

FERGUSON

v.

LEVER

ORDER

Appeal dismissed with costs.

FERGUSON

v.

LEVER

JUDGMENT

ORAL

BARWICK C.J.

FERGUSON

v.

LEVER

The appellant/plaintiff sued the defendant/respondent for fraudulent misrepresentation inducing the investment by the appellant of some \$12,000 in the capital of the company A. K. Lever & Co. Pty. Ltd. of which the respondent was then the Managing Director.

The representation, as alleged in paragraph 3 of the statement of claim, which is said to have been false and to have induced the investment, is in these terms:

"The Defendant, with a view to inducing the Plaintiff to acquire shares in the said Company orally represented to the Plaintiff that the said Company was in such a financial position that moneys invested by the Plaintiff in the said Company would be available to be expended in the promotion of the sale of the Company's products."

The learned primary judge found that the plaintiff had not been induced to take up those shares by any misrepresentation but that, on the contrary, being experienced himself in business matters and having access to the balance sheets of the company, he took up the shares because he, the appellant, saw in the company an avenue for employment and

an opportunity to exercise what he considered to be his skill in rescuing the company from what he knew to be a serious financial situation. His Honour also found that the representation alleged by the appellant in the statement of claim was not in fact made.

These findings were made after an oral hearing in which both parties gave evidence both in chief and in cross-examination. The judge did not accept the evidence of the appellant but preferred the evidence of the respondent, which he accepted.

No indisputable evidence has been brought to my attention which could warrant an appellate court disregarding these basic findings of fact, nor have I heard anything from appellant's counsel which would justify such a course. That being so, the claim in fraud must fail.

Counsel for the appellant has sought to make a case in fraud by asserting that the respondent, as counsel said, warranted his own honesty or, as counsel also put it, was under a duty to disclose his own intentions as a creditor of the company. But, in my opinion, these submissions are mistaken and without support in fact or in law. Nothing that the appellant received by way of information about the company was shown to have been false. The primary judge believed evidence that the appellant had said before deciding to take up the shares that he had all the information about the company which he needed for the purposes of that decision.

Faced with these findings by the primary judge, the appellant's submission that the judgment for the defendant

should be set aside is, in my opinion, hopeless. I agree entirely with Lucas J. in his reasons for judgment in the Full Court when he said:

"On these allegations, then, the action went to trial and was fought. The learned trial judge made every necessary finding of fact against the appellant. Thus, he found that the express representation of fact pleaded in paragraph 3 was not made. This was enough for the disposal of the case, but the learned judge went further; the evidence was such that he found that in any event the appellant was not induced by any such representation to buy the shares, and there was indeed abundant evidence which justified a conclusion that in buying them the appellant was acting in reliance on his own judgment against the background of his own extensive commercial experience, and in the belief that he could by his efforts bring the company to success.

It is sufficient to say that, consistently with the firmly established principles upon which courts act in these matters, particularly when, as here, the credibility of witnesses is in issue, there is no ground whatever for setting aside any of the findings of fact made by the learned trial judge."

I also agree with what his Honour Mr. Justice Lucas had to say in those reasons as to the amendment which was made by the appellant to the statement of claim during the hearing but I do not wish to add anything to what his Honour there said.

In my opinion, the appeal should be dismissed.

FERGUSON v. LEVER

JUDGMENT  
(ORAL)

McTIERNAN J.

FERGUSON v. LEVER

I agree. In the course of his judgment Mr. Justice Lucas said that paragraph 5 refers back to paragraph 3 and the plain fact is that, reading his Honour's words, the only representation pleaded is the express representation set out in paragraph 3. His Honour Mr. Justice Lucas made a very clear analysis of the statement of claim and he came to that conclusion with respect to its proper interpretation.

I agree with what the Chief Justice has said as to the matters dealt with by his Honour and concur that the appeal should be dismissed.

FERGUSON

v.

LEVER

JUDGMENT  
(ORAL)

MENZIES J.

FERGUSON

v.

LEVER

I agree with the reasons for judgment of the  
Full Court of Queensland that this appeal should be dismissed.

FERGUSON

v.

LEVER

JUDGMENT  
(ORAL)

STEPHEN J.

FERGUSON

v.

LEVER

I also agree with what the Chief Justice has said and add that not only does the transcript disclose, on examination, any error in the trial judge's finding of fact, on the contrary, the transcript of evidence demonstrates, in my view, the correctness of those findings, and I would dismiss this appeal.

FERGUSON v. LEVER

JUDGMENT  
(ORAL)

JACOBS J.

FERGUSON v. LEVER

I agree with the conclusions of the learned Chief Justice, and with the reasons he has expressed as to conclusiveness of the findings of fact made by the primary judge. These appear to me to be an insuperable obstacle to the appellant's success. I do not think that the nature of the pleadings was misunderstood by either the primary judge or the Full Court in the manner which has been submitted by counsel for the appellant. Indeed, it is quite clear that the alternative allegation of no disclosure depends upon there having been made earlier, expressly or impliedly, a representation of the kind set out in par. 3 of the statement of claim. Although, if such a representation were made and if it were true at the time, a subsequent change of intention or circumstances might require disclosure and a failure to disclose might be fraudulent, that situation arises only when there has been a representation which was relied on. However, the finding of fact is that there was no such representation.

It is true that counsel for the appellant could properly refer to the terms of the interrogatory which was answered by the defendant, namely Interrogatory 2:

"I did, in the month of November 1966 tell the plaintiff that A. K. Lever & Co. Pty. Ltd. was in need of money or required money or could with advantage use money for promotional purposes or for expanding its activities."

Such an admission by the defendant might have gone a distance towards obtaining a finding that a representation was made of intention to use the money for the purposes there indicated, but that finding was not, in fact, made.

The interrogatory itself is neutral upon the important question whether or not there was a representation. It would not be open to this Court to infer from the facts

set out in the conversation that there was a representation as alleged in the pleadings. The answer to Interrogatory 2 is a piece of evidence which is not conclusive and it cannot overbear the weight of the findings of fact of the primary judge. In my opinion the appeal should be dismissed.

IN THE HIGH COURT OF AUSTRALIA

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FERGUSON

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v.

LEVER

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**REASONS FOR JUDGMENT**

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*Judgment delivered at*..... BRISBANE

*on*..... 29 May 1974.

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No. 8 - Reasons for Judgment of Full  
Court of Supreme Court of  
Queensland comprising their  
Honours -

Mr. Justice Skerman  
Mr. Justice Lucas  
Mr. Justice Douglas

Dated 27 March 1973.

10.

IN THE FULL COURT OF QUEENSLAND

BEFORE:

No. 1178 of 1967

Mr. Justice Skerman  
Mr. Justice Lucas  
Mr. Justice Douglas

20.

BRISBANE, 27 MARCH 1973.

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BETWEEN:

30.

GEORGE LIONEL FERGUSON

(Plaintiff) Appellant

- and -

ALLAN KEITH LEVER

(Defendant) Respondent

JUDGMENT

40.

MR. JUSTICE SKERMAN: The appellant attacks  
the findings made by the learned trial judge in this  
action on the grounds set out in the notice of appeal.  
In my opinion there was evidence to support all the  
findings made by His Honour as set out in his reasons  
for judgment, having regard to the evidence which 50.  
he accepted. I can find no basis on which this court  
could legitimately substitute its findings for any of  
those made by the trial judge or for reversing his  
conclusion that there must be judgment for the defendant  
for the reasons stated in his judgment.

I would dismiss the appeal with costs.

MR. JUSTICE LUCAS: This is an appeal against 60.  
a judgment of Mr. Justice Matthews in an action for  
damages for fraudulent misrepresentation. The action  
arose out of the purchase by the plaintiff of shares  
in a company called A. K. Lever Pty. Ltd., of which  
the defendant was a director. The plaintiff paid  
\$12,000 for the shares, and it was admitted by the 70.  
defendant that they were valueless. The appeal is

Reasons for Judgment  
of Full Court of  
Q'land

from the second trial of the action; the first trial resulted in judgment for the defendant, but an appeal was taken to the High Court, and that court ordered a new trial on the ground that the learned trial judge had wrongly refused to admit relevant evidence. The second trial also resulted in judgment for the defendant, and this appeal now comes to this court. 10.

It should be said at the outset that the court is not concerned, as a question in vacuo, with the commercial probity of the defendant in connection with the transaction which resulted in the acquisition by the appellant of his shares. The court is concerned with the case as pleaded and fought before the learned trial judge. 20.

It is necessary to keep in mind two elementary principles which apply to a common law action of deceit. First, that it must be based upon a representation of fact by the defendant (which may include a representation of intention), which is false to the knowledge of the defendant, or made recklessly without belief in its truth. Secondly, that for a very long time it has been regarded as necessary to plead an allegation of fraud with precision. 30.

The material allegations in the Statement of Claim are contained in paragraphs 3 to 6, and are as follows:- 40.

"3. The defendant, with a view to inducing the plaintiff to acquire shares in the said company orally represented to the plaintiff that the said company was in such a financial position that moneys invested by the plaintiff in the said company would be available to be expended in the promotion of the sale of the company's products. In making the said representation the defendant impliedly represented that he held the belief that the said moneys would be so available and that he had no present intention of taking advantage of the receipt by the company of the said moneys to recoup himself for any alleged debt. 50.

4. The said representations were false and the said defendant knew that they were false in that - 60.

(a) The said company was not in such a financial position that moneys invested by the plaintiff in the said company would be available to be expended in the promotion of the sale of the company's products.  
(b) The defendant did not believe that the said moneys would be so available.  
(c) The defendant then intended to take advantage of the receipt by the company of moneys invested by the plaintiff to recoup himself for an alleged debt of \$3,000 and thereby diminish the sum. 70.

Reasons for Judgment  
of Full Court of  
Q'land

5. If the said defendant did not on the said date (11th November, 1966) intend to take advantage of the receipt of the said moneys by the said company to recoup himself as aforesaid, the defendant did at some later time before the 5th March, 1967 form the said intention and did fraudulently conceal such intention from the plaintiff knowing that but for such concealment the plaintiff would not acquire shares in the said company. 10.

6. The plaintiff relying on the truth of the said representations and because of such fraudulent concealment as aforesaid did on the 5th day of March 1967 purchase 6,000 \$2 shares in the said company for \$12,000."

There is in my opinion no valid criticism which can be directed to the form of these pleadings. They seem to me clearly to set up a case of fraud. Thus, paragraph 3 sets out the basic misrepresentation of fact upon which the action is founded. It is an allegation as to the financial situation of the company; that its financial situation was such that money subscribed by the appellant for these shares would be available to be expended in the promotion of the sale of the company's products. This is pleaded as an express representation; the paragraph goes on to allege that, in making it, certain further representations were implied, as follows:- 20. 30.

"In making the said representation the defendant impliedly represented that he held the belief that the said moneys would be so available and that he had no present intention of taking advantage of the receipt by the company of the said moneys to recoup himself for an alleged debt." 40.

Paragraph 4 constitutes an allegation of the falsity of the representation. In particular, it is alleged in paragraph 4(c) that it was false because, on the date on which it was made, the defendant had the intention of applying the money not to the promotion of the company's products, but to the payment of debts which were owing by the company to himself and to members of his family. 50. 60.

Paragraph 5 is clearly expressed as alternative to paragraph 4(c). The burden of the allegation which it contains is that if the defendant did not, on the date on which the representation was made, have the intention ascribed to him in paragraph 4(c), he formed that intention at some later time before the appellant subscribed his money, and fraudulently concealed that intention from the appellant. 70.

Paragraph 6 is an allegation that the appellant was induced to buy the shares by the representation alleged in paragraph 3 and by the fraudulent concealment already mentioned.

On these allegations, then, the action went to trial and was fought. The learned trial judge made every necessary finding of fact against the appellant. Thus, he found that the express representation of fact pleaded in paragraph 3 was not made. This was enough for the disposal of the case, but the learned judge went further; the evidence was such that he found that in any event the appellant was not induced by any such representation to buy the shares, and there was indeed abundant evidence which justified a conclusion that in buying them the appellant was acting in reliance on his own judgment against the background of his own extensive commercial experience, and in the belief that he could by his efforts bring the company to success.

It is sufficient to say that, consistently with the firmly established principles upon which courts act in these matters, particularly when, as here, the credibility of witnesses is in issue, there is no ground whatever for setting aside any of the findings of fact made by the learned trial judge. Mr. Moynihan for the respondent has directed our attention to parts of the evidence which put this proposition beyond doubt. It was, however, argued for the appellant that the judge did not go far enough; he should have made findings as to any representations which he found to have been established by the evidence, whether they were pleaded or not. The argument seems to be that one can ignore the case as pleaded, but if the evidence discloses something that might amount to a fraudulent misrepresentation, then a plaintiff is entitled to judgment. *Blomley v. Ryan* (1954-56) 99 C.L.R., 362 was cited as an example of the application of this suggested principle, but it was of course a very different case. It was an action for specific performance resisted on the ground of fraud; the case was, therefore, concerned with what equity calls fraud, a concept of much wider scope than the fraudulent misrepresentation which must serve as the basis of a common law action of deceit. In any event, the learned trial judge in that case

indicated the course of procedure which he adopted in the following passage from his judgment (at pages 363 and 364):-

"The case is, of course, of a type in which a decree for specific performance is normally available but the defendant claims that the circumstances established by the evidence operated to render the agreement voidable at his option or, alternatively, show that this is a case in which the Court, in the exercise of its judicial discretion, should refuse to make such a decree. The circumstances that the latter defence was available only in answer to the plaintiff's primary claim for specific performance left the suit in such a form that it was possible that the claim for damages could succeed, although upon the evidence it might be proper to refuse a decree for specific performance and, indeed, although the evidence which made such a refusal proper was adequate to support a counter claim for rescission of the agreement. Upon consideration of the matter after the termination of the hearing, I formed certain views on the questions of fact involved in the case and it appeared to me that the attention of the parties should be directed to this possibility. Accordingly the suit was restored to the list and I intimated to counsel for the parties that the views which I held upon the evidence as it then stood would require me to refuse to make a decree for specific performance and that consideration should be given to the question of what other order or orders should be made. I further intimated to them that I had grave doubts whether justice did not require that further consideration should be given by the parties to the form of the pleadings and the parties were informed that I would be prepared to hear them on this aspect of the matter at some future time."

It is clear that the learned judge attached great importance to the form of the pleadings, but in the result he granted leave to the defendant to amend his defence and to call further evidence.

Counsel for the appellant had some difficulty in formulating the precise additional findings which he said should have been made by the learned trial judge, and in any event it seems highly unlikely that at the trial he asked for any such findings to be made. In my opinion the learned trial judge was under no obligation to make findings upon any issues which did not come squarely within the scope of the pleadings as they stood at the trial; upon these issues he made the necessary findings, with the result which has already been mentioned.

In particular it was argued for the appellant

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that paragraph 5 of the Statement of Claim should have been regarded as setting up a separate and independent representation, additional to that pleaded in paragraph 3. It was said that the fraud consisted in the concealment from the appellant of an intention formed by the respondent, and that this 10. concealment was of such a kind as itself, in the circumstances of the case, to amount to a representation. Let it be conceded that in certain circumstances concealment of a material fact can amount to a false representation to found an action for deceit; nevertheless, in this case the facts pleaded in 20. paragraph 5 cannot possibly amount to an allegation of such a representation. The paragraph refers to "the said intention", that is, the intention "to take advantage of the receipt of the said moneys by the said company to recoup himself as aforesaid". The words "as aforesaid" are referable only to 30. paragraph 4(c) which has already been set out, and the intention referred to is the intention of the respondent "to recoup himself for an alleged debt of \$3,000". In other words, paragraph 5 is quite meaningless unless it is read with paragraph 4(c). It does not contain an allegation of a separate 40. representation, but is clearly designed to give a continuing effect to the particular aspect of falsity mentioned in paragraph 4(c). That paragraph in turn refers back to paragraph 3, and the plain fact is that the only representation pleaded is the express representation set out in paragraph 3.

In these circumstances, it was quite unnecessary for the learned judge to make any finding in relation to any separate representation said to have been 50. pleaded in paragraph 5, and indeed it would have been wrong for the learned judge to have made any such finding, assuming in favour of the appellant, what certainly does not appear clearly, that he was asked to do so.

In these circumstances, it is unnecessary to 60. go through the large number of alleged facts as to the company's situation and activities which was said to support the proposition that the concealment mentioned in paragraph 5 was such as itself to constitute a representation. It is only necessary to say that some of the facts so canvassed, if established, might give rise to relief against the company in 70.

certain circumstances, and that, in any event, the evidence does not establish with any clarity that the respondent was aware of all such facts or that the appellant was unaware of all of them.

As the learned judge recognised, the strongest evidence in the appellant's favour was the respondent's answer to interrogatory No. 5. That answer was as follows -

"I did in the month of November, 1966 intend to seek to have some money repaid to me by A. K. Lever & Co. Pty. Ltd. if the plaintiff should pay money into the company for shares or otherwise, but I had not formed any intention as to how much money. In the first quarter of 1967 money was repaid to me by A. K. Lever & Co. Pty. Ltd. I do not know how much money was repaid to me as aforesaid, nor at what precise time or times, but to the best of my knowledge, information and belief the amount and time of such repayment comprised a sum of \$2,101.26 on the 3rd day of March, 1967. The steps taken, the persons by whom, and the times when steps were taken to effect the payment of such money to me were that from time to time, on dates which I do not now recall, I inquired of the manager of A. K. Lever & Co. Pty. Ltd. whether the company had funds available for payment to me, and when such funds were available he authorised a payment to me which was carried out by means of a cheque drawn on the bank account of the company signed by me and by another officer of the company."

But this of itself does not establish that the intention which the respondent thereby admitted he held was a dishonest or fraudulent intention. The learned judge, as I have said, was quite entitled to come to the final conclusion to which he did come.

A paragraph was added to the Statement of Claim by amendment. It was in the following terms -

"6A. The Defendant having, in the manner aforesaid, induced the Plaintiff to subscribe \$12,000.00 for 6,000 shares in the said Company, so contrived matters by signing cheques to the extent of \$12,000.00 that no part of the said \$12,000.00 became available to be expended in the promotion of the Company's products, that all the said money was otherwise immediately expended."

This was dealt with in the following passage from the learned judge's judgment -

"Mr. McCawley for the plaintiff, in the course of his address, submitted that as an alternative to the plaintiff's claim of fraud, if the plaintiff in the event failed to establish such cause of action, he was entitled to

Reasons for Judgment  
of Full Court of  
Q'land

judgment for damages if the facts pleaded in clause 6A were established; the basis of such right was said to be comparable with that of a claim for 'unjust enrichment'. I must confess to some lack of appreciation as to what is meant to be involved by this amendment, because if the defendant 'in the manner aforesaid induced the plaintiff to subscribe \$12,000 for 6,000 shares in the said company', the fraud alleged by the plaintiff has been established. If the defendant did not do this the facts supporting paragraph 6A have not been proved. Mr. McCawley submitted that the pleadings should be read distributively, but I do not comprehend how this action in tort by the amendment can be converted into an action for money had and received when there is no suggestion of waiver of the tort and the money received by the defendant (from the company and not from the plaintiff) amounted to some \$2,000."

10.

20.

We need only say that we are of opinion that the learned judge was clearly right in dealing with the matter in this way.

For all these reasons, I agree with the order which has been proposed by the learned presiding judge.

30.

MR. JUSTICE DOUGLAS: I agree with what has fallen from both my learned brothers and have nothing further to add. I agree with the order proposed.

MR. JUSTICE SKERMAN: I agree generally with the reasons which have been read by my brother Lucas for his opinion that the appeal should be dismissed. The appeal is dismissed with costs.

40.

MR. McCAWLEY: May I mention just one matter? I do not know whether it is something that should - in His Honour's judgment there were some things said about the argument which I put forward which does not, in my submission, correctly represent my argument, and if there ever should be occasion to refer to it hereafter, I would like it to be clearly remembered that I said, "if representations were made of a similar nature", not just "if any representations were made" - "if representations in substance, to that effect, were made, His Honour should so have found." I think the court will remember I did argue upon that basis.

50.

MR. JUSTICE SKERMAN: That is in relation to paragraph 3 of the Statement of Claim?

60.

MR. McCAWLEY: Yes.

MR. JUSTICE SKERMAN: That has been recorded by the shorthand-writers.

70.

IN THE FULL COURT  
OF QUEENSLAND

10.

No. 1178 of 1967

BETWEEN:

GEORGE LIONEL FERGUSON  
(Plaintiff) Appellant

AND:

ALLAN KEITH LEVER  
(Defendant) Respondent 20.

FULL COURT: BEFORE THEIR HONOURS MR. JUSTICE SKERMAN,  
MR. JUSTICE LUCAS AND MR. JUSTICE DOUGLAS  
THE TWENTY SEVENTH DAY OF MARCH, 1973

THIS MATTER having on the Twenty second, Twenty third  
and the Twenty seventh days of March, 1973 come on 30.  
for hearing by way of appeal from the Judgment of His  
Honour Mr. Justice Matthews, pronounced at Brisbane  
on the Twenty-sixth day of September, 1972 WHEREBY  
IT WAS ADJUDGED that the Plaintiff recover nothing  
against the Defendant and that the Defendant recover  
against the Plaintiff his costs to be taxed including 40.  
the costs of the first trial and UPON HEARING Mr.  
McCawley of Counsel for the Appellant and Mr. Moynihan  
of Counsel for the Respondent

IT IS THIS DAY ORDERED that the said appeal be dismissed  
and that the Respondent do recover against the  
Appellant, his costs of the appeal to be taxed.

50.

BY THE COURT

(L.S.)

V. G. McMahon

REGISTRAR

60.

No. 10 - Notice of Appeal to  
High Court of Australia.  
Dated 16 April 1973.

IN THE HIGH COURT OF

AUSTRALIA

Appeal No. 10 of 1973.

10.

QUEENSLAND REGISTRY

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

BETWEEN:

GEORGE LIONEL FERGUSON

(Plaintiff) Appellant

20.

AND:

ALLAN KEITH LEVER

(Defendant) Respondent

TAKE NOTICE that the Full Court of the High Court of Australia will be moved by way of appeal at the First Sittings of the High Court in its appellate jurisdiction appointed to be held at Brisbane after the expiration of six weeks from the institution of this Appeal or so soon thereafter as Counsel can be heard for an Order THAT the Judgment of the Full Court of the Supreme Court of Queensland pronounced the twenty-seventh day of March, 1973 whereby the Appellant's appeal from the judgment of the Honourable Mr. Justice Matthews dated the twentysixth day of September, 1972 was dismissed with costs be wholly set aside and that in lieu thereof judgment be entered for the Plaintiff for Thirteen thousand one hundred and fifty dollars (\$13150.00) and interest at ten per centum per annum calculated as to Twelve thousand dollars (\$12000.00) as from the Sixth day of March, 1967 as to One hundred and fifty dollars (\$150.00) from the Eighteenth day of April, 1967 with costs of this Appeal and of the Appeal to the Full Court and of the trial and re-trial herein to be taxed, OR THAT the High Court direct that judgment be entered for the Appellant for such other sum or sums of money as the High Court shall think fit, OR in the alternative that a new trial be had and that the Respondent be ordered to pay the Appellant's costs of the re-trial before Mr. Justice Matthews and of the Appeal to the Full Court and of this Appeal to be taxed upon the following grounds, that is to say:-

Notice of Appeal  
to High Court of  
Aust.

- (A) That the judgment of the Honourable Mr. Justice Matthews was wrong in and contrary to law in that
- (1) His Honour's findings were against the evidence and manifestly wrong. 10.
  - (2) That His Honour's finding that the representations alleged in the Statement of Claim were not made is contrary to the admitted and undisputed facts.
  - (3) That His Honour failed to appreciate that the allegations in paragraph 3 of the Statement of Claim were allegations of then existing facts. 20.
  - (4) That His Honour's finding that the Defendant did not say to the Plaintiff that monies invested by the Plaintiff would be expended in promotion of the sale of the products of A.K. Lever Pty. Ltd. indicates a basic misconception of the Plaintiff's case. 30.
  - (5) Alternatively to (1) that on the undisputed, and or, admitted facts the first representation alleged in paragraph 3 of the Statement of Claim was proved in substance, and that the second allegation therein was proved as alleged. 40.
  - (6) That His Honour, upon a proper approach to the Defendant's evidence was bound to find that the Plaintiff's allegations were made out, or that some similar fraudulent representation was made and His Honour should have caused any necessary amendments to be made conformably with his finding. 50.
  - (7) That the continuing and unrevealed intention of the Defendant to obtain for his own purposes and those of his wife and son monies from money to be furnished by the Plaintiff was fraudulent, and that failure to disclose that intention at all stages amounted to a continuing representation of the non-existence of such intention, and that it was sufficient if the Defendant did not know but had reason to believe or think it probable or possible that if the Defendant revealed his said intention the Plaintiff would not buy shares in A. K. Lever Pty.Ltd. 60. 70.

- (8) That His Honour failed to appreciate or advert to the fact that figures supplied to or explained to the Plaintiff in February 1967 only related to the position of A. K. Lever Pty. Ltd. as at October 1966, and that the position had greatly deteriorated since that time, as the Defendant well knew. 10.
- (9) That His Honour should have found that the Defendant's failure to tell the Plaintiff of the drastic deterioration of the financial position of A. K. Lever Pty. Ltd. as at early March 1967 was fraudulent. 20.
- (B) That the judgment of the Full Court was further wrong in law, in that
- (1) It proceeded upon a mistaken view of the effect of the Appellant's pleading in paragraph 5 of the Statement of Claim.
- (2) It was based in part upon a misunderstanding of so much of the learned trial Judge's judgment as referred to Answers to Interrogatories. 30.
- (3) That it did not proceed upon a "rehearing" whereas if the Court had for itself considered the effect of the Defendant's Answer to Interrogatory 3 and his oral evidence, it must have concluded that the express representation pleaded in paragraph 3 of the Statement of Claim was made and that the implied representation necessarily followed. 40.
- (4) That the Full Court misread the judgment of the learned trial Judge with respect to the Defendant's Answers to Interrogatories. 50.

DATED this Sixteenth day of April 1973.

E. Duncan  
ERNEST DUNCAN  
The sole member of the firm  
of J.J. O'Connor Duncan & Co.,  
Solicitors for the Appellant,  
T. & G. Building, 60.  
Queen Street,  
BRISBANE.

To:- The District Registrar,  
The High Court of Australia,  
BRISBANE.

And to:-  
The abovenamed Respondent and  
to his Solicitors,  
Messrs. Trout Bernays & Tingle, 70.  
329 Adelaide Street,  
BRISBANE.

Notice of Appeal  
to High Court of  
Aust.

IN THE HIGH COURT OF

AUSTRALIA

Appeal No. 10 of 1973.

10.

QUEENSLAND REGISTRY

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

BETWEEN:

GEORGE LIONEL FERGUSON

(Plaintiff) Appellant

20.

AND

ALLAN KEITH LEVER

(Defendant) Respondent

I, ERNEST DUNCAN of 11 Berkley Street, Holland Park, Brisbane in the State of Queensland, Solicitor, make oath and say as follows:-

30.

1. I am the Solicitor for the abovenamed appellant.

2. The Judgment appealed against in the Full Court of Queensland was an Appeal against a final judgment in an action to recover \$12,000.00 damages for fraudulent misrepresentation on the purchase of 6,000 shares in a proprietary company.

40.

3. The evidence was that at the time of the purchase of the shares the liabilities of the company greatly exceeded the assets and that the shares were valueless.

SWORN by the abovenamed )  
Deponent at Brisbane in )  
the State of Queensland )  
this Sixteenth day of )  
April 1973, Before me: )

50.

E. Duncan

(?) signature J.P.

60.

A Justice of the Peace

70.

IN THE HIGH COURT OF AUSTRALIA

QUEENSLAND REGISTRY      Appeal No. 10 of 1973

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

10.

BETWEEN:

GEORGE LIONEL FERGUSON

(Plaintiff) Appellant

-and-

ALLAN KEITH LEVER

(Defendant) Respondent

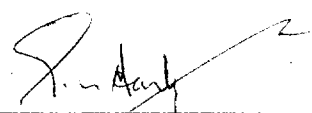
20.

WE HEREBY CERTIFY that this transcript has  
been examined and that it has been found to be correct.

Examined by

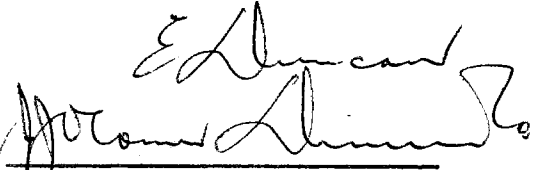


30.



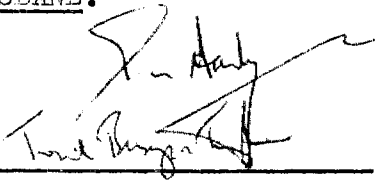
DATED this *Twenty Second* day of *May* 1974.

40.



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50.



TROUT BERNAYS & TINGLE,  
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60.

70.

Certificate as  
to correctness  
of Record