No. 17 of 1957

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

WYVILL

V.

GREGORINI

ORIGINAL

REASONS FOR JUDGMENT

lz. 2 6

Judgment delivered at Sydney

on Tuesday, 27th August 1957

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

WYVILL

v.

GREGORINI

ORDER

Appeal dismissed with costs.

WYVILL

v.

GREGORINI

JUDGMENT DIXON C.J.

WYVILL

v.

GREGORINI

I have had the advantage of reading the judgment of Kitto J. and agree in it completely.

WYVILL v. GREGORINI.

JUDGMENT. WEBB, J.

WYVILL v. GREGORINI.

JUDGMENT. WEBB, J.

This is an appeal against a judgment of the Supreme Court of Western Australia (Dwyer, C.J.) entered for the respondent defendant in an action by the appellant plaintiff for the rescission of a contract made in January, 1955, for the sale of a mixed business in East Perth for £2,500 on the ground of fraudulent misrepresentation, or alternatively for damages.

Clause 13 of the contract purports to prevent any representation from being relied upon as an inducement to enter into the contract except the representation that the takings of the business were £160 weekly. This, however, did not prevent a fraudulent misrepresentation inducing the contract from being relied upon as a ground for rescission or damages. See Pearson v. Dublin, 1907 A.C. 351 and Suburban Homes Limited v. Topper, (1929) 35 A.L.R. 294 and 297.

Summarized the grounds of appeal are that the respondent represented to the appellant that the profits of the business were £25 weekly; that this was fraudulent; and that it induced the appellant to enter into the contract.

The appellant did not rely on this representation as to profits in her first statement of claim nor in her second statement of claim as originally delivered: she relied upon it for the first time in an amendment of the second statement of claim made in May 1956, that is to say, nine months after the action was commenced and 16 months after the contract was entered into. However, the respondent admitted in his further amended defence that he had made the representation that his profits were £25 per week. But in giving her evidence in chief the appellant said that

the respondent told her she would not be able to run the business on her own and would have to get staff and that her profit would be reduced accordingly. It is true that the respondent was then estimating the profits that the appellant would make, but he also was contrasting her position with his in regard to the making of profits and suggesting that she would have wages expenses that he did not have. Again, the respondent in his evidence said that when he mentioned that his profits were £25 per week he pointed out that there were difficulties in the way and that the rent was £4 per week, whereas he paid no rent as the shop premises belonged to his wife.

The learned judge came to the conclusion that the profits were really represented at £25 per week less wages and rent that the respondent had not to pay. I think that conclusion was reasonably open and I am not prepared to take a different view. Then from statements prepared by the respondent's accountant his Honour was satisfied that the profits were not misrepresented as being £25 per week after deducting rent and wages. His Honour assumed, as did the respondent's accountant, that stock had been taken out of the shop and cash out of the till for the respondent's personal requirements and other commitments but had not been recorded in the books or accounts of the business. But it is as likely as not that these personal requirements and other commitments were met from moneys borrowed by the respondent. It so happens that these borrowed moneys were not accounted for to the extent of between £1,100 and £1,200 and that the respondent's personal requirements and other commitments would have amounted to about that sum. However no conclusion can safely be drawn from this, at all events to the extent of imputing fraud to the respondent. There was no cross-examination of the respondent or

his accountant on this aspect; and so we cannot be sure that an explanation consistent with the accuracy of the accountant's statements was not forthcoming. Fraud has to be proved strictly. The most that we could find would be misrepresentation but without fraud, and clause 13 of the contract is effective to exclude that.

Although in the notice of appeal a new trial is sought as an alternative, neither counsel pressed for one. New trials have been granted simply on the ground that the conduct of the trial was unsatisfactory. But however regettable it might appear that the cross-examination of the respondent did not extend further than it did in relation to the application of the borrowed moneys, this did not render the trial so unsatisfactory that a new trial is called for.

I would dismiss the appeal.

WYVILL

v.

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JUDGMENT KITTO J.

WYVILL

v.

GREGORINI

The appellant, Carolina Louisa Wyvill, sued the respondent, Robert Francis Gregorini, in the Supreme Court of Western Australia, alleging that the respondent had induced her by fraudulent misrepresentations to purchase from him a mixed business in Perth. She claimed rescission of the contract of sale and return of the purchase money paid, or alternatively damages.

The respondent acquired the business in July 1954. It was a business which included amongst its wares smallgoods, greengrocery, dry groceries, fruit and soft drinks. In February 1955, the respondent, who had not been attempting to sell the buisness, was approached by an agent named Fry whom the appellant had asked to find her a business which she might purchase. Negotiations ensued, and on the 18th of that month the parties entered into a written contract for the sale and purchase of the business for £2,500. It contained the following special provision: "The Purchaser admits that he has thoroughly inspected the business and buys it as it stands and enters into this contract after such inspection and examination and states that no statement made by the Vendor or any agent of the Vendor has influenced or induced the Purchaser to enter into this agreement save and except the following: (a) Written Lease expiring on or about Feb. 1958 with option of renewal for Two years. (b) Rental Four Pounds per week. (c) Approximate weekly takings over period of Six Months preceding this sale One hundred and sixty Pounds (£160)."

Ten days later, on 28th February 1956, the appellant took possession of the business pursuant to the contract.

The respondent admitted on the pleadings that in the course of the conversations which led up to the contract, and in order to induce the appellant to purchase the business, he represented to her that the average weekly takings of the business for the six months preceding the 18th February 1955 were approximately £160, and that the business showed a profit of £25 per week. The appellant alleged that she purchased the business on the faith of these representations, and that they were false and fraudulent. She alleged that there was a third representation on the faith of which also she purchased the business, namely that the business included sales to and trade with children attending schools in the vicinity; and this representation she alleged was false in that the business was not "an established School Shop" and that it had only been opened by the respondent six months before. The respondent denied that he had represented that the business was "an established school shop".

The action was tried by Dwyer C.J. without a jury, and judgment was given for the respondent. The learned Chief Justice found that the admitted representations as to takings and profits were substantially true. He found, further, that the representation as to takings had no inducing effect on the appellant. The alleged representation concerning trade with school children his Honour put aside because the business commanded a body of customers from an adjoining school attended by hundreds of girls, and there was no definite meaning of the expression "established school shop" which would make the representation untrue. Finally he held that the action must in any case fail because, as no allegation of fraud was established, clause 13 of the contract was effectual to protect the respondent in respect of all representations other than the representation as to takings and that representation was not proved to be untrue.

It may be remarked at the outset that even if fraud had been proved a case for relief was not made out.

The appellant, as has been mentioned, went into possession on 28th February 1955, and she made considerable changes in the manner in which the business was carried on. The respondent and his wife gave her full-time or part-time assistance in the business for the first five weeks, and at the end of that time, according to her evidence, she complained to the respondent that the profits were not £25; but she continued nevertheless to carry on the business, and she was still carrying it on at the institution of the proceedings, and indeed at the time of the trial in August 1956. As the trial judge said, the takings had by then declined so seriously that the business built up by the respondent had vanished. It seems clear that restoration of the status quo, even substantially, had become impossible before the appellant took any step to disavow the purchase; and, that being so, neither at common law nor in equity could any purported rescission by the appellant of the contract of purchase and sale be treated as effectual: cf. Alati v. Kruger (1955) 94 C.L.R. 216. Moreover, no evidence was adduced at the trial as to the fair value of the business at the time of the contract, and without such evidence the common law relief of damages could not have been given: see Holmes v. Jones (1907) 4 C.L.R. 1692. In these circumstances the action must necessarily have failed; but it is desirable nevertheless to deal with the evidence and the findings as to the takings and profits of the business, since the appellant renewed before us her attempt to establish the falsity of the representation made to her as to profits, and failed, as I think, to displace the conclusion of the learned trial judge that the representation was substantially true.

As regards the takings, little need be said except by way of preliminary to a consideration of the profits. The statement of claim as finally amended contained two allegations which, though separated in the pleading, should probably be taken together in considering the appellant's

case in relation to takings. They are the allegation already mentioned that the average weekly takings over the six months before the sale were approximately £160, and an allegation that the respondent "fraudulently concealed from the appellant the fact that the said weekly takings included a sum of £30 per week or thereabouts which represented the proceeds of the sale of butter which commodity was sold by the defendant (the respondent) at a price which showed a negligible margin of profit." In her evidence in chief the appellant said that she found the takings were about right, but that there was no margin of profit. Possibly her real complaint as to takings was intended to be that it was only by selling £30 worth of butter almost at cost that the respondent's total sales were made to reach the level of £160 per week, and that to describe them as of that order without disclosing the situation in regard to sales of butter was to imply, and to imply fraudulently, that they were obtained by ordinary trading. But even if this complaint had been made specifically it could hardly have been upheld, for the evidence satisfied the learned Chief Justice that the quantity of butter sold by the respondent did not exceed an average of 12 lbs. a day, which at the respondent's selling price of 4/- per lb., would be about £14 worth a week. The weekly takings over the six months before the sale averaged, according to the respondent's records, £15¼. He admittedly produced some records to the appellant in the course of the negotiations, and although in giving evidence she denied that the records in court were those which she had been shown, Dwyer C.J. was satisfied that they were. These records showed the takings the average of which was £15¼ a week. The appellant when considering the purchase took no point about the small deficiency below £160 a week, and in the circumstances the conclusion was justified that the representation was substantially true. It may be mentioned that an accountant,

a Mr. Whiteley, whom the appellant called as a witness at the trial, reported after an examination of the appellant's own records that for the first five weeks after she took over the business the takings were approximately at the level indicated by the respondent's figures.

The argument for the appellant in this Court concentrated on the representation as to profits. It differed from the representation as to takings in not relating to any particular period. As admitted on the pleadings, it must be taken as referring to the profits which the business was currently showing at the time of the sale. The admission may have gone further than the facts justified, for Dwyer C.J. thought that what was actually said by the respondent appeared to have been treated more as an estimate based on the amount of the weekly takings than a representation of fact. This seems to be correct. It is necessary to bear in mind that the respondent's book-keeping methods were crude and inaccurate, and that he was in the habit of supplying his household needs out of stock and using money from the till for family and personal expenditure. Any statement that he made about profits could hardly be or be understood as other than an estimate; and according to the note we have of his evidence the statement which he actually made was couched in the language of estimate: "Some mention was then made about profits. I said they'd be £25 per week." It may be remarked in passing that, even giving full effect to the admission in the pleadings that the statement as to profits was a representation of fact intended to induce the apppellant to purchase the business, and even assuming that the statement was untrue, a finding of fraud was of course impossible if the respondent had a genuine belief in its truth; and on the evidence a finding might well have been made, if it had been necessary to consider the point, that he had such a belief. As Dwyer C.J. pointed out, the £25 represented about 17½% of the takings, and on the evidence this percentage seems not to be at all too

high. In fact the respondent in giving evidence put his average profit margin on all lines at 20%. A profit of £25 a week would not be inconsistent with that, for 20% of £160 is £32, and the deductions for which the respondent had to allow, for such part-time assistance as he employed and for petrol and oil, might well leave an amount in the region of £25. Moreover, even the appellant, when the respondent's books were produced to her while she was considering the purchase, thought that they confirmed his statements both as to takings and as to profits. But the question of the respondent's belief need not be pursued beyond saying that, since cl. 13 of the contract afforded a complete answer to the action unless fraud was proved, the appellant had the burden of proving not only that the profit was less than £25 a week but also that the respondent either knew that it was less or spoke recklessly, not caring whether it was or not.

Turning to the question whether the representation as to profits was in fact untrue, it is important to observe at the outset that the respondent was in a special position in regard to profits, and that he made it clear to the appellant that £25 was the amount of the profit which the business was showing to him, and not the profit which she could expect to make. She admitted in evidence that he told her that the figure would be reduced by reason of her having to get additional staff. This referred to the fact that, whereas he had had to employ only part-time assistance to supplement the efforts of his wife and himself, the appellant would need a full-time employee, and the standard wage was £14 for a male and £8 for a female. And his warning went further than that: he pointed out, as the trial judge found, that she would have to pay £4 a week for rent, whereas he himself had been paying no rent, since the premises belonged to his wife. The finding on this point was attacked before us, but it was one which was plainly open to his Honour on the evidence, and, as it depended upon the credibility of the respondent, it must be accepted on this

appeal.

The appellant sought to prove that the profit was less than £25 a week both by showing the history of the business after she took it over and by adducing the results of an accountant's consideration of the respondent's records. For a plaintiff seeking to prove fraud, and relying partly upon her own experience of the business to prove it, the appellant put forward a strangely confused case. She gave evidence herself which, if it had been accepted at face value, would have put her out of court. According to the records she produced and verified, her profit in the first week of her management was £62; in the second week nearly £50; in the third £38; in the fourth £35; in the fifth £28; in the sixth, in which there was an unusually large item of £42 for cigars, £7.10.0. In giving evidence she summarised the operations of the first six weeks by saying that her profit was over £25 a week, and in that time she had to find £300 to pay for stock. In the following weeks the amounts, according to her, were £40, £8, £21, £35, £29, £25. Then there was a loss in one week of £14, followed by profits of £17, £15, £22. Over four months the books showed an average profit of more than £20 a week. These figures were all arrived at after allowing for £12 or £12.10.0 a week for wages and £4 a week for rent. The learned Chief Justice, however, did not dispose of the case on this evidence, for he thought it untrustworthy. The difficulty in accepting it seems to be that when the appellant's profit figures are compared with her figures for turnover they show an average profit-margin so markedly greater than the 20% which was all that the respondent claimed to have made that there must be something wrong with them. It may be, as suggested by counsel for the respondent on the argument of the appeal, that her calculations

had not allowed for omissions to keep up stock levels by sufficient purchases. But however this may be, her accountant, Mr. Whiteley, after making all the adjustments which he thought should be made to her figures, estimated her profit to the end of June 1955 at £8. 2. 0 a week. If to that figure one adds £4 a week being the amount which she paid for rent, and £9. 9. 0 a week being the amount which she paid for wages to a youth whom she employed at two-thirds of the standard wage, one gets a figure of £21.11. 0 to compare with the respondent's representation of £25. In making the comparison it is necessary to allow for differences between the business as the appellant conducted it up to the end of June 1955 and the business as the respondent conducted it while it was his. The appellant raised the price of butter, and thereby abandoned an inducement by which the respondent had attracted customers to the shop. She deserted the respondent's practice of buying fruit and vegetables at the markets. Her own comment on this, in giving evidence, was that "he probably bought cheaper than I did"; and the respondent expressed the opinion that buying fruit and vegetables from a middleman lost her about £5 a week. Then, again, she lost the benefit of an arrangement to supply cut lunches to a government department nearby. This, according to Iris Evans, an employee who worked in the business for each of the parties, was because she would not bother to supply what was wanted. According to the respondent's evidence, she would run short of stocks, was slow at the counter and became unpopular with the school children; and Iris Evans said that the sandwiches which the appellant supplied to the children were not fresh cut and had stale contents, that she would accept orders for pies, pasties and similar goods and not fulfil them, and that she would sell out if she could. Taking all these changes into account - indeed even taking into account only the change in the method of buying fruit and vegetables if the respondent's figure of £5 loss be accepted - there is solid ground, even in Mr. Whiteley's investigations

of the appellant's results in the business, for thinking that the learned trial judge was right in his conclusion that the representation that the respondent's profit was £25 a week was substantially true.

Mr. Whiteley was called primarily, however, to prove the results of his investigation of the respondent's own records. Opposed to him was an accountant called by the respondent, a Mr. Griffin. The learned trial judge did not accept Mr. Whiteley's findings, because they ignored unrecorded extractions by the respondent from stock and from cash for family maintenance and current expenditure. His Honour accepted a report prepared by Mr. Griffin which made certain allowances for these matters, being of opinion that it contained a fair summarisation of the conduct and results of the respondent's trading operations. The choice which his Honour thus made as between the two accountants was attacked on the appeal on two grounds, first, that certain reasons which his Honour gave for thinking that unrecorded extractions were so substantial that they should be taken into consideration were ill-founded, and, secondly, that in Mr. Griffin's report there was demonstrable error.

His Honour's reason for regarding the unrecorded extractions as substantial was that the respondent, having no resources other than the business from which to meet the ordinary needs of his family and himself, and having been, when he started the business, in debt and under the necessity of borrowing money to buy plant and stock, had yet managed to pay off a fair amount of his indebtedness, to increase his stock-in-trade, to acquire a half-interest in a racehorse, and to meet betting debts amounting to about £80. For the appellant it was said that to take this view is a mistake, because in fact the respondent had other resources available to him. In the first place it was put that when he acquired the business he borrowed from a firm of solicitors, Lavan & Walsh, a sum of £1500, and, although he said in evidence that

he spent £1423 on plant, he in fact spent nearly £600 less than that on plant and so had the rest of the borrowed money to draw upon for other expenditure. This conclusion is reached by the following steps: (1) In the respondent's account book (p.262), £1522 is shown as expended on items which include the plant costing £1423, and amongst these items is a refrigerator costing £660 and scales costing £65. The total of these two items is £725. (2) It appears from a "betterment" statement (p.223), prepared by Mr. Griffin from the respondent's records that the latter paid instalments totalling only £154. 4.10 on a refrigerator and shop scales. (3) Therefore the difference between the £725 and the £154. 4.10, namely £571, must have been available for other purposes. In the second place, it was said, it appears from the "betterment" statement (p. 223) that the respondent, while he was conducting the business, increased the balance of his indebtedness to banks and other creditors over stock and cash on hand by £591 - a figure which is obtained by adding together the items £505. 7. 3, £68.11. 5 and £180 and deducting from the total the amounts of £157 and £5. Thirdly, the respondent said in evidence that his wife had a private income of about £5 a week.

It must be said at once that even if there is substance in the contentions thus made as criticisms of his Honour's statement that the appellant had no resources outside the business, there was nevertheless in the evidence ample support for his view that conclusions such as Mr. Whiteley's, drawn only from the available records and making no allowance for substantial extractions of stock and cash from the business for private purposes, must be erroneous. It is true that positive evidence about such extractions is to be found only in the respondent's own testimony, and Mr. Whiteley, unlike Mr. Griffin, had had to conduct his investigations without the benefit of verbal information from the respondent. But

the learned judge must have regarded what the respondent said on these matters as substantially true, for he accepted the results which Mr. Griffin's report showed on its face were reached with the assistance of this information. In his evidence the respondent valued the stock which was taken from the business for family use at £10 a week. He also said that he took cigarettes from stock, though the judge's notes do not record that he gave a figure in this connection. Some purposes for which he said that he took cash from the business absorbed, according to him, between £8 and £9 a week, including £4 for entertainment expenses and the like. He referred also to other extractions of cash, and said that he thought it cost the family over £25 a week to live. If this evidence was anywhere near the truth, Mr. Whiteley's conclusions must necessarily be put aside.

But since acceptance of Mr. Griffin's report as "a fair summarisation" led the learned judge to his view that the representation as to profits was substantially true, it is desirable to look more closely at the "betterment" statement which shows how the conclusion was reached. The first seven items show the alteration in the capital position of the business in the period during which the respondent was carrying it on. The stock on hand increased by £157. There was no cash in hand at the beginning, but there was £5 at the end. But while at the beginning there was a credit of £81.11. 1 in a bank account, at the end there was an overdraft of £423.16. 2, a loan of £180 was owing to a bank on a joint account, and debts owing to other creditors had risen by £68.11. 5. The "betterment" statement treats plant as unchanged at £1423. The result down to that point in the statement is a net capital deterioration of £591.18. 8. But the statement then goes on to list several items of expenditure which had been borne by the business and which ought to be notionally brought back in order to ascertain the result of the trading

over the period. The first is the £10 a week for stock taken for family use. The next is 7/- a day for cigarettes, the figure apparently having been obtained by Mr. Griffin from the respondent. Then there is £5 a week for miscellaneous living expenses and £4 a week for entertainment and social costs, these two items making up the £8 to £9 which the respondent mentioned in his evidence. Then there are the instalments on a refrigerator and shop scales totalling £154. 4.10, and some special payments set out in a schedule totalling £469.19. 8. The items thus brought back in the account exceeded the amount of the capital deterioration by £697. 4.10. This figure is described in the statement as the "nett determined income in period of 31 weeks"; and it is equivalent to £22. 7. 0 a week over that period. If the figure is even approximately correct it justifies the learned trial judge's conclusion that at the date of the sale it was substantially true that the business was showing £25 a week profit; for the respondent had built the business up over the period of his ownership, and the more recent profit must therefore have been appreciably more than £22. 7. 0 a week.

Mr. Griffin did not suggest that the figure he reached in his "betterment" statement was accurate. In his report he emphasised that it was subject to qualifications because of the haphazard manner in which the respondent's records had been kept. But he said that in his view £697. 4.10 was a fair estimate of the nett income of the business, and that the procedure he had adopted would, in his view, be acceptable to any statutory taxing authority in determining the nett profit. In giving evidence he expressed the opinion that the respondent's profits were probably higher than he had found. Now, it is an important fact that, so far as appears, hardly a word of cross-examination was directed to all this. It may well be that there was cross-examination of which the learned Chief Justice did not see fit to take any note, but his Honour's notes provide the only information we have as to the proceedings at the trial, and the appeal must be decided on the material

before us. There is nothing to show that Mr. Griffin was asked whether he had ascertained what the respondent had done with the money he borrowed from Lavan & Walsh, or specifically whether it was a correct inference from the appearance in the records of the items totalling £154. 4.10 for instalments on the refrigerator and the shop scales that that amount at least of the borrowed money had been used for purposes which he was treating as having been met out of the business. It does not even appear that the refrigerator and the scales were identified with those referred to in the respondent's account book as having been bought out of the borrowed money. Mr. Griffin's statement that the profits were probably higher than he had found them is untouched by any recorded cross-examination. Neither he nor the respondent appears to have been asked anything about the way in which the wife's private income was applied. If there was cross-examination on any of these matters, the learned Chief Justice presumably found in the answers nothing which he thought should be recorded as favourable to the appellant's case.

In these circumstances it is out of the question to expect a court of appeal to upset the finding which his Honour based on Mr. Griffin's report. Insofar as the report relied upon information received from the respondent, that information was, for the most part at least, specifically verified by the respondent in the witness-box; it was all open to be tested by cross-examination; and whether it should be accepted or not depended not a little on the impression which the witnesses made in court. Insofar as Mr. Griffin's report depended on his own investigations and on the way in which he worked to his result as a matter of accountancy, since the judge accepted him as a witness the only challenge to his conclusions which a court of appeal could entertain would be on the ground of an error so clearly demonstrated that he could not possibly have maintained his opinion in the face of it if he had been given an opportunity to do so. No such ground has been

shown to exist.

An attempt was made, on the argument of the appeal, to show from Mr. Griffin's report that the unrecorded abstractions from the cash of the business, which the respondent asserted and Mr. Griffin treated as having been made, in fact could not have been made. Mr. Griffin's report gives the total of the recorded sales during the respondent's ownership of the business as amounting to £4590.16. 4 (p. 218, line 31). It gives the total deposits in the bank as £4244. 2. 2., "indicating that £346.14. 2, the difference between sales and deposits, was retained and used to pay wages of £135, and private drawings" (p. 219, lines 7-10). This would make the private drawings only £211.14. 2, or £6.16. 7 a week over the time the respondent owned the business. And, the argument proceeded, even these figures cannot be accepted, because allowance must be made for outgoings for petrol, wages and electric power which amounted in all to £238. 7. 7 (p. 225). But this reasoning, like that which was reflected in a profit and loss account prepared and submitted by counsel for the appellant as part of his argument in this Court, leaves out of account the very feature of the case which Dwyer C.J. made the ground of his rejection of Mr. Whiteley's evidence, namely that to the £4590.16. 4, the amount of the respondent's recorded sales, there must be added, not only the value of the abstractions from stock for family use, but also the abstractions of cash from the till during the course of a day and before the day's takings were recorded. In other words the £4590.16. 4 is not the total of the amounts from which it is said that unrecorded abstractions were made, but is the total of the recorded takings, i.e. the amounts recorded at the end of each day, each day's amount being only the balance which remained after unrecorded extractions had been made. Conclusions based on recorded takings obviously cannot be relied upon where it is known that there were both substantial dispositions of stock otherwise than by sale and substantial resort to

takings before any record of sales was made.

Little need be said as to the finding that the representation concerning profits did not operate as an inducement to the appellant to purchase the business, but it may be observed that there was good ground in the material before his Honour for the view that the appellant, warned as she was that she could not expect to make as much profit as the respondent, made her decision upon a consideration of the respondent's takings and of the profit she thought she could make if those takings were maintained, and put out of consideration the profits made by the respondent. It was certainly a matter for legitimate comment that in the statement of claim as originally framed, and again as amended three months before the trial, there was no mention of the representation as to profits. It was introduced for the first time, as the learned Chief Justice pointed out, by an amendment made at the hearing, nine months after the institution of the action.

The result of all these considerations is that the appeal fails and must be dismissed with costs.