



12 February 2014

PRESS SUMMARY

Cramaso LLP (Appellant) v Ogilvie-Grant, Earl of Seafield and Others (Respondents) *On appeal from the Court of Session (Inner House), [2011] CSIH 81*

JUSTICES: Lord Mance, Lord Clarke, Lord Reed, Lord Carnwath, Lord Toulson

BACKGROUND TO THE APPEAL [9-15]

This appeal concerns a lease taken by a limited liability partnership, Cramaso, of the respondents' grouse moor near Grantown-on-Spey, and whether in making certain pre-contractual representations the respondents owed a duty of care to Cramaso.

In September 2006, the respondents' surveyor, Mr Kennedy, contacted a Mr Erskine, who had previously expressed an interest in taking a lease of the moor. After visiting and shooting on the moor, Mr Erskine emailed Mr Kennedy expressing concern that the shooting planned for that season would leave an inadequate breeding population. Mr Erskine said that he was not qualified to quantify the damage which the shooting was doing to stocks, but he thought it was not insignificant. Mr Kennedy forwarded the email to Mr Lewis, the respondent's chief executive, expressing his own view that the estate had been overshot to the extent that a lease might not be possible [9,11].

On 29 September 2006, Mr Lewis responded stating: "*I have sent a separate email re the grouse programme which you may wish to pass on to Alastair Erskine.*" That separate email is described by Lord Reed as "*the critical email*". In response to similar concerns raised by a previous prospective tenant, Mr Lewis had sent an email seeking to reassure him that the respondents had considered the capacity of the moor to bear the shooting planned for that season. In it he had given information about the grouse counts carried out on the moor earlier that year and the estimated population extrapolated from those counts. However, as the counts were carried out in the most heavily populated areas, they represented an over-estimate [10-12]. The critical email repeated this information, but did not form part of the chain of messages initiated by Mr Erskine's email and did not have the appearance of responding to any concern expressed about over-shooting. It began by stating: "*Now that we are well through with the grouse season, I thought it may be appropriate to recap on how we set this year's programme for Castle Grant and where we are to date. The following information was provided to you at the beginning of August.*" Mr Lewis added: "*I am very happy for you to pass this on to Alastair Erskine if you feel this would be helpful to him.*" [12]

Mr Kennedy did so on 2 October 2006. Mr Erskine instructed solicitors to conclude the lease in the name of an LLP. On 10 October 2006, the solicitors informed the respondents of Mr Erskine's intended use of the LLP to take the tenancy. Discussions continued between him and Mr Lewis, who was aware of the LLP arrangement. Cramaso was incorporated on 16 November 2006 and the lease signed between 8 December 2006 and 18 January 2007 [13]. When Mr Erskine discovered that the counting areas were not representative and that the grouse population was smaller than he had believed, he brought proceedings alleging that Mr Lewis had deliberately misled him in order to induce him to take the lease [14].

The Lord Ordinary concluded that Mr Erskine had been the directing mind of Cramaso and the information in the critical email amounted to a material, negligent misrepresentation that he had relied upon in deciding to contract [1-2] [15]. On appeal, the parties agreed that the Lord Ordinary had erred in considering that the non-existence of Cramaso at the time of the representation amounted to an insuperable obstacle to the existence of a duty of care to it, on the basis that a duty could be owed to a class of persons. However, the Inner House held that at the time the email was sent there was no-one other than Mr Erskine whose reliance upon it could have been foreseen. There had therefore been no proximity and consequently no duty of care to Cramaso. As a result, the LLP could not recover damages [3].

Cramaso appealed to this court, and the parties focused upon two issues: i) whether, on the assumption that the respondents owed a duty of care in negligence to Mr Erskine, such a duty was owed to Cramaso; and ii), whether the assumption on which the first issue proceeded was correct [4].

JUDGMENT

The Supreme Court unanimously allows the appeal, with judgments delivered by Lord Reed and Lord Toulson.

REASONS FOR THE JUDGMENT

Lord Reed begins by questioning whether the way the case has been approached by the courts below and in the parties' printed cases is correct [5-7]. Instead of viewing the representation as an event whose legal consequences were fixed at the time when the statement was made, Lord Reed concludes that the case in fact concerns a continuing representation capable of remaining in effect until the contract is concluded [31].

The representation contained in the critical email was undoubtedly of a continuing nature so long as Mr Erskine remained the prospective contracting party [24]. In principle, the possibility that a representation may continue to be asserted, and may have a causative effect so as to induce the conclusion of a contract, is not necessarily excluded where, as here, the contracting parties are not the original representor and representee. The inference can be drawn from the parties' conduct that they proceeded with the negotiation and conclusion of the contract on the basis that the accuracy of the representation continued to be asserted by the representor, implicitly if not expressly, after the identity of the prospective contracting party had changed. In such circumstances, the representation could continue to have a causative effect, so as to induce the conclusion of the contract [25].

Where the inference to be drawn is that a representation continued to be made until the contract was concluded, it may also be inferred that the risk of harm being suffered as a result of reliance upon it, in the event that it was inaccurate, continued to be foreseeable. In such circumstances, the representor may be taken to have assumed responsibility for the accuracy of the representation towards the contracting party who relied upon it, even where he is not the original representee [26]. Just as a representation may continue up to conclusion of the contract when made by a company's agent prior to the commencement of his agency, it may have the same effect where the person to whom it is addressed becomes the agent of the contracting party [27-28]. In this case, the negotiations simply continued after it became apparent that an LLP was to be used as the vehicle for Mr Erskine's investment. Neither party drew a line under the previous discussions, disclaimed what had previously been said or sought assurance that it could be relied upon as between the contracting parties [30].

In continuing and concluding the contractual negotiations with Cramaso, through its agent Mr Erskine, without having withdrawn the representation earlier made to him as an individual, the respondents by their conduct implicitly asserted to Cramaso the accuracy of that representation. It continued to be foreseeable that the representation would induce the other party to the negotiations to enter into a contract. The respondents therefore assumed a responsibility towards Cramaso for the accuracy of the representation and owed it a duty of care, which they failed to fulfil [31]. Cramaso is entitled to recover damages for any loss suffered as a result, under section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 [32-43].

In a concurring judgment, Lord Toulson rejects the respondents' argument that it was necessary for Cramaso to show that, at the time of the critical email, Mr Lewis knew or ought to have known that there was a high degree of probability that Mr Erskine would be sent the email and would rely upon it. The situation where a statement is made by one party to another, who in turn relies upon it in entering a contract with a third party is different to the present situation, where a statement was made during contractual negotiations by one prospective party to another in relation to the very transaction about which they were negotiating [51]. Lord Toulson agrees with Lord Reed that the fact the representation was negligent rather than fraudulent does not affect its continuing nature; what matters is its continuing potency as an inducing factor [63].

The case will have to return to the Court of Session for further procedure in relation to remedies [44].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html