EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

BVIHCVAP2012/0035

(On appeal from the Commercial Division)

EAST PINE MANAGEMENT LIMITED

Appellant

and

[1] TAWNEY ASSETS LIMITED
[2] OLDRIL HOLDINGS LIMITED
[3] GUILDRON TRADING LIMITED

Respondents

Before:

The Hon. Dame Janice Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Christopher Parker, QC, for the Appellant
Mr. James Ayliffe, QC, with him Ms. Keisha Durham, for the Respondents

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2013: September 18;
2014: March 24.

Civil appeal – Commercial law – Agreement by two Russian dealerships to merge – Agreement to use BVI company and to apply English law - Fraudulent misrepresentation – Prediction of one dealership as to its coming year-end profitability – Failure to disclose extent of black cash payments and grey suppliers – Unreliability of Russian official company statements – Whether prediction amounting to false representation – Whether defendant knew it was false at the time it was made – Whether defendant intended claimant to act on it – Whether claimant acted on misrepresentation and suffered loss – Appeal from judge's findings of fact

East Pine and Tawney Assets Limited, two Russian John Deere agricultural equipment dealerships, agreed to merge the two businesses in a BVI company. It was commonly understood by the parties that the business atmosphere in Russia was corrupt. Bribes and commissions were commonly used to conduct business; the use of black cash to keep

payments off-the-book was commonplace; even staff got their share of black cash, being payments made to them concealed from the revenue authorities; it was also common for businesses to incur imaginary debts, supported by imaginary inventory, through grey or non-existent suppliers, thus creating false VAT inputs to set aside a company's VAT liability on its outputs. Official financial statements might include fictitious profits and fail to take into account bribes and other black cash payments.

On 21st August 2010, during the early stages of negotiations for merger, at a dinner in a restaurant, Mr. Korontsvit of Agrosnab told Mr. Amirkhanian of Mercury that Agrosnab's operating profit for the year 2010 could be $1m. This estimate contributed to a comparatively higher figure being placed on the value of Agrosnab over Mercury. The parties agreed that they would conduct no due diligence on each other. They agreed, on a back-of-the-envelope calculation, that the principals of Agrosnab should be paid $4m in cash to equalise the merged businesses.

The merger took place on 25th November 2010 when a Share Subscription Agreement ("the Agreement") was entered into by the parties and one half of the balancing sum paid, the other half being due by way of notes. The Agreement stated that it was the entire agreement between the parties. It did not include any warranty by Agrosnab as to profitability or as to the extent of black cash payments. On 15th December 2010, Mercury staff moved into Agrosnab's offices and began training with Agrosnab staff, with Mercury providing a new CFO to manage the financial affairs of the two companies. When it became apparent early in the new year that Agrosnab had made a loss instead of a profit, the principals of Mercury demanded a renegotiation of the balancing payment, but Agrosnab refused. The actual merger never happened since on 16th March 2011 East Pine walked away from the joint venture claiming misrepresentation by Agrosnab.

Both parties commenced legal proceedings against each other with East Pine contending that it was entitled to rescind the Agreement for misrepresentation. On a determination of East Pine's case, the judge found that Mr. Korontsvit relying on an expected upturn in sales towards the end of the year had told Mr. Amirkhanian at the dinner on 21st August that he believed that Agrosnab could turn in an operating profit of $1m for the year, and not $1.5m as Mr Amirkhanian alleged. Further, that East Pine entered into the joint venture on the basis of a recommendation by Mr. Amirkhanian to the SI Partners setting out five reasons for the joint venture with a balancing payment to Agrosnab, none of which reasons included Agrosnab's prediction of future profitability.

The learned trial judge found that he could not infer that Mr. Korontsvit was dishonest at the time he made the prediction, or that Mr. Korontsvit did not believe that Agrosnab could make such an operating profit, if his expectation of an upturn in sales before the end of the year had occurred.

He found that East Pine did not enter into the Agreement relying either wholly or in part upon the representations Mr. Korontsvit made to Mr. Amirkhanian. By the time the Agreement came to be signed the principals of East Pine were well aware that Agrosnab would not make the profit estimated by Mr. Korontsvit at the 21st August 2010 dinner and they were not relying on it at that stage. Their attempt to argue an agreement for the

parties to renegotiate the balancing payment in the event the profitability did not turn out as estimated contradicted their reliance on the representation. He delivered judgment dismissing East Pine's case in misrepresentation. East Pine appealed.

Held: dismissing the appeal and awarding costs to the respondents, that:

1. The judge had properly tested the veracity of the witnesses by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and paying particular regard to their motives and to the overall probabilities.

   Armagas Ltd. v Mundogas SA (The Ocean Frost)Ocean Frost [1985] 3 WLR 640 applied.

2. An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. The learned trial judge had the advantage of seeing and hearing the witnesses give their testimony. This Court is satisfied that the learned trial judge drew the proper inferences from the evidence before him and came to a proper conclusion. East Pine has not discharged the burden on an appeal against a judge's finding of fact by establishing that the judge was plainly wrong.

   Golfview Development Limited v St. Kitts Development Corporation et al Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2004/0017 (delivered 20th June 2007, unreported) followed; Kanwal Sohal v Patwant Singh Suri and Another [2012] EWCA Civ 1064 applied.

3. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. To prevent a false statement being fraudulent, there must always be an honest belief in its truth. East Pine has failed to show that, Mr. Korontsvit, when he made the forecast, did so with an intention to deceive. The learned trial judge, on the evidence presented, made a determination that Mr. Korontsvit did not do so dishonestly. East Pine, having failed to satisfy the test warranting disturbance of a judge's finding by an appellate court, cannot succeed on this ground.

   William Derry et al v Sir William Henry Peek, Baronet (1889) 14 App Cas 337 applied; Nocton v Lord Ashburton [1914] AC 932 applied; Armstrong and Another v Strain and Others [1952] 1KB 232 applied.

4. The burden is on a claimant to establish to the satisfaction of the court that he did place reliance on the representation made. As long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing the

claimant to act, it is a cause of his loss no matter how strong or how many are the other matters which play their part in inducing him to act. Where the misrepresentation made no difference at all to the representee, in that he would have acted in precisely the same way and contracted on precisely the same terms even if he had known the truth, there is no possibility either of rescission or damages. The learned trial judge had evidence before him which contradicted East Pine's assertion that they were entitled to rely on the representation they claimed had been made on 21st August 2010. The learned trial judge's conclusion cannot be faulted. Accordingly, this ground also fails.

William Smith v David Chadwick et al (1884) 9 App Cas 187 applied; ECO3 Capital Limited et al v Ludsin Overseas Limited [2013] EWCA Civ 413 applied.

JUDGMENT

[1] MITCHELL, JA [AG.]: This action involves a dispute between two Russian John Deere agricultural equipment dealerships who agreed to merge their businesses. One party paid a substantial sum to the other to equalize its investment in the merger. It has sued in misrepresentation for rescission of the agreement and a refund of sums advanced.

The Background

[2] The appellant, ("East Pine"),[1] is a BVI registered company acquired, for the purposes of the merger, by a group of investors acting through their Moscow-based boutique investment company, called SI Capital Partners Ltd ("SI Partners"). This project of the SI Partners was managed by Mr. Rudy Amirkhanian with the assistance of his partner, Ms. Elena Lokteva. In the summer of 2010, when the events began to evolve, the SI Partners, using a Russian company called Mercury Technology Ltd. ("Mercury"), had recently acquired for some US$17 million ("$17m") the valuable assets of a failed Russian agricultural machinery dealership called Matrix. Matrix held a John Deere dealership covering five Russian regions, but no current staff. The SI Partners had no experience in this business and were looking for a partner for Mercury who would provide staff and the commercial expertise necessary to turn the acquired assets to account.

[1] As used in this judgment, the term 'East Pine' sometimes for simplicity refers to the company's principals.

The need to find such a partner was urgent if Mercury was to comply with John Deere's requirements and continue to hold the dealership. Failure to find a solution to their problem quickly might result in their having to write off $17m, less any amount that could be realised from a sale of assets.[2] Also, the new sales season was imminent, and they needed to take urgent action to correct Mercury's operational deficiencies.

[3] The first respondent, ("Tawney")[3] was another BVI company acquired by the other party to the merger for the purposes of the joint venture. Its principals were Mr. Dimitry Korontsvit and Mr. Alexander Altynov. They owned the shares in an existing agricultural machinery business called CJSC Agrosnab ("Agrosnab") which also had a valuable John Deere dealership covering eight Russian regions and considerable experience in the field. John Deere recommended Agrosnab to the SI Partners as their best solution to Mercury's lack of management expertise. The principals of Agrosnab were interested in finding a financially strong partner, which they thought they had found in Mercury. They transferred their shares in Agrosnab to Tawney for the purposes of the merger.

[4] It was commonly understood by all the parties that the business atmosphere in Russia at the time was corrupt. It was impossible to conduct a successful business without the payment of bribes and commissions to ensure that business was obtained on advantageous terms. The use of black cash was commonplace. Black cash was a term used to describe payments kept off-the-book. Black cash paid bribes, presents, gifts and so-called commissions. Even staff got their share of black cash as payments to them that were concealed from the revenue authorities for their benefit. It was also commonplace for businesses to incur imaginary debts to 'grey' or non-existent suppliers in respect of imaginary supplies of spare parts inventory. The existence of these fictitious debts, supported by imaginary inventory, created false VAT inputs which could be set against a company's VAT liability on its outputs, thus enabling a company to 'manage' its

[2] At p. 134 of the transcript of his evidence, Mr. Amirkhanian thought it might result in a loss to the partners of $7-8m.

[3] Similarly, the term 'Tawney' sometimes refers to the company's principals.

VAT cash flow. It was common Russian business practice to maintain two sets of books. One set, the Official Statements, was kept to be produced to officials such as revenue authorities or to banks when seeking funding. These Official Statements might include fictitious profits, and failed to bring into account bribes paid. It was probable that a company's Official Statements would give an enhanced impression of profitability when compared with reality.

The Negotiations

[5] Informal discussions between Mr. Amirkhanian (of SI Partners and East Pine) and Mr. Korontsvit (of Agrosnab and Tawney) began during the summer of 2010. At a dinner on 21st August 2010, Mr. Korontsvit told Mr. Amirkhanian that Agrosnab's operating profit could be $1m for its year ending 31st December 2010. This estimate of profit, among other factors, East Pine claimed, contributed to the comparatively higher valuation placed by both parties on Agrosnab over Mercury, and also resulted in the partners agreeing to pay Mr. Korontsvit and Mr. Altynov a $4m balancing sum to ensure that both parties held equal shares in the merged business.

[6] At an early stage, East Pine's principals, Mr. Amirkhanian and Ms. Lokteva, knew, partly because Mr. Korontsvit and Mr. Altynov told them so, and partly because it was what they expected, that it was the practice in Agrosnab to pay bribes and to falsely book bribes and commissions as marketing or consultancy expenses, as described above. As early as 10th September Mr. Korontsvit wrote to Ms. Lokteva saying that several lines in the Official Statements needed to be explained.[4] For obvious reasons, he did not put an explanation about the false book entries in writing but suggested they be explained in meetings. Indeed, she agreed in cross-examination that Mr. Korontsvit constantly made himself available and offered to provide such information as she required it.[5] When the supposedly more accurate

[4] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony of Ms. Elena Lokteva testimony at p. 18, line 20.
[5] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony of Ms. Elena Lokteva at p. 19, line 7.

Management Accounts were sent later, the most that Mr Korontsvit warranted about them was that "incomes are calculated stricter than in bookkeeping". It was also agreed at the outset that if the merger took place it would be necessary to continue the practice, but that such payments should now be at a minimum and should appear in the Official Statements and be auditable.

[7] The merger took place on 25th November 2010 when a Share Subscription Agreement (the "Agreement") was entered into by the parties. One-half of the balancing payment was made, the balance was due by way of notes, and has never been paid. The Agreement stated that it was the entire agreement between the parties, and it did not include any warranty by Agrosnab as to its expected year-end profitability or as to the extent of its black cash payments.

[8] On 15th December 2010 Mercury staff moved into Agrosnab's office accommodation, steps were taken to institute a unified accounting system, and a single CFO from Mercury was appointed to manage the financial affairs of both operating companies. During the course of preparing the 2011 budget it became apparent that Agrosnab had made a loss for the year 2010 rather than a profit. The relationship collapsed when Agrosnab's principals refused to pay back a part of the balancing sum demanded by East Pine's principals on the basis that Agrosnab had not turned out to be as profitable, and because its business culture was more corrupt, East Pine alleged, than had been represented. The actual merger of the two businesses in the new holding company called MAST never happened, since on 16th March 2011 East Pine walked away from the joint venture claiming misrepresentation by Tawney's principals.

[9] One of the curious features of the negotiations between the parties was that it was agreed from the outset that neither side should do any due diligence on the other. The excuse given for this agreement was that the parties were concerned that John Deere may not have approved of the merger, and so it was agreed to push the merger through rapidly and to present John Deere with a *fait accompli* further down the line. As it was, the judge found that John Deere was told what was afoot

prior to the execution of the Agreement, and there was no record of it raising any objection to the merger.[6] Nor was there any reason given to him why due diligence carried out by either party on the other would antagonise John Deere.

The Litigation

[10] On 1st September 2011, Tawney commenced proceedings in the Virgin Islands against Guildron and the parties to the SI Partnership, alleging breach of the Agreement and conspiracy, and seeking relief under section 184I of the Business Companies Act, 2004,[7] the unfair prejudice section. On 13th October 2011, East Pine commenced its own proceedings, alleging that the affairs of Guildron were conducted in a manner which was unfairly prejudicial to East Pine, and East Pine sought orders (a) for Tawney to transfer its 50% share of Guildron to East Pine gratis; (b) setting aside the machinery by which Mercury became an indirect subsidiary of Guildron; (c) repayment of the $2m paid to Agrosnab on completion; (d) damages; and (e) certain consequential relief. East Pine's claim was essentially for the unwinding of the transactions carried out pursuant to the Agreement and consequential damages for fraudulent misrepresentation said to have induced East Pine to enter into the Agreement. Despite the fact that East Pine's case had been issued later in time than Tawney's, it was agreed between the parties that it would be heard first. That course focussed the trial on the central area of dispute between the parties, namely East Pine's contention that it was entitled to rescind the Agreement for misrepresentation. A finding one way or the other on this issue would effectively determine the principal issue in the two actions, leaving only questions of relief.

[11] East Pine's claim was that Agrosnab concealed the extent to which its Official Statements were false, thereby inducing it to enter into the joint venture. East Pine urged that Agrosnab's Official Statements on which it claimed to have relied did not include various fictitious profits and black cash payments consisting of bribes, kickbacks and commissions, and dealings with grey suppliers. Nor did

[6] Para. 24 of the judgment.
[7] No. 16 of 2004, Laws of the British Virgin Islands.

they include the money taken out of the accounts each month by Agrosnab's CEO, Mr. Korontsvit, as a concealed supplement to his declared salary. The result was that, far from making a profit at the end of the year, as had been represented, Agrosnab made a large loss. The nub of the claim was that Mr. Korontsvit could not have honestly held the belief that Agrosnab would make the profit that he had forecast on 21st August 2010, as, if he had included in his calculations Agrosnab's fictitious profits and black cash payments, and if he had excluded the dealings with grey suppliers, it would have been apparent to him that Agrosnab was on the way to making a large loss at the end of the year. He must have been acting dishonestly when he made the forecast of profitability on which East Pine agreed to merge with Agrosnab, with a balancing payment of $4m.

[12] The trial started on 4th and ended on 10th July 2012. Testifying for East Pine were Mr. Amirkhanian, Mr. Borodkin, and Ms. Lokteva. The witnesses for Tawney were Mr. Korontsvit and Mr. Altynov.

The Judgment

[13] The learned trial judge engaged in a detailed analysis of the contradictory evidence before him, and of the pleadings of the parties. He came to certain findings of fact and he gave his reasons for those findings. In particular, he found that Mr. Korontsvit had told Mr. Amirkhanian that he believed that Agrosnab could turn in an operating profit of $1m for the year ending 31st December 2010, not that he represented that the company would make that profit.[8] He found that he could not infer that Mr. Korontsvit was dishonest at the time or that he did not believe that Agrosnab could make such an operating profit if his expectation of an upturn in sales before the end of the year had occurred. He accepted that Mr. Korontsvit told Mr. Amirkhanian at the outset that he was not a financial expert and that a final figure could be above or below this forecast.[9] He found that Mr. Korontsvit's

[8] Para. 90 of the judgment.
[9] Para. 90 of the judgment.

forecasts of profit and turnover had turned out to be out of kilter with the reality, but not that when he made his forecast it was given dishonestly.[10]

[14] The judge found that the agreement not to conduct due diligence by either side before completion worked to the disadvantage of both sides.[11] When negotiations opened there was no actual knowledge by either party about the financial situation of the other. Instead, the parties resorted to making estimates of the worth of each company in order to agree the amount of any balancing payment. What resulted from the process was what the judge described as a 'back-of-an-envelope' estimate.[12] Mr. Amirkhanian calculated that Agrosnab was 1.5 times as valuable as Mercury. Mr. Korontsvit calculated it was worth twice as much as Mercury. They agreed to split the difference and to work on the basis that Agrosnab was worth 1.75 times Mercury. It was Mercury's deliberate choice to dispense with due diligence that had resulted in Mercury's late discovery of the extent of the black cash payments. Mercury thereby took the risk that what it subsequently found may not have been to its liking. The judge concluded that the real reason why no due diligence was carried out was that SI Partners, and hence East Pine, were in a hurry to merge with an experienced dealership such as Agrosnab, since without its input and expertise Mercury did not have a viable business.[13]

[15] The judge found that the forecast made by Mr. Korontsvit on 21st August 2010 was never represented as one of continuing effect; there was no trace of it in the Agreement or in Ms. Lokteva's 4th March 2011 report to the SI Partners when she was attempting to renegotiate the balancing payment.[14] He did not believe Mr. Amirkhanian when he wrote earlier to his partners that Mr. Korontsvit had told him that Agrosnab would make a profit of $1.5m. He thought that Mr. Amirkhanian made that estimate up for his own purposes.[15]

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[10] Para. 92 of the judgment.
[11] Para. 24 of the judgment.
[12] Para. 25 of the judgment.
[13] Para. 24 of the judgment.
[14] Para. 93 of the judgment.
[15] Para. 90 of the judgment.

[16] The evidence was that prior to the signing of the Agreement, Mercury's staff moved into Agrosnab's office accommodation and Mercury took over the position of Chief Financial Officer for both companies, though Mr. Amikhanian and Ms. Lokteva complained that they did not receive full cooperation. Given the company reports and statements that had been supplied to Mr. Amirkhanian and Ms. Lokteva prior to the signing of the Agreement, the judge did not accept their assertion that they continued to have reasons for believing that Agrosnab's year-end figure would be in the region, as they testified, of $600k to $700k.[16] He found that such an expectation was wildly optimistic, and he did not believe that they truly thought at that stage that such an outcome was achievable. Indeed, even though they knew months before the merger that Agrosnab was not as profitable as they alleged Mr. Korontsvit had claimed, Mr. Amikhanian admitted in evidence that even an outfall (by which I understand him to mean a loss) of $500k would have been acceptable to him, if there had been a logical explanation for it. The judge found it impossible to reconcile this evidence with any continuing reliance on the forecast of 21st August of a year-end profit of $1m.[17] He concluded that the forecast had been overtaken by events and had become spent long before the Agreement was entered into.

[17] Further, he did not accept Mr. Amirkhanian's testimony that it was agreed that the balancing payment of $4m was intended to be renegotiated in the light of future events.[18] Mr. Korontsvit denied that he had made such a promise. The judge found that apart from the fact that this alleged agreement found no echo in any of the correspondence leading up to the signing of the Agreement, and was not found in the Agreement itself, its existence if true would defeat any suggestion that East Pine relied on Mr. Korontsvit's profit forecast when it signed the Agreement. This contradiction was put to Mr. Amikhanian in cross-examination, and he had no sensible answer to it. The judge concluded that the alleged agreement for a revisiting of the balancing payment was an invention of Mr. Amirkhanian. East

[16] Para. 99 of the judgment.
[17] Para. 99 of the judgment.
[18] Para. 98 of the judgment.

Pine, he found, was well aware at the time that the Agreement was entered into that the profit figures in Agrosnab's official statements could not be relied on.[19]

[18] The learned trial judge found that East Pine did not enter into the Agreement either wholly or in part in reliance upon the representations Mr. Korontsvit made to Mr. Amirkhanian in the discussions leading up to the Agreement, as alleged by Mr. Amirkhanian.[20] He found that East Pine entered into the joint venture on the basis of a recommendation by Mr. Amirkhanian to the SI Partners made by a letter of 10th September, a copy of which was in evidence. There was no mention in the letter of Agrosnab's alleged anticipated future profitability.[21] The five reasons Mr. Amirkhanian gave his partners why the joint venture should be entered into on the basis that Agrosnab was valued at $10m and Agrosnab was valued at $17.5m were that:

(1) Agrosnab would have a turnover for the year of $25m with a profit of $1.5m, while Mercury would show a turnover of $17-23m, probably at a loss;

(2) Agrosnab and Mercury each held various valuable properties;

(3) Agrosnab's structure would permit a five-fold increase in sales without the need for additional corporate overhead;

(4) the resulting elimination of Mercury's headquarters would lead to savings; and

(5) the combined assumed value of the merged company would be $27.5m with Mercury having contributed $10m and Agrosnab $17.5m so that to maintain 50% shareholding a payment of $4m to Mr. Korontsvit was necessary.

[19] The judge found that the black cash payments made by Agrosnab, the manipulation of VAT through grey inventory, transfer pricing, and payments of secret and unaccounted for bribes, were more in the nature of non-disclosures

[19] Para. 107 of the judgment.
[20] Para. 100 of the judgment.
[21] Para. 100 of the judgment.

rather than representations.[22] He found that while East Pine claimed that it did not know the full extent of the black cash payments at the time of the Agreement, it knew that they existed.

[20] He found that while Mr. Korontsvit of Agrosnab did promise Mr. Amirkhanian before the Agreement was concluded to stop all future black cash payments from 1st January, it might have been impossible for Agrosnab to eliminate all such payments and remain in business.[23] In any event, he found that Mr. Korontsvit's promise was at most an expression of intention rather than a misrepresentation upon which commercial persons rely. He could find no contemporaneous document which suggested to him that, had the full extent of black cash payments been known to Mr. Amirkhanian, it would have been a deal breaker, or that East Pine had been misled into completing the Agreement as a result of this particular representation.[24]

[21] The judge found that East Pine was not entitled to elevate into actionable misrepresentation non-specific statements about black cash payments which it had been admitted before the Agreement had been concluded formed part of Agrosnab's business culture.[25] Nor, he found, was East Pine entitled to turn non-disclosures into representations. He found that East Pine had failed to establish a case on the basis of the representations about the black cash payments.[26]

[22] The judge found no basis in the evidence for a finding that Tawney was insolvent on a balance sheet basis and unable to pay its debts as at the date of the Agreement, as claimed by East Pine.[27] While it was true that after conclusion of the Agreement East Pine lent some RR35.6m, that borrowing meant that Tawney was able to pay its debts and purchase equipment. The fact that a company may

[22] Para. 101 of the judgment.
[23] Para. 102 of the judgment.
[24] Para. 104 of the udgment.
[25] Para. 105 of the judgment.
[26] Para. 106 of the judgment.
[27] Para. 108 of the judgment.

need loan finance in order to continue trading did not mean that it was unable to pay its debts. The claim on that basis, he held, also failed.

The Applicable Law on Misrepresentation

[23] For a misrepresentation to vitiate a claimant's consent to a transaction there must be a causal link between the representation and the representee's conduct. The representee must enter into the transaction in reliance on the misrepresentation; conversely, the transaction must be induced by the misrepresentation. Although a distinction is drawn between reliance and inducement, they are closely related concepts that are both concerned with causation. Reliance signifies the required causal link between the representee's conduct and the representation, viewed from the representee's perspective. Inducement signifies that causal link, but from the representor's point of view. It is not possible for there to be inducement without reliance. For rescission for fraud the misrepresentation need not have been the sole or major cause that led the representee to enter into the transaction, but it must have been 'a' cause that influenced the decision of the representee to enter into the transaction. In determining whether fraud induced the contract the courts are not prepared to speculate as to what would or would not have happened if the fraud had not been perpetrated. It is irrelevant whether or not the injured party would have entered into the transaction in the absence of the fraud. Rescission will be unavailable only if the representee's judgment was not influenced or affected by the fraud at all.[28] So that, to entitle a claimant to succeed in an action in deceit, he must show that he acted in reliance on the defendant's misrepresentation. If he would have done the same thing even in the absence of it, he will fail. What is relevant here is what the claimant would have done had no representation at all been made. In particular, if the making of the representation in fact influenced the claimant, it is not open to the defendant to argue that the latter might have acted in the same way had the representation been true.[29]

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[28] This exposition of the law is taken from O'Sullivan, Elliott and Zakrzewski: The Law of Rescission (Oxford University Press) paras. 4-90 and 4-93.

[29] Clerk & Lindsell on Torts, (20th edn., Sweet & Maxwell) at para. 18-34.

[24] In William Derry et al v Sir William Henry Peek, Baronet[30] the directors of a company issued a prospectus describing tramways which they proposed to construct. The prospectus stated that a "great feature of this undertaking" was that the company would be able to use steam or mechanical motive power instead of horses. In the event, the Board of Trade refused consent for the use of steam or mechanical power, except on certain parts of the tramways. In those circumstances the venture failed and the company was wound up. Sir Henry Peek, a baronet who had invested substantial sums in reliance on the prospectus, sued the directors for fraudulent misrepresentation. The plaintiff failed at trial, but succeeded in the Court of Appeal. The House of Lords reversed the Court of Appeal's decision and restored the decision of the trial judge, essentially because the mental element of the tort had not been established. Some of the law lords speak of the directors having held an honest but mistaken opinion.[31] Others speak of the directors having no intention to deceive.[32] In the course of his speech Lord Herschell reviewed the authorities at some length and then summarised the principles as follows at page 374:

> "Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

[30] (1889) 14 App Cas 337.
[31] Lord Bramwell at p. 149.
[32] Lord Halsbury LC at p. 344.

[25] In Nocton v Lord Ashburton[33] the plaintiff, a mortgagee, claimed that he had released part of the security which he held on the basis of his solicitor's advice; the solicitor had given the advice in bad faith, because he knew that the security would be insufficient; the plaintiff suffered loss in consequence. The plaintiff failed at trial, because fraud had not been proved. The Court of Appeal reversed that decision, but the House of Lords restored the decision of the trial judge. In a famous passage at page 963, Lord Dunedin said this:

> "Now, as I understand the matter, if the action had been brought at law, under the old system it could have been based either (1.) on fraud, or (2.) on negligence, and the relief in either case would have been damages. But if based on fraud, then, in accordance with the decision in Derry v Peek, the fraud proved must be actual fraud, a *mens rea*, an intention to deceive. It is an action of deceit."

[26] In Armstrong and Another v Strain and Others[34] the purchasers of a bungalow relied upon an estate agent's representation. The estate agent, Mr. Skinner, did not know that the representation was untrue. The vendor, Mr. Strain, did not authorise Skinner to make the representation or know that Skinner was making it, but he did know of facts which rendered it untrue. Devlin J dismissed the purchasers' claim for fraudulent misrepresentation. The Court of Appeal upheld that decision, essentially on the basis that the court cannot combine the knowledge of an innocent principal and agent, so as to produce dishonesty. Romer LJ said at page 247:

> "I can see no sufficient ground for disturbing any of the judge's findings of fact. Of these findings the most important, for present purposes, were that neither Strain, nor either of his agents, Uren and Skinner, was fraudulent. Inasmuch as there are no intermediate stages recognized by the law between fraud on the one hand and innocence on the other, the case has accordingly, on these findings, to be approached on the footing that each of these men was entirely guiltless, in relation to the sale transaction in general and, in particular, to the representations on which the plaintiffs bought the bungalow. Strain, Uren and Skinner are, however, being sued for deceit, and the essentials of such an action have been prescribed by the highest authority."

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[33] [1914] AC 932.
[34] [1952] 1 KB 232.

[27] William Smith v David Chadwick et al[35] continues to be good authority for the proposition that inducement and reliance may be inferred from the purpose of the representor, the nature of the statement, and the fact the contract was entered into. It is sufficient that the misrepresentation is a material inducement; it does not have to be the only one. But, whether by direct evidence or by reliance on an inference, the burden is on the claimant to establish to the satisfaction of the court that he did place reliance on the representation. As Lord Blackburn said at page 196 of the judgment:

> "I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and if it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement."

[28] In the recent decision of the English Court of Appeal in ECO3 Capital Limited et al v Ludsin Overseas Limited,[36] Lord Justice Jackson helpfully summarises the four ingredients of the tort of deceit as being:

(i) The defendant makes a false representation to the claimant;

(ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false;

(iii) The defendant intends that the claimant should act in reliance on it;

(iv) The claimant does act in reliance on the representation and in consequence suffers loss.

Ingredient (i) describes what the defendant does. The false representation must be of a kind which the law recognises as giving rise to liability. The representation must be unambiguous and material. It must be a statement as to an existing fact.[37] A statement may amount to a misrepresentation if facts are omitted which render that which has actually been stated false or misleading in the context in

[35] (1884) 9 App Cas 187.
[36] [2013] EWCA Civ 413.
[37] Bisset v Wilkinson and Another [1927] AC 177; Thomas Witter Ltd v TBP Industries Ltd [1996] 2 All ER 573.

which it is made.[38] Ingredient (ii) describes the defendant's state of mind. It requires either knowledge of the falsity or recklessness whether the representation be false. As for ingredient (iii), it is satisfied where the circumstances are such that the representor must have supposed that the representation would probably induce a person in the situation of the representee to act upon it.[39] Ingredient (iv) requires that the representee must have relied upon the representation. The representation need not be the claimant's sole or main inducement to enter into the contract, provided it formed a reason why he did so.

[29] As long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing the claimant to act, it is a cause of his loss no matter how strong or how many are the other matters which play their part in inducing him to act. Where the misrepresentation made no difference at all to the representee, in that he would have acted in precisely the same way and contracted on precisely the same terms even if he had known the truth, there is no possibility either of rescission or damages.[40]

[30] Where a party has entered into a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered into the contract, at least on the same terms, but for the misrepresentation.[41] A representee, who had an opportunity to discover the truth, but did not take it, may yet succeed in a claim for rescission. So, in Redgrave v Hurd,[42] Jessel MR held:

> "Nothing can be plainer, I take it, on the authorities in equity that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence... It is not sufficient, therefore, to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity."[43]

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[38] Chitty on Contracts (31st edn., Sweet & Maxwell) Volume 1, para.¶6-020.
[39] Cullen v Thomson (1862) 6 LT 870, 874.
[40] Jeb Fasteners Limited v Marks Bloom & Company (A Firm) [1983] 1 All ER 583 per Stephenson LJ in the English Court of Appeal.
[41] Chitty on Contracts (31st edn., Sweet & Maxwell) Volume 1, para. 6-038.
[42] (1881) 20 Ch D 1.
[43] At pp. 13-14.

No doubt, for this reason the agreement of the parties not to conduct any due diligence on each other prior to the merger did not play any role in the decision of the judge. If he had found that Mr. Korontsvit had made the fraudulent misrepresentation complained of, and that East Pine had relied on it in entering into the Agreement, the agreement of the two parties not to do due diligence on each other would not have affected his finding one way or the other.

The Appeal

[31] East Pine appeals against the judge's findings, urging 23 grounds of errors in his findings of fact and of law. Counsel for Tawney complains with some justification that it is difficult to deal with the huge number of complaints ("a tsunami of unstructured criticisms") against the judge's findings. East Pine complains against the learned trial judge's approach to the conflicting evidence and his failure to infer dishonesty on the part of Mr. Korontsvit amounting to a misrepresentation on his part. Counsel for East Pine points to the discrepancy between actual events and the predictions made by Mr. Korontsvit, and submits that the judge refused to deal with East Pine's claim, and instead proceeded on the basis that there was no evidence from which he could infer that Mr. Korontsvit did not believe that Agrosnab could make an operating profit of $1m by the end of the year. Counsel complains that the judge simply asserted that he was not prepared to find that Mr. Korontsvit deliberately misled a prospective business partner at the outset of their discussions and did so without any consideration of the evidence that pointed to Mr. Korontsvit's testimony being dishonest. He also submits that the judge ignored various parts of the evidence, made findings in the absence of evidence to support it, and failed to make necessary inferences.

[32] The judge, it is said, failed to have regard to anything other than his view of the demeanour of Tawney's main witness and failed to test that view against the documentary evidence, prior inconsistent statements of that witness, and the many untruths that the witness told the court. The result was, counsel asserts, that the judge failed to discharge his judicial function.

[33] Counsel characterises the judge's reasoning on non-reliance as nonsense. He complains against the judge's finding as to the credibility of Mr. Korontsvit, who first in the statement of case, and then in his witness statement, denied that he had made any prediction about operating profits, only, after prolonged cross-examination, to admit at trial that he had made such a prediction. Counsel characterises the judge's finding that this admission showed candour on the part of Mr. Korontsvit as perverse.

[34] Counsel contrasts the judge's approach in this case with that advocated by Robert Goff LJ in Armagas Ltd. v Mundogas SA (The Ocean Frost):[44]

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

Counsel for East Pine submits that, given the wide discrepancy between the prediction and the true position at the end of the year, which turned out to be fairly disastrous, some explanation was called for. The judge, he submits, was wrong not to conclude that Mr. Korontsvit was dishonest in his representation as to profitability and that East Pine had relied on that representation to its loss.

The Applicable Law on Appeals from a Judge's Findings of Fact

[35] The principles governing an appeal against a judge's findings of fact are almost too well known to need repeating. In the case of Golfview Development Limited v St. Kitts Development Corporation et al,[45] Rawlins JA put it this way.

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[44] [1985] 3 WLR 640, approved in Grace Shipping Inc. and Hai Nguan & Co. v CF Sharp (Malaya) Pte Ltd. [1987] 1 Lloyd's Rep 207. And, see Kanwal Sohal v Patwant Singh Suri et al [2012] EWCA Civ 1064.

[45] Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2004/0017 (delivered 20th June 2007, unreported).

"[23] To the extent that Golfview's appeal and the Corporation's cross-appeal on this issue seek to impeach fact-finding by the trial judge, the legal principles which are applicable are well settled. In David Carol Bristol v Dr Richardson St Rose,[6] *[St. Lucia Civil Appeal No. 16 of 2005 (20th February 2006)]* I stated[7] *[At paragraph 13 of the judgment]* that on the authority of the judgment in the House of Lords in Benmax v Austin Motor Co. Ltd,[8] *[[1955] 1 All ER 326]* and from decisions of this Court, including Francis v Boriel,[9] *[St. Lucia Civil Appeal No. 13 pf 1995 (20th January 1997)]* Grenada Electricity Services Ltd v Isaac Peters,[10] *[Grenada Civil Appeal No. 10 of 2002 (28th January 2002)]* and Asot A. Michael v Astra Holdings Limited, Robert Cleveland and Others v Astra Holdings Limited,[11] *[Antigua and Barbuda Civil Appeals Nos. 17 and 15 of 2004 (16th May 2005)]* an appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. I continued by stating that an appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Section 33(1)(b) of the Eastern Caribbean Supreme Court (St Christopher and Nevis) Act empowers this Court to draw factual inferences.[12] *[No. 17 of 1975 of the Laws of St. Christopher and Nevis]*"

[36] In the more recent English Court of Appeal case of Kanwal Sohal v Patwant Singh Suri and Another,[46] Lady Justice Arden put it this way:

"30. It is common ground that, on an appeal against a judge's findings of fact, the appellant has in general to show that the judge was plainly wrong. It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court will not interfere with a finding made by the judge unless the judge's conclusion is "outside the bounds within which reasonable disagreement is possible". Where,

[46] [2012] EWCA Civ 1064.

however, the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court in general must make up its own mind as to the correctness of the judge's finding (see Datec Electronic Holdings v United Parcels Service [2007] 1 WLR 1325 at [46] per Lord Mance).

> "31 In this case, the appellant makes a number of challenges: he contends that the judge failed to draw certain inferences from the primary facts, that, in other respects, he drew the wrong inferences and that in drawing or not drawing inferences the judge attached the wrong weight to various matters. In my judgment, where the challenge is to an inference not drawn, or drawn, by the judge from other facts the principles are as set out above. The appellant has to show that the failure to draw the inference, or as the case may be the making of the inference, was plainly wrong. The respect which, as I have just explained, an appellate court accords to primary facts based on oral evidence, and to an evaluation of facts made by the judge, applies also to inferences drawn from such facts or evaluation. Putting the matter another way, in those circumstances, the appellant will in general have to show that the inference, which he contends should have been drawn, was one that should inevitably have been drawn, so as to entitle the appellate court to interfere. In addition, it follows from the fact that the appellate court must be satisfied that the judge is wrong that it is not enough merely to disagree with the weight which, when drawing or deciding not to draw inferences, the judge has given to some factors over others.
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> "32 Further, it is in general not enough on an appeal from a judge's findings of fact to point to the fact that there are additional findings that the judge could have made. The judge is not bound to make findings on every matter in issue in the trial. In general a judge is only obliged to make findings on key matters though in some cases it may also be appropriate to make findings on an alternative basis in case the judgment is overturned on appeal..."

[37] The burden was on East Pine to satisfy me that the judge in this case was plainly wrong in his findings of the facts, and it has not discharged that burden. This is not a case where fraud was clearly to be inferred from the documents and the facts proved before the trial judge. The judge was being asked to infer the dishonesty of Agrosnab's principals from the various contradictory evidence put

before him. Applying William Smith v David Chadwick et al,[47] East Pine failed in their further burden of establishing, whether by direct evidence or by reliance on an inference, that East Pine did place reliance on the representation as to Agrosnab's possible profit at the end of 2010. The judge who saw and heard the witnesses was not satisfied that those for the respondent were guilty of dishonesty, and the appellant has not made out a case, far less a strong case, for finding the witnesses guilty of misrepresentation when the judge below has not found them guilty of it. It was clearly open to him on all the evidence before him to so conclude. East Pine has not shown that in so concluding he was plainly wrong or that the opposite conclusion was inevitable on the facts of the case as accepted by him. Nor was he satisfied that East Pine continued to place any reliance on the estimate made by Mr. Korontsvit by the time they came to enter into the Agreement.

Conclusion

[38] In my view the learned trial judge was entitled to rely on Mr. Amirkhanian's letter of 10th September to the SI Partners in which he set out his arguments in favour of the merger without reference to Mr. Korontsvit's estimate of the anticipated profitability of Agrosnab at the end of the year as demonstrating that Mr. Amirkhanian did not place any significant reliance on the forecast to justify the merger with the balancing payment. I agree with him that this was strong evidence that the estimate as to future profitability did not play a significant role in the decision to merge.

[39] Given the judge's findings as to the climate of business corruption that was commonly accepted in Russia at the time in question, I have great difficulty in appreciating how the fine distinctions and nice points made by counsel for East Pine, on the numerous facts and matters that he urges the judge should have weighed, could have any relevance or indeed satisfy the test warranting disturbance by an appellate court. Estimates of profit and loss, and the accuracy

[47] See para. 27 above.

of companies' statements of accounts, were known by the parties to be inaccurate and not to be depended on. Even the supposedly more reliable Management Accounts were at an early stage known to be inaccurate: they did not include all the black cash payments, and concealed the fact that they included some off-the-book expenses. Indeed, East Pine's Ms. Lokteva testified that as of 24th September 2010, two months before the Agreement was entered into, she suspected that Agrosnab's Official Statements did not accurately state its profits and that it was not as financially sound as the statements suggested. Mr. Amirkhanian testified that around this time he was aware that fake inventory was booked in order to manage Agrosnab's VAT liability.

[40] In October 2010 East Pine's Ms. Lokteva was given a list of wire transfers showing payments made to shadow banking 'partners', i.e., fraudulent transactions. Using her own methods, Ms. Lokteva attempted to calculate Agrosnab's operating profit. Up to the day before the Agreement was entered into on 25th November 2010, Mr. Korontsvit was informing East Pine's principals of the continuing need to resort to black cash payments, to which no demur was made. Mr. Amirkhanian was aware of off-the-books payments being made to customers and to suppliers. He was merely not aware of the full extent of these black cash payments.[48]

[41] Given all the above, the judge was entitled to find, as he did, that the negotiations between the parties proceeded on a basis that the profits were fictitious, and both the Official Statements and the Management Accounts were inaccurate. The judge was entitled to conclude, as he did, that East Pine's attempt to argue an agreement for the parties to renegotiate the balancing payment, in the event that the profitability of Agrosnab did not turn out as estimated, contradicted their assertion that they were entitled to rely on the representation they claimed had been made on 21st August 2010.[49] It is hardly surprising that the judge found that the mis-statements of fact complained of by East Pine were not relied on by its principals at the time the Agreement was entered into. The judge was entitled on

[48] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony of Mr. Amirkhanian at pp. 162-163.
[49] Para. 98 of the judgment.

the evidence to conclude that it was irrelevant whether the black cash payments were only a handful or were more; that whether the Management Accounts were or were not more accurate than the Official Statements had no effect on East Pine's decision to enter into the Agreement; and that whether there were fictitious sales or fake spare parts generating a fictitious profit was of no significance to East Pine, since none of these factors influenced East Pine's principals to enter into the Agreement. Without satisfactory proof of reliance on Mr. Korontsvit's 21st August estimate, East Pine's case in fraudulent misrepresentation based on this representation would fail.

[42] The judge enjoyed the advantage of seeing and hearing the witnesses testify, which advantage I did not share. I have read the transcript of evidence. It is apparent that Mr. Amirkhanian left most of the details surrounding the merger to Ms. Lokteva. Ms. Lokteva's evidence is muddled and difficult to follow in many places. What is clear is that she used the admittedly unreliable Official Statements to make all her calculations as to the profitability of Agrosnab, using formulas of her own that she did not discuss with Agrosnab's principals. Mr. Korontsvit complains with some justification that if Ms. Lokteva had only informed him of her calculations he would happily have shown her why they were wrong. He had no opportunity to set out the details of the black cash payments and the grey suppliers and the other devices used in the company accounts and reports to reduce taxes. She knew from the beginning of September that Mr. Korontsvit was taking undeclared money out of the company as an addition to his salary, but she sought no details from him or Mr. Altynov until very late in the day.[50] Her explanation for not discussing her calculations as to the profitability of Agrosnab with him is, "Because it seems to me right and I didn't need the confirmation. I have got enough information to draw this conclusion".[51] When pressed as to why she did not seek confirmation from Mr. Korontsvit and Mr. Altynov about the extent of the black cash payments or the fictitious sales her further explanation was that she knew the ideology used in producing the more reliable Managerial Reports so

[50] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony of Mr. Altynov at p. 90, line 24.
[51] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony of Ms. Lokteva at p. 47.

that she needed no confirmation from them.[52] It was clear from her testimony that she had not sought an explanation of the Management Reports which had been refused, nor had she been deliberately misled.[53]

[43] In the face of the learned trial judge's finding about the Agreement having been entered into as a result of (a) knowledge by all parties prior to the date of the Agreement of the inaccuracy of all Official Statements; (b) their deliberate agreement not to do due diligence on each other resulting in East Pine's late discovery of the extent of the black cash payments; and (c) his disbelief of Mr. Amirkhanian's testimony that he made it clear to Mr. Korontsvit at an early stage that he considered that a dishonest business culture would be a deal-breaker,[54] it is hard to fault his conclusion that none of the matters complained of by East Pine induced East Pine to enter into the Agreement. I cannot find in the record or in the judgment any support for the submission of counsel for East Pine that the learned trial judge in this case fell into the error described by Goff LJ in the Ocean Frost case.[55] On the contrary, he tested the veracity of the witnesses by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case and also to their motives and the overall probabilities.

[44] I am satisfied that the judge was entitled on the evidence to find both that Mr. Korontsvit did not act fraudulently when he gave his estimate of the possible profitability of Agrosnab at the dinner on 21st August, but that, in any event, East Pine was not relying on that estimate on 25th November 2010 when it entered into the Agreement which resulted in the merger of the two businesses. Mr. Korontsvit had a perfectly reasonable explanation as to why he believed in August that Agrosnab could possibly make a profit in the region of $1m by the end of the year, even though in August the company was making a loss. From his knowledge of

[52] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony of Ms. Lokteva at pp. 35-63.
[53] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony ofMs. Lokteva at p. 60.
[54] See Record of Appeal, File A, Transcript of Trial Proceedings, Testimony of Mr. Amirkhanian--- at pp. 162-163.
[55] Para. 34 above.

the market, he expected sales to pick up in the last quarter of 2010 which would produce the profits he expected. In the event, the pick-up did not occur in the last quarter but in the first quarter of the following year, as was not disputed. In the circumstances, the threshold test of proof that the estimate had been made without an honest belief in its truth established in Derry v Peek[56] has not been met by East Pine. Applying the principles enunciated by Lady Justice Arden in the Kanwal Sohal case,[57] I see no reason to interfere with the finding of facts by the trial judge.

[45] I would dismiss the appeal in its entirety with costs. The litigation between the parties in the court below is incomplete. I do not grant Agrosnab the relief it seeks in counsel's submissions on the disposal of the appeal to order the first instance court to determine the appropriate relief consequential on the original judgment. I would leave the learned trial judge to conclude the remaining proceedings and to grant such relief to the parties as appears to him to be justified.

Order

[46] The appeal is dismissed with costs to the respondents pursuant to rule 65.13 of the Civil Procedure Rules 2000 of two-thirds of the amount awarded in the court below.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Janice M. Pereira
Chief Justice

I concur.

Mario Michel
Justice of Appeal

[56] See para. 35 above.
[57] See para. 36 above.