim is against the Defendant to recover Damages for Deceit for that the Defendant in or about November 1980 falsely and fraudulently represented to the Plaintiff that he had the authority to and would sell to the Plaintiff an undetached dwelling house at 8 Gwendon Park Avenue, Saint Andrew as a consequence whereof the Plaintiff sold her own dwelling house in consequence whereof the Plaintiff suffered damages.
>
> Alternatively the Defendant by fraudulent misrepresentation induced the Plaintiff to sell her dwelling house as a consequence whereof the Plaintiff has suffered damages."

So from the outset, the appellant averred that there was a false representation or alternatively, a fraudulent one by the respondent that he had the authority to sell the house he jointly owned and that the respondent fraudulently induced her to sell her town-house. The distinction to be noted is that a false representation may be made because of want of care and that may be the basis for negligent misstatement. On the other hand, if there was a

false representation knowing that it was false, that would be fraudulent and capable of being the basis of the tort of deceit. Then in the statement of claim paragraph 10 reads:

> "10. Subsequent to the receipt of the aforesaid agreement for sale and deposit the Defendant without any just excuse falsely and fraudulently refused to complete the said agreement as a consequence whereof the Plaintiff has suffered damages."

As regards these particulars when paragraph 10 is read as a whole, they must pertain both to negligence which is covered by the phrase "without just excuse falsely" and deceit which is covered by "fraudulently."

"

PARTICULARS OF FRAUD

(a) Representing to the Plaintiff that he had the authority to and would sell to the Plaintiff the aforesaid dwelling house.

(b) Inducing the Plaintiff to sell her own dwelling house in order to purchase the aforesaid dwelling house.

(c) Contracting to sell his said dwelling house to a third party when he knew or ought to have known that the Plaintiff had divested herself of her own dwelling house for the sole purpose of purchasing the aforesaid dwelling house.

(d) Inducing and/or procuring the Plaintiff to expend money and incur expenses when he knew or ought to have known that she was acting to her detriment in this regard.

PARTICULARS OF SPECIAL DAMAGES

Money spent for Valuation of the aforesaid dwelling house	$130.00
Rental for alternative accommodation per month and continuing	$300.00
Removal	$250.00
	$680.00

AND THE PLAINTIFF CLAIMS Damages."

The pleadings on both sides were ample rather than precise. Both parties combined alternative averments in the same paragraphs. As regards the issue of fraud, that may be stated thus - whether it would be open to the plaintiff upon the pleadings to prove fraud at the trial which would constitute a cause of action (see Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004 cited in Mutual Life Ltd. v. Evatt [1971] A.C. p. 801 a case on negligent misstatement). The averments pertaining to the fraudulent representations that the respondent had the authority to sell are as follows:

> "4. Further and/or alternatively, the Defendant being well aware of the fact that the Plaintiff had an oral agreement to sell her dwelling house aforesaid to Yvonne Josephs induced the Plaintiff to execute the said Contract by representing to the Plaintiff that he was ready, willing and able to and would execute a Contract to give effect to his oral agreement to sell the aforesaid property part of 8 Gwandon Park Avenue to the Plaintiff."

As for the fraudulent representation to induce the appellant to sell her town house at Calabar Mews, paragraphs 3 and 5 of the statement of claim are relevant. They read:

> "3. The Defendant well knew that the execution of the contract pursuant to the oral agreement between the Plaintiff and the said Yvonne Josephs was contingent upon the Defendant executing a contract pursuant to the oral agreement between the Plaintiff and himself.
>
> 5. The Plaintiff immediately prior to executing the Contract referred to in paragraphs 3 and 4 hereof advised the Defendant that the said contract had been drawn and a deposit was tendered but that she would not execute the same and accept the tender unless he was ready and willing to execute a Contract with her and accept her tender in accordance with their agreement whereupon the Defendant induced the Plaintiff to complete her contract as he had issued instructions to his Attorney-at-Law to prepare the same and the only reason why it

had not yet been done was that his said Attorney-at-Law was engaged in other work."

As regards the effect of the fraudulent representation in inducing the appellant to act to her detriment, paragraph 6 of the statement of claim is as pertinent. The averment reads:

> "6. Pursuant to the oral agreement between the Plaintiff and the Defendant and by reason of the representations made by the Defendant, the Plaintiff at her own expense and with the consent and concurrence of the Defendant procured a valuation of the Defendant's said dwelling house and thereafter secured a promise of a Mortgage to enable her to complete the purchase."

Apart from the fraudulent oral representation, the appellant also relied on written representations. Here is the relevant pleading:

> "7. The Defendant's Attorney-at-Law duly prepared the contract and the Plainitff executed the same on or about the 6th of March 1981."

Then in paragraphs 8 and 9 the appellant indicated how in reliance on the combination of these representations, she altered her position to her detriment:

> "8. Further the Plaintiff relying upon the representations of the Defendant and yielding to his inducements executed her Contract for the sale of her dwelling house aforesaid on or about the 11th day of December 1980 and by reason thereof has had to vacate the same on or before the 31st day of May 1981.
>
> 9. The Defendant's Attorneys-at-Law duly prepared the contract to be executed by the Plaintiff and the Defendant and the Plaintiff executed the same and delivered the same to the Defendant's Attorneys-at-Law together with her deposit of $5,600.00."

In his defence, the respondent denied these averments seriatim. It is interesting to refer to his admissions to assess the strength of the appellant's case and the cogency of the learned judge's findings. Paragraph 6 of the defence reads:

"6. The Defendant admits that the Plaintiff sent a valuer to the property 8 Gwendon Park Avenue but says that the valuer visited the property before an oral Agreement was reached between the Plaintiff and the defendant."

Here is how the learned judge resolved that issue:

" The plaintiff agreed with the defendant on a date on which the valuators could come to value 8 Glendon Drive. The plaintiff paid a valuation fee on 2.12.80 and the valuator's report was prepared on 10.12.80.

The defendant admitted in cross-examination that 'it could be correct that she called me before valuator come.'

He stated however, that, 'Plaintiff had valuation done before she visited my house.' The Court finds this as quite unlikely."

Paragraph 8 of the defence is instructive. It reads:

"8. The Defendant denies that he made any representations to the Plaintiff as alleged in paragraph 8 of the Statement of Claim. The Defendant has no knowledge of the other matters referred to in paragraph 8 of the Statement of Claim."

Yet in paragraph 2 of his defence, the respondent admits that the appellant informed him that she proposed to sell her own town house. Here is how the admission was made:

"2. Except that the Plaintiff informed the Defendant that she proposed to sell her property at West Path, Calabar Mews, the Defendant knows nothing of the matters set out in paragraph 2 of the Statement of Claim."

The natural inference from the pleading was that there was a business relationship between the parties and the appellant was entitled to rely on the honesty and due care from the respondent.

Two other paragraphs in the defence are important, having regard to evidence from the respondent's wife. They read in part as follows:

> "10. The Defendant denies that he falsely, fraudulently or without just cause refused to conclude the sale of part of 8 Gwendon Park Avenue to the Plaintiff. The Defendant makes no admissions as to the alleged damage which the Plaintiff claims she has sustained." (Emphasis supplied)

Then in two further paragraphs the respondent explained that his representations were neither falsely (negligently) or fraudulently (deceitfully) made and he had just excuse. They read:

> "10. The Defendant had every intention of selling the property to the Plaintiff. The Defendant had the authority of his wife at that time (she being a joint owner of the property with the Plaintiff) to enter into the oral agreement. The Defendant did not change his mind until early in March, 1981 when his wife indicated that she was not prepared to sign the Contract for Sale for a very personal reason.
>
> Accordingly the Defendant instructed his Attorneys-at-Law to inform the Plaintiff's Attorney-at-Law that the Defendant was no longer selling the property. This they did by letter of 11th March, 1981 to the Plaintiff's Attorney-at-Law."

Then paragraph 12 of the defence reads in part:

> "12. The Defendant admits that he represented to the Plaintiff that he had the authority to sell the property and says that at the time he made the representations he did have his wife's authority to make the representation."

As for paragraph 13 of the defence, it demonstrates that the respondent knew he was meeting a case of fraudulent representation. The pleading reads:

> "13. By reason of the matters hereinbefore set forth the Defendant denies that he acted fraudulently or deceitfully in the transaction the subject of this action."

It is against the background of these averments, the evidence and the learned judge's findings that the respondent was liable for deceit, that this case must be examined. Harrison J. summarised his findings in nine paragraphs. The principal points

which emerge are that the appellant visited the respondent's house in November 1980 and he made an oral offer which was accepted, to sell her half of a duplex. She made it clear that she would have to sell her town house in Calabar Mews before she could purchase the respondent's house. The appellant took her brother, Aulous Madden and a friend, Emery Woodstock to inspect the house in November, shortly after her initial visit. What is important about this second visit is that, both her brother and her friend gave unchallenged evidence that the appellant told the respondent that she would have to sell her town house to purchase his house and that the respondent replied that, that was understandable.

The learned judge also found that, on the Tuesday following the Sunday when her brother and friend inspected the house, she had an offer from Yvonne Josephs to purchase her town house and the respondent reiterated that he was definitely selling his house when she requested a further assurance.

It is necessary at this stage to note that Patricia Elliott told her husband that she had changed her mind about selling the house after the initial visit of the appellant. Any representation by the respondent after that first visit that he was going through with the sale, was without his wife's authority and the issue to be determined at that stage was, whether such representations were fraudulent.

The evidence of Patricia Elliott is of vital importance to the appellant's case. It was crucial for the judge's finding so it is necessary to cite the relevant part:

> " So I told defendant I reconsidering sale of house.
>
> I first told defendant this just about same time plaintiff came to visit property - after she left.
>
> My reason - parting finally with property - I had four children and in close proximity - meeting plaintiff for first time - I had second thoughts about selling.

The further circumstances surrounding the sale are important to the appellant's case. It is appropriate to refer to three letters which passed between the legal advisors of the parties. Despite his wife's determined opposition to the sale, the respondent did not raise the issue with his lawyers or informed the appellant of the position. The first letter reads thus:

" January 30, 1981

Messrs. Dunn, Cox & Orrett,
Attorneys-At-Law,
46 Duke Street,
Kingston.

Attention: Mr. Lancelot Cowan

Dear Sirs,

Re: 8 Gwendon Park Avenue -
Sale - Francis Elliott
et ux to Verna Madden

Further to the telephone conversation between your Mr. Cowan and the writer, we are happy to advise that we have now received instructions in this matter and take pleasure in enclosing herewith, Agreement for Sale in triplicate together with a photostat copy of approved Sub-division plan. The premises being sold is Lot 1 on the plan.

The writer is not aware of exactly how the fact that there is a common wall and a common roof is going to affect the purchaser and we suggest that you discuss this matter with her and advise us as to what restrictive covenants and/or easements the Purchaser will be prepared to accept in protection of her right to structural support or otherwise.

Kindly return the Agreements to us for execution by the Vendors together with your client's deposit after execution by the Purchaser.

Yours faithfully,

LIVINGSTON, ALEXANDER & LEVY

Despite the turbulence at the home he was giving confident instructions to his solicitors in connection with the sale when he knew the appellant had signed an agreement for sale of her town house. He did not alert her in December to the dangers when she was signing, for she then could have inserted a special condition in the contract for the sale of her town house to protect her position. The appellant rightly pointed out that there was an oral agreement for sale and it was in those circumstances in cross-examination she was asked if she had ever heard the phrase that a promise was a comfort to a fool. She could not sue in a contract as the respondent had not signed the written agreement, but the law of obligations includes the law of the tort of deceit. Dunn, Cox & Orrett, the appellant's lawyers at that time, replied thus:

> " 16th February, 1981.
>
> Messrs. Livingston, Alexander & Levy,
> Attorneys At Law
> 20 Duke Street
> KINGSTON
>
> ATTN. MR. LAZARUS:
>
> Sir,
>
> Re: 8 Gwendon Park Avenue,
> Sale Francis Elliott et ux
> to Verna Madden.
>
> We return herewith the Agreement for Sale in the above matter and request that it be amended in terms of the offer of finance copied herewith.
>
> Yours faithfully,
> DUNN, COX & ORRETT

Then on 27th February, 1981 another representation was made.

It states:

> The situation has come about because of a very personal reason and we should be obliged if you would advise your client accordingly.
>
> If you are so desirous, the writer will discuss the matter with you.
>
> Yours faithfully,
>
> LIVINGSTON, ALEXANDER & LEVY

It must be reiterated that the appellant signed an agreement for sale of her town house from 11th December, 1980 on the basis of specific assurances from the respondent, that his representations were honest and careful as the law requires. The further representations lulled her into a false sense of security.

The foundation of Mrs. Forte's submission was that, after the respondent's initial representation to the appellant, every representation was fraudulent. He compounded the situation by agreeing to an inspection by the valuator and giving instructions to his solicitors to prepare an agreement for sale. Since the first representation, the situation was altered and he failed to disclose or to use stronger language, concealed from the appellant the true statement of facts. That was, that his wife as joint owner, had reconsidered the sale and that there were continuous conflicts at home over the matter: Briggs v. Wally (1954) 1 All E.R. 909 is a good example of concealment amounting to fraud. The relevant part of the headnote on page 909 reads:

> "... it was the agent's duty, having made false representations, to correct them before the other party acted on them to his detriment, but R, continued to conceal the true facts, and so the representations were continuing representations; and, therefore, the appellants were entitled to recover."

After the initial representation, the respondent had no authority to sell and he concealed that fact. Derry v. Peek (supra) where the directors misunderstood the meaning of the law, the just excuse was that they had an honest

belief in the representation in the prospectus. Although the representations that the respondent had the authority to sell and was selling were false, the respondent did not misunderstand his wife's opposition. He only thought that in the future he could convert her to agree to the sale. As the appellant acted on these representations to her detriment, the respondent is liable for deceit.

This case was well researched and well argued on both sides. Perhaps in adverting to the law, it is best to start with a definition of fraud by Viscount Maugham in Bradford Building Society v. Borders [1941] 2 All E.R. 205 at 211:

> " My Lords, we are dealing here with a common law action of deceit, which requires four things to be established. First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit: Peek v. Gurney [1873] L.R. 6 H.L. 377; 35 Digest 21, 119; 43 L.J. Ch.19; [1871] L.R. 13 Eq. 79 at p. 390 per Lord Chelmsford, and at p. 403 per Lord Cairns, and Arkwright v. Newbold [1881] 17 Ch. D. 301; 35 Digest 20, 114; 50 L.J.Ch. 372; 44 L.T. 393 at p. 318. Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true: Derry v. Peek [1889] 14 App. Cas. 337; 35 Digest 27, 185; 58 L.J. Ch. 864; 61 L.T. 265; revsg. [1887] 37 Ch.D. 541 and Hecton v. Ashburton (Lord) [1914] A.C. 932; 35 Digest 55, 493; 83 L.J.Ch. 784; 111 L.T. 641. Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him: Peek v. Gurney (supra) and Smith v. Chadwick [1884] 9 App. Cas. 187; 35 Digest 18, 106; 53 L.J.Ch. 873; 50 L.T. 697 at p. 201. If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made: Derry v. Peek (supra) at p. 374, and

> If it tenanted I could cope with that and I also considered my children that it was not wise to do something like that.
>
> Defendant was annoyed At my changed of mind. I say he annoyed because of how he spoke to me.
>
> Defendant said he had a gentleman agreement with this lady and he had to hold on to his part and I not know meaning of an agreement.
>
> We had continuous argument from that time. Next discussions in February or March.
>
> When I say continuous - I mean not discussions - but hurt feelings - he never spoke to me like that before.
>
> In March we had another discussion.
>
> I told him that if he continued on this trend I was leaving. I wanted a divorce."

At no time between the initial visit in November 1980 and March 11, 1981 when the respondent decided to discontinue the transaction, did the respondent inform the appellant of his wife's conduct regarding this important business transaction. It was important to both sides - the appellant was buying, he was selling because he wished to realise capital to pay off a burdensome mortgage. In fact, relying on his assurances, she secured a valuation report on the house, dated 10th December for which she paid $132. Be it noted that the appellant had to secure the respondent's agreement for the valuer to inspect the house. Further, she secured a mortgage to purchase the house from I.C.D. Pension Fund. Even more important, after further assurances that his word was his bond, she sold her house. She added that the respondent told her that the only reason why the contract was not ready was that her lawyer was busy doing a recount of electoral votes and in reliance on that specific confirmation, she called on her lawyer and signed for the sale of her town house.

"

27th February 1981.

Messrs. Dunn, Cox & Orrett,
Attorneys-at-Law,
46 Duke Street,
Kingston.

Attention: Mr. Lancelot R. Cowan

Dear Sirs,

RE: 8 Gwendon Park Avenue,
St. Andrew
Sale Francis Elliott et ux
to Verna Madden

Thank you for your letter of the 16th instant.

We now return herewith original and one copy Agreement for Sale duly amended as requested.

We await the Agreement duly signed together with the required deposit.

Yours faithfully,
LIVINGSTON, ALEXANDER & LEVY

It was on the 11th March that the appellant became aware of the respondent's conception of the phrase "my word is my bond." It was meant to convey the meaning that a promise was a comfort to a fool. On that date the appellant's lawyers wrote:

"

11th March 1981.

Messrs. Dunn, Cox & Orrett,
Attorneys-at-Law,
46 Duke Street,
Kingston.

Attention: Mr. Lancelot R. Cowan

Dear Sirs,

RE: 8 Gwendon Park Avenue
St. Andrew -
Sale Francis Elliott et ux
to Verna Madden

We refer to previous correspondence ending with our letter of the 27th February 1981 and advise that our clients regret that they have to withdraw their offer to sell the above premises effective immediately.

> Peek v. Gurney at p. 409. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing: Clarke v. Dickson [1859] 6 C.B.N.S. 453; 35 digest 18, 100; 28 L.J. C.P. 225; 33 L.T.O.S. 136. I am not, of course, attempting to make a complete statement of the law of deceit, but only to state the main facts which a plaintiff must establish."

As the basis of the fraud was the concealment of Patricia Elliott's opposition to the sale from the first visit to her home, it is necessary to advert to another and earlier case on concealment. Here is how Lord Chelmsford puts it in Peek v. Gurney [1861] All E.R. Rep. 117 at p. 122:

> "... The concealment in the present case was of the all-important fact of the true state of the affairs of the old firm, which, if they had been disclosed, the wildest speculator would have turned away from a proposal to build a company on such a foundation."...

Would the appellant have sold her house, had it not been concealed from her that the wife of the respondent, as joint owner was opposed to the sale? I would say emphatically that she would not sell then, or else why did she seek so many assurances over the telephone.

Lord Colonsay at p. 127 said:

> "... I think with my noble and learned friend that this prospectus did suppress important matter, and if it did not contain any direct allegation of what was false, it was at least of a misleading character. It was a suppressio veri, which, if it did not amount to an allegatio falsi, at least amounted to a suggestio falsi, and I cannot see any grounds upon which I could justify it."

The principle as expounded by Lord Cairns was stated thus at p. 129:

> "... There must, in my opinion, be some active misstatement of fact, or, at all events such a partial and fragmentary statement of fact that the withholding of that which is not stated makes that which is stated absolutely false."

In Bricss cited above, Lord Reid at p. 916 said:

> "... It was his duty, having made false representations, to correct them before the other party acted on them to his detriment, but he continued to conceal the true facts."

In the same case, Lord Cohen when dealing with continuing representations, approved of a statement in Halsbury's. His Lordship said:

> "In Halsbury's Laws of England, 2nd ed., vol. 23, p. 29, para. 44, it is stated:
>
> > 'Where there is an appreciable interval between the two dates abovementioned [i.e., date when made and date when acted upon], and the representation relates to an existing state of things, the representor is deemed to be repeating his representation at every successive moment during the interval, unless he withdraws or modifies it by timely notice to the representee in the meantime.' "

Mr. Batts, on behalf of the respondent contended that, the respondent's statement was one of intention, not a state of existing fact. The proper response to that submission is to be found in a case he helpfully cited - Edgington v. Fitzmaurice [1881-5] All E.R. 856. There Bowen L.J. at p. 861 made the classic statement:

> "... There must be a mis-statement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact."

The appellant had to prove dishonesty or recklessness on the respondent. Elliott knew of his wife's opposition, he knew that his wife was a joint owner, yet he concealed her opposition to the sale, from the appellant. It therefore is relevant to determine the state of his mind when he represented

that he had authority to sell and repeatedly confirmed that he was selling. Lord Herschell laid down the test in Derry v. Peek (supra) which has not been challenged in the civil law. Lord Herschell said at p. 25:

> "I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold; the probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form, and by asking ourselves whether a reasonable man would be likely under the circumstances so to believe."

Would a reasonable man in this jurisdiction dealing with an important transaction as the sale of a house, adopt Elliott's conduct? He knew of his wife's stance, yet he continued to mislead the appellant. Elliott's excuse was that he hoped to persuade his wife, but he was failing daily to do that. His excuse that he had succeeded on a previous occasion when he sought to sell their house at Harbour View does not wash. The evidence does not have the full explanation of the Harbour View transaction nor was it even hinted at to the appellant. It would be extraordinary if Elliott could rely on such an excuse in any jurisdiction which inherited the common law. Real estate transactions could not be conducted with any certainty if the law on deceit were as adumbrated by the respondent.

In these circumstances, I approve of the excellent summary of Harrison J., on this aspect of the case. The judge was fully aware of the high balance of probabilities which was borne by the appellant when he said:

> "A representation of fact or conduct, with knowledge that the representation was false or wilfully without any genuine belief in its truth and intending the plaintiff to act on it and he did so incurring damage, amounts to the tort of deceit. The defendant

> "had a duty to communicate with the plaintiff any change of circumstances, namely, the change of mind of his wife."

Here, the learned judge grasped the distinction between a false statement (negligence) and wilfully without any genuine belief in its truth (deceit). He did not however, state that two separate torts were in issue.

> How the alternative case of negligent misstatement arose on the pleadings, was established by the evidence and adverted to on appeal

In his written submissions, Mr. Batts on behalf of the respondent contended that:

> "5. That the learned trial judge erred in law in that he failed to appreciate that:
>
> (a) In the tort of deceit the misrepresentation must be one of fact and not of future intent.
>
> ...
>
> (c) There is no fraud if the representor believes that fact to be so even if he is negligent in his belief."

The admission that the parties were in contractual relations together with this submission when linked with paragraph 10 of his pleaded defence, shows that the respondent was virtually admitting negligence. The learned trial judge, having found the respondent liable for deceit, did not trouble himself with the issue of the alternative tort of negligent misrepresentation. Nor did the appellant, although I raised it. Yet since Nocton v. Ashburton [1914] A.C. 932, it is appropriate to consider that alternative. To demonstrate what happened in that case, it is pertinent to refer to p. 939 which states the effect of the pleadings:

> " Neville J. found that, although the defendant Nocton fell far short of the duty which he owed to his client as a solicitor, the plaintiff had failed to make out a charge of fraud

> against him, and he held that as the action was based solely upon fraud it was not maintainable. He accordingly dismissed the action as against the defendant Nocton with costs."

Turning to the speech of Lord Haldane at p. 945, His Lordship said:

> " The Court of appeal took a different view. They held that the solicitor had, on the evidence, been guilty of actual fraud, so that an action of deceit would lie. If the action had been one of negligence they thought it would have been undefended, but the Master of the Rolls, in agreement with Neville J., said that 'it would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based on negligence.' As, however, they came to the conclusion that the solicitor had been guilty of actual deceit, this point was not important. The Court of Appeal therefore gave judgment for Lord Ashburton, and directed an inquiry as to damages to be held before the official referee."

That His Lordship also regarded the issue of common law negligence as a possible alternative on the pleadings is evident in the following statement at p. 945:

> "... But where I differ from the learned judges in the Courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to treat the action as one of mere negligence at law unconnected with misconduct. This alternative they thought was precluded by the way the case had been conducted. I am not sure that, on the pleadings and on the facts proved, they were right even in this." ...

In this passage His Lordship suggests that, that solicitor's misconduct would give rise to a breach of fiduciary duty as well as negligence.

There is yet another important statement from His Lordship which points out that a breach of fiduciary duty over which equity has an exclusive jurisdiction, is the counterpart

of an action at common law for negligent misstatements. It reads at p. 957:

> " I think that Neville J. was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of the Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence."

As for relief, Lord Haldane approved of the order of the Court of Appeal which ordered an enquiry for damages although he expressly stated that restitution with interest was the proper order for a breach of fiduciary duty. Lord Atkinson agreed with Lord Haldane, but before turning to the other speeches, it is instructive to refer to one further passage from Lord Haldane. At p. 949 His Lordship said:

> " My Lords, it is plain that between the <u>grossly careless use of language</u> (negligence) and the reckless use which will still give a right to succeed in an action for deceit the line of demarcation may seem to plain persons to be very fine."...
> (Emphasis supplied)

That their Lordships considered "grossly careless use of language" as negligent misstatement an alternative averment on the pleading, was brought out with even greater force by Lord Dunedin who said at p. 965:

> " Returning now to the pleadings in the present case, the case as originally launched, seeking for relief as to the 65,000 £, was undoubtedly based on fraud; and that fact tinged the form of the pleadings. That part of the case is gone; but the Court of Appeal thought that it dominated the pleadings as to the relief in respect of the release of Block A. It was held by the cases of <u>Archbold</u> 2 H.L.C. 440, Thom 8 Ex. 725, and <u>Swinfen</u> 5 H.&N. 890

> that if on striking out the allegations of fraud a cause of action still remains, the action may proceed. I should myself have been prepared so to read paragraphs 31 and 33 of the statement of claim as to shew an averment of negligence even when the averments of fraud are struck out. In that case, as Neville J. says, 'I think that Mr. Nocton fell far short of the duty which he was under as a solicitor to the plaintiff,' and as the Court of Appeal held that the action, if based on negligence, was practically undefended, it would have been unnecessary to consider, as the Court of Appeal did, whether the fraud which Neville J. had held not proved was proved."

Lord Shaw was even more explicit on the issue that negligent misstatement was an alternative averment if there was a failure to prove fraud. Perhaps I may add that the principle being advanced is well known to criminal pleaders. They plead murder and may fail to prove it, but may succeed on manslaughter because of the failure to prove a specific intent.

Had Harrison J. not found deceit, I am certain he would have gone on to consider the alternative of negligent misstatement. As Lord Shaw did not find deceit, here is how he put the issue at p. 967 - 968:

> " My Lords, standing the averments thus, they appear to me to lay the basis of, and to give due notice of, a claim for liability upon a ground quite independent of fraud, namely of misrepresentations and misstatements made by a person entrusted with a duty to another, and in failure of that duty. I have stated what is found in the pleadings, purposely deleting from them the allegations of fraud which they contain. I think that with those allegations of fraud deleted there was quite sufficient left in the pleadings for the determination of the case as it is now being settled by this House.
>
> I incline to the view that prior to the passing of the Judicature Act this is a course which would have been taken in a Court of Equity. In Hickson v. Lombard [1866] L.R. 1 H.L. 324, at p. 331 the Lord Chancellor, Lord Chelmsford, refers with approval to 'the principle explained by

> Lord Cottenham in the case of Archbold v. The Commissioner of Charitable Bequests in Ireland 2 H.L.C. 440 at p. 460, that where a bill alleges matters of fraud and all the subsequent considerations depend on these matters which are not proved, the Court must necessarily dismiss the bill, 'but if fraud be imputed and other matters alleged which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to.'
>
> There is indeed in the present case a good deal to remind one of the observation of Pollock C.B. in Swinfen v. Lord Chelmsford (supra): 'If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved, and we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences, whether done wilfully or not.' "

Turning to the concluding paragraph of Lord Parmoor's speech, His Lordship said at pp. 977 - 978:

> " No doubt paragraph 33 does directly allege fraud in connection with the release of Block A, but if all the allegations directly imputing fraud are excluded, sufficient remains on which to found a charge of negligence for breach of duty of the appellant in his employment as a solicitor. It does not appear to me that there would be any injustice to the appellant in dealing with the action as one of negligence for breach of duty. The same evidence would have been required whether the action had been founded on negligence or fraud, and the defence would have been conducted in either case on the same lines."

Turning to a recent authority, the general principle was expressed by Lord Denning M.R. in Re Vandervells Trust No. 2 [1974] 3 All E.R. 205 at p. 213 and repeated in Drane v. Evangelou

[1978] 2 All E.R. 437at 440. It reads thus:

> "It is sufficient for a pleader to state material facts. He need not state the legal result. If for convenience, he does so, he is not bound by, or limited to what he has stated. He can present in argument, any legal consequence of which the facts permit."

The classic case of Hedley Byrne & Co. Ltd. v. Heller [1964] A.C. 465 demonstrates the importance of Nocton's case at pp. 518 - 519. As the allegation of fraud was abandoned in that case, see p. 469, Lord Devlin was concerned to show the relationship between breach of fiduciary duty in equity and negligence at common law, rather than to demenstrate that proof of negligence where fraud was alleged, could result in a judgment for the lesser tort of negligent misstatement.

Turning to these pleadings, it is necessary to advert to the averments referred to previously. All that needs be done is, to rely on falsely and strike out fraudulently in the endorsement on the writ and at paragraph 10 of the statement of claim. Equally, where the particulars of fraud are stipulated, fraud ought be struck out and negligence would be averred from reliance on the word falsely. Paragraph 1 which establishes the special relationship between the parties was admitted. It reads:

> "1. On or about the 17th day of November 1980 the Defendant orally offered to sell an undetached dwelling house located at and known as 8 Gwenlon Park Avenue, Norbrook in the Parish of Saint Andrew for the price of $5,600.00 and the Plaintiff (sic) accepted the said offer."

Then paragraph 2 reads:

> "2. On or about the 5th day of December 1980 the Plaintiff orally offered to sell her dwelling house at 16 West Path Calabar Mews in the Parish of Saint Andrew to one Mrs. Yvonne Josephs for the price of $37,000.00 and the said Mrs. Yvonne Josephs accepted the said offer."

The Defence at paragraph 2 is instructive, it states:

> "2. Except that the Plaintiff informed the Defendant that she proposed to sell her property at West Path, Calabar Mews, the Defendant knows nothing of the matters set out in paragraph 2 of the Statement of Claim."

The question to be posed as regards this defence is, why should the appellant inform the respondent of this transaction if it was not connected with their business transaction which was admitted?

Of even more importance was the near admission in the pleading of liability for negligence. The initial plea in paragraph 10 denying fraud, has already been referred to, but the continuation of that paragraph is of utmost importance and is repeated for emphasis. It reads:

> "10. The Defendant had every intention of selling the property to the Plaintiff. The Defendant had the authority of his wife at that time (she being a joint owner of the property with the Plaintiff) to enter into the oral agreement. The Defendant did not change his mind until early in March, 1981 when his wife indicated that she was not prepared to sign the Contract for Sale for a very personal reason.
>
> Accordingly the Defendant instructed his attorneys-at-Law to inform the Plaintiff's Attorneys-at-Law that the Defendant was no longer selling the property. This they did by letter of 11th March, 1981 to the Plaintiff's Attorneys-at-Law."

In an important real estate transaction where the respondent did not change his mind until early March 1981, although his wife gave evidence that she opposed the sale continuously until he withdrew, the respondent owed a duty to the appellant to be careful. So he was in breach of that duty and the particulars at (a) (b) (d) already adverted to, must serve in the alternative as the particulars of negligence. There was also an averment of "without any just excuse falsely" which covers the tort of negligent misstatement.

The failure of the respondent to inform the appellant of his wife's opposition or in the alternative, concealing that information were aspects of his conduct which was below the standard that the law imposes as the duty of care in business transactions. That that is a category of negligence is evidenced in W.B. Anderson & Sons Ltd. v. Rhodes (Liverpool) Ltd. [1967] 2 All E.R. 850 where the headnote aptly summarises the issue. It reads:

> "(i) a duty of care existed between R., Ltd. and the four plaintiffs in relation to representations made by Reid acting as R., Ltd.'s servant or agent, because the representations concerned business transactions whose nature made clear the gravity of the enquiries and the importance and influence attached to the answers, and because none of the plaintiffs would have been willing to sell to T., Ltd. on credit but for the assurance that T., Ltd. was credit-worthy."

Similarly, in the instant case, the appellant would not have sold her house when she did, nor would she have suffered physical inconvenience in rented accommodation or incurred expenses for a valuer when she did, if the respondent had not been in the alternative, grossly negligent as outlined.

The issue of damages

Mrs. Forte argued her appeal on damages on the basis of deceit. The damages may not have been markedly different if the finding below had been the alternative averment of negligent misstatement. The test for the measure of damages is foreseeability for negligent misstatement: see Vol. 31 3rd edition Halsbury's Laws paragraph 1112. The learned judge ordered general damages of $1,000. The writ was filed on 27th May 1981, some twelve years ago. Since then, inflation and the external value of the currency has radically altered money values. Thus an award of $1,000 is in reality, nominal damages. so that the appellant's contention that the award even of $10,000 was wrong in principle, is readily accepted.

The appellant sold her house for $37,000 on 11th December 1980 with vacant possession on or before 31st May 1981. She filed her writ 27th May 1981. The unchallenged evidence was that by May 1981 when she gave up possession, the value had increased to $42,000. The valuator also gave unchallenged evidence that there was a rapid increase in house prices after December 1980, subsequent to the general election of that year. So the presumption must be that the appellant would have sought to purchase a house around May 1981 in her favourite areas of Stony Hill and Norbrook. She would then have the enhanced capital value of her Calabar Mews town house as the basis for such a venture. Mrs. Forte however, argued for the capital value of the town house in 1984 which was then valued at $100,000. That was the time when she had built a house. I cannot accept that as the correct principle to assess the measure of damages. The appellant also suffered some inconvenience at 15 Wickham Avenue as rented accommodation was difficult to come by. The place was being repaired and her living room was used as a passage way. So an award must be made under this head.

Doyle v. Olby (Ironmongers) Ltd. [1969] 2 All E.R. 119 cited with approval, a statement from Lord Atkin in Urquhart, Stracey v. Urquhart at p. 122. The statement runs thus:

> " 'I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter. Whether he buys shares or buys sugar, whether he subscribes for shares, or agrees to enter into a partnership, or in any other way alters his position to his detriment, in principle the measure of damages should be the same, and whether estimated by a jury or a judge. I should have thought it would be based on actual damage directly flowing from the fraudulent inducement.' "

Lord Denning's M.R. gloss is equally instructive. Lower down on the same page, he puts it thus:

> "... The person who has been defrauded is entitled to say: 'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.' All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen."

When this principle is applied to the facts of this case, the appellant is entitled to say that the respondent must make reparation for all the actual damage directly flowing from the fraudulent inducement. On the other hand, be it noted that the damages for negligent misstatement is restricted, being based on the test of foreseeability.

In Saunders v. Edwards [1987] 2 All E.R. 651, a further sum of £500 was awarded for inconvenience and disappointment and it was laid down that such a figure should not be a conventional sum, but, should be moderate. In terms of present day value of money, I think a sum of $10,000 is appropriate under this head.

As regards special damages, I would disallow the amount of $1,000 being the difference between her mortgage payment and rental she had to pay. That seems to me, to be double counting since she wanted to buy a place in a better area and she rented a place in such an area. The valuation fee is important because that was the initial loss incurred by the appellant in reliance on the false and fraudulent representations of the respondent. That was the basis of tortious liability.

Conclusion

Perhaps I may be permitted to say that, had this case been pleaded solely on the basis of negligent misrepresentation, it may have been uncontested as regards liability. In the court

below, the hearing was eight days and judgment delivered on the ninth . In the Court of Appeal, the hearing lasted four days with attendant costs. Experienced criminal pleaders seldom plead manslaughter where the less burdensome charge of causing death by dangerous driving is appropriate. Maybe civil pleaders in this jurisdiction should follow where damages would be roughly the same: see 12th edition Precedents of Pleadings Bullen & Leake & Jacobs p. 452. What would determine the damages on the alternative plea? It is pertinent to refer to the Wagon Mound No. 1 Overseas Tankship v. Morts Dock [1961] 1 All E.R. 404. At p. 413 when referring to Polemis [1921]All E.R.Rep. p. 40 where damages were reckoned on the same basis as deceit, Viscount Simonds said:

> "It is a principle of civil liability subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour."

The appellant and the respondent were in a contractual relationship, and the respondent as a reasonable man, must have foreseen a probable rise in prices during the period 1980 to 1981. This was brought home to him as the appellant secured a valuation on his house, although they had previously agreed on a price. This approach to determine the measure of damages was reiterated in the Wagon Mound No. 2 [1967] A.C. p. 617 where Lord Reid said at 636:

> "It has now been established by the Wagon Mound(No. 1) [1961] A.C. 388 and by Hughes v. Lord Advocate [1963] 1 All E.R. 705 that in such cases damages can only be recovered if the injury complained of was not only caused by the alleged negligence but was also an injury of a class or character foreseeable as a possible result of it."

In the end, I would allow the appeal against damages and award $80,000 general damages with no interest in that regard, and affirm items (2) and (3) of special damages, but with interest at 12 percent from 1st December, 1980. I would affirm the order on liability, so the cross-appeal on liability and on damages is dismissed. The costs of the appeal and cross-appeal are to go to the appellant and these costs must be agreed or taxed.

PATTERSON, J.A. (Ag.)

This is an appeal and cross-appeal from the judgment of Harrison, J. in an action by Verna Madden (the appellant) against Francis Elliott (the respondent) claiming damages for deceit or alternatively, for fraudulent misrepresentation. The learned trial judge found in favour of the appellant and awarded her general damages in the sum of $1,000 and special damages in the sum of $1,992. The appellant's appeal is against the quantum of damages awarded, and she seeks an order that both the general damages and the special damages be increased. The respondent, in his cross-appeal, seeks an order that the judgment be set aside and that judgment be entered for the respondent with cost; alternatively, that the award of damages be set aside in whole or in part.

The appellant's case is stated in the endorsement to the writ as follows:

> "The Plaintiff's claim is against the Defendant to recover Damages for Deceit for that the Defendant in or about November, 1980, falsely and fraudulently represented to the Plaintiff that he had the authority to and would sell to the Plaintiff an undetached dwelling house at 8 Gwendon Park Avenue, Saint Andrew, as a consequence whereof the Plaintiff suffered damages.
>
> Alternatively the Defendant by fraudulent misrepresentation induced the Plaintiff to sell her dwelling house as a consequence whereof the Plaintiff has suffered damages."

The respondent admitted representing to the appellant that he had the authority to sell and would sell her the dwelling house, owned jointly by his wife and himself, and said at that time he had his wife's authority to sell. He denied, however, that he acted fraudulently or deceitfully in the transaction, as he had every intention of selling the property to the appellant. He only changed his mind when in March, 1981 his wife indicated she was not prepared to sign the contract for sale.

I think it will be useful to examine the chronology of events as the court found them to be.

1. In November, 1980, the appellant mentioned to the respondent her desire to sell her house and to purchase another in the Norbrook or Stony Hill area; the respondent informed her that he had such a house for sale. She informed him that she would have to sell her house to purchase his.

2. In the said month of November, the appellant visited the respondent's premises at 8 Gwendon Park Avenue; she was shown the house for sale by the respondent and she met and spoke with the respondent's wife. An oral agreement was made between the appellant and the respondent. After the appellant left, and unknown to her, the respondent's wife informed him that she had decided not to sell the house to the appellant.

3. In the said month of November, on a Sunday, the appellant, her brother and a friend visited and inspected the house. They spoke with the respondent then about re-modelling the house and for the second time the appellant informed the respondent that she would have to sell her house to purchase his.

4. The Tuesday following, the appellant advised the respondent by telephone that she had found a purchaser for her house, and when asked, the respondent confirmed that he was definitely selling her his house.

5. On a day between the Tuesday referred to above and the 2nd December, 1980, the appellant and the respondent agreed for a valuator to value the respondent's house. The appellant paid a deposit on the valuation fee on the 2nd December, 1980. The valuation was done and the report was prepared on the 10th December, 1980.

6. On the 11th December, 1980, the appellant signed an agreement for sale of her house, and gave notice to her mortgage company of her intention to redeem the mortgage on it.

7. By letter dated 30th January, 1981, the respondent's attorneys-at-law advised the appellant's attorneys-at-law that "we have now received instructions in this matter and take pleasure in enclosing herewith, Agreement for Sale in triplicate."

8. On 3rd February, 1981, the appellant applied for a mortgage to purchase the dwelling house at 8 Gwendon Park Avenue.

9. On the 12th February, 1981, the appellant was advised that she had been granted the mortgage in the sum of $45,000 in respect of 8 Gwendon Park Avenue.

10. By letter dated 16th February, 1981, the appellant's attorneys-at-law returned the agreement for sale to the respondent's attorneys-at-law, requesting certain amendments.

11. By letter dated the 27th February, 1981, the respondent's attorneys-at-law returned the said agreement to the appellant's attorneys-at-law, duly amended, and requested its return "duly signed together with the required deposit."

12. On the 9th March, 1981, the appellant paid to her attorneys-at-law the sum of $5,600 being the deposit of ten percent of the purchase price of the dwelling house of 8 Gwendon Park Avenue.

13. By letter dated the 11th March, 1981, the respondent's attorneys-at-law advised the appellant's attorneys-at-law that the respondent had withdrawn "their offer to sell the said premises effective immediately."

14. By letter dated 16th March, 1981, the appellant's attorneys-at-law sent the signed agreement for sale along with the $5,600 deposit to the respondent's attorneys-at-law.

15. By letter dated the 22nd April, 1981, the respondent's attorneys-at-law returned the signed agreement and the deposit of $5,600 to the appellant's attorneys-at-law, reiterating the withdrawal of the sale.

16. The appellant gave the purchaser of her house possession on the 31st May, 1981, and moved into rented premises at 15 Wickham Avenue from the 1st June, 1981, to the 27th April, 1984, when she removed to a house she had built.

Such then are the facts that the learned trial judge stated he found, and in addition, he adverted to the fact that the appellant had telephoned the respondent several times concerning the purchase of his house. He also accepted the appellant's evidence that after she discovered that the sale was not going through, she made several telephone calls to the respondent, but he did not return her calls. She failed in her attempts to purchase other premises, much to her anxiety and distress. She cried.

On the facts found, the learned trial judge concluded:

> "The defendant Francis Elliott entered into an oral contract, along with his wife, with the plaintiff for the sale of the Gwendon Park property; this contract was not enforceable. The defendant was therefore initially making a true representation of fact, namely, that his wife and himself intended to convey the legal estate in the said property to the plaintiff and that he and his wife had the power to so convey it. The defendant's act of continuing discussions with the plaintiff was a maintenance of that posture, that is, that he the defendant had his wife's authority to continue to negotiate and that the initially true intention remained unchanged. The fact that the defendant's wife changed her mind was a material fact showing that he no longer had her authority to proceed with the arrangement for sale, and so he did not have any longer the power to convey the legal estate therein to the plaintiff. It was no longer a true statement of fact, and therefore the defendant was under an obligation to disclose the change of circumstances to the plaintiff.
>
> This Court finds that the meeting and visit to the said property was in November, 1980. The defendant was therefore aware from the evening after the plaintiff's visit ended that his wife had changed her mind. He should have disclosed to the plaintiff, this material fact, as to relieve the plaintiff of the expenses of continuing the negotiations and plans of a prospective purchaser pursuing a bona fide contract of sale, and the pain of disappointment. Even, assuming that, on the defence's case, (which this Court does not so find) the plaintiff's first visit was in January 1981, the defendant was under an obligation to then declare the changed circumstances. He did not even advise his own

"attorneys-at-law until March 1981. One cannot fail to note the continuing correspondence between the respective attorneys between the period January and March 1981.

The plaintiff was therefore continuously led to believe that there was no obstacle to the passing of the legal estate - this was a misrepresentation of fact."

In my judgment, the representation that is fundamental is the respondent's statement made on or about the 17th November, 1980, that he would sell the dwelling house to the appellant. That was a true representation of his present intention and there is no evidence to show otherwise. The learned trial judge found that it was a true representation of fact and I agree. It cannot ground an action in deceit.

The other representations which are relevant and which fall to be considered arise in this way. The appellant said that she contacted the respondent and told him that she had found a purchaser for her house and that she again asked him if he was definitely selling her his house, and that he said yes, she could go ahead and sell her house. When the appellant was ready to sign the agreement for sale of her house, she informed the respondent and told him that she did not wish to sign it without having a firm contract to purchase his house. His reply to this was, she said, that his word was his bond and that she could go ahead and sign the agreement for the sale of her house as he was definitely selling his house to her. It was on the strength of that conversation that on the 11th December, 1980, she signed the agreement for sale of her house.

The court found as a fact that the respondent's wife "probably decided in November, 1980, not to sell the property to the plaintiff." It must be taken that the respondent knew from the outset that in order to complete the sale and effect a transfer of the house, his wife would have to join with him

in signing the necessary documents. They held the property as joint tenants. It is clear that initially he had her consent to the sale of the house. So the question arises, when she withdrew her consent, was the respondent under a duty to disclose that fact to the appellant? The learned trial judge did not consider the respondent to be under such a duty, but rather that he was "under an obligation" to disclose the change of circumstances. Mrs. Forte contended that the respondent was under a duty to make that disclosure, bearing in mind that according to the appellant's evidence, on at least six occasions after the original oral agreement, the respondent represented to her that he would be selling the house to her. The continued non-disclosure of the fact of his wife's change of mind may give rise to the tort of deceit, so she argued, since the respondent did not then have the authority to sell.

The case of Briess and others v. Woolley and others (1954) 1 All E.R. 909 was relied on as authority in this regard. In that case the managing director of a manufacturing company, by unlawful means, increased the amount of goods he manufactured and sold, thus producing substantial profits which would not have been made by lawful means. The company began to lose money after a while, and the managing director represented to intended purchasers of shares in the company, that he had a manufacturing licence and an allocation of raw materials, and he showed them the accounts which were accurate, but he concealed the fact that he had been acting illegally. It was held that he had a duty, "having made false representations, to correct them before the other party acted on them to his detriment."

It is plain that the case of Briess (supra) is easily distinguishable from the instant case. The managing director knew at the time he showed the would-be purchasers the accounts, and up to the time they bought in the company, that he was acting dishonestly, and that he was misrepresentating the

true facts. There could be no doubt that he was guilty of a fraudulent misrepresentation and that was never an issue in the case. The real issue was whether the shareholders in the company were liable for the fraudulent misrepresentations made by the managing director of the company. However, it supports the argument that a fraudulent misrepresentation may be a continuing one up to the time it is acted upon; and if not corrected before, it gives rise to an action in deceit.

Concealment or non-disclosure of a material fact, may, in certain circumstances, be relevant when the issue that falls to be decided is whether or not a representation is false, and therefore is a misrepresentation.

In Peek v. Gurney & Ors. (1873) (1861-73) All E.R. Rep. 116, the question of concealment was considered. Lord Chelmsford, in his opinion, had this to say (at p. 123):

> "I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose."

Lord Cairns, in his opinion, said this (at p. 129):

> "Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, 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 that the withholding of that which is is not stated makes that which is stated absolutely false."

I have already quoted the learned trial judge's finding that there was a misrepresentation of fact made by the respondent to the appellant, and I see no reason to disturb such a finding. The subsequent statements were all of a similar effect to the fundamental statement. They all conveyed to the appellant the respondent's continued intention to sell

her the house. However, I do not think that the state of mind of the respondent's wife, and the non-disclosure by the respondent of his wife's change of mind are the real issues that fell to be decided, since the learned trial judge found there was a misrepresentation of fact. What is germane at this point is whether the respondent fraudulently misrepresented the facts or whether he actually and honestly held the express intention to sell the house as he said he would, in light of the knowledge that his wife had withdrawn her consent and whether such intent was held up to the time that the respondent notified the appellant of his change of mind. The respondent's state of mind as regards his belief in the truth of the misrepresentation is of paramount importance when considering whether or not such misrepresentation was fraudulent. In an action for deceit, A fraudulent misrepresentation must be proved by the plaintiff.

In the leading case of Derry & Ors. v. Peek (1886-90) All E.R. Rep. 1, the respondent, Sir Henry Peek, brought an action against the appellants, who were the directors of a tramway company, seeking to recover damages for mis-statements which were contained in a prospectus issued by them, and on the strength of which he acted to his prejudice. At the trial of the action, the question that arose to be considered was whether the appellants had made the statements in the prospectus bona fide, and without any intention to deceive. The issue finally fell to be decided by the House of Lords. Lord Herschell delivered the leading opinion of the House. He carefully reviewed the relevant authorities and then proceeded to state briefly the conclusions to which he had been led. At page 22 he stated:

> "I think the authorities establish the following propositions: 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 shown that a false representation has been made

" (i) knowingly, or

(ii) without belief in its truth, or

(iii) 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 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."

Lord Herschell (at p.22) pointed out that in his opinion:

"... making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds."

And he further said:

"At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality."

In my view, the conclusion in this case clearly shows that proof of fraud is indispensable to the common law action of deceit, and further, it firmly establishes that an honest belief in the truth of a false statement negates the question of fraud, and consequently, deceit. It seems to me, therefore, that it is incumbent on the judge in every action for deceit, to consider, not only whether a representation is false, but also if it is fraudulent, and therefore the state of mind of the representor at the time when the representation is made and up to the time that it is acted upon by the representee

is of paramount importance in that regard. In every action for deceit, there must be proof that the representor had no actual and honest belief in the truth of the misrepresentation made by him.

On the face of the statements which the appellant said the respondent made, it would appear that the respondent was then, on each occasion, making a promise with the intention of fulfilling it, namely, that he would sell the appellant the house at 8 Gwendon Park Avenue, and unless it can be shown that he did not actually and honestly believe he could so sell the house, or that no such intention existed in his mind, it cannot be said that he is guilty of a fraudulent misrepresentation of an existing fact. But neither the intention nor the belief of the respondent is capable of positive proof. Such conditions of mind may be determined only by considering what he said or did, or both what he said and did, and thereafter by applying the test of the reasonable man in similar circumstances. His words and behaviour must be examined in the light of the reasonable man. So one must look to discover what direct evidence there is in this regard and what inferences can be drawn.

The documentary evidence discloses that an agreement for the sale of the house at 8 Gwendon Park Avenue was actually drawn up by the attorneys-at-law for the respondent, on instructions received by them, and it was ready for execution sometime in January, 1981. The agreement for sale was sent to the appellant's attorneys-at-law, but by letter dated 16th February, 1981, it was returned to the respondent's attorneys-at-law for amendment. By letter dated the 27th February, 1981, the respondent's attorneys-at-law returned the said agreement to the appellant's attorneys-at-law, duly amended and requested

that it be returned "duly signed together with the required deposit." By letter dated the 11th March, 1981, the respondent's attorneys-at-law advised the appellant's attorneys-at-law that the respondent had withdrawn "their offer to sell the said premises effective immediately." This was before the agreement had been returned by the appellant's attorneys-at-law, and it was the very first time that the appellant was informed that the sale had been called off.

The respondent's evidence is that his wife and himself had discussions about selling the house in question to reduce the mortgage that they had on their entire property and to that end, a sub-division plan was completed in 1979. The oral agreement between the appellant and the respondent and his wife for the sale of the house was then made but the wife changed her mind that day about selling to the appellant. On a previous occasion she had changed her mind on a similar matter, and so he "thought he could show her the benefit of the sale," as he had done then.

There can be no doubt that the respondent assumed the dominant role in family affairs such as this, and that is not an unusual role of the male partner. The wife's evidence is to the effect that she gave the respondent a free hand in business transactions. From the very first conversation between the appellant and the respondent, the respondent had consistently acted as the person with authority to sell the house, and this is evident from his conduct at all times, not merely to the time that the respondent entered into the contract to sell her house, but right up to March 1981, when he realised that his wife was resolute in her stand not to sell the house to the appellant.

The respondent agreed with the appellant for a valuation of the house for sale to be done, and the valuation was actually done. He allowed the appellant, her brother and a friend to

inspect the house, and they discussed the selling price and repairs to be done to the house. He told the appellant that he was in touch with his lawyers to have the contract drafted and that too was done. It was in March, 1981 that he told his wife that he had given his word to the appellant and that the documents for completion of the sale were ready. It was only then that she told him that if the sale went through she was leaving the matrimonial home. Consequently, he called off the sale.

He is supported by his wife in her testimony in this regard. They had been married since 1965 and it was the respondent who took the business decisions in the family and she always accepted what he said. He had authority to make decisions - including the sale of property jointly owned. The evidence discloses that even before consulting his wife, he told the appellant that he had a house for sale.

The evidence in this regard is uncontradicted, and if it is accepted by the court, it is capable of supporting a finding that the respondent must have actually and honestly believed he could, and must have had the intention to, sell the house to the appellant at all times that he represented to her he would and that the intention existed up to and beyond the time that the appellant acted on it by executing the agreement for sale in respect of her house. In other words, it discloses that it was more probable than not that the respondent honestly believed in the truth of his statements when he made them and that such belief continued up to and beyond the time that the appellant acted upon them, and that there was sufficient ground to warrant the belief and so he did not act recklessly or carelessly.

It is a proven fact that the stated intention of the respondent did not materialize, and the evidential value to be placed on such a fact must therefore be considered. I

think the relevant proposition is succinctly stated by the authors of Clerk and Lindsell on Torts - 16th Edition para. 18-06 at pp. 1014-1015, and I will respectfully adopt it. It reads as follows:

> "The mere fact that the intention which was represented to exist was not eventually carried into effect is little or no evidence of the original non-existence of the intention. The representor may have subsequently changed his mind; and in such a case there is no misrepresentation at all. Moreover the representee may have accepted the profession of the other party as a promise which would presumably be kept, and not as an announcement about the state of his mind. And if so, any loss that he may sustain will be caused not by the incorrectness of that announcement, on which ex hypothesi he was not relying, but by the breach of the promise, and he will therefore be left to any remedy that he may have in contract."

There is no evidence coming from the appellant that would even suggest that the respondent was not acting honestly when he made the statements. Perhaps the true position in the instant case may be summed up by reference to the speech of Lord Herschell in Derry & Ors. v Peek (supra) (at pp. 24 to 25) when he had this to say about the directors in that case:

> "I think they were mistaken in suppcsing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was, therefore, inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established."

There is nothing that I would add to these words and I respectfully adopt them in stating what I consider to be the true position of the respondent in this case. I think that the respondent was mistaken in supposing that his wife would change her mind and would in fact join with him in selling the house to the appellant. As joint tenants, it was necessary for them both to agree to sell, and they had discussed the matter and arrived at such an agreement. When subsequently he represented that he would sell and that his word was his bond, knowing then that his wife had withdrawn her consent to sell to the appellant, that was not an accurate statement. But that was not the question. If the respondent believed that his wife would be persuaded to change her mind and join him in the sale of the property to the appellant, has the appellant made out, which it was for her to do, that the respondent has been guilty of a fraudulent misrepresentation? I think not. The evidence does not support a finding that the respondent knowingly made a false statement, or that he did not believe it to be true. I am of the view that the evidence strongly supports a finding that the respondent actually and honestly intended to sell the house to the appellant and he actually and honestly believed that his wife would change her mind and join in the sale of the house to the appellant. That being so, there would be no fraud proved in the respondent and the action must fail.

It does not appear to me that the learned trial judge gave due consideration to the real issue raised by the defence in the case, viz. the respondent's state of mind at the relevant times he made the statements after the initial oral agreement and up to the time that the appellant acted on them. The learned judge made no finding of fact in regards to the crucial issue of the respondent's state of mind. Therefore this court is at liberty to consider any evidence that the court below failed to consider sufficiently or at all, and arrive at its own conclusion.

I find as a fact that the respondent, when he made the statements that he would sell, honestly held that intention, and that was so despite the withdrawal of his wife's consent on the day the oral agreement was arrived at, that is, on or about the 17th November, 1980. At all times up to March 1981, he honestly believed that he would be able to persuade his wife to change her mind. An inference that could be drawn from the evidence is that possibly he did not think that she was serious when she said she had changed her mind about selling to the appellant, having regard to his past experience and the fact that they had decided to sell the house to reduce the mortgage on the entire holding. More importantly, his subsequent actions in allowing the valuation to be done, fixing the sale price and instructing his attorneys-at-law to prepare all necessary documents to conclude the sale, all speak to his honest belief that he would sell the house. It is noteworthy that the sale was not called off until the time had come for both the respondent and his wife to sign the agreement for sale; it had been prepared in their joint names as the vendors.

I would find as a fact that the respondent did not act fraudulently, and, therefore, cannot be guilty of deceit. Accordingly, I would dismiss the appellant's appeal and allow

the respondent's cross-appeal and order that the judgment in the court below be set aside and that judgment be entered for the respondent with costs to the respondent both in the court below and in this court, to be agreed or taxed.

ROWE, P.

In the event the appeal is dismissed. The cross-appeal is allowed. The judgment of the court below set aside. The appellant must therefore pay to the respondent the taxed or agreed costs both here and below.