THREE ISSUES IN MISREPRESENTATION

SK Shipping Europe Ltd v Capital VLCC 3 Corp, "C Challenger"

Edwin Peel*

The decision of the Court of Appeal in *SK Shipping Europe Ltd v Capital VLCC 3 Corp, "C Challenger"*[1] raises three noteworthy issues in the law of misrepresentation and its application to the facts of the case. The first is whether the defendant had any right to rescind for misrepresentation and is the latest consideration by the courts of the inter-relationship between representations and warranties in circumstances where they cover the same subject matter. The second and third are whether the defendant had lost the right to rescind, and the consequences thereof, either by way of affirmation, or in the exercise of the court's discretion under s.2(2) of the Misrepresentation Act 1967. In the event, the Court of Appeal agreed with Foxton J at first instance[2] that the defendant had no right to rescind in the first place, so that anything said in relation to the second and third issues is obiter dictum. The Court was particularly reluctant to commit to a view as to the correctness of Foxton J's application of the 1967 Act, which is the most intriguing aspect of the case. Although all three issues arise in the context of a charterparty, none of them turn on any special features of such a contract and either have arisen, or could very easily arise, in other contexts.

Facts and issues arising

The salient facts may be summarised as follows. The parties entered into a two-year time charter on 6th December 2016 for the vessel "C CHALLENGER", at a hire rate of US $30,500 per day. The charter was contained in a fixture recap email which incorporated by reference the terms of the Shelltime 4 charterparty form.[3] As is standard in a time charter, warranties were given as to the vessels' speed and fuel consumption, with compensation payable in the event of over-consumption, based on a review of performance to be carried out every six months. When the vessel went into service, it quickly became apparent that the warranties were not being fulfilled, leading to over-consumption. This was primarily because they were not realistic in the first place.[4] The warranties had been offered, and agreed to, largely as a result of the inexperience of the employee of the claimant who had been tasked with collating the data upon which they were based.[5] That data had been included in a

---

1* Professor of Law, Clarendon Harris Fellow in Law, Keble College, Oxford; Barrister, One Essex Court.
[2022] EWCA Civ 231.

2 [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep 109.

3 A formal charterparty was drawn up by the broker but was never executed, which gave rise to an issue under the Statute of Frauds 1677 whether a guarantee was enforceable. There was no appeal from Foxton J's determination that it was.

4 In due course, the cleaning of the hull improved the performance and the judge found that it was likely that the warranted performance would have been achieved by a full hull re-coating and engine overhaul which would have been carried as part of the special survey of the vessel due at the end of 2017, but by then the charterparty had been terminated in the circumstances explained below.

5 Any liability for misrepresentation lay therefore in negligence, or a lack of "reasonable grounds" to believe the truth of any statements made under s.2(1) of the Misrepresentation Act 1967. Foxton J. acquitted the claimant of any dishonesty.

document which was provided to the broker and then reproduced in the warranties that were being offered, save that the latter omitted the statement in the former that the data was "based on average of last 3 voys".

The claimant shipowner maintained that the position should be reviewed after six months in accordance with the terms of the charterparty, but within that period the defendant first made payment of hire "under protest", then applied deductions, and from June 2017 stopped paying hire altogether. Nevertheless, on 13th July 2017 the defendant fixed the vessel for a voyage from Southwold to Tanjung Pelapas in Malaysia. The fuel consumption on that voyage was particularly high, and it became necessary to re-bunker the vessel before it could complete discharge on 5th September 2017, which was a source of embarrassment for the defendant with its sub-Charterer. On 19th October 2017, the defendant purported to rescind the charterparty for misrepresentation, alternatively to terminate for repudiatory breach. Although the defendant was clearly unhappy with the performance of the vessel, the purported rescission also (as is often the case where rescission is sought) enabled it to escape what had become a bad bargain. The "C CHALLENGER" was a VLCC (very large crude carrier). Freight rates in the VLCC market fell dramatically during 2017. By the end of February, spot rates were around US $16,800 per day. From mid-March onwards, with the exception of a small rally in April and May, rates were at or below US $10,000 per day. On 20th October 2017, the claimant purported to terminate the charterparty on the basis that the defendant was not entitled to terminate or rescind and was therefore guilty of renunciation.[6]

The three principal issues which Foxton J was required to resolve and which became the subject of appeal were as follows: (i) was the claimant guilty of any misrepresentation which induce the charterparty, in circumstances where the data provided as to the performance of the vessel was also included in the draft warranties which became terms of the contract: (ii) if the defendant had the right to rescind, had it been lost by its affirmation, e.g. by fixing the vessel to a further voyage in July 2017; and (iii) was this a case in which the court would exercise its discretion under s.2(2) of the 1967 Act not to order rescission, but award damages in lieu, and what effect did that have on the defendant's purported rescission in October 2017.

Warranties, Representations & Inducement

The right to rescind a contract arises if the party seeking to rescind can establish that they were induced to enter it as a result of a misrepresentation by the other party. The defendant's right to rescind in the *C Challenger* was contested by the claimant on the basis either that there had been *no misrepresentation*, or the defendant was not *induced* by any misrepresentation which had been made. As to the former, the submission on behalf of the claimant was that there had been no *representation* at all. This submission turned on the phenomenon of "warranties as representations". It has tended to arise most often in the context of acquisition agreements, such as SPAs, and that context is referred to initially to provide an abstract example. If, during the course of negotiations, a seller indicates that it is willing to offer a warranty in the SPA, usually in the form of a draft, what representation, if any, does the seller provide as to the contents of the warranty? For example, if a warranty is

6 The same dispute arose in relation to three other vessels which were chartered at around the same time, but to different companies nominated by the same guarantor under all four charterparties. Those proceedings settled.

offered that a business has at all times complied with certain licensing requirements, does that also amount to a representation, i.e. a statement of fact that the business has at all times complied with such requirements, so that, if this is not the case, the seller will be liable for breach of the warranty in the executed SPA, but also for misrepresentation?
Some decisions have recognised the possibility of such an outcome,[7] but the prevailing approach in the context of acquisition agreements is that something more than the offer of the warranty is required.[8] As it has been put by Andrew Baker J: "if a contractual provision states only that a party gives a warranty, that party does not by concluding the contract make any statement to the counterparty that might found a misrepresentation claim."[9] The offer of a warranty indicates only what the party in question is willing to *warrant* if the contract is entered; it exposes the warrantor only to liability for breach of warranty and not to liability for misrepresentation. The same approach can also be seen in cases concerned with charterparties[10] and this provided the short answer to the defendant's submission that "the Owner's offer to contract on the terms which were eventually agreed itself amounted to a misrepresentation as to the vessel's fuel consumption".[11]

This was, however, a case where there was something more than the offer of the warranties. The document circulated which presented the data which was incorporated in the warranties also included the statement "based on average of last 3 voys". That statement contained two representations, both of which proved to be false: a representation that the data had been checked against, and so far as necessary adjusted so as to be reasonably consistent with the average performance of the vessel over three recent voyages at the date when the exercise was done; and an implied representation that the claimant was not aware at the date of the representation of any reason why the data had ceased to be broadly representative of the vessel's recent performance at that date. The defendant could therefore point to two representations for the purpose of establishing that a misrepresentation had been made, but its claim to rescind nonetheless failed. The offer of the warranties may not have prevented the finding of misrepresentation because there was "something more", but they were the reason why the defendant could not meet the requirement of inducement.

For cases other than fraud,[12] a claim for misrepresentation is not available if the party making it would have entered into the contract on the same terms even if the representation had not

7 See eg *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch); *Avrora Fine Arts Investment Ltd v Christie Manson &*
Woods Ltd [2012] EWHC 2198 (Ch); [2012] PNLR 35; *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91.

8 *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch); *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm); [2016] 2 CLC 297; *Ivy Technology Ltd v Martin* [2020] EWHC 94. For "something more" in the responses given by a seller as part of a due diligence exercise, see *MDW Holdings Ltd v Norvill* [2021] EWHC 1135 (Ch); cf. *Arani v Cordic Group Ltd* [2021] EWHC 829 (Comm) (no representations made in a Disclosure Letter).

9 *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm); [2016] 2 CLC 297 at [20]. *Quaere* if the "something more" can be derived from a draft warranty which "represents and warrants", as opposed to just "warrants": *Idemitsu* at [21]; cf. *Bikam OOD, Central Investment Group SA v Adria Cable Sarl* [2012] EWHC 621 (Comm).

10 *The Larissa* [1983] 2 Lloyd's Rep 325.

11 [2022] EWCA Civ 231 at [41].

been made.[13] In simple terms, Foxton J found (and the Court of Appeal agreed) that, in the counterfactual world, only the offer of the warranties would have been made, i.e. the "three voyage statement" would have been omitted from presentation of the data. In that situation, Foxton J found (and, again, the Court of Appeal agreed) that the charterparty would still have been concluded on the same terms as it was in fact concluded.[14] As Males LJ put it:[15]

> "The terms offered by the Owner were attractive and what really mattered to the Charterer was the performance warranty which the Owner would give: if the vessel over-consumed, the Charterer would be compensated under the mechanism in clause 24. Actual performance data were not normally provided and it had not been the Charterer's practice in negotiating other fixtures to ask about this. If such data had really been important to the Charterer, it would have asked questions about the figures provided by the Owner,…"

This form of reasoning would seem equally applicable in the acquisition agreement context referred to above. In that context, of course, a term will often be included which is intended to pre-empt the question of representations and/or inducement. This is the sort of provision under which a buyer acknowledges that, in entering into the contract no representations were made ("no representation"), or that it did not rely on any representations made ("non-reliance").[16] They are very effective at defeating a claim for misrepresentation on the basis that the buyer is estopped from claiming that representations were made, or had been relied upon. They do not, however, mean that questions of whether, in fact, representations were made and relied upon are redundant, along with the reasoning in the *C Challenger*, for at least two reasons. First, if, as a matter of fact, representations were made and did induce the contract, those are the circumstances in which a "no representation" or "non-reliance" clause may be treated as an exclusion clause and subject to the test of reasonableness under s.3 of the Misrepresentation Act 1967.[17] Second, such clauses are ineffective against a finding of fraudulent misrepresentation,[18] but for such a finding it will be necessary to establish a false representation and inducement.[19] To the extent that such questions arise, the decision in the *C*

---

12 The test of "inducement" in fraud is far from certain: for discussion, see *Treitel: The Law of Contract* (15th ed), 9-030.

13 The Court of Appeal (Males LJ) relied in particular on the decision of Christopher Clarke J in *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep 123. For general discussion, see *Treitel: The Law of Contract* (15th ed), 9-027 to 9-033.

14 Including a guarantee given by the fifth defendant (the first to fourth defendants were the companies nominated by the guarantor as charterers for each of four time charters entered into, but only the charter for the "C CHALLENGER" proceeded to trial: see comment at n 6 above).

15 [2022] EWCA Civ 231 at [68].

16 There is no evidence of any such provision in the time charterparty in the *C Challenger*. One suspects that such provisions are not commonplace, whereas in SPAs and similar they are ubiquitous.

17 *First Tower Trustees Ltd v CDS (Superstores) International Ltd* [2018] EWCA Civ 1396; [2019] 1 WLR 637.

18 See e.g. *Trident Turboprop (Dublin) Limited v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm); [2008] 2 Lloyd's Rep 581 at [42] and *J N Hipwell & Son v Szurek* [2018] EWCA Civ 674; [2018] L & TR 15 at [16]; *Casa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 at [526].

19 Whatever form that may take: see n 12 above.

Challenger makes clear that they will be resolved by a close analysis of the relevant counterfactual and a careful assessment of "what really mattered" to the representee.

Affirmation

The defendant's purported rescission of the charterparty failed therefore on the ground that it had no right to rescind in the first place, but Foxton J held that any right it might have had was lost, in any event, by affirmation. The Court of Appeal held that he was right to so hold. While anything the Court might have to say on this is obiter, the issue raised is a point of some significance in practice which can be dealt with quite briefly. Having become aware of the circumstances which it said gave rise to the right to rescind early on in the performance of the charterparty, the defendant nevertheless called for its further performance for some time; most notably when fixing the vessel for the voyage to Malaysia on 13th July 2017. Taken on its own, that was compelling evidence of affirmation, but the defendant relied on the fact that such actions were accompanied by an express reservation of rights. This did not avail it. A key passage in the reasoning of Foxton J,[20] which is approved by Males LJ,[21] is as follows:

> "…the issue of whether there has been an election requires the court to have regard to all the material, including any reservations which have been communicated. Where conduct is consistent with the reservation of a right to rescind, but also consistent with the continuation of the contract, then an express reservation will preclude the making of an election. This is likely to be the case where there is a reservation of rights accompanying the exercise of a contractual right to obtain information as to a party's rights, or where a party is performing its own obligations while assessing its position. However, where a party makes an unconditional demand of substantial contractual performance of a kind which will lead the counterparty and/or third parties to alter their positions in significant respects, such conduct may be wholly incompatible with the reservation of some kinds of rights, even if the party demanding performance purports at the same time to reserve them…There are some contexts in which actions speak louder than words."

In agreeing with this analysis, Males LJ rejected the defendant's submission that the only way in which a relevant reservation of rights cannot preserve a party's position is if the reservation is a sham.[22] One suspects that some parties, and even some of their lawyers, may have proceeded on the basis that such a submission was correct, such that an express reservation prevails in any circumstances short of a sham,[23] allowing the right to rescind, in this case,[24] to be held like the Sword of Damocles over the head of the other party. It is, ultimately, a question of fact and, as Foxton J pointed out, sometimes "actions speak louder

20 [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep 109 at [211].

21 [2022] EWCA Civ 231 at [75].

22 See *Wilken, The Law of Waiver, Variation & Estoppel* 2nd Ed (2012), para 4.14.

23 *Quaere* "sham".

24 For the position re termination for breach, see *Tele 2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ 9; cf. *Sumitomo Mitsui Banking Corp Europe Ltd v Euler Hermes Europe SA (NV)* [2019] EWHC 2250 (Comm); [2019] BLR 561 at [64].

than words". Foxton J's decision certainly went a little further than previous judges may have gone in the face of an express reservation, and the principal ground of appeal was that he had gone too far; in particular, when he described the fixing of the vessel on 13th July 2017 as "so inherently affirmatory that it is incompatible with an attempt to reserve a right at the same time to set the Charterparty aside *ab initio*."[25] This was rejected by Males LJ on the basis that the judge was "not treating the giving of voyage orders as a special category of intrinsically affirmatory conduct, regardless of other matters."[26] If he had been, that would have been as equally dogmatic, and erroneous, as the view that a reservation of rights will always prevail, short of a sham. Rather, Males LJ held that Foxton J had just been expressing the view that all the circumstances must be taken into account.

One further point of some significance should also be briefly noted in the context of affirmation. The charterer had been nominated by another company who acted as guarantor thereunder. It was the charterer who had given the voyage order, not the guarantor, leading to the submission that even if the charterer had affirmed the charterparty, the guarantor had not. This submission was given "short shrift" by both Foxton J and Males LJ on the basis that, in the circumstances of the charterer's nomination, "it would be wholly artificial to treat an election to maintain the charterparty as not extending to the guarantee of the Charterer's obligations under the charterparty."[27]

Section 2(2) of the Misrepresentation Act 1967

If the defendant had the right to rescind and had not affirmed the charterparty, Foxton had held that, nevertheless, they would still have been guilty of renunciation because of the effect of s.2(2) of the 1967 Act. This provision is not invoked very often and it is helpful to set it out first:

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

Foxton J held that, had it been necessary to do so, he would have applied s.2(2) in the following way. He would have exercised his discretion and declared the contract "subsisting", on the basis that, if the defendant had known the true position when negotiating the charterparty, the only effect was that the hire rate would have been reduced by US $500

25 [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep 109 at [223]

26 [2022] EWCA Civ 231 at [77].

27 [2022] EWCA Civ 231 at [80].

per day. That made damages in lieu more equitable since their assessment was straightforward and adequately addressed the loss which would be caused to the defendant by upholding the contract, while rescission would throw the loss caused by a fall in the market rate for the hire of VLCCs on to the claimant. The effect of such a declaration was that, by purporting to rescind on 19th October 2017, the defendant had committed a repudiatory breach and was liable in damages based on the difference between the charter rate and the market rate for the balance of the charter period. Foxton J also held that damages in lieu under s.2(2) would not have indemnified the defendant against that liability since it was suffered "not by reason of the misrepresentation, but by reason of the court's decision to award damages in lieu",[28] that being a risk which the defendant had assumed by ceasing performance in advance of obtaining an order for rescission.

Males LJ observed, rather pointedly, that a number of judges have been tempted to comment on s.2(2) when it has not been strictly necessary to do so, and not necessarily to the greater clarification of the law.[29] He preferred to leave the issue whether Foxton J's approach was wrong in principle for decision in a case where it mattered. Nonetheless, he made a number of observations which are worthy of note, the tenor of which appear to cast doubt on this aspect of Foxton J's judgment, but are primarily expressions of doubt as to whether some aspects of the drafting of s.2(2) had been fully considered.

The cases discussed in the Tenth Report of the Law Reform Committee which led to the passing of the 1967 Act were considerably more straightforward than the situation encountered in the *C Challenger*.[30] What mainly troubled Males LJ was the retrospective effect of any declaration that the contract is subsisting and the "insuperable difficulty" for commercial parties who need to know where they stand. There is obvious scope for a real dilemma for such parties, and their advisers, particularly in a long term contract for services like a time charterparty. If they purport to rescind, they run the risk of an analysis like that of Foxton J and find that they have wrongfully terminated, leading to a claim against them for repudiatory breach and damages for loss of bargain. If they continue to perform, they may end up paying large sums by way of hire which they may not get back even if it is ultimately established that they had the right to rescind and (though not mentioned by Males LJ) they may be found to have affirmed the contract. A without prejudice agreement might be a possibility,[31] or an urgent application to the court, but the trial in the *C Challenger* took ten days and it is unrealistic to think that such a case could be heard in short order by the Commercial Court, or an arbitral tribunal. Males LJ also observed that Foxton J's approach was "coloured by his view that rescission for misrepresentation is not a self-help remedy… but depends on the representee obtaining an order for rescission from the court". He

28 [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep 109 at [257]

29 The cases to which reference is made are *The Lucy* [1983] 1 Lloyd's Rep 188 and *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016.

30 Surprisingly, given the close analysis to which the 1967 Act was subjected, none of the issues raised before Foxton J and the Court of Appeal are addressed by Atiyah and Treitel in their assessment of the Act: (1967) 30 MLR 369.

31 See *The Lucy* [1983] 1 Lloyd's Rep 188.

described this as a "controversial question",[32] but acknowledged that s.2(2) is drafted on the basis that, at least in some circumstances, rescission does not depend on obtaining a court order, given the reference to a contract which "ought to be *or has been* rescinded".

The difficulties referred to by Males LJ perhaps reinforce why it is that, if available, rescission is the normal remedy[33] and a "strong starting point",[34] but one obvious mischief at which s.2(2) is aimed is the representee who rescinds in order to escape from a bad bargain because of factors which have nothing to do with the misrepresentations which allow for rescission. The *C Challenger* was such a case, given that the defendant was, and would be, fully compensated for the breach of the warranties under the express provisions of the charterparty[35] and to deny rescission left the defendant with the consequences of having made a bad bargain because of the fall in the market.

32 The distinction between equitable rescission, which requires an order of the court, and common law rescission, which is a self-help remedy, is rarely of significance since the fusion of common law and equity. As it happens, the recent decision of the Court of Appeal in *IGE USA Investments Ltd v Revenue & Customs Commissioners* [2021] EWCA Civ 534; [2021] 3 WLR 313 may provide such an instance (six year limitation period applied to equitable rescission; no limitation period for common law recission). An appeal is due to be heard in the Supreme Court which may allow this "controversial question" to be further addressed, albeit in a different context.

33 *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745, [2015] CLC 269 at [24].

34 [2022] EWCA Civ 231 at [86].

35 With the exception of consequential damages in the sum of US $68,425 incurred when the vessel was required to re-bunker in Malaysia.