Hilary Term
[2014] UKSC 9
On appeal from: [2011] CSIH 81

JUDGMENT

Cramaso LLP (Appellant) *v* Ogilvie-Grant, Earl of Seafield and Others (Respondents) (Scotland)

before

Lord Mance
Lord Clarke
Lord Reed
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

12 February 2014

Heard on 18 and 19 November 2013

Appellant
Alan Dewar QC
Graeme Hawkes
(Instructed by Anderson Strathern LLP)

Respondent
Craig R K Sandison QC
David Thomson
(Instructed by Brodies)

LORD REED (with whom Lord Mance, Lord Clarke, Lord Carnwath and Lord Toulson agree)

1. The appellant is a limited partnership formed by Mr Alistair Erskine and his wife as a vehicle for entering into a commercial contract with the respondents. These proceedings were brought by the appellant on the basis that it was induced to enter into the contract by a misrepresentation which was fraudulent or in any event negligent. The appellant sought the reduction of the contract and damages. After proof the Lord Ordinary, Lord Hodge, found that Mr Erskine was the directing mind of the appellant, and that he had decided to enter into the contract in reliance upon a negligent misrepresentation contained in an email sent to him some weeks before the appellant was formed. The allegation of fraud was found not to have been established: [2010] CSOH 62. The latter point has not been pursued further. Nor has the present appeal concerned the question whether the remedy of reduction may be available. The issue with which we are concerned is whether the appellant was induced to enter into the contract by a negligent misrepresentation and, if so, is in principle entitled to recover damages.

2. The Lord Ordinary focused upon the legal situation as at the time when the email in question was sent. He approached the case as one where A (the appellant, through Mr Erskine acting as its agent) had relied upon a representation made by B (the respondents) to C (Mr Erskine acting as an individual), and where the question was whether B had owed a duty of care to A at the time when the representation was made to C. Applying the principles set out in *Caparo Industries plc v Dickman* [1990] 2 AC 605, the Lord Ordinary held that the appellant could not recover damages because it had not been in existence at the time when the email was sent. Although the respondents had owed a duty of care to Mr Erskine, no such duty could in his view have been owed at that time to the appellant, since a non-existent entity could not hold any right or be owed any duty.

3. Both parties appealed against the Lord Ordinary's decision. Before the Inner House, it was conceded on behalf of the respondents that the Lord Ordinary had erred in considering that the non-existence of the appellant at the time when the email was sent was necessarily an insuperable obstacle to the existence of a duty of care: it was accepted that in appropriate circumstances a duty of care could be owed to a class of persons, some of whom might not then be in existence. In the present case however, it was submitted, at the time when the email was sent there was no-one other than Mr Erskine whose reliance upon it could reasonably have been foreseen. In those circumstances, there had therefore been no proximity between the appellant and the respondents. It followed, applying *Caparo*, that no duty of care had been owed by the respondents to the appellant. Those submissions were

accepted by the Second Division: [2011] CSIH 81; 2012 SC 240. Their discussion of the case again proceeded on the assumption that the relevant question was whether, at the time when the email was sent to Mr Erskine, the respondents had owed a duty of care to the appellant. Their Lordships did not address the respondents' cross-appeal, which challenged the Lord Ordinary's finding that a duty of care had been owed to Mr Erskine.

4. In the present appeal, the issues were identified by the parties as being, first, whether, on the assumption that the respondents owed a duty of care in negligence to Mr Erskine, such a duty of care was owed to the appellant; and secondly, whether the assumption upon which the first issue proceeded was correct. The case was again approached as one where A had relied upon a representation made by B to C, and where the relevant question was whether B had owed a duty of care to A. It was again assumed that that question had to be answered as at the time when the email was sent to Mr Erskine. The authorities relied upon were again *Caparo* and more recent English and Commonwealth authorities in which the *Caparo* principles were applied. The question focused in the printed cases, put shortly, was whether the *Caparo* principles could be regarded as satisfied as at the time when the email was sent, on the basis that the appellant was the alter ego of Mr Erskine, and the contract between the appellant and the respondents was the same as the contract which the respondents had had in contemplation when they made the statement to Mr Erskine.

5. There is however a question as to whether the basis upon which the case has been approached by the courts below, and by the parties in their printed cases, is correct. Is this truly a case in which A relied upon a representation made by B to C? Was the representation made only at the time when the email was sent? Or is this a case where, as was argued before the Lord Ordinary, there was a continuing representation, which was capable of remaining in effect until a contract was concluded? If so, in the circumstances of this case, was the contract concluded between the parties on the basis of a continuing representation made by the respondents to the appellant? If so, did the respondents assume a responsibility towards the appellant for the accuracy of the representation?

6. If these questions are answered affirmatively, then the case is not concerned with the circumstances in which a third party may sue in damages for economic loss suffered as a result of relying upon a representation of which it was not the addressee, but with the recovery of damages where a party to a contract was induced to enter into it by a negligent misrepresentation made to it by the other party to the contract. In Scots law, that involves a consideration of section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act") and of the authorities in which that provision has been discussed.

7. The questions which I have posed in para 5, and the area of the law which I have mentioned in para 6, were not discussed by the courts below or by the parties in their printed cases, but were raised during the hearing of the present appeal. Counsel for the respondents accepted that there would be no unfairness in the court's considering these matters; and, in the circumstances, the parties were permitted to make additional submissions in writing.

8. Before addressing these matters, it is necessary first to consider the relevant facts as found by the Lord Ordinary.

The relevant facts

9. The respondents are the owners of a grouse moor at Castle Grant, near Grantown-on-Spey, over which commercial shooting takes place. Recognising that there required to be substantial investment in the moor in order to increase the number of grouse, and being unwilling to undertake that investment themselves, they sought to attract a tenant. The matter was taken forward by their employee and chief executive, Mr Sandy Lewis, and by a chartered surveyor, Mr Jonathan Kennedy, who was engaged to advise them. In May 2006 Mr Erskine learned that a lease of the moor might be available, and entered into discussions with Mr Kennedy. He was sent the proposed terms of a lease. He did not however pursue his interest.

10. The respondents then entered into discussions with another prospective tenant, Mr Paddy McNally. In the course of those discussions, Mr McNally expressed concern about possible over-shooting of the moor during the 2006 season. In order to reassure Mr McNally that the respondents had considered the capacity of the moor to bear the shooting planned for that season, Mr Lewis sent his adviser an email dated 4 August 2006, in which he gave information about the grouse counts carried out on the moor earlier that year and the estimated grouse population of the moor, extrapolated from the counts. The areas of the moor in which the counts were carried out were not however representative of the moor as a whole, but were the parts of the moor which were considered to be the most heavily populated by grouse. As a result, the estimated grouse population, as stated in the email, was well in excess of the actual population. In the event, Mr McNally decided not to proceed with the transaction.

11. On Mr McNally's withdrawal, Mr Kennedy contacted Mr Erskine in early September 2006 in order to pursue the possibility of his taking a lease of the moor. After taking part in a shoot and making a further visit to the moor, Mr Erskine became concerned that the shooting planned for that season would leave an inadequate breeding population on the moor. He expressed his concern in an email to Mr Kennedy, in which he said that he was not qualified to quantify the damage

which the shooting was doing to the grouse stocks but thought that it was not insignificant. Mr Kennedy forwarded the email to Mr Lewis, stating in his covering message that there was no doubt in his mind that the estate had been overshot, and that this had undoubtedly had an effect on the letting of the moor and might have made it impossible.

12. Mr Lewis replied by email on 29 September, stating:

> "I have sent a separate email re the grouse programme which you may wish to pass on to Alastair Erskine."

The separate email sent by Mr Lewis to Mr Kennedy, which I will refer to as the critical email, did not form part of the chain of messages initiated by Mr Erskine's email, and did not have the appearance of responding to any concern expressed about over-shooting. Its subject was "Grouse Bags", and it began by stating:

> "Now that we are well through with the grouse season, I thought it may be appropriate to recap on how we set this year's programme for Castle Grant and where we are to date. The following information was provided to you at the beginning of August."

Mr Lewis then repeated the information which had originally been sent in the email of 4 August 2006. The email concluded:

> "I am very happy for you to pass this on to Alastair Erskine if you feel this would be helpful to him."

13. On 2 October 2006 Mr Kennedy forwarded the critical email to Mr Erskine, as Mr Lewis had suggested. Mr Erskine decided to proceed with the transaction, and instructed his solicitors, Anderson Strathern, to conclude the lease in the name of a limited liability partnership. On 10 October Anderson Strathern informed the respondents that Mr Erskine intended to use a new limited liability partnership to take the tenancy. Discussions continued between Mr Erskine and Mr Lewis, who was aware of Mr Erskine's intention to incorporate the appellant as a vehicle for the lease. The appellant was incorporated on 16 November 2006. The lease was signed on various dates between 8 December 2006 and 18 January 2007.

14. Mr Erskine subsequently discovered that the counting areas were not representative of the moor as a whole, that the grouse population was smaller than he had believed, and that it would in consequence take longer for the population to

recover to the point where shooting could take place at the level which he had intended. He considered that Mr Lewis had deliberately misled him in the critical email in order to induce him to take on the lease, and brought the present proceedings on that basis.

15. The Lord Ordinary accepted that the critical email contained a material misrepresentation, namely an implicit representation that the counts were representative of the population of grouse on the moor. He found that Mr Lewis had acted honestly but negligently. He had had no basis for making the representation and did not check his facts before doing so. He had been aware of Mr Erskine's concern that there had been overshooting, and of the importance to an incoming tenant of an adequate population on which to build. The Lord Ordinary stated (paras 104-105):

> "The purpose of the representation was to give reassurance to Mr Kennedy and Mr Erskine that the 2006 shooting programme was justified and that it would leave a substantial surplus of birds on the moor, in order to maintain Mr Erskine's interest in entering into the lease… The managers of the estate had, or would be perceived to have, access to a much more detailed knowledge of the quality of their moor than any other party. In response to expressed concerns about the 2006 shooting programme and the availability of a sufficient end of season surplus, Mr Lewis chose to provide reassurance in his representations."

The Lord Ordinary also accepted that the representation had induced Mr Erskine to choose to enter into the lease.

Was the representation of a continuing nature?

16. The law relating to the effect of representations upon a contract proceeds on the basis that a representation made in the course of pre-contractual discussions may produce a misapprehension in the mind of the other party which continues so as to have a causative effect at the time when the contract is concluded. It is on that basis that a misrepresentation may lead to the setting aside of the contract as being vitiated by error or fraud.

17. The capacity of a representation to have a continuing effect was noted by Lord Cranworth, when rejecting what he described as "a very desperate argument" that a representation could not justify the setting aside of a bond because it was made some time before the bond was executed, in *Smith v Kay* (1859) 7 HL Cas 750, 769:

> "It is a continuing representation. The representation does not end for ever when the representation is once made; it continues on. The pleader who drew the bill, or the young man himself, in stating his case, would say, Before I executed the bond I had been led to believe, and I therefore continued to believe ..."

18. A similar explanation can be found in the judgment of Lord Wright MR in *With v O'Flanagan* [1936] Ch 575, which was another action for the rescission of a contract. Under reference both to English authorities concerned with the law of contract, and to a Scottish authority concerned with the law of reparation (the case of *Brownlie v Miller* (1880) 7 R (HL) 66; *Brownlie v Campbell* (1880) 5 App Cas 925, which I shall discuss shortly), his Lordship observed at p 584 that "a representation made as a matter of inducement to enter into a contract is to be treated as a continuing representation", and added at pp 584-585:

> "This question only occurs when there is an interval of time between the time when the representation is made and when it is acted upon by the party to whom it was made, who either concludes the contract or does some similar decisive act; but the representation remains in effect and it is because that is so, and because the court is satisfied in a proper case on the facts that it remained operative in the mind of the representee, that the court holds that under such circumstances the representee should not be bound."

19. The law relating to reparation for harm suffered as a result of the conclusion of a contract in reliance upon a misrepresentation made in the course of pre-contractual discussions proceeds in this respect upon the same basis. As Smith J observed in the Australian case of *Jones v Dumbrell* [1981] VR 199, 203:

> "When a man makes a representation with the object of inducing another to enter into a contract with him, that other will ordinarily understand the representor, by his conduct in continuing the negotiations and concluding the contract, to be asserting, throughout, that the facts remain as they were initially represented to be. And the representor will ordinarily be well aware that his representation is still operating in this way, or at least will continue to desire that it shall do so. Commonly, therefore, an inducing representation is a 'continuing' representation, in reality and not merely by construction of law."

20. As Smith J indicated by his use of the words "ordinarily" and "commonly", whether a representation should be treated as continuing depends upon the facts of the individual case (see also *Macquarie Generation v Peabody Resources Ltd* [2000]

NSWCA 361, paras 3-22, per Mason P). Where a misrepresentation does not have a continuing effect, for example because it is withdrawn or lapses, or because the other party discovers the true state of affairs before the contract is concluded, it cannot induce the other party to enter into the contract and therefore cannot affect its validity or give rise to a remedy in damages for any loss resulting from its conclusion. As Lord Brougham observed in *Irvine v Kirkpatrick* (1850) 7 Bell App (HL) 186, 237-238, in order that the misrepresentation may be of any avail whatever, it must inure to the date of the contract. If the other party discovers the truth before he signs the contract, "the misrepresentation and the concealment go for just absolutely nothing".

21. Whether the remedy sought is reduction of the contract or damages for the loss suffered as a result of entering into it, in either case a representation may therefore be treated by the law as having a continuing effect, rather than as being an event whose legal consequences are necessarily fixed at the time when the statement in question was made.

22. The continuing effect of a pre-contractual representation is reflected in a continuing responsibility of the representor for its accuracy. Thus a person who subsequently discovers the falsity of facts which he has innocently misrepresented may be liable in damages if he fails to disclose the inaccuracy of his earlier representation: *Brownlie v Miller* (1880) 7 R (HL) 66, 79; *Brownlie v Campbell* (1880) 5 App Cas 925, 950 per Lord Blackburn. The same continuing responsibility can be seen in the treatment of representations which are true when made, but which become false by the time the contract is entered into: see, for example, *Shankland & Co v Robinson & Co* 1920 SC (HL) 103, 111 per Lord Dunedin.

23. The law is thus capable, in appropriate circumstances, of imposing a continuing responsibility upon the maker of a pre-contractual representation in situations where there is an interval of time between the making of the representation and the conclusion of a contract in reliance upon it, on the basis that, where the representation has a continuing effect, the representor has a continuing responsibility in respect of its accuracy.

24. In the present case, the representation contained in the critical email was undoubtedly of a continuing nature so long as Mr Erskine remained the prospective contracting party. The question then arises whether, in the circumstances of this case, the representation continued after the identity of the prospective contracting party changed, and, if so, whether the respondents assumed a responsibility towards the appellant for the accuracy of the representation.

Did the representation, and responsibility for its accuracy, continue after the identity of the contracting party changed?

25. In principle, the possibility that a representation may continue to be asserted, and may have a causative effect so as to induce the conclusion of the contract, is not necessarily excluded where, as in the present case, the contracting parties are not the original representor and representee. In such a case, it is possible that the inference can be drawn from the parties' conduct that they proceeded with the negotiation and conclusion of the contract on the basis that the accuracy of the representation continued to be asserted by the representor, implicitly if not expressly, after the identity of the prospective contracting party had changed. In such circumstances the representation may have continued to have a causative effect, so as to induce the conclusion of the contract.

26. Where the inference to be drawn is that a representation continued to be made until the contract was concluded, it may also be inferred that the risk of harm being suffered as a result of reliance upon it, in the event that it was inaccurate, continued to be foreseeable. In such circumstances, the representor may be taken to have assumed responsibility for the accuracy of the representation towards the contracting party who relied upon it, even though that person was not the original representee.

27. No authority has been cited in which the court has considered the liability of a contracting party for a representation inducing the conclusion of the contract by someone other than the original representee. The decision of the House of Lords in *Briess v Woolley* [1954] AC 333 is however relevant. The case concerned a fraudulent misrepresentation made in the course of pre-contractual discussions by a shareholder in a company. He was subsequently authorised by the other shareholders to continue the negotiations as their agent, and in due course a contract was concluded. The shareholders were held liable in damages to the other contracting party, notwithstanding that the representation had been made by the shareholder before he began to negotiate on their behalf. Lord Reid stated at p 349:

> "The misrepresentations were continuing representations intended to induce the other party to make the contract, and when that party made the contract to his detriment, a cause of action arose, and in my opinion it arose against both the agent and the principal. The agent continued to be fraudulent after he was appointed. 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."

Lord Tucker added at p 354:

> "the duty of the agent, who has made the misrepresentation, to correct it cannot be regarded as only a personal obligation. If he has in the meantime been appointed agent with authority to make representations for the purpose of inducing a contract he, in his capacity as agent, is by his conduct repeating the representations previously made by him."

28. The same principle should also apply in the converse situation, where the representation is made to (rather than by) the agent prior to the commencement of his agency. In such a situation, depending of course on the facts, the representor can equally be taken to be, by his conduct, implicitly repeating the representation previously made, and can therefore owe a duty in respect of the accuracy of the representation towards the agent's principal.

29. The case of *Briess v Woolley* concerned a misrepresentation which was fraudulent rather than negligent; and it preceded the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Once it is accepted that a negligent misrepresentation can give rise to a remedy in damages, however, there is no reason why the approach adopted in *Briess* should not apply to negligent as well as to fraudulent misrepresentations which are made in order to induce the representee to enter into a contract. A negligent misrepresentation is equally capable of having a continuing effect up until the time when the contract is concluded, where the person by whom the representation is made, or to whom it is addressed, becomes the agent of the person by whom the contract is concluded.

30. In the present case, the change in the identity of the prospective contracting party did not affect the continuing nature of the representation, or the respondents' continuing responsibility for its accuracy. It appears from the Lord Ordinary's findings that the negotiations which had been under way between Mr Erskine and the respondents, in the course of which the critical email was sent, simply continued after it had become apparent that a limited liability partnership was to be used as a vehicle for Mr Erskine's investment. Neither party drew a line under the previous discussions, after the appellant was formed, in order to begin afresh. Neither party disclaimed what had previously been said in the course of their discussions, or sought assurances that it could be relied upon as between the appellant and the respondents. The seeking of such an assurance would no doubt have appeared to those involved to be an unnecessary formality. As the Lord Ordinary found, the representation made in the critical email remained operative in the mind of Mr Erskine after he began to act in the capacity of an agent of the appellant, up until the time when the lease was executed on behalf of the appellant. The appellant was thus induced to enter into the contract by that representation.

31. In continuing and concluding the contractual negotiations with the appellant, through its agent Mr Erskine, without having withdrawn the representation earlier made to Mr Erskine as an individual, the respondents by their conduct implicitly asserted to the appellant the accuracy of that representation; and they did so in a situation where it continued to be foreseeable that the representation would induce the other party to the negotiations to enter into a contract. They therefore assumed a responsibility towards the appellant for the accuracy of the representation. They therefore owed the appellant a duty of care, which they failed to fulfil.

The recovery of damages where a party to a contract was induced to enter into it by a negligent misrepresentation

32. The law in Scotland governing the recovery of damages, where a party to a contract was induced to enter into it by a negligent misrepresentation made by or on behalf of another party to the contract, involves a consideration of section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and of the authorities in which that provision has been discussed.

33. Following the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, the Scottish courts accepted the general principle that damages could be recovered for economic loss suffered as a result of reliance upon a negligent misrepresentation, where the relationship between the person making the representation and the person relying upon it was of a kind which gave rise to a duty of care. The salient feature of that case, and of later analogous cases such as *Smith v Eric S Bush* [1990] 1 AC 831, which gave rise to such a duty, was identified by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 620-621:

> "The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it."

34. Where a representation is made by one person to another in relation to the subject matter of a contract which they are contemplating entering into, the circumstances may plainly be of the kind described by Lord Bridge. Nevertheless, in a number of decisions at first instance, the Scottish courts treated such cases as an exception to the principle established by *Hedley Byrne*, on the basis that the doctrine of precedent required them to follow the decision of the Inner House in *Manners v Whitehead* (1898) 1 F 171. It had been held in that case, in the words of the headnote, that "A person who is induced to enter into a contract by misrepresentations is not entitled to damages from the person making the representations, unless they are fraudulent." The decision reflected the view of the law then prevailing both in Scotland and in England (see *Le Lievre v Gould* [1893] 1 QB 491): a view from which the House of Lords departed in *Hedley Byrne.*

35. This exception to the *Hedley Byrne* principle was illogical and unjust. It resulted in a situation where it was accepted that A could sue B where B's negligent misrepresentation induced A to enter into a contract with C, provided there was a "special relationship" between A and B, but not where it induced A to enter into a contract with B himself (see, for example, *Twomax Ltd v Dickson, McFarlane & Robinson* 1982 SC 113). The Scottish Law Commission responded by recommending legislative reform. Its Report on Negligent Misrepresentation (Scot Law Com No 92, 1985) contained a draft Bill, which was enacted as section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Section 10(1) provides:

> "A party to a contract who has been induced to enter into it by negligent misrepresentation made by or on behalf of another party to the contract shall not be disentitled, by reason only that the misrepresentation is not fraudulent, from recovering damages from the other party in respect of any loss or damage he has suffered as a result of the misrepresentation; and any rule of law that such damages cannot be recovered unless fraud is proved shall cease to have effect."

36. Section 10(1) is drafted in a negative form. It does not provide that a party to a contract who has been induced to enter into it by negligent misrepresentation made by or on behalf of another party to the contract is entitled to recover damages: it provides that such a person shall not be disentitled by reason only that the misrepresentation is not fraudulent, and that any rule of law that such damages cannot be recovered unless fraud is proved shall cease to have effect. Whether such a person is entitled to damages therefore depends on the common law, modified by section 10(1) only to the extent that recovery is not excluded by reason of the absence of fraud. The consequence is that entitlement to damages depends upon establishing the breach of a duty of care, since at common law it is the breach of a duty of care which renders a negligent misrepresentation wrongful.

37. This approach reflects the Commission's identification of the mischief in the existing law as being the rule in *Manners v Whitehead*, as it was described: that is to say, the requirement to establish fraud. It considered, and rejected, the possibility that the Scottish legislation should be modelled upon section 2(1) of the Misrepresentation Act 1967: a complex provision which has the effect of dispensing with the need to establish a duty of care in English law where a person has entered into a contract after a misrepresentation has been made to him by another party to the contract, and as a result has suffered loss. The Commission considered that, in Scotland, the common law should continue to govern the question whether the circumstances were such as to give rise to a duty of care (para 3.2).

38. The Commission noted that the relationship between parties in pre-contractual discussions was one where the proximity between them, and the foreseeability of reliance upon representations, were particularly apparent (para 2.3), but considered that the existence of a duty of care should continue to be governed by the common law (para 3.2). There are indeed a variety of circumstances in which a duty of care might be absent: for example, where the representation was accompanied by an effective disclaimer of responsibility, or where the representation was subject to a time limit which had lapsed, or where reliance upon the representation was not reasonably foreseeable, or where the parties by their contract effectively excluded liability for negligent pre-contractual representations, or where the contract itself governs the subject matter of the representation.

39. Section 10(1) does not therefore impose a statutory liability for careless misrepresentations which have induced a party to enter into a contract, but removes the barrier which previously existed to the recovery of damages where a party had been induced to enter into a contract by a misrepresentation made in breach of a duty of care.

40. This point does not emerge altogether clearly from the two authorities in which section 10(1) has been considered. In the first, *Hamilton v Allied Domecq plc* 2001 SC 829, the Lord Ordinary, Lord Carloway, was not assisted by the fact that he was not referred to any Scottish authorities on the subject of negligent misrepresentation but was instead referred to section 2(1) of the Misrepresentation Act 1967. His Lordship stated at para 17 that, as a result of section 10(1) of the 1985 Act, there was no need to enter into the field of *Hedley Byrne* type "special relationships" and whether a duty of care was owed: the statute provided the remedy, and its practical effect was that one contracting party had a duty to the other not to make negligent misrepresentations which induced the other to contract.

41. That approach was followed by Lord Glennie in *BSA International SA v Irvine* [2010] CSOH 78. He stated at para 15 that, as a result of the section, it was enough to found a claim for damages that the representation was negligent: there

was no need to import into the relationship of intending contractual parties concepts that had developed in the law of tort and delict to identify other situations in which a party might owe a duty of care to another as regards the accuracy of statements made by him. Lord Glennie added at para 16 that the issue was likely to be almost entirely academic, since the criteria for the imposition of a duty of care would invariably be satisfied when the misstatement was an operative misrepresentation, in the sense in which that expression had been used by Prof J M Thomson in his article, "Misrepresentation", 2001 SLT 279: that is to say, an inaccurate statement of fact made in pre-contractual discussions which induced the misrepresentee to enter into the contract and which would have induced a reasonable person to do so.

42. I sympathise with the view that this issue will often be academic, for the reason given by Prof Thomson and adopted by Lord Glennie. The law does not impose a general duty of care in the conduct of contractual negotiations, reflecting the fact that each party is entitled, within the limits set by the law, to pursue its own interests. As the Supreme Court of Canada has observed, the prospect of causing deprivation by economic loss is implicit in the negotiating environment (*Martel Building Ltd v Canada* [2000] 2 SCR 860, para 51). It is also possible that a contract entered into between the parties may limit or exclude the scope for finding a duty of care in respect of pre-contractual representations. Nevertheless, it has long been accepted that the relationship between the parties to contractual negotiations may give rise to such a duty in respect of representations which the representor can reasonably foresee are likely to induce the other party to enter into the contract, unless circumstances negativing the existence of such a duty, such as those mentioned in para 38, are present. It is therefore unnecessary in most cases to go back to the fundamental principles governing the existence of a duty of care, as set out in the tripartite test adopted in *Caparo Industries plc v Dickman* [1990] 2 AC 605, or to undertake an assessment of whether a "special relationship" existed. Questions as to the circumstances in which the relationship between parties negotiating a contract gives rise to a duty of care in respect of representations inducing the contract are not now of such a novel character as normally to require consideration from first principles.

43. As I have explained, however, that does not mean that liability will necessarily exist where a party to a contract has been induced to enter into it by a negligent misrepresentation made by or on behalf of another party to the contract. Since section 10(1) does not create a statutory liability, the question whether the misrepresentation was made in breach of a duty of care still has to be answered, even if the answer may sometimes be obvious.

44. In the present case, it is plain, on the Lord Ordinary's findings of fact, that a duty of care was owed by the respondents to Mr Erskine in respect of the representation contained in the critical email. For the reasons I have explained, a duty of care was also owed by the respondents to the appellant, when they negotiated

and concluded the contract on the basis of the discussions previously held with Mr Erskine. The respondents acted in breach of that duty of care, and are therefore liable in damages for any loss suffered by the appellant as a result. The case will therefore have to return to the Court of Session for further procedure.

Conclusion

45. For these reasons, I would allow the appeal.

LORD TOULSON

46. I agree with the reasoning and conclusion of Lord Reed. I add my own shorter judgment because the case is in some respects novel. However, its solution requires no new principle. Once properly identified, the application of the relevant principles becomes straightforward, but they were perhaps obscured rather than illuminated by the way in which the case was presented below.

47. The claim was for the reduction (ie setting aside) of the lease entered into between the claimant Cramaso, acting through the agency of Mr Erskine, as lessee, and the respondent trustees, as lessor, and for repayment of Cramaso's associated expenses. Cramaso was created by Mr Erskine for the purpose of taking the lease, and he was its controller or, as the Lord Ordinary described him, its *directing mind*. The ground of Cramaso's claim was that it had been induced to enter into the lease by a misrepresentation made either fraudulently or negligently by an agent of the trustees to Mr Erskine. The representation was made before Cramaso's creation.

48. The Lord Ordinary found that Mr Erskine had been induced to enter into the lease on behalf of Cramaso by a misrepresentation. He rejected the allegation that the misrepresentation had been made fraudulently, but he found that it had been made negligently. However, he granted absolvitor (ie dismissed the proceedings) on the ground that Cramaso had not come into the picture at the time when the misrepresentation was made to Mr Erskine. For that reason he concluded that (a) no duty of care was owed by the trustees to Cramaso at the time when the misrepresentation was made, and (b) Cramaso therefore had no cause of action against the trustees and no right to reduction of the lease. I part company with the Lord Ordinary, and the Second Division which upheld his judgment, at stage (b).

49. In the courts below attention was concentrated on the legal position at the time of the representation, and this was regarded as decisive. In this court Mr Dewar QC refocused the argument in response to questions and comments from the bench.

He switched from focusing on the time of the misrepresentation, and the question whether at that time the trustees' duty of care might be defined so as to encompass a category of affected persons capable of including Cramaso on its later formation, to the different issue whether the absence of a duty of care owed to Cramaso at the time of the misrepresentation was fatal to its claim on the facts as found by the Lord Ordinary. The change of tack took Mr Sandison QC by surprise, but he fairly and properly accepted that there was no injustice in the court addressing the issue.

50. Logically the first issue to consider is the challenge made by the trustees to the Lord Ordinary's finding that there was a negligent misrepresentation to Mr Erskine. The question was essentially one of fact on which the Lord Ordinary was entitled to find as he did. However, Mr Sandison did raise one point of law. He submitted that it was necessary for Cramaso to show that at the time of Mr Lewis's email dated 29 September 2006 to Mr Kennedy he knew or ought to have known that there was a high degree of probability that Mr Erskine would be sent the email and would rely upon it. Mr Sandison based that submission on passages in *Caparo Industries plc v Dickman* [1990] 2 AC 605 from the speeches of Lord Bridge at pp 620-621, Lord Oliver at p 638 and Lord Jauncey at pp 660-661.

51. The submission is ill-founded. In *Caparo* the court was considering the familiar situation in which it is alleged that D, the defendant, was negligent in a statement made to C, the claimant, upon which C relied in entering into a transaction with T, a third party. It is readily understandable that in that type of situation cogent grounds are needed to explain why D ought to have had C in his contemplation as somebody entitled to rely on D's statement when considering whether to enter into a transaction with T. The situation where a statement is made during contractual negotiations by one prospective contracting party to another is quite different. Here, the statement made by Mr Lewis was intended for the attention of Mr Erskine in relation to the very transaction about which they were negotiating.

52. Since *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, 820, it has been established that the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 is capable of applying to pre-contractual representations. Lord Denning MR stated the principle as follows:

> "if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and

thereby induces the other side to enter into a contract with him, he is liable in damages."

53. This is not necessarily an exhaustive statement of the circumstances in which a duty of care may arise in connection with a statement made in a pre-contractual context. However, where the principle in *Esso v Marden* applies, there is no need for a court to go into issues of the kind discussed in *Caparo* and the various other authorities relied on by Mr Sandison, including *Smith v Eric S Bush* [1990] 1 AC 831, *White v Jones* [1995] 2 AC 207, *Al Saudi Banque v Clark Pixley* [1990] Ch 313 and *Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181. Those were all cases where C claimed to have entered into a transaction with T in reliance on a representation by D and the courts wrestled with the problem how to determine whether D owed C a duty of care in relation to that transaction. In particular, the courts struggled with the question how the putative duty was to be defined so as to avoid, in Cardozo CJ's memorable expression in *Ultramares Corporation v Touche* (1931) 174 NE 441, 444 "liability in an indeterminate amount for an indeterminate time to an indeterminate class". No comparable problem arises in considering whether the trustees owed a duty of care to Mr Erskine when making a representation to him about the grouse moor which they were hoping that he would lease.

54. Even, if Mr Sandison's primary submission on the *Caparo* point were right, it would in any event be immaterial what Mr Lewis may have considered to be the degree of probability that Mr Kennedy would pass on his email to Mr Erskine, since Mr Lewis invited Mr Kennedy to consider passing it on, which Mr Kennedy unsurprisingly did. It was marketing information provided by the trustees, through Mr Lewis, to their agent with a view to its being used in the lease negotiations.

55. I turn to the point on which Cramaso's claim foundered in the courts below. The issue is whether it is fatal to Cramaso's claim that the negligent misrepresentation was made before Cramaso was formed or even mentioned.

56. The formation of Cramaso made no difference to the subject matter of the negotiations or to the people involved in conducting them. What changed was the role of Mr Erskine. From being himself the prospective lessee, he became the agent of a company created and controlled by him for the purpose of taking the lease. The question which arises in these circumstances is whether the earlier misrepresentation is to be regarded as water under the bridge, a matter about which Cramaso could have no cause for complaint albeit that its factual effect was to induce Mr Erskine to go ahead with the transaction which was concluded by the execution of the lease, or whether the misrepresentation is to be regarded as having continued up to the time of the execution of the lease so as to entitle Cramaso to complain of it.

57. As a matter of general principle, a representation made during contractual negotiations for the purpose of inducing a contract will ordinarily be regarded as continuing until the contract is actually concluded because it will generally be reasonable for the representee to continue to rely on it. There may be exceptions, for example where there has been a material change of circumstances which would make the representation irrelevant, but I can see no reason to depart from the general principle in the present case.

58. It is unnecessary for me to refer to all the authorities to which Lord Reed has drawn attention. However, *Briess v Woolley* [1954] AC 333 is particularly relevant to the present case because of the part played at the time of the representation by a person who became the agent of one of the parties after the representation was made but before the contract was made. The plaintiffs entered into a contract to buy the shares of company X as a result of a fraudulent representation by R, who was X's managing director. At the time of making the false representation R had no authority to negotiate a sale of the shares. He was subsequently authorised by X's shareholders to act on their behalf in the matter. The plaintiffs sued the sellers. The plaintiffs won at first instance, lost in the Court of Appeal but won in the House of Lords. They lost in the Court of Appeal because it was held, at [1953] 2 QB 218, 222, that the misrepresentation had been made once and for all before R became the sellers' agent for the purposes of the sale. The Court of Appeal also held that there was no ratification of R's earlier conduct. Its conclusion on the latter point was upheld by the House of Lords, but the appeal succeeded on the basis that the false representation was to be regarded as a continuing representation.

59. Mr Gerald Gardiner QC on behalf of the plaintiffs presented a simple argument. He submitted at p 335:

> "If one effects a sale by one's agent, who signs the contract, one cannot ratify the contract and take the money payable under it while at the same time disclaiming the way in which the contract was brought about."

60. Cramaso's argument in the present case is essentially the same, namely that the trustees cannot disclaim the way in which the contract was brought about by their agent.

61. Mr Gardiner's submission was echoed in the speech of Lord Reid at p 349. He rejected:

> "the contention that a principal can disclaim responsibility for fraudulent misrepresentations made by his agent which, although made before the agency commenced, to the agent's knowledge continued to influence the other party after his appointment as agent and finally induced the other party to enter into the contract which the agent had been authorised to make and did make on behalf of his principal. The misrepresentations were continuing representations intended to induce the other party to make the contract, and when that party made the contract to his detriment, a cause of action arose, and in my opinion it arose against both the agent and the principal."

62. Lord Tucker at pp 353-354 approved the statement of the trial judge that the law regarded the representations as continuing during the whole period between the time the representations were made and the time when they were finally acted upon. He said:

> "It was contended by counsel for the respondents that when once the representations were made the wrongful act was complete although no action for damages would lie until the representee suffered damage. He argued that the representations were not continuing but the consequences of the original representation continued, and accordingly, provided that the representor was not the agent of the respondents when the original representation was made, they could not be held responsible because the consequences of that representation took effect at a time when the representor had become their agent.
>
> No authority for this proposition was cited, and it is, in my view, founded upon error. The tort of fraudulent misrepresentation is not complete when the misrepresentation is made. It becomes complete when the misrepresentation – not having been corrected in the meantime – is acted upon by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted upon by the representee the tortious act is complete provided that the representation is false at that date. If false when made but true when acted upon there is no misrepresentation. In *Spencer Bower on Actionable Misrepresentation*, 2nd ed, p 77, article 73, it is stated: 'It is commonly said that the representation must be shown to have been false when made. But this is not quite correct. The only real issue is – was it true or false when it was acted upon?'

In *Halsbury's Laws of England*, 2nd ed, vol XX111, p 29, para 44, it is stated:

'Where there is an appreciable interval between the two dates above mentioned [ie 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.'

I do not think the accuracy of these statements can be challenged. It is true that there does not appear to be any express authority which can be quoted as an example of the application of this principle to a case of principal and agent where the agency commences after the making of a representation which is allowed by the agent to continue uncorrected with knowledge of its falsity until acted upon. I agree, however, with Barry J, that the duty of the agent, who has made the misrepresentation, to correct it cannot be regarded as only a personal obligation. If he has in the meantime been appointed agent with authority to make representations for the purpose of inducing a contract he, in his capacity as agent, is by his conduct repeating the representations previously made by him."

63. Although that was a case of a fraudulent misrepresentation, I cannot see that it makes a difference to the continuing nature of the representation whether it was fraudulent or negligent. It is, of course, true that a negligent misrepresentor is unlikely to be aware that he has been negligent, whereas the maker of a deliberately false statement will know what he has done. However, that does not affect the general proposition stated in Halsbury's Laws which Lord Tucker cited with approval, and it is logical that it should not do so. What matters is the continuing potency of the representation as an inducing factor. The potency and duration of a representation do not depend on the honesty or dishonesty of its maker.

64. In *Briess v Woolley* R was the representor, whereas in the present case Mr Erskine was the representee. But I do not see why that distinction should make any difference to the principle. The proper conclusion is that the representation was a continuing representation, which operated as an inducing factor on the mind of Mr Erskine after he became Cramaso's agent, and Cramaso was entitled to rely on it, just as Cramaso (on the authority of *Briess v Woolley*) would have carried responsibility for the ongoing effect of a prior misrepresentation by Mr Erskine to the trustees.

65. On that reasoning I would hold that the decisions of the lower courts were wrong.