Implied representations, affirmation and section 2(2) of the Misrepresentation Act 1967

Chris Smith QC & Mark Stiggelbout

28 February 2022

The Court of Appeal has just handed down judgment in the C CHALLENGER, dismissing the appeal. The judgment addresses several points of general importance including the circumstances in which a representation of fact will be implied from the offer of a contractual term, the effect of a reservation of rights on an alleged affirmation, and the operation of section 2(2) of the Misrepresentation Act 1967.

The Facts

In November 2016, the Claimant, the owner of the Vessel, circulated details of the Vessel's speed and consumption capabilities to the market as part of its attempts to find a long-term charterer. Those attempts were successful and, in December 2016, it was agreed that the Vessel would be chartered out to the 1st Appellant ("the Charterer"), with the 2nd Appellant ("the Guarantor") agreeing to act as guarantor thereof. The Charter contained consumption warranties in a standard form.

The Vessel was delivered in February 2017. Throughout the life of the Charter, the Vessel consumed bunkers in excess of the warranted levels. The Charterer complained about this and, as early as March 2017, asserted that the Vessel's consumption capabilities had been misrepresented. The Charterer continued to employ the Vessel until September 2017, but repeatedly reserved its rights as regards the alleged misrepresentation. During this period, the Vessel was ordered in July 2017 to perform a sub-fixture. On 19th October 2017, the Charterer purported to rescind the Charter and/or terminate it for repudiatory breach.

The Owner commenced proceedings claiming damages for breach of charter. The Charterer and the Guarantor defended the proceedings and advanced a counterclaim on the basis that the Owner had fraudulently misrepresented the Vessel's consumption capabilities and thereby induced the Charterer into concluding the Charter.

After a 10 day trial, Foxton J held *inter alia* that: (1) the Owner had made two representations in November 2016 about the Vessel's recent consumption; (2) the Owner had not, however, made any representation as to the Vessel's expected or future consumption; (3) further, the Owner had not, by offering a speed and consumption warranty, thereby made any implicit representation of fact as to the Vessel's actual or expected consumption; (4) the Charterer had not been induced by the representations (both those in fact made and those alleged) into entering into the Charter; (5) by ordering the Vessel to perform the July 2017 sub-fixture, the Charterer had in any event affirmed the Charter (and the Guarantor had likewise affirmed the Guarantee); (6) if the Charterer had been entitled to rescind the Charter in October 2017, the Court would have exercised its discretion under section 2(2) of the Misrepresentation Act 1967 to award damages in lieu of rescission; (7) damages under section 2(2) of the Misrepresentation Act 1967 were not to be assessed so as to constitute the monetary equivalent of rescission.

Permission to appeal was granted in respect of the above findings and a two-day hearing took place in the Court of Appeal on 8th and 9th February 2022 in front of Lord Justice Males, Lord Justice Phillips and Lady Justice Carr. The Court's findings are summarised below.

The Representation

The Court of Appeal reconsidered the Judge's original finding that the Owner had not made any representations as to the Vessel's future or expected performance and confirmed it, noting that as a matter of general principle a misrepresentation should not be too easily found.

The point of wider importance which arose in this context was whether the very offer of a speed and consumption warranty carried with it an implied representation as to the Vessel's fuel consumption. The Court confirmed that an offer to contract will not generally be regarded as amounting to a representation about future performance, but noted that there are circumstances where an offer to contract on certain terms carries with it an implied representation as to the party's honesty in relation to the proposed transaction. The Court of Appeal declined to go further than this and questioned the general principal espoused in ***Kingscroft Insurance Co Ltd v Nissan Fire & Marine Insurance Co Ltd (No. 2)*** [1999] 1 Lloyd's Rep IR 603 that there is a general rule that, merely by offering to contract, a party represents that it is able and willing to perform the contract.

Inducement

The Court of Appeal confirmed that the correct counterfactual was to ask what would have happened if the representation had not been made. On the facts before it, and as the Judge had found, this involved considering what would have happened if the Owner had just offered a speed and consumption warranty but had not made any representations as to the Vessel's recent performance. The alternative counterfactuals put forward by the Appellants (in which the Owner was to be taken either to have provided no consumption warranty at all, or to have provided such a warranty but expressly stated when doing so that it was not willing to represent the accuracy thereof) were dismissed as being highly unrealistic. By contrast, the counterfactual adopted by the Judge corresponded with the normal situation as between and owner and charterer when negotiating a time charter.

Affirmation

In the authorities and the textbooks divergent views have been expressed as to whether or not a party that has reserved its rights can be taken to have affirmed a contract.

The Court of Appeal expressly disagreed with the conclusion expressed in some of the texts that the only way in which a reservation of rights cannot prevent an affirmation is if the reservation is a sham. Rather, the Court held that whilst a reservation of rights will often have the effect of preventing subsequent conduct from constituting an affirmation, this is not an invariable rule. The Court must have regard to all the circumstances and weigh up the nature and terms of any reservation of rights against the nature and consequences of any demand for future performance.

Applying these principles, on the facts before him the Judge was correct to conclude that the order to perform the July 2017 sub-fixture constituted an affirmation, notwithstanding the Charterer's reservation of rights. The Court of Appeal further stated that the affirmation would reasonably have been understood as extending to the Guarantee as well.

Section 2(2) of the Misrepresentation Act 1967

The issues arising under section 2(2) are of considerable public importance. It is not going too far to state that they are points for the Supreme Court. The key question was whether or not the Court could and should exercise the discretion to refuse rescission if (1) the contract is no longer subsisting at the time the Court is asked to exercise its discretion; (2) the refusal of rescission would have the effect that the representee's purported rescission constituted a repudiation of the contract.

These are difficult points, giving rise to a host of sub-issues such as whether rescission is a self-help remedy or requires an order of the Court, and what damages can in fact be awarded in lieu of rescission under section 2(2) (given that that measure will be relevant to the question of whether the Court should exercise its discretion to refuse rescission).

In light of its earlier findings, it was not strictly necessary for the Court of Appeal to address these issues. Nonetheless, in light of the fact that they had been fully canvassed by the Judge at first instance, and the first instance judgment had already been commented on in the textbooks, the Court decided to add a few important observations of its own.

The Court firstly noted that it should not be taken to endorse the approach of the Judge (*viz.* that he would have awarded damages in lieu of rescission but not assessed so as to constitute the monetary equivalent of rescission) but wished to leave the question of whether that approach was wrong for decision in a case where it mattered. However, the Court then went on to make four observations, all of which suggest that it disagreed with the conclusion the Judge had reached on the points of general principle. Firstly, the Court considered rescission to be the normal remedy, and thus a strong starting point, in circumstances where there has been a misrepresentation which induced the representee to enter into a contract. Secondly, it was hard to see how the Court's discretion to declare a contract subsisting under section 2(2) was intended to operate in the case of a contract for services where the contractual period has already come to an end by the time of the Court's decision. Thirdly, it would make it difficult for such a representee to know how to act if, rather than taking effect immediately, any attempted rescission might subsequently be treated by the Court as amounting to a repudiation which rendered the representee liable for damages. Fourthly, the Judge's approach was coloured by his view – which is itself a highly controversial question – that rescission is not a self-help remedy but requires an order from the Court.

However, the Court then identified various reasons on the facts of the case why it might be said that rescission would not be justified. In that regard, the Charterer had been fully compensated for the Vessel's overconsumption by the consumption warranty, save for a relatively small consequential loss incurred when the Vessel ran out of bunkers on the sub-fixture ordered in July 2017. The Charterer's remaining losses simply reflected the fact that the charter became a bad bargain for it as a result of the market fall.

The law in thus in an uncertain state on these issues. At first instance, Foxton J gave a fully reasoned judgment on them (albeit *obiter*). The Court of Appeal has now cast doubt on that judgment, but without itself resolving the issues. In the circumstances, the first instance judgment remains the leading authority on these important points relating to section 2(2) of the Misrepresentation Act 1967, albeit with a cloud now hanging over it.

Chris Smith QC and Mark Stiggelbout were instructed by Fanos Theophani, Harriet Thornton and Florence Preux at Preston Turnbull LLP.

Chris Smith QC

"Extremely bright and able to get to the point of a case very quickly. Dealing with colleagues or instructing solicitors Chris is open, friendly, and pleasant to work with, but insistent when needing to be." (Legal 500, 2022)

Chris has a broad practice encompassing all areas of commercial law, with a particular focus on dry shipping, commodities, energy, and insurance disputes. He has appeared extensively in the Commercial Court, representing clients at all stages of proceedings, from urgent pre-action interlocutory applications all the way through to trial. Chris also appears regularly in both domestic and international arbitrations, and has undertaken cases before tribunals in London, Zurich and Hong Kong.

> view Chris' full profile chris.smith@quadrantchambers.com

Mark Stiggelbout

"He is very reliable, very sensible and a future star. The quality of his work is impressive." (Chambers UK, 2022)

Mark has a broad international commercial practice, with particular emphasis in shipping, commodities, insurance, international arbitration, aviation, and energy disputes. He is recommended as a leading practitioner in both of the independent guides to the market - Chambers UK and the Legal 500.

> view Mark's full profile mark.stiggelbout@quadrantchambers.com