[HIGH COURT OF AUSTRALIA.]

AUSTRALASIAN BROKERAGE LIMITED
PLAINTIFF, APPELLANT;

AND

THE AUSTRALIAN AND NEW ZEALAND BANKING CORPORATION LIMITED.
DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 31; *Aug.* 1, 2, 24.

Starke, Dixon, Evatt and McTiernan JJ.

*Misrepresentation—Scope of authority—Agreement to sell shares—Specified number to be "subscribed or underwritten"—Statement that specified number had been "over-subscribed"—Liability of company for representations of director—Direction to jury—Averments in count framed in deceit—Induced by misrepresentation to perform existing legal obligation.*

The scope of an agent's authority is determined by the nature of the duties entrusted to him. To make representations as to the number of shares already allotted and the terms of allotment is incidental to the negotiation of a brokerage agreement for the selling of a company's shares so that the company is liable for such representations falsely made by a director to whom the negotiation of such an agreement is entrusted, and it is a misdirection to state the issue as being whether the director had enough authority to make false statements.

For one party to a binding contract to induce another to perform it by representations of fact false to his knowledge is not actionable as deceit.

The prospectus of the respondent corporation contained a statement that the corporation would not proceed to allotment until 400,000 shares had been subscribed or underwritten. During the course of negotiating an agreement between the appellant company and the respondent for the disposal of the shares of the latter corporation, its chairman of directors, who had been entrusted with the conduct of the negotiations on behalf of the respondent, informed the appellant's chairman of directors that the specified number of shares had been allotted, and later handed to him a prospectus of the

respondent and other documents in which it was variously stated that the respondent had proceeded to allotment with the required allotment figure "over-subscribed," or "exceeded." The agreement was executed. It subsequently appeared that only 86,000 shares had been subscribed in cash and allotted, that a firm underwriting contract was held by the respondent with respect to the balance of the specified number of shares, and that applications for those shares had not been made. In a common law action for deceit the appellant complained that by the misrepresentations of the respondent's chairman of directors, made orally and by way of the documents, it had been induced (*a*) to enter into the agreement, and (*b*) to carry out its terms, to its prejudice. A verdict in favour of the respondent was set aside on appeal and a new trial ordered. At the re-trial the question whether the respondent was responsible for the statements of its chairman of directors was left to the jury. The direction of the trial Judge on this point tended to show that it was not so responsible. He refused to direct the jury that the expression "over-subscribed" could not include "underwritten," and left it to the jury to determine the meaning of the expression. A verdict for the respondent was given on both counts.

*Held* that the jury had been misdirected, and (*Starke* J. dissenting) there should therefore be a new trial on the first count; but that a new trial of the second count should not be ordered, because it alleged no more than that the appellant had been induced to carry out an existing legal obligation.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by Australasian Brokerage Ltd. against Australian and New Zealand Banking Corporation Ltd. the plaintiff declared upon three counts for breach of warranty and two counts in deceit. The jury found a verdict for the plaintiff in the sum of £2,500 upon the warranty counts, and a verdict for the defendant upon the two counts in deceit. In one of the counts in deceit the plaintiff alleged that the defendant "falsely and fraudulently represented to the plaintiff that 400,000 shares in the defendant company had been duly subscribed and allotted, which the defendant knew to be untrue and thereby induced the plaintiff to enter into an agreement, dated 19th June 1930, between the plaintiff, the defendant and Dominion Brokers Ltd., whereby the plaintiff suffered damage." In the other count in deceit the plaintiff alleged the same fraudulent representations on the part of the defendant inducing the plaintiff to carry out the terms of the agreement already mentioned. Particulars under the first of these counts alleged that the

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representations were made orally by one A. C. Willis, a director of the defendant company, at various conversations with one A. G. de L. Arnold, chairman of directors of the plaintiff company and also its solicitor, between 7th March and 19th June 1930; and those under the second count alleged in addition thereto, representations by the defendant in writing by various drafts, printers' proofs and final prints of a prospectus issued by the defendant, under date 30th June 1930, between 19th June and 30th September 1930. The verdict upon the first count in deceit was returned by direction of the trial Judge, and upon the other after consideration by the jury. Upon appeal, the Full Court of the Supreme Court entered a verdict for the defendant upon all the counts. From this decision the plaintiff appealed to the High Court, which ordered a new trial of the counts in deceit. The re-trial resulted in a verdict for the defendant, and the plaintiff applied to the Full Court of the Supreme Court for a new trial. The application was based on the ground, among others, that the trial Judge had not correctly directed the jury with regard to the authority of Willis to make the representations in question on behalf of the defendant or with regard to the truth or otherwise of the representations. The direction on the question of the authority of Willis sufficiently appears in the judgments hereunder. As to the representations, it appeared from the evidence that the defendant's first prospectus contained a statement that "the corporation will not proceed to allotment until 400,000 shares have been subscribed or underwritten"; in a subsequent draft prospectus, which was handed by Willis to Arnold, it was stated that the defendant had proceeded to allotment "with the required allotment figure of 400,000 shares over-subscribed by 32,000" and "the requirements . . . for such allotment were over-subscribed," and the printed prospectus contained the same statement with the exception that, for the phrase "over-subscribed by 32,000," the word "exceeded" was substituted. It also appeared that only 86,000 shares had been subscribed in cash and allotted, but the defendant had an underwriting contract covering the balance of the 400,000 shares, which had not been applied for. In the course of his summing up, the trial Judge, referring to the first prospectus, directed the jury that "you have

to put a meaning on it, on all the facts before you." His Honor also said that he left it to the jury to say whether the words in the later documents referring to the "required" number of shares "refer back to the statement made in the first prospectus that the required amount is made up of 400,000 shares underwritten or subscribed, or are they straight out statements that this company had 400,000 shares or more subscribed to it. . . . The main contention . . . seems to be on that . . . point, whether you have to consider the 400,000 as relating to 'required' that is to say, the 400,000 made up of subscriptions and underwriting, or is the 400,000 to be limited to subscribers only? . . . I will not rule to you that 'over-subscribed' cannot refer to underwriting . . . but the question I am leaving to you is whether it can be construed in conjunction with the underwriting. That is a matter for you under the circumstances." The Full Court refused to grant the application for a new trial.

From that decision the plaintiff now appealed to the High Court.

Other material facts appear in the judgments hereunder.

*Windeyer* K.C. (with him *Wesche*), for the appellant. The language of the agreement entered into between the appellant and the respondent on 19th June 1930 shows an implied promise that the statement in the prospectus shall be accurate. The representation that 400,000 shares had been subscribed and allotted was false. The word "subscribed" as used implies the payment of money. By that representation the appellant was induced to enter into the agreement and to carry out its terms. The underwriting agreement was not such as to enable the respondent to proceed to allotment. The representations made by Willis came within the scope of his authority to do all things incidental to the business he was admittedly carrying on for the respondent. The trial Judge misdirected the jury on this point. The effect of the summing up was that the jury was allowed to consider whether Willis had authority to make false statements. There was not any justification for the statement that the prescribed number of shares had been over-subscribed. Had that number been over-subscribed there would not have been any need for underwriting. "Subscribed" has a

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meaning different from that of "underwritten." The trial Judge was in error in leaving to the jury the question whether underwriting could be called in aid. The jury was not entitled to accept such underwriting as was proved as answering the question whether there had been a misrepresentation because the words used were not capable of the meaning that underwriting was an alternative to "subscribe." The words used are clear and unambiguous. There was an intention on the part of the respondent to deceive. Upon the important question of misrepresentation the trial Judge omitted to give a ruling and the Full Court gave an erroneous ruling. In the circumstances of the case the Court should, notwithstanding that the matter has been litigated twice previously, grant a new trial. On the previous occasions the jurors were not only misdirected, but also were not directed on important aspects of the matter. Two features in particular were that (*a*) an unambiguous statement was allowed to be given by the jury one or other of two suggested meanings, and (*b*) the trial Judge suggested, as his opinion, that the words were capable of, and bore, a meaning of which they were not capable. The jury was misled; therefore the appellant is entitled to a new trial as of right and not as a matter of discretion. There is no authority which supports the Full Court's view that an action in deceit necessarily fails where the plaintiff alleges that, through the defendant's fraud, he (the plaintiff) was induced to perform, or to continue to perform, an existing obligation.

[EVATT J. The American writer, *T. A. Street*, says that "in the eye of the law a man is not injured by being beguiled into the doing of a thing which he is already legally bound to do. Where this happens the deceitful artifice is not a ground even for the avoidance of a contract, and, *a fortiori*, it does not afford a ground for the action of deceit" (*Foundations of Legal Liability* (1906), vol. I., p. 416).]

*Curtis* K.C. (with him *Badham*), for the respondent. The Court will not order a third trial of the matter unless a miscarriage of justice is proved. The appellant did not allege fraud on the part of the respondent until the first hearing, long after litigation had commenced. According to the particulars the oral representations

alleged were made anterior to the execution of the agreement; therefore, at most, they can be used only as an inducement to enter into the agreement, not as an inducement to carry out its terms. The words used by Willis do not amount to a misrepresentation. Even if they do they do not amount to more than the representation in the first prospectus. The words "subscribed or underwritten" in the prospectus should be given their ordinary meaning, that is, that the prescribed number of shares should be either actually subscribed or covered by a valid underwriting agreement. There is no allegation that a representation was made that the prescribed number was exceeded. The whole of the written documents relied upon as evidence of fraud inducing continuance of the contract was before the jury in the first trial and they found no fraud, and that finding was also given by the jury in the second trial, who had before them in addition to the documents, Arnold's statement. Although the question should not have been left to the juries their findings on this point, in the circumstances, afford strong reasons why a third trial should not be granted. The juries were properly directed on the question whether the statements made by Willis came within the scope of his authority. He was not, whether as a director or otherwise, expressly or impliedly authorized to make misstatements with regard to the prospectus. On the second count the jury must have found that the documents did not support a charge of fraud. Those documents were not documents in respect of which the question of authority arose.

*Windeyer* K.C., in reply. The gist of the matter is: What is meant by "over-subscribed"? That word excludes underwriting. The words used are not ambiguous; therefore the direction of the trial Judge to the contrary was erroneous. The finding as to the second count was not necessarily a finding as to the first count. The question of fraudulent intention does not depend upon what Arnold understood, but upon the words used and the interpretation of those words. In view of the prospectus the words used are not capable of an innocent interpretation. The jury was misdirected on this point. Even though the representations by which the appellant was induced to enter into and to carry out the terms of

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the agreement were partly true and partly false it is entitled to succeed (*Cutts* v. *Buckley* (1); *Edgington* v. *Fitzmaurice* (2)). The appellant has incurred loss by following out the terms of the agreement which it was induced to enter by the respondent's misrepresentations and is, therefore, entitled to damages (*Spencer Bower* on *Actionable Misrepresentation*, 2nd ed. (1927), p. 152).

*Curtis* K.C., by leave, referred to *Henderson* v. *Lacon* (3) and *Arnison* v. *Smith* (4).

*Cur. adv. vult.*

Aug. 24.

The following written judgments were delivered:—

STARKE J. This is an appeal from a judgment of the Supreme Court of New South Wales dismissing a motion on the part of the appellant for a new trial of an action brought by it against the respondent. The action has been twice tried with a jury. At the original hearing, the plaintiff—the appellant—declared upon five counts, but judgment has been entered in favour of the present respondent upon all but two of these counts, the fourth and the fifth. The fourth count alleged certain fraudulent representations on the part of the respondent inducing an agreement dated 19th June 1930, between the appellant, the respondent, and Dominion Brokers Ltd., whereby the appellant suffered damage. The fifth count alleged the same fraudulent representations on the part of the respondent inducing the appellant to carry out the terms of the agreement already mentioned. Particulars under the fourth count alleged that the representations were made orally by one A. C. Willis at various conversations with one A. G. D. Arnold between 7th March and 19th June 1930; and those under the fifth count alleged that the representations were made orally by Willis between the same dates, and also by the respondent in various drafts, printers' proofs and final prints, and in a prospectus issued by the respondent between 19th June and 30th September 1930. Willis was a director of the respondent company, and Arnold was the chairman of directors of the appellant company and also its solicitor. It was admitted at

(1) (1933) 49 C.L.R. 189.
(2) (1885) 29 Ch. D. 459.
(3) (1867) L.R. 5 Eq. 249.
(4) (1889) 41 Ch. D. 348.

the first trial that the statements contained in a prospectus of 30th June 1930, whatever they might mean, were made by Willis to Arnold before the agreement of 19th June 1930, but not that they were made on the authority of the respondent company. Evidence was tendered of oral representations made by Willis to Arnold between 7th March and 19th June 1930, but was rejected. The learned trial Judge withdrew the fourth count from the jury. A verdict was found for the defendant—the respondent—on the fifth count, but otherwise for the plaintiff—the appellant. The Supreme Court of New South Wales, on a motion for a new trial, directed that a verdict be entered for the defendant, the respondent. The reasons given by the learned Judges were thus expressed: "It was argued on behalf of the plaintiff that the statement" (in the prospectus) "'the Corporation proceeded to allotment on the 6th June 1930 with the required allotment figure of 400,000 shares exceeded' meant subscribed and allotted in the ordinary way, and that as this was untrue, a term of the contract was broken and a false representation made. On the other hand, it was contended that these words had to be read in conjunction with the statement in the New Zealand prospectus, a reliance being placed upon the words 'allotted or underwritten,' and in view of the evidence it was clear that there had been no breach of agreement or misrepresentation. We are of opinion that the contention of the defendant is correct. The statement in the New Zealand prospectus of 1929 was before Mr. Arnold before he entered into the agreement on behalf of the plaintiff, and it is clear from that that the allotment figure was 400,000 shares subscribed or underwritten, so that when we refer to the second prospectus we have to consider what the required allotment figure of 400,000 shares means. . . . The 'required allotment figure' refers to the statement made in the first prospectus '400,000 shares subscribed or underwritten.' That is, that in considering the statement in the second prospectus, the word underwritten must be considered. If that be so, it is clear from the evidence that more than 400,000 shares had been allotted and underwritten before the agreement of 19th June was entered into between the plaintiff and the defendant. If that be so, there was no misstatement before

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Mr. Arnold upon which an action for breach of contract or misrepresentation could be founded."

The learned Judges were inclined to think that the fourth count should have been left to the jury, as the fifth count was left to them; but that as the same representations, though oral, were relied upon as to the fourth count as in the case of the fifth count, the same construction must be put upon them and the same result reached. On a further appeal to this Court, however, a new trial was ordered on the fourth and fifth counts. Unfortunately, reasons were not given for this decision. It was suggested rather than argued before this Court that the fifth count disclosed no cause of action, but it was allowed to go down with the fourth count for a new trial, leaving the question of law open for further consideration. But it is fairly clear, I think, that this Court was of opinion that there was evidence fit for submission to a jury that statements of the nature alleged in the fourth and fifth counts made by Willis to Arnold in the course of the negotiation of the agreement of 19th June 1930 were within the scope of his authority as a director or agent of the respondent, that the learned trial Judge was in error in rejecting such statements, and that the learned Judges of the Supreme Court were in error in confining themselves to the legal construction of a somewhat confused document. The fact that Willis negotiated the agreement of 19th June 1930 with Arnold, and that the respondent accepted and acted upon it, is some evidence that the scope of his authority extended to acts and statements calculated to bring about that agreement. The statements in the 1930 prospectus, taken in connection with the earlier prospectus of 1929, and in the context in which they are found, are capable of more than one meaning. And the questions were—in what sense a reasonable business man might understand those statements; in what sense Arnold understood and acted upon the statements; whether, so understood, they were true or false; and whether the respondent intended the statements in the sense so understood and knew that they were false (*Smith* v. *Chadwick* (1); *Angus* v. *Clifford* (2)). But it is unnecessary to pursue this topic further. A new trial was had on the fourth and fifth counts, and the jury returned a verdict for the respondent.

(1) (1884) 9 App. Cas. 187, at p. 201. (2) (1891) 2 Ch. 449, at p. 472.

The appellant again moved the Supreme Court for a new trial, but the motion was dismissed. And an appeal is now brought to this Court.

The cause of action alleged in the fifth count is that the appellant suffered damage in carrying out and performing an existing legal obligation by acting on the false statement of the respondent. But in a common law action for deceit damage is the gist of the action. An allegation that a person carried out and performed an existing legal obligation owing to fraudulent statements discloses no damage. A verdict is therefore rightly entered for the respondent on this count.

The cause of action alleged in the fourth count is that the plaintiff was induced to enter into an agreement on the false representations of the respondent, whereby it suffered damage. Interviews took place between Arnold and Willis on 11th March and 5th June 1930. A prospectus of 1929 was referred to in which appeared the statement: "The corporation will not proceed to allotment until 400,000 shares have been subscribed or underwritten"; and Arnold deposed to the following conversation:—

"Arnold: You have got your 400,000 shares in New Zealand?

Willis: Yes.

Arnold: I want a statement that the 400,000 shares were allotted.

Willis: All right."

The statement was required, I gather, in a prospectus that was about to be issued. Willis denied these statements. It was proved, I think, that 400,000 shares were not subscribed in cash, nor allotted, and it is open to question whether they were, strictly speaking, underwritten. Agreements to underwrite were proved, but applications for shares in accordance with such agreements were not made. The jury found, as already stated, for the defendant, and the Supreme Court refused to disturb the verdict. The main ground of objection was that the learned trial Judge had not properly directed the jury on the subject of the liability of the defendant respondent in respect of false statements made by Willis inducing the agreement of 19th June 1930. The charge was far from satisfactory. I transcribe the essential parts of it from the transcript:—

"I leave it to you whether you thought Mr. Willis had authority to make such representations to bind the company. I am told by

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the High Court that the evidence ought to be admitted. These conversations are between Mr. Arnold, who represents the plaintiff, and Mr. Willis, who was a director of the defendant company, and was one of the directors who signed the agreement, and was also, according to Mr. Arnold's evidence, the director whom he saw all through in regard to the matter. Mr. *Curtis* puts it to you that he might be all that, that he might have a right to do all these things, but as a director he has no right to make false representations to bind his company . . . Mr. Willis is a director who, according to Mr. Arnold, says certain things which are not true, and Mr. *Curtis* says 'If he had no authority to do that from the company, he cannot bind the company.' It will be for you to say whether he had authority. Mr. *Windeyer* says that these acts which I have put before you are sufficient to show that he had authority to bind the company. If you find that Mr. Willis acting in that way had authority to bind the company, then you will have to consider these representations as being the company's representations."

At the conclusion of the charge, counsel for the appellant requested that the learned Judge direct the jury that Mr. Willis had authority to do all things incidental to the business he was admittedly carrying on for the bank, but the Judge refused to do so. Counsel for the respondent said that he did not object to a direction that the jury should consider "all things necessarily incidental to the business." Later the jury was thus addressed :—

The Judge : Of course, in considering the position of Mr. Willis, you have to remember that he was the managing director of this company, and that he would have authority to do all such things as a managing director could do.

Mr. *Windeyer* : He was chairman of directors.

The Judge : Yes, that is so.

Mr. *Windeyer* : And for a long time he was sole representative in Sydney.

Mr. *Curtis* : I agree "all things necessarily incidental to his duties as chairman of directors."

Mr. *Windeyer* : That is not what I am asking for, that he had authority to do all things necessarily incidental to the business he was admittedly carrying on for the bank.

The Judge: Mr. Windeyer asks me to tell you that, and I leave that to you, and I still leave the same question to you, whether he had all that authority to make statements which were untrue.

Mr. *Windeyer*: I suggest formally that that is a misdirection. It is never part of a person's authority to commit a tort; it is only authority to do something which may become a tort.

The Judge: I will leave it as it stands.

An innocent principal is, however, civilly responsible for the fraud of his agent acting in the course of his employment and within the apparent scope of his authority, to the same extent as if it were his own fraud. The scope of a person's employment depends upon the business he is employed to transact and the nature of the transaction entered upon. The position of Willis was such that he was authorized to negotiate the agreement made with Arnold, and it is difficult to understand why statements made by him in the course of procuring that agreement were not within the apparent scope of his authority. The jury should have been so directed, and the charge was therefore faulty.

But should a new trial be directed? It is not unimportant that the learned Judges of the Supreme Court refused to direct a third trial of the fourth count. Nor is it unimportant that a verdict was found by the jury for the respondent upon the fifth count, which covered statements in a prospectus of June 1930 much stronger than those to which Arnold deposed. It is true no doubt that the learned Judge said that on each count the jury must find that the representation was made, that it was made by a person having authority to make it, that it was false, and that it was false to the knowledge of Willis. So far as the fifth count was based upon statements made by Willis, the charge is open to the same objection as the fourth count, but the Judge's remarks could not well have been understood as applying to statements in a prospectus issued by the company itself, and much stronger than those made orally to Arnold. Further, when the whole question of Willis' authority was left as a fact to a jury of business men, it may well be doubted whether the insufficiency of the charge led to any real misunderstanding of the position or any miscarriage of justice. It is possible, but unlikely, I think, that the jury found that Willis'

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statements were false and fraudulent and induced the agreement of 19th June 1930, and yet that he had no authority to make them. A third trial in a case of this description would be a grievous burden to the litigants, and in all the circumstances it should be refused, and the appeal dismissed without costs.

DIXON, EVATT AND MCTIERNAN JJ. Upon the first trial of the action out of which this appeal arises the jury found a verdict for the plaintiff for £2,500 upon three counts for breach of warranty and a verdict for the defendant upon two counts in deceit. The verdict upon one of the two counts in deceit was returned by direction of the Judge, and, upon the other, after consideration by the jury. Upon appeal, the Supreme Court entered a verdict for the defendant upon all the counts. From the order of the Supreme Court the plaintiff appealed to this Court, which considered that no warranty was disclosed by the evidence but that a miscarriage had occurred in relation to the plaintiff's cause of action in fraud, because of the erroneous rejection of evidence. A new trial was, therefore, ordered of the counts in deceit. The re-trial resulted in a verdict for the defendant. The plaintiff applied for a new trial, which was refused by the Supreme Court. From that refusal the plaintiff now appeals to this Court.

To induce a Court to order a third trial, the party against whom the verdict has passed must establish that the second trial took a course clearly prejudicial to him and so erroneous that the verdict cannot justly be allowed to stand. We are unable to escape the conclusion that the plaintiff has succeeded in discharging this burden. The reasons for this conclusion cannot be made intelligible without some statement of the transaction out of which the action arises.

The defendant is a company which was promoted in New Zealand at the end of 1928. According to a prospectus dated 1st July 1929, primarily the aim of the company was " to transact general banking business including current and fixed deposits, bills of exchange, letters of credit, drafts, etc., etc.; to endeavour by the pursuing of up-to-date methods and ideas in banking to bring the bank into close and friendly touch with all classes of business, and to extend

such banking and credit facilities as will be commensurate with safety and adequate remuneration to the shareholders."

Before engaging in banking, however, the company turned its attention to the disposal of its shares, two millions of which, of a face value of £1, it offered in New Zealand and Australia. To this end it made an agreement, dated 5th June, with a New Zealand company called "Dominion Brokers Ltd.," which undertook to use its best endeavours to sell or procure subscriptions for shares in the defendant company and to maintain at its own expense a competent and reliable staff for that purpose. The agreement, which conferred upon the broking company the exclusive right to sell the shares, and fixed its remuneration at five per cent on the nominal amount of all shares allotted during its currency, contained the following provisions:—"The broker shall not later than the 31st day of December, 1929, enter into a firm underwriting contract with the bank whereby the broker undertakes by that date to subscribe or to procure subscriptions by responsible persons firms or companies for 400,000 shares in the bank at par. The broker shall also not later than the 30th day of September 1930, enter into a further firm underwriting contract with the bank whereby the broker undertakes by that date to subscribe or to procure subscriptions by responsible persons firms or companies for an additional 350,000 shares in the bank at par. On all shares so underwritten as aforesaid the broker shall pay or cause to be paid to the bank by the respective dates aforesaid the sum of five shillings per share, the balance of 15s. per share being callable by the bank by calls not exceeding 2s. 6d. per share in every six months thereafter. The bank shall proceed to allotment when and not before shares to the nominal value of four hundred thousand pounds (£400,000) have been sold or underwritten in accordance with the terms hereof but this clause shall not debar the bank from allotting the shares subscribed for by the signatories to its memorandum of association." This agreement was annexed to the prospectus, the body of which stated that the company would not proceed to allotment until 400,000 shares had been subscribed or underwritten. It stated also that a sum of five shillings per share—application and allotment money—was payable on application.

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Dixon J. Evatt J. McTiernan J.

According to the evidence, on 22nd July 1929 Dominion Brokers Ltd. executed in favour of the defendant company another document, the authenticity of which, however, is not admitted. By this document Dominion Brokers Ltd., according to and under the terms of the agreement of 5th June 1929, underwrote and contracted to apply for 400,000 shares in the defendant company, with the condition that there should be deducted from that number all shares subscribed for by other persons by 31st December 1929.

On 6th January 1930, the defendant company's directors resolved that, the 400,000 shares provided by the prospectus as the minimum number to be subscribed or underwritten before allotment having been subscribed and duly underwritten, shares amounting to 86,000 be allotted to various persons specified. The minute of this resolution gave a list or particulars of underwriting contracts for 275,000 shares. These appear to have been sub-underwriting agreements.

According to the prospectus of 1st July 1929, the company had a registered office in Sydney, a firm of accountants acted as its secretaries in Sydney, and one of its directors, A. C. Willis, resided in Sydney. In fact, a board of directors had been established in Sydney, and on 5th April 1929 it formally appointed Willis a director. He became chairman. The company does not appear to have had any business to transact in Sydney until negotiations were opened in March 1930 with the plaintiff company to undertake the disposal of its shares in Australia. But there is evidence from which it might be inferred that until 19th June 1930 when, as a result of those negotiations, an agreement was executed, and when also an individual was appointed as secretary, the defendant company was represented in Australia only by Willis. He conducted all the negotiations with the plaintiff company and with Dominion Brokers Ltd. which led to the agreement.

The plaintiff company, which appears to have been formed in New South Wales in September 1929 as an underwriting and share-selling company, had for its leading director a solicitor named Arnold. He had known Willis before he was connected with such enterprises as that of the defendant company. On 8th March 1930, Arnold casually met Willis, who appears to have told him of the proposal to sell that company's shares in Australia. As a result

Arnold had an interview with Willis on 11th March 1930. The account given by Arnold of what took place was not contradicted. It is as follows:—"I said 'The company I represent is the Australasian Brokerage Limited. We have been going about six months and we have done a good deal of business. I am the chairman of directors and there are two other directors, Mr. Rolls and Mr. Rosenthal.' Mr. Willis said 'The selling of the shares has not been handled by the bank; it is in the hands of a company called Dominion Brokers Ltd.' and he then handed me the New Zealand prospectus. The conversation seems to be rather disconnected, but I spoke to Mr. Willis in the light of what I had said to him on the 8th March. He then handed me the New Zealand prospectus and I saw a copy of the printed agreement. I did not read the whole of it, but I saw the names of the Dominion Brokers there. I also looked at the page relating to the allotment of shares. I said to Mr. Willis 'You have got your 400,000 shares in New Zealand.' He said 'Yes, Dominion Brokers had a representative in Sydney named Mr. Manning.'" He added that what he said about the 400,000 shares referred to the prospectus. After the interview, Arnold says that he read through the prospectus and the agreement annexed to it. He again saw Willis on 3rd June for the purpose of discussing what the defendant company's New South Wales prospectus would contain. After dealing with some other matters, Arnold says that finally he said: "And I want a statement that 400,000 shares were allotted," to which Willis replied: "All right."

The first of the plaintiff's counts in deceit is based upon these two conversations. It alleges that, to induce the plaintiff company to acquire from Dominion Brokers Ltd. a right to act as the defendant company's brokers, and to enter into a further agreement in reference to such rights with the defendant company, that company falsely and fraudulently represented to the plaintiff company that 400,000 shares of the defendant company had been duly subscribed and allotted, whereas 400,000 shares had not been duly subscribed and allotted as the defendant company well knew. Consistently with Arnold's evidence of the making of the representations relied upon in support of this count, the purpose of his enquiry may have been to satisfy himself that no difficulty had been experienced by Dominion

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Brokers Ltd. in New Zealand in disposing of 400,000 shares to the public, or that the defendant company had obtained application and allotment moneys in respect of that number of shares, or that in undertaking the disposal of shares in Australia the plaintiff company could truthfully represent that 400,000 shares had been taken up in New Zealand. In fact only 86,000 shares had been allotted, but a firm underwriting agreement, unless the document be ante-dated, had been made by Dominion Brokers Ltd. so as to satisfy the terms of the agreement of 5th June 1929 and the statement in the prospectus that the defendant company would not proceed to allotment until 400,000 shares have been subscribed *or underwritten.*

On behalf of the defendant company, it is said that Arnold, having read the prospectus, must have understood Willis's statement to mean that no more than that 400,000 shares had either been allotted or underwritten firm. But the firm underwriting agreement required by the agreement of 5th June 1929 is one by which the brokers undertook that, before 31st December 1929, they would subscribe or procure subscriptions for the full amount, and Arnold swore that he understood that on 6th January 1930 more than 400,000 shares had been allotted. The questions what meaning was intended to be and was actually conveyed to him were, of course, for the jury. The question of inducement was also one for that tribunal. Upon that question, the purpose for which he required the information was important, because the respect in which the representation departed from the actual facts might be less material if he had in view one suggested purpose rather than another or others. But, in any view, the jury was entitled to find that the representation operated as an inducement to Arnold's company to enter into the agreement. The agreement is dated 19th June 1930. By its provisions the plaintiff company was appointed sole broker of the defendant company for the disposal of two millions of its shares at par at a commission of seven and one-half per cent. The plaintiff company undertook to use its best endeavours to sell or procure subscriptions of the shares and to maintain at its own expense a competent staff. It agreed to sell the shares only on the terms, conditions, facts and figures contained in prospectuses, application forms and literature

supplied by the defendant company. Within a week of the agreement a draft prospectus was, Arnold says, given to him. It contained the following paragraph:—"Allotment—The corporation proceeded to allotment on the 6th January 1930, with the required allotment figure of 400,000 shares over-subscribed by 32,000. "Approval of New Zealand Public—The response of the business and professional communities in New Zealand to the issue of the shares in the Australian and New Zealand Banking Corporation Ltd. at the end of 1929 is crystallised in the fact that when the corporation went to allotment in New Zealand on 6th January 1930, the requirements at that time for such allotment were *over-subscribed*. Apart from the actual financial outcome of the share issue in question, it is important to bear in mind the significance of the New Zealand attitude towards the new bank. The economic status and financial soundness of the Dominion and her standing in the international money market makes her national approval of the present enterprise doubly assuring and important."

On 8th July 1930, Willis handed to Arnold another draft prospectus containing the same passage. The printed prospectus was issued in September, although dated 30th June 1930. Instead of the words "over-subscribed by 32,000," it substituted simply the word "exceeded." Otherwise the passage stood unaltered. Even without the statement thus excluded that the excess over the required allotment was 32,000 shares, this paragraph of the prospectus appears to us to mean that over 400,000 shares have been actually allotted as a result of applications from the commercial and investing community in New Zealand. Its terms are not consistent with the greater part of the 400,000 shares remaining upon the hands of the underwriters. It conveys to the reader, as it was evidently intended to do, that applications had been received for and allotments made of more than 400,000 shares. A critical examination of the precise expressions chosen shows that it is not said that 400,000 shares have been allotted but that "the required allotment of 400,000 shares" was "exceeded" and that "the requirements . . . for such allotment were over-subscribed." But even to one who had studied the New Zealand prospectus of 1st July 1929, this peculiarity of expression, although doubtless designed, would not control the

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meaning which the context almost demands. It is true that the New Zealand prospectus expressed the requirement by stating that the company would not proceed to allotment until 400,000 had been subscribed or underwritten. But the underwriting agreement annexed thereto provides for a firm underwriting agreement by which the broker undertakes by 31st December 1929 to subscribe or procure subscriptions for the 400,000 shares. A statement that, on 6th January 1930, the required allotment figure was over-subscribed when read in reference to this document would mean that the company allotted its shares with more than 400,000 shares subscribed.

The second of the plaintiff company's counts in deceit is based upon the passage in the Australian prospectus and the drafts of it. The count states the agreement and alleges that thereafter the defendant company falsely and fraudulently represented to the plaintiff company that 400,000 shares of the defendant company had been duly subscribed and allotted, whereas such shares had not been so subscribed and allotted as the defendant company well knew, and the defendant company by the representation had induced the plaintiff company to carry out the terms of the agreement and to incur expense in and about its performance. The difficulty in this count lies in the inducement and damage alleged. The count is so framed as to state an agreement prima facie valid and enforceable and without alleging matter showing it to be invalid, unenforceable or discharged, goes on to allege that the plaintiff company was induced to perform the agreement, a thing it appears on the averments contained in the count to be legally compellable to do, and that in performing the agreement it incurred expenses and thus lost sums of money. " In the eye of the law a man is not injured by being beguiled into the doing of a thing which he is already legally bound to do. Where this happens the deceitful artifice is not a ground even for the avoidance of a contract, and, *a fortiori*, it does not afford a ground for an action of deceit " (*T. A. Street's Foundations of Legal Liability*, (1906), vol. I. p. 416). For this reason the count is bad. Upon the issue of fact that it raised, the real questions would appear to be whether Arnold believed, on reading the prospectus and the drafts, that 400,000 shares had been allotted and whether

he acted upon that belief. The meaning of the prospectus is clear enough, but it does not follow that it misled Arnold. The defendant company did embark upon the performance of the agreement. A general manager was appointed and an organization was set up for disposing of the shares. In the advertisements employed much use was made of the statement contained in the prospectus. Little success attended the plaintiff company's efforts. After expressions of dissatisfaction, it began to enquire what capital had been issued by the defendant company, and, eventually on 19th February 1931, it informed the defendant company that, on a search and inspection of the register, it found the number of shares allotted was under 200,000. Shortly afterwards it notified the defendant company that it could not continue to sell shares on the faith of a prospectus it now knew to contain untrue statements and would hold the defendant company responsible for the damage sustained as a consequence. Some collateral proposals or requests made by the plaintiff company provided a basis for an attack upon its sincerity, a matter not material to this appeal.

The second trial took place before *James* J. Almost at the commencement of the evidence, the learned Judge rejected conversations with Willis upon the ground that the defendant company would not be bound by his representations. In doing so, he said: "It comes back to the one point: has he power to make a representation which is untrue and which can bind the company?" It was not until the trial had proceeded for some time that the plaintiff company's counsel succeeded in getting in the evidence already referred to as supporting the first count in fraud. In his charge to the jury, the learned Judge said: "I leave it to you as to whether you thought Mr. Willis had authority to make such representations to bind the company . . . Mr. *Curtis* puts it to you that he might be all that, that he might have a right to do all these things, but as a director he has no right to make false representations to bind his company. That is how he puts it to you. Mr. Willis is a director who, according to Mr. Arnold, says certain things which are not true, and Mr. *Curtis* says 'If he had no authority to do that from the company, he cannot bind the company.' . . . Mr.

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*Windeyer*" (the plaintiff company's counsel) "says that these acts which I have put before you are sufficient to show that he has authority to bind the company. If you find that Mr. Willis acting in that way had authority to bind the company, then you will have to consider these representations as being the company's representations."

At the end of the charge, Mr. *Windeyer*, in the presence of the jury, applied for a direction "that Mr. Willis had authority to do all things incidental to the business he was admittedly carrying on for the bank." This was refused.

After another complaint had been dealt with, counsel for the defendant company said he did not object to a direction that the jury should consider all things necessarily incidental to the business. The learned Judge observed, in effect, that Willis was the chairman of directors and would have authority to do all such things as a chairman of directors could do. Defendant company's counsel: "I agree 'all things necessarily incidental to his duties as chairman of directors.'" Mr. *Windeyer*: "That is not what I am asking for, that he had authority to do all things necessarily incidental to the business he was admittedly carrying on for the bank." His Honor: "Mr. *Windeyer* asks me to tell you that and I leave that to you, and I will leave the same question to you, whether he had all that authority to make statements which were untrue." Mr. *Windeyer*: "I suggest formally that that is a misdirection."

This treatment of the question whether the defendant company was responsible for the representations of Willis was altogether wrong. Nothing could be more calculated to mislead than the question whether Willis had "all that" authority to make statements which were untrue. But that question was formulated by the learned Judge at the beginning of the trial and submitted to the jury at the end of the trial. If its board of directors confided the conduct of the negotiations for the agreement to Willis, it followed as a matter of law that the defendant company was responsible for the statements which he made to the other party if they concerned the subject matter of the agreement. The scope of the authority is determined by the nature of the duty entrusted

to the agent (*Colonial Mutual Life Assurance Society* v. *Producers and Citizens Co-operative Assurance Co. of Australia* (1); *Coroneo* v. *Kurri Kurri and South Maitland Amusement Co.* (2)). If the work of negotiating such an agreement was left to Willis, to make statements on relevant matters was clearly within the scope of the authority. To describe the situation of the company, state the amount of its issued capital, and give the circumstances in which it was allotted, are all involved in supplying the other party with the knowledge which he will require in order to consider the proposal. By introducing the false character of the statements actually made into the question whether to make statements on such matters is in the course of authority, the learned Judge supplied an entirely erroneous standard. "A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment," per *Willes* J., *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (3). "It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that

(1) (1931) 46 C.L.R. 41.
(2) (1934) 51 C.L.R. 328.
(3) (1872) L.R. 7 C.P. 415, at p. 420.

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they authorized the particular fraud complained of or gave a general authority to commit frauds," per Sir *Montague E. Smith*, speaking for the Privy Council in *Mackay* v. *Commercial Bank of New Brunswick* (1).

The inference that the negotiation of the arrangement had been left to Willis was, upon the evidence, almost unavoidable. But, from first to last, the learned Judge would appear to have encouraged the jury to adopt the view that the defendant company was not responsible for misrepresentations made by Willis. No explanation was given to the jury of the question whether Willis had authority to make the statements ascribed to him. They were left almost to guess at what amounted to "authority," at the mode in which it might be derived, and at the considerations which determine its scope. At some stages of the discussion it seems to have been assumed that Willis was acting with the assent of the company in negotiating the arrangement, and yet, although the responsibility for his representations relating to the subject matter would ensue from this fact, the matter was put to the jury as if it was for them to say whether the company had actually authorized him to tell untruths.

An attempt was made to establish that the jury, in finding a verdict for the defendant, must have proceeded upon some other issue. For this purpose the verdict twice found for the defendant on the second count was relied upon. Unfortunately, the direction concerning authority extended to the second count. But, further, the finding on the second count may well be attributable to the fact that the learned Judge, not merely left the interpretation of the prospectus to the jury, but led them to suppose that, if the words "the requirements for such allotment were over-subscribed" "refer back to the statement made in the first prospectus that the required amount is made up of 400,000 shares underwritten or subscribed," the prospectus should not be considered untrue. It is, of course, quite clear that the reference is to the prescribed number of shares for going to allotment, which is stated in the earlier prospectus and the agreement annexed thereto.

1) (1874) L.R. 5 P.C. 394, at pp. 410, 411.

The crucial questions, what Arnold believed and what effect his belief had as an inducement to him, were not clearly and distinctly put to the jury and were not discussed with them by the learned Judge. But the jury was allowed and, indeed, rather encouraged to give what we consider an untenable meaning to a written document. It is, we think, impossible to extract from the verdict on the second count in deceit any actual finding which would govern the first count. The learned Judges in the Full Court thought that *James* J. had finally left the question of authority to the jury in the manner in which the plaintiff company's counsel asked, and *Milner Stephen* J. attached importance to a concluding observation of his Honor that he would "leave it as it stands." We cannot agree that counsel obtained what he sought. The qualification destroyed the whole value, if otherwise it possessed any, of the statement "Mr. *Windeyer* asks me to tell you that and I leave that to you."

We think a new trial must be had on the first count.

The second count should not go down for further trial. No doubt it might be amended so as to include allegations of the matters contained in the first count from which it would appear that the agreement was voidable. But no advantage would be obtained from this course. The representations in the first count would still remain the operative inducement from which the final damage ensued.

Under the first count, the draft and the printed prospectuses are admissible on the issues of honesty and of inducement. Upon Arnold's evidence, the material passage in the prospectus should be regarded as made by the company in order to comply with the request he made on 3rd June. If so, it is evidence of what Willis understood him to mean when he said that he wanted a statement that 400,000 shares were allotted and of how Willis meant his assent to be understood. Further, the nature of the statements in the prospectus may be considered upon the question whether what Willis is alleged to have said on 11th March and 3rd June was innocent. To the question of inducement the prospectuses are relevant as tending to explain why, upon Arnold's story, he continued to rely upon the truth of the representations. They cannot, however, be treated as independent misrepresentations inducing the damage, and to amend the

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count, as suggested, and submit it to the jury would create a danger of their being so used.

For these reasons we think there should be a new trial upon the first count in deceit.

*Appeal allowed with costs. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that a new trial be had between the parties limited to the first count in deceit being the fourth count in the declaration as amended under the order of Milner Stephen J. made on 30th September* 1931. *Order that the costs of the appeal to the Full Court of the Supreme Court be paid by the respondent. Order that the costs of the second trial be allowed to the party who is finally successful in the action. The reason for not including any order as to the costs of the first trial is because those costs are dealt with by the order of this Court of* 1st *August* 1932.

Solicitors for the appellant, *A. G. de L. Arnold & Co.*
Solicitors for the respondent, *Robson & Cowlishaw.*

J. B.