

Cons Gates v The City Mutual Life Assurance Society Limited 160 CLR 1	Cons/App'l Kyogle Shire Council v Francis (1988) 13 NSWLR 396	Foll R v Hood (1988) 54 NTR 1	Appl Bateman v Slayer 71 ALR 553	Appl Gould v Vaggelas 157 CLR 215	Appl Zoneff v Elcom Credit Union Ltd 94 ALR 445	Appl Demetrios v Gikas Dry Cleaning Industries Pty Ltd (1991) 22 NSWLR 561	Appl Thompson v Henderson & Parners Pty Ltd (1990) 58 SASR 548
	Foll Cut Price Deli Pty Ltd v Jacques (1994) 126 ALR 413	Cons Copping v ANZ McCaughan Ltd (1997) 87 SASR 525	Appl Kerry & Good Pty Limited v M GICA (1992) Ltd (1997) 77 FCR 307	Ref'd to Voss Real Estate v Schreiner (1998) 70 SASR 545	Appl Thiess Contractors v Pluce (Granny Smith) Pty Ltd (1999) 16 BCL 130	Cons Murphy v Overton Investments (2001) 112 FCR 182	
Foll Gould v Vaggelas (1984) 56 ALR 31							

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[HIGH COURT OF AUSTRALIA.]

TOTEFF . . . . . APPELLANT ;  
PLAINTIFF,  
  
AND  
  
ANTONAS . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

*Fraud—Measure of damages—Misrepresentation inducing party to enter into agreement—Agreement to purchase business as going concern—Price apportioned as between goodwill, plant and stock—Misrepresentation only going to goodwill.* H. C. OF A.  
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T. was induced to enter into a contract for the purchase of a business as a going concern by the fraudulent misrepresentations of A., the vendor, as to the profits and takings of such business. The memorandum of agreement between the parties apportioned the total price of £2,200 between goodwill £200, plant £1,750, stock £250. The fair value of the business as a going concern was £900. In an action for deceit the trial judge, taking the view that the misrepresentations went only to the value of the goodwill, and not to the value of the plant and stock, awarded as damages £200, being the amount apportioned in respect of goodwill.

*Held* that, since the misrepresentation induced the entire purchase, the damages to which T. was entitled were £1,300, being the difference between £2,200, the price paid, and £900, the real market value of the business as a going concern, and it was immaterial that the memorandum of agreement apportioned the sum of £2,200, in the way in which it did.

Decision of the Supreme Court of South Australia (*Mayo J.*) reversed.

APPEAL from the Supreme Court of South Australia.

Denu Toteff, on 9th March, 1950, commenced an action, as plaintiff, in the Supreme Court of South Australia against Michael Elias Antonas, as defendant. The plaintiff alleged that, by reason of certain fraudulent misrepresentations made to him by the defendant, he had been induced to enter into an agreement, dated 12th

H. C. OF A. November, 1949, with the defendant, the material clauses of which  
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1. The vendor will sell and the purchaser will buy the goodwill of the business of a fish cafe and restaurant including grills and the sale of non-intoxicating beverages of every description now carried on by the vendor at the shop situated at and known as No. 2 Main Street Henley Beach South Australia together with the tenant's fixtures and fittings and chattels specified in the schedule hereto (hereinafter called "the plant") and stock of the said business on the completion date.

2. The price for the said goodwill plant and stock shall be the sum of two thousand two hundred pounds which is apportioned as to personal goodwill the sum of one hundred pounds, as to local goodwill the sum of one hundred pounds, as to plant the sum of one thousand seven hundred and fifty pounds and as to stock the sum of two hundred and fifty pounds.

The action was tried before *Mayo J.* who, in a judgment delivered on 25th September 1951, found that the plaintiff had been induced to buy the business as a going concern by the following false and material misrepresentations (a) that the business had made a profit of £1,200 during the preceding twelve months ; (b) that the takings of the business averaged £100 a week during the preceding year ; (c) and that the takings of the business amounted to as much as £500 a week during portion of the said year. The trial judge held, however, that in the absence of any representation concerning the value of the plant and stock, and in the absence of proof that the proved misrepresentations had any relation to the price paid for plant and stock, the damages to which the plaintiff was entitled were £200, being the amount apportioned by the agreement for goodwill.

From this decision the plaintiff appealed to the High Court of Australia.

*H. G. Alderman* Q.C. and *J. F. Brazel*, for the appellant.

The respondent in person.

*Cur. adv. vult.*

March 17.

The following written judgments were delivered :—

DIXON J. This appeal relates to the amount of damages awarded to a successful plaintiff in an action of deceit. The appellant is the plaintiff in the action, and he complains that the damages were erroneously assessed at too low a sum. There is no other question before us.

The transaction of which these proceedings are the outcome was the sale by the defendant to the plaintiff of the goodwill of the business of a fish cafe and restaurant together with certain fixtures fittings and other chattels and the stock in trade. The business was carried on in Main Street, Henley Beach, South Australia. The parties executed a memorandum of agreement dated 12th November 1949 setting out the terms of sale, and containing a schedule specifying the fixtures fittings and chattels (called the "plant") and including items of stock in trade. The agreement provided that the price of the goodwill plant and stock should be £2,200 and apportioned it "as to personal goodwill the sum of £100, as to local goodwill the sum of £100, as to plant the sum of £1,750 and as to stock £250".

The plaintiff charged the defendant with certain fraudulent misrepresentations as to the takings and profits of the business. The action was heard by *Mayo J.* who found in the plaintiff's favour upon the issues of representation, falsity, fraud, materiality and inducement. As to the last his Honour said: "These representations were said by the plaintiff to be of material effect in inducing him to buy the business as a going concern. I accept that as the fact".

According to an expert, whose evidence *Mayo J.* says he was disposed to accept, the business as a going concern was worth £856. The plaintiff in fact resold it for £900. Both the valuation and the resale included the same fittings fixtures and chattels as in the original contract. The evidence as to the amount of stock is not very distinct but the changes in the quantity of stock carried cannot have been great and certainly could not make any very considerable difference in the value of the business as a going concern. His Honour appears to have been content to accept the amount of £900 as the value of the business, that is to say of all the plaintiff obtained under his purchase, and we see no reason to adopt any other figure.

The plaintiff claimed that he was entitled to recover the difference between this sum and the purchase money (£2,200) which, by the deceit, he had been induced to pay. His damages were thus £1,300. *Mayo J.* however took the view that the representations touched only the value of the goodwill and left the value of the "plant" and stock unaffected. His Honour treated the provision in the contract assigning a distinct value of £200 to goodwill, of £1,750 to plant and chattels and of £250 to stock as significant, indeed it might fairly be said as decisive. "In the present case" said the learned judge "there was no representation concerning the

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value of the plant and stock nor has it been demonstrated that the statements concerning takings and profits had any relation to the price paid for plant and stock. If plant and stock had a value in the business, considered as a going concern, in excess of the market value of each element considered separately and apart from the business, that accretion would seem to be added in reality as part of the goodwill. But that view is negatived here because goodwill is separately priced". Taking the view that the price, and so by consequence the value, of the plant and stock stood apart from the goodwill and that the misrepresentations related only to the latter, *Mayo J.* awarded to the plaintiff the amount only which, according to the contract, he had paid in respect of goodwill, viz. £200.

I think that this mode of assessing the damages is erroneous and that the plaintiff is entitled to recover the full difference between the purchase money he paid for the business as a going concern, including plant and stock as well as goodwill, and the value which he obtained. On the figures already given that amounts to £1,300.

In an action of deceit a plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage he has suffered in consequence of his altering his position under the inducement of the fraudulent misrepresentations made by the defendant. When what he has been induced to do is to make a purchase from the defendant and part with his money to him in payment of the price, then, if the transaction stands and is not disaffirmed or rescinded, what is recoverable is "the difference between the real value of the property, and the sum which the plaintiff was induced to give for it" per *Abbott L.C.J. Pearson v. Wheeler* (1). As Sir *James Hannen P.* in *Peek v. Derry* (2) pointed out, the question is how much worse off is the plaintiff than if he had not entered into the transaction. If he had not done so he would have had the purchase money in his pocket. To ascertain his loss you must deduct from the amount he paid the real value of the thing he got. It may be objected that the point of the application of this doctrine lies in identifying "the transaction" and that what *Mayo J.* has done is to identify it as the purchase of the goodwill and that only. But what is meant is the transaction into which the representation induced the plaintiff to enter. The measure of damages in an action of deceit consists in the loss or expenditure incurred by the plaintiff in consequence of the inducement on which he

(1) (1825) Ry. & Mood. 303, at p. 304 [171 E.R. 1028, at p. 1029].

(2) (1887) 37 Ch. D. 541, at p. 594; cf. (1889) 14 App. Cas. 337.

relied diminished by the corresponding advantage in money or moneys worth obtained by him on the other side : *Potts v. Miller* (1). You look to what he has been induced to part with as the initial step. He is entitled to say that but for the fraud he would never have parted with his money : per *Coleridge L.C.J., Twycross v. Grant* (2). But he cannot recover the entire price he has paid unless the thing prove wholly worthless. If the thing has any appreciable value the damages must be reduced *pro tanto* : per *Cockburn L.C.J., Twycross v. Grant* (3). It must not be forgotten that after all deceit is an action on the case for special damage incurred in consequence of the defendant's fraudulent inducement.

Now quite clearly the defendant's fraudulent inducement in the present case operated upon the entire purchase. The plaintiff may correctly say that but for the defendant's fraud he would not have bought the business or any of the component items and would not have parted with £2,200 of his money or any portion of that sum.

It is nothing to the point that in the contract he was content to attribute £1,750 of that sum to plant and £250 to stock and it is nothing to the point that the misrepresentations were not as to the value, considered as separate items, of the plant and stock.

It is nothing to the point because notwithstanding that fact, what the plaintiff got was worth in all only £900 and what he gave under the influence of the fraudulent inducement was £2,200.

The consequence is that he is entitled to £1,300 as damages. The appeal should therefore be allowed with costs and the judgment of the Supreme Court for the plaintiff should be increased from the sum of £200 to the sum of £1,300.

McTIERNAN J. I agree that the appeal should be allowed.

The appellant was induced by the respondent's deceit to purchase property consisting of goodwill, plant and stock in trade, for the price of £2,200. The subject matter of the fraudulent misrepresentations was the amount of the takings and profits of the business. The goodwill was represented to be valuable whereas it had no value on the date of the completion of the sale. The appellant, however, obtained the plant and stock which the respondent induced him to purchase : there was no representation that the plant and stock were other than the tangible assets which the appellant obtained on the completion of the sale. The distinguishing characteristic of the case is that the agreement of sale contained a stipulation apportioning the price to goodwill, plant and stock in

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(1) (1940) 64 C.L.R. 282, at p. 297. (3) (1877) 2 C.P.D., at p. 543.  
(2) 1877) 2 C.P.D. 469, at p. 491.

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trade respectively. To goodwill the amount of £200 was apportioned. The appellant obtained the plant and stock he agreed to purchase but not the business because the goodwill was of no value. The learned trial judge decided that the proper measure of damages was £200 the agreed value of the goodwill. Although there was the apportionment of the price to goodwill, plant and stock, there was only one sale and one price. The business was not separately sold for £200: the effect of the deceit was more than to induce the appellant to pay £200 for the business. He was induced by it to pay the price of £2,200 for the business, the plant and the stock in trade. The fair value of the totality of this property was £900. The true measure of the damages which the respondent is liable to pay him is the difference between the price, £2,200, and the sum of £900, *Holmes v. Jones* (1). The amount of the difference is the pecuniary loss sustained by the appellant in consequence of the respondent's fraud. There should be judgment for the appellant for £1,300.

WILLIAMS J. This is an appeal by the plaintiff from a judgment of the Supreme Court of South Australia (*Mayo J.*) claiming that the damages awarded him in the action, £200, should be increased from that sum to £1,300. The action is one in which his Honour found that the plaintiff had been induced to purchase the defendant's business by the defendant fraudulently representing to him that the business had made a profit of £1,200 during the preceding twelve months, that the takings of the business averaged £100 a week during the preceding year, and that the takings of the business amounted to as much as £500 a week during portion of that year. The contract of purchase is dated 12th November 1949 but it was in fact entered into on the day before and provides *inter alia* that cl. (1) the vendor will sell and the purchaser will buy the goodwill of the business of a fish cafe and restaurant including grills and the sale of non-intoxicating beverages of every description now carried on by the vendor at the shop situated at and known as No. 2 Main Street Henley Beach aforesaid together with the tenant's fixtures and fittings and chattels specified in the schedule thereto and stock of the business on the completion date; cl. (2) the price for the goodwill plant and stock shall be the sum of two thousand two hundred pounds which is apportioned as to personal goodwill the sum of one hundred pounds, as to local goodwill the sum of one hundred pounds, as to plant the sum of one thousand seven hundred and fifty pounds and as to stock the sum of two hundred and fifty pounds. Clause (4) provided that the completion date

(1) (1907) 4 C.L.R. 1692, at p. 1703.

should be 11th November 1949, that is the same date as the making of the contract. H. C. OF A.  
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His Honour considered that the parties themselves had apportioned the purchase money between the items mentioned in cl. (2) of the contract, that there was no representation concerning the value of the plant and stock, that the plaintiff had obtained possession of this plant and stock which must be taken to have a value of £2,000, and that it had not been demonstrated that the statements concerning takings and profits had any relation to the price paid for plant and stock. Accordingly he confined the damages flowing from the misrepresentations to the items apportioned to goodwill and in this way reached the sum of £200.

With all respect to his Honour this was an erroneous approach. The contract was a contract for the sale of the business as a going concern. The representations related to the takings and profits the plaintiff might reasonably expect to make out of the business if he purchased it on this basis. The damages that the plaintiff would suffer if the representations were untrue was the difference between the real market value of the business as a going concern and the price the plaintiff paid for the business. The business was a business of selling fish and chips and soft drinks carried on at Henley Beach, somewhat grandiloquently described as the business of a "fish cafe and restaurant". The stock of the business consisted mainly of fish, potatoes and soft drinks. The stock was mainly perishable and wholly consumable. The real value of the business and all its assets, whether apportioned into items or not, lay in its turnover and the profits that could be made thereon.

The plaintiff said that he opened up the business the week after he purchased it and carried it on as it had been carried on heretofore. He kept the business open from 18th November 1949 to 1st June 1950. He then shut it up for the winter months, opened it again on 6th October 1950, and kept it open until 7th January 1951 when he sold it for £900. He found that the takings were much less than he had been led to expect which was not strange because the defendant in his defence denied that he had made the representations, but admitted that, if made, they were false. The plaintiff called a witness A. R. Burley, a public accountant, who had been the secretary of the S.A. Cafe and Confectioners Association for fifteen years and assistant secretary for twelve years before that, and who was an experienced valuer of suburban cafes. He gave evidence that he made an inspection of the business in suit on 9th March 1950 and valued it as a going concern at £886. This evidence is uncontradicted and his Honour said that he was disposed to accept it. It is supported by the price obtained when the business

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was sold by the plaintiff in January 1951. In this state of the evidence the only reasonable conclusion open on the evidence is that the real value of the defendant's business was £900 and therefore, as the plaintiff contends, £1,300 less than the price he was induced to pay by the misrepresentations.

The measure of damages is the difference between what the plaintiff paid, the sum he was out of pocket, and the real market value of the assets he acquired. Where the whole value of the assets is their value for use as part of a going concern, the fact that the total purchase money is apportioned between the assets that have been purchased is immaterial. The plaintiff is still out of pocket the difference between what he paid for the whole of those assets as part of a going concern and the real market value of the business : *McConnel v. Wright* (1) ; *Holmes v. Jones* (2) ; *Potts v. Miller* (3) ; *McAllister v. Richmond Brewing Co. (N.S.W.) Pty. Ltd.* (4). In *Holmes v. Jones* (5) O'Connor J. said " where the complaint is that the contract has been induced by a fraudulent misrepresentation, the remedy for that wrong is to put the party, who has been induced to make the contract, as far as possible in the position he would have been in if he had not entered into the contract. To put him into that position he must be recompensed for the damage he has sustained by entering into the contract. In order to ascertain the extent of that damage the whole contract must be looked at " (6).

The appeal should be allowed with costs. The judgment of the Supreme Court should be varied by substituting for the figures £200 the words and figures " the sum of £1,300 " and striking out the words " being of opinion " down to " exceed £750 ".

*Appeal allowed with costs.*

*Judgment of the Supreme Court of South Australia varied by substituting for the figures £200 the words and figures " the sum of £1,300 " and striking out the words " being of opinion " down to " exceed £750 ".*

Solicitors for the appellant, *Alderman, Brazel, Clark & Ward*, Adelaide, by *Morgan, Fyffe & Mulkearns*.

Solicitors for the respondent, *Isaachsen, Bright & Zelling*, Adelaide.

R. D. B.

(1) (1903) 1 Ch. 546, at pp. 554, 555.

(2) (1907) 4 C.L.R., at pp. 1703, 1709, 1717.

(3) (1940) 64 C.L.R. 282, at pp. 297, 299, 307.

(4) (1942) 42 S.R. (N.S.W.) 187, at p. 192 ; 59 W.N. 147, at pp. 150-151.

(5) (1907) 4 C.L.R. 1692.

(6) (1907) 4 C.L.R., at p. 1709.