

## Practice questions for Chapter 10 – Vitiating factors

### Problem question

Paul established and has built up a relatively successful, high-street accountancy firm. He is due to retire in six months, so decides to sell the firm. He is approached by Aled, who expresses interest in purchasing the firm and asks why the firm has been so successful. Paul replies that it is because: 'There are no other accountancy firms within 30 miles. This business will make you a fortune. I believe the annual level of profit is around £1.2 million.' Aled asks his accountant, Chloe, to verify Paul's stated level of profits. Chloe confirms Paul's statement, but, in fact, the firm only makes around £100,000 profit per year. Aled asks for a few weeks to think it over. Paul then discovers that Ernst & Waterhouse, a multinational accountancy firm, is due to open an office close to his firm. He does not inform Aled of this. Aled agrees to purchase the firm and subsequently discovers the true level of profit, as well as the opening of the rival office.

Aled seeks your advice to his legal options.

### Introduction

- Firstly, identify that you have correctly recognized the area(s) of the law that the question relates to. This question clearly involves a discussion of the law relating to misrepresentation.
- The introduction should be used to deal with any preliminary points that need raising before you apply the law to the question. For example, it would be well worth defining what an actionable misrepresentation involves and the requirements, namely:
  1. A false statement of fact or law;
  2. The statement should be addressed to the person misled; and
  3. The person misled must be induced into entering into the contract by the statement.
- You may also want to identify the issues to be discussed. In this question, Paul has made three statements that deserve discussion, so each statement will be considered in turn. Regarding each statement, it will first be discussed whether the statement is actionable and, if it is, what remedy(ies) will Aled be entitled to.

### 'There are no other accountancy firms within 30 miles'

*Is the representation actionable?*

- This is clearly a statement of fact and it is clearly addressed to Aled.
- The issue is is the statement false. At the time the statement is made, it is true. However, between the statement being made and the contract being entered into, Paul discovers that a large accountancy firm is to open in the area. The issue is has Paul committed a misrepresentation by not disclosing this change of circumstances to Aled.
- Point out that the general rule is that silence does not constitute misrepresentation (citing authority such as *Fletcher v Krell*),<sup>1</sup> so non-disclosure will not usually render a statement false. However, there

---

<sup>1</sup> (1873) 42 LJ QB 55.

are exceptions to this, and *With v O'Flanagan*<sup>2</sup> clearly states that where a change of circumstances occurs (as in our problem), the representor will need to inform the representee of the change, and if he does not do so, his silence will amount to a misrepresentation. Accordingly, Paul's statement is false.

- The final issue to discuss regarding the statement's actionability is whether Aled was induced into entering the contract by this statement. Whether inducement was present will depend strongly on the facts of the problem. A statement indicating that there is no local competition would certainly be a strong inducement into purchasing a firm.
- Based on the above, it would appear that this statement is indeed actionable. The issue therefore is what remedy would Aled be entitled to.

### *Remedies*

- The remedy or remedies available to Aled depend upon the type of misrepresentation that has been committed. The type of misrepresentation that has occurred here is open to discussion.
- Lord Blackburn in *Brownlie v Campbell*<sup>3</sup> stated that if a change of circumstances occurs, and the representor is aware of such a change and does not inform the representee of the change, then this would amount to a fraudulent misrepresentation.
- In *With v O'Flanagan*,<sup>4</sup> Lord Wright MR stated that, such a failure to disclose would not likely amount to fraud as the representor may not realize that he is obliged to inform the representee of the change. Therefore, failure to disclose a change of circumstances may amount to a negligent or innocent misrepresentation.
- In the more recent case of *Conlon v Simms*,<sup>5</sup> however, the Court of Appeal stated that a dishonest non-disclosure can amount to a fraudulent misrepresentation.
- There are not enough facts given to categorically state what form of misrepresentation Paul has committed, so all the various possibilities should be discussed. In all four types of misrepresentation, rescission is available, so unless rescission is barred (and there is nothing in the facts to indicate that it would be) or the court exercises its powers to award damages in lieu of rescission (which it cannot do if the misrepresentation is fraudulent), then Aled will be able to rescind the contract with Paul.
- Damages may also be available and the level of damages will depend upon the type of misrepresentation.

### **'This business will make you a fortune'**

#### *Is the representation actionable?*

- It could be argued that this does not amount to a representation and is instead a mere puff. If this is the case, it will not be actionable. However, it is not clear and so the possibility of it amounting to a representation must also be discussed.
- Paul may try to argue that the statement is one of opinion and, as statements of opinion are generally not actionable (*Bissett v Wilkinson*),<sup>6</sup> this statement will not amount to a representation. Aled could in turn argue that a statement of opinion can involve a misrepresentation of fact if the

---

<sup>2</sup> [1936] Ch 575 (CA).

<sup>3</sup> (1879-80) LR 5 App Cas 925.

<sup>4</sup> [1936] Ch 575 (CA).

<sup>5</sup> [2006] EWCA Civ 1749; [2008] 1 WLR 484.

<sup>6</sup> [1927] AC 177 (PC).

representor does not believe in the opinion stated (*Jendwine v Slade*)<sup>7</sup> or implies that he has reasonable grounds for the opinion when he does not (*Smith v Land and House Property Corporation*).<sup>8</sup> Therefore, if Paul does not believe in the statement, it will amount to a false statement of fact.

- Again, the statement was addressed to Aled and establishing inducement would be straightforward.
- It cannot be said conclusively that the statement amounts to an actionable misrepresentation, but it is likely that it would. The next step is therefore to determine what remedy Aled would be entitled to.

### *Remedies*

- If Paul made the statement without any belief in its truth, or if he was recklessly careless whether it be true or false, then the statement would amount to a fraudulent misrepresentation. This would allow Aled to rescind the contract and claim damages.
- It may be the case that Paul believed his statement to be true (although given the falsity of the statement regarding the profit, the student may feel that this is unlikely). If this is the case, it is more likely that the misrepresentation will be negligent, in so much as Paul should have known that his statement was false. Aled can therefore rescind the contract and claim damages. Aled would be advised to claim under the Misrepresentation Act 1967 as damages would be greater and the burden of proof would be on Paul to show that he had reasonable grounds to believe that his statement was true.

### **Annual level of profit**

#### *Is the representation actionable?*

- On the face of it, this would appear to be a clear misrepresentation. Paul's statement as to the firm's level of profit appears to be a false statement of fact, and it was clearly addressed to Aled.
- There are, however, one or two points that make the validity of this statement more problematic. First, Paul states that he *believes* that the annual level of profit is £1.2 million. Paul could therefore argue that this was a statement of opinion and such statements are not normally actionable. However, given that the actual level of profit was around £100,000, Aled would not find it difficult to argue that either Paul could not have honestly believed that the opinion stated was accurate, or that Paul had no reasonable grounds for such an opinion.
- The second point to note is the one that would cause problems for Aled. Aled asks his accountant, Chloe, to verify the validity of Paul's statement, which (despite its inaccuracy), she does. As Aled has relied on Chloe's verification and not Paul's statement, it is highly unlikely that Aled will be able to establish that Paul's statement induced him into entering the contract. The case of *Attwood v Small* provides powerful authority for this.
- It is therefore unlikely that Aled will be able to establish that Paul's third statement amounted to a misrepresentation.
- However, it could be argued that Chloe's verification of Paul's inaccurate statement does amount to a misrepresentation. It is clearly a false statement of fact that was addressed to Aled. It also clearly induced Aled into entering into the contract with Paul. It is highly probable therefore that Chloe has committed an actionable misrepresentation, so what remedy can Aled obtain from Chloe?

---

<sup>7</sup> (1797) 2 Esp 571.

<sup>8</sup> (1885) LR 28 ChD 7 (CA).

### Remedies

- If Chloe knew the true level of profit, but lied, then the misrepresentation will be fraudulent. However, in cases where professional advice is being provided, it is much more likely that the misrepresentation will be negligent. It will be remembered that where there is a three-party situation as in our case (Chloe's statement induces Aled into entering into the contract with Paul), then the Misrepresentation Act 1967 will not apply, and so Aled will need to base his claim under the common law. He will undoubtedly be able to recover damages for the loss suffered.

### Conclusion

- It is highly likely that Aled will be able to rescind the contract with Paul, and will also likely have a cause of action against Chloe. It should, however, be remembered that the courts will not permit double recovery. Therefore, in Aled recovers his full loss from Paul, it is unlikely that he will be able to recover additional damages from Chloe.

### Essay question

'The decision of the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* may have made the law relating to mistake as to quality more certain, but in doing so, it has made the law unacceptably rigid and removed a judicial discretion that was much-valued.'

Discuss.

### Introduction

- Begin by stating that this question involves a discussion of the law relating to mistake as to quality. State that the law relating to mistake as to quality was set out in the case of *Bell v Lever Bros Ltd*.<sup>9</sup> Briefly discuss why the test laid down in *Bell* was extremely difficult to satisfy.

### Mistake as to quality in equity

- This difficulty in establishing mistake at common law was made less burdensome by the existence of the doctrine of mistake in equity. The issue here is what is the relationship between the two.
- The case of *Solle v Butcher*<sup>10</sup> first established the concept of common mistake at equity. In this case, Denning LJ (as he then was) began by stating that the restrictive interpretation evidenced in *Bell* was correct. He went on to suggest, however, that *Bell* was not the whole of the law in relation to common mistake, and said that there was also a doctrine of equity, not referred to by the House of Lords in *Bell*. Subsequent commentators (e.g. Poole) have wondered how the House of Lords in *Bell* managed to forget about this doctrine of equity – the most likely explanation, and one backed up by evidence, is that Denning LJ made up the doctrine in this case. Certainly there is little doubt that before *Solle*, there was little authority for a separate doctrine in equity.
- Doubtless Denning LJ felt the need to create the doctrine in equity to mitigate the harshness of the doctrine at common law following *Bell*. The test in equity is considerably more relaxed than the common law test described above for three reasons:

---

<sup>9</sup> [1932] AC 161 (HL).

<sup>10</sup> [1950] 1 KB 671 (CA).

1. The test in equity is wider. Like the common law test, the equity test asked whether or not the mistake was fundamental, but the definition of 'fundamental' in equity was considerably more relaxed and so covered a broader range of mistakes.
  2. Second, the effect of mistake in equity is to render the contract voidable, whereas at common law, the contract would be void.
  3. Third, the courts in equity had greater remedial flexibility when setting aside a contract.
- Given that the test in *Solle* is more relaxed than the test in *Bell*, it can be validly argued that *Solle* challenged *Bell*. However, as *Solle* was a Court of Appeal decision and *Bell* was a House of Lords decision, the Court in *Solle* could not refuse to follow *Bell*. They got around this by saying that *Bell* applied to the doctrine of mistake at common law and so did not determine the scope of the doctrine of mistake in equity.
  - Accordingly, for over fifty years the position was that the common law doctrine of equity existed as a separate and more relaxed doctrine when compared to mistake at common law. In *Associated Japanese Bank v Credit Du Nord SA*,<sup>11</sup> Steyn J stated:

a narrow doctrine of common law mistake (as enunciated in *Bell v Lever Bros Ltd*) supplemented by the more flexible doctrine of mistake in equity (as developed in *Solle v Butcher* and later cases) seems to me an entirely sensible and satisfactory state of law.

- Steyn J described the doctrine in equity as 'supplementary' and he went on to consider the relationship between the two doctrines:

Where common law mistake has been pleaded, the court must first consider this plea. If the contract is held to be void, no question of mistake in equity arises. But, if the contract is held to be valid, a plea of mistake in equity may still have to be considered.

- Whilst the doctrine of mistake at equity did permit for more flexibility, it did create a tension between *Bell* and *Solle*. If there was an equitable jurisdiction, it is difficult to see why it was not used, or even mentioned, in *Bell*.

### **Great Peace**

- This tension was resolved in the case of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*,<sup>12</sup> when the Court of Appeal concluded that *Solle* should be disapproved on the grounds that it was inconsistent with the decision in *Bell*.
- A ship, the *Cape Providence*, suffered severe structural damage whilst in the South Indian Ocean and was in danger of sinking. The ship owners engaged the defendant to salvage the ship. However, the tug they hired was four to five days away from the ship.
- Fearing that the ship would sink and the crew drown, the defendant asked its brokers to find a vessel nearer the *Cape Providence* that could assist with the evacuation of the crew. The brokers consulted a reputable organization, Ocean Routes, who provided the brokers with the names of four vessels and informed the brokers that the nearest vessel was the *Great Peace*, a vessel owned by the claimant.
- It was estimated that the *Great Peace* was 35 miles away from the *Cape Providence* and on this basis, the defendant entered into a contract with the claimant to hire the *Great Peace* for a minimum of five

---

<sup>11</sup> [1989] 1 WLR 257 (QB).

<sup>12</sup> [2002] EWCA Civ 1407.

days. However, it turned out that the *Great Peace* was in fact 410 miles away from the *Cape Providence*.

- Given this, the defendant cancelled the contract and refused to pay the hire price. The claimant sued claiming five days hire. The defendant argued that the contract was (i) void at common law for common mistake, and (ii) voidable in equity for common mistake.
- With regard to (i) the Court applied the traditional test and held that to establish mistake at common law, the mistake must render the contract essentially and radically different from the subject matter which the parties believed to exist. The Court of Appeal did not believe that this test had been met. The mistake as to distance did not render the services to be provided by the claimant's vessel essentially different from which the parties had agreed – they would still be employed to salvage the ship and rescue the crew - it would just take longer.
- Regarding (ii), at first instance, Toulson J found the reasoning of Denning LJ in *Solle* to be defective. This was upheld in the Court of Appeal. Initially, the Court expressed sympathy for Lord Denning's view when Lord Phillips stated that:

We can understand why the decision in *Bell v Lever Bros* did not find favour with Denning LJ. An equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances.

- However, the Court ultimately concluded that *Solle* and similar cases could not stand alongside *Bell* – the Court of Appeal accordingly disapproved it and considered it not to be good law. In particular, Lord Phillips identified three questions for consideration:

(1) Prior to *Bell v Lever Bros Ltd* was there established a doctrine under which equity permitted rescission of a contract on a contract on grounds of common mistake in circumstances where the contract was valid at common law? (2) Could such a doctrine stand with *Bell v Lever Bros*? (3) Is this court none the less bound to find that such a doctrine exists having regard to *Solle v Butcher* and subsequent decisions.

- Based on these conditions, the court concluded that there was no equitable jurisdiction to set aside a contract that is valid at common law.
- Most academics (e.g. McKendrick, Poole, Reynolds) consider this case to be correctly decided on the facts, and there is no doubt that it does resolve the conflict between *Bell* and *Solle*. McKendrick especially argues that on the facts of the case, it would be unlikely that the defendants would have been able to establish mistake in equity anyway.
- But this can also lead to criticism. A decision by the Court of Appeal to hold that another Court of Appeal decision is incorrect is a bold step. In fact, the general rule is that Court of Appeal decisions are binding on later Court of Appeal panels. The Court in *Great Peace* used an exception to this that *Solle* was incompatible with *Bell*. *Solle* had been followed on several occasions and one could legitimately argue (as does McKendrick) that it should have been left to the House of Lords to overrule the case. Further, given that on the facts there would probably have been no mistake in equity, there was no pressing need to overrule *Solle* in this case.
- Also criticism has been levelled at the length and time taken to overrule *Solle*. The Court carefully examined all the cases from which the doctrine in equity was supposed to derive and in which it was considered. Reynolds has argued that there was no need to do this as there was little evidence for the doctrine in equity in any case. As we have noted, Lord Denning probably conceived the doctrine in *Solle* himself without any real case law to back it up.

- This lack of authority has been known for some time. Sir Christopher Slade stated this as far back as 1954.<sup>13</sup> The lack of real authority meant that the Court in *Great Peace* could have disposed of *Solle* with little fuss. Yet for some reason, the Court of Appeal decided to spend considerable time citing many cases and offering elaborate reasoning to justify what could be seen as a relatively simple conclusion.

Such unnecessary judgments are a waste of both time and expense. Of this, Reynolds stated that '[t]here is a danger that the common law, already under some threat in England, may throttle itself by a mountain of paper.'

- The upshot of the case is that, for the moment at least, there is no doctrine of common mistake in equity. Whilst on principle and in terms of consistency, this may be the correct view, it does remove the remedial flexibility that equity provided. At common law, contracts found to have a mistake are void – in that sense it is an 'all or nothing' remedy. It has been argued that this is perhaps the 'most disturbing feature'<sup>14</sup> of the *Great Peace Shipping* case. Chandler, Devenney and Poole conclude:

Whatever the dubious origins for supplemental equitable intervention, and however difficult it may have been to rationalise the common law and equitable treatment, there can be no denying that the exercise of this jurisdiction enabled justice to be done in individual cases as between the parties, and the courts (or at least those below the House of Lords) had long accepted the availability of such relief as forming part of their discretion.<sup>15</sup>

- This view is reminiscent of that espoused by Sir Christopher Staughton in the case of *West Sussex Properties Ltd v Chichester DC*,<sup>16</sup> where he stated:

It is a matter of some satisfaction, in my view, that we can and do regard ourselves as bound by the decision in *Solle v Butcher* ... That decision has now stood for over 50 years. Despite scholarly criticism it remains unchallenged in a higher court; indeed, there have been remarkably few reported decisions where it has been considered during that long period. As this case shows, it can on occasion be the passport to a just result.

- Against this idea that the doctrine of equity in *Solle* can produce justice in individual cases, the court in *Great Peace* had no answer.

---

<sup>13</sup> C Slade, 'The Myth of Mistake in the Law of Contract' (1954) 70 LQR 385.

<sup>14</sup> A Chandler, J Devenney and J Poole, 'Common Mistake: Theoretical Justification and Remedial Inflexibility' [2004] JBL 34, 52.

<sup>15</sup> *ibid.*

<sup>16</sup> Unreported, 28<sup>th</sup> June 2000.