A

[QUEEN'S BENCH DIVISION]

ESSO PETROLEUM CO. LTD. *v.* MARDON

[1966 E. No. 2571]

B 1974 July 15, 16, 17, 18, 19, 22, 23, 24; 31

Lawson J.

Negligence—Duty of care to whom?—Careless misrepresentation—Pre-contractual situation—Negotiations for tenancy of petrol station—Petroleum company making statement concerning potential throughput of station—Company aware that prospective tenant relying on accuracy of statement in taking C *tenancy—Whether company owing duty of care to tenant—Whether special relationship between parties—Whether breach of duty*

Contract—Condition or warranty—Statement of potential—Negotiations for tenancy of petrol station—Statement by petrol company as to potential throughput—Tenancy taken in reliance on statement—Whether statement constituting warranty

D In 1963 the defendant was interested in taking a tenancy of a petrol filling station owned by the plaintiffs. An experienced representative of the plaintiffs told him that the plaintiffs estimated that the throughput of the station in its third year would be 200,000 gallons. The defendant's own estimate, which he indicated to the plaintiffs' representative, was of a potential throughput of 100,000 to 150,000 gallons E a year, but relying on the expertise of the plaintiffs' representative, he accepted their estimate of 200,000 gallons and took a tenancy of the site. The plaintiffs had failed to reappraise their original forecast in the light of the physical characteristics of the site after development was completed. Owing to those characteristics only about half the throughput estimated by the plaintiffs was ever achieved. The defendant's tenancy was unprofitable, and he was eventually unable to pay for petrol F supplied. The plaintiffs issued a writ claiming possession, moneys due and mesne profits. The defendant gave up possession, and counterclaimed damages for, inter alia, breach of warranty and negligence.

On the counterclaim: —

Held, (1) that a statement could not constitute a warranty unless the maker of the statement intended it to be a promise or guarantee and it was of such a nature as to be capable of G subjecting him to a clear contractual obligation; that the accuracy of the plaintiffs' statement had depended on factors outside their control and had not been intended to constitute a promise, nor was it susceptible of constituting a clear contractual obligation; and that, accordingly, it did not constitute a warranty (post, pp. 150H—151A, E–H).

Heilbut, Symons & Co. v. *Buckleton* [1913] A.C. 30, H.L.(E.) applied.

H (2) That, however, where the maker of a statement held out his skill and knowledge to reinforce the acceptability of the statement a special relationship was created from which a duty of care in making the statement arose (post, pp. 152G–H, 153E–G, 154B); that such a duty could arise even though the statement was made during pre-contractual negotiations between the parties (post, p. 157H); that, although both parties had been

---

[Reported by A. G. B. HELM, ESQ., Barrister-at-Law]

aware of defects in the layout of the petrol station which might affect the success of the business, the plaintiffs had known that the defendant relied on their expertise in making his decision to take a tenancy (post, p. 152E–F); that, accordingly, there had been a special relationship between the parties under which the plaintiffs owed a duty to the defendant to take proper care in making the statement (post, pp. 155H—156B); and that since they had been in breach of that duty they were liable to the defendant in negligence.

Hedley Byrne & Co. Ltd. v. *Heller & Partners Ltd.* [1964] A.C. 465, H.L.(E.); dicta of Lord Reid and Lord Morris of Borth-y-Gest in *Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793, 812 and *Dillingham Construction Pty. Ltd.* v. *Downs* [1972] 2 N.S.W.L.R. 49 applied.

The following cases are referred to in the judgment:

Anderson (W. B.) & Sons Ltd. v. *Rhodes (Liverpool) Ltd.* [1967] 2 All E.R. 850.

Andrews v. *Hopkinson* [1957] 1 Q.B. 229; [1956] 3 W.L.R. 732; [1956] 3 All E.R. 422.

Bentley (Dick) Productions Ltd. v. *Harold Smith (Motors) Ltd.* [1965] 1 W.L.R. 623; [1965] 2 All E.R. 65, C.A.

Bisset v. *Wilkinson* [1927] A.C. 177, P.C.

Brown v. *Sheen and Richmond Car Sales Ltd.* [1950] 1 All E.R. 1102.

Candler v. *Crane, Christmas & Co.* [1951] 2 K.B. 164; [1951] 1 All E.R. 426, C.A.

Coats Patons (Retail) v. *Birmingham Corporation* (1971) 69 L.G.R. 356.

De Lassalle v. *Guildford* [1901] 2 K.B. 215, C.A.

Dillingham Construction Pty. Ltd. v. *Downs* [1972] 2 N.S.W.L.R. 49.

Erskine v. *Adeane* (1873) L.R. 8 Ch.App. 756.

Hedley Byrne & Co. Ltd. v. *Heller & Partners Ltd.* [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.).

Heilbut, Symons & Co. v. *Buckleton* [1913] A.C. 30, H.L.(E.).

Hill v. *Harris.* [1965] 2 Q.B. 601; [1965] 2 W.L.R. 1331; [1965] 2 All E.R. 358, C.A.

Le Lievre v. *Gould* [1893] 1 Q.B. 491, C.A.

Morgan v. *Griffith* (1871) L.R. 6 Exch. 70.

Mutual Life and Citizens Assurance Co. Ltd. v. *Evatt* [1971] A.C. 793; [1971] 2 W.L.R. 23; [1971] 1 All E.R. 150, P.C.

Nocton v. *Lord Ashburton* [1914] A.C. 932, H.L.(E.).

Oleificio Zucchi S.p.A. v. *Northern Sales Ltd.* [1965] 2 Lloyd's Rep. 496.

Oscar Chess Ltd. v. *Williams* [1957] 1 W.L.R. 370; [1957] 1 All E.R. 325, C.A.

Shanklin Pier Ltd. v. *Detel Products Ltd.* [1951] 2 K.B. 854; [1951] 2 All E.R. 471.

No additional cases were cited in argument.

ACTION

The following statement of facts is summarised from the judgment of Lawson J. In 1962 the plaintiffs, Esso Petroleum Co. Ltd., acquired a site at Eastbank Street, Southport, Lancashire, and developed it as a petrol station, saleroom and other premises. The development was completed early in 1963. The defendant, Philip Lionel Mardon, who had been concerned with the motor trade since 1947, had managed and owned petrol filling stations and had lived in Southport, except for one year, from 1947 to 1959, became interested in taking a tenancy of the site. Mr. Leitch, a dealer sales representative of the plaintiffs with nearly 40 years' experience, drove the defendant to the site, and in the course of

A the drive, in general conversation, told the defendant of his very long experience in the petrol trade. At a subsequent meeting, at which Mr. Allen, the plaintiffs' area dealer sales manager, and Mr. Leitch were present, the defendant was told that the plaintiffs estimated that the throughput of the site in its third year of operation would amount to 200,000 gallons a year. The defendant indicated that he thought that 100,000 to 150,000 gallons would be a more realistic estimate, but he B was convinced by the far greater expertise of, particularly, Mr. Leitch. He proceeded to negotiate for and obtain the grant of a three-year tenancy at the rent of £2,500 a year for the first two years, rising to £3,000 in the last year. The tenancy agreement was dated April 10, 1963. In September 1964 a new agreement dated September 1, 1964, was substituted. It created a term of one year and was to continue thereafter terminable C by three months' notice to expire at the end of the first year or on the last day of any month thereafter. The rent was to be £1,000 a year, plus a rent in respect of a lubrication bay and a surcharge in respect of petrol sales. Due to various factors, including the layout of the site, its limited visibility from the adjacent streets, access to it and egress from it, sales of petrol at the site were considerably less than 200,000 gallons a year. The evidence indicated throughput of petrol as follows: April 11, 1963, D to April 10, 1964, 58,375 gallons; April 11, 1964, to April 10, 1965, 83,306 gallons; April 11, 1965, to April 10, 1966, 86,502 gallons; April 11, 1966, to August 27, 1966, 26,347 gallons; (under the succeeding tenant) 1968, 82,117 gallons; 1969, 96,318 gallons; 1970, 110,418 gallons; 1971, 101,821 gallons; 1972, 94,240 gallons; 1973, 96,265 gallons. The defendant made a net operating loss throughout the period of his tenancy, and eventually E found himself unable to pay for the petrol supplied by the plaintiffs. On August 28, 1966, his supplies were cut off. He remained at the site doing such business as he could. On December 1, 1966, the plaintiffs issued the writ in the action. On March 7, 1967, the defendant gave up possession of the site.

By their writ, the plaintiffs claimed against the defendant possession, payment of moneys due and mesne profits from December 28, 1966, until F possession was given. By way of counterclaim, the defendant claimed damages for misrepresentation, breach of warranty and negligence.

Colin Ross-Munro Q.C. and *John Peppitt* for the plaintiffs.

John Hall Q.C. and *Alan Rawley* for the defendants.

G *Cur. adv. vult.*

July 31. LAWSON J. read the following judgment. In this case the plaintiffs, Esso Petroleum Co. Ltd., by their writ issued on December 1, 1966, claim against the defendant, Mr. Philip Lionel Mardon, formerly the plaintiffs' tenant of a petrol service station, showroom, offices and other H premises situated on the south side of Eastbank Street, Southport, Lancashire, first, possession on the ground of non-payment in breach of covenant of moneys due under the relevant tenancy agreement in respect of which breach the plaintiffs duly served a notice under section 146 of the Law of Property Act 1925; secondly, payment of moneys due; thirdly, mesne profits from December 28, 1966, until possession is given. The defendant in fact gave up possession on March 7, 1967. The moneys due have been agreed in the sum of £483·69 and the mesne profits in the

sum of £620. There is, therefore, no issue outstanding on the claim, and, subject to the counterclaim, £1,103·69 is due to the plaintiffs.

By way of counterclaim against the plaintiffs, the defendant claims damages, relying on certain statements alleged to have been made to him by the plaintiffs' employees in 1963 and 1964. His counterclaim is based on three grounds. First, he alleges misrepresentation, but it is conceded that, since the transaction in this case was dealt with long before the Misrepresentation Act 1967, and since the relief provided for in that Act in respect of innocent misrepresentation is specifically excluded in pre-1967 cases, the defendant is not entitled to any relief in respect of this head of his counterclaim. Secondly, he counterclaims for breach of warranty by the plaintiffs in relation to the subject matter of the defendant's tenancy agreements. Since these agreements were completely reduced into writing, however, the defendant's claim is put as being for breach of a collateral agreement or collateral agreements, that is to say, an agreement or agreements entered into between the parties in relation to the subject matter of the tenancy agreements. Thirdly, he counterclaims for damages in negligence, in that he alleges that the plaintiffs, by their employees, made statements to him in relation to the subject matter of the tenancy agreements without taking proper care as to the accuracy of those statements. It is thus the second and third heads of the counterclaim with which I am concerned. [His Lordship stated the facts and continued:]

It will probably be helpful if I briefly recapitulate my basic findings of fact as to the inducement of the defendant to enter into, first, the agreement of April 10, 1963, secondly, the agreement dated September 1, 1964. As to the former, I find that the defendant was induced by and entered into that agreement in reliance on the plaintiffs' forecast of a 200,000 gallons throughput of petrol in the third year of that tenancy as one provided by experts, and that the plaintiffs appreciated that the defendant did in fact so act in reliance on their statement. As to the latter, I find that the defendant was not induced to enter into that agreement in reliance on their earlier forecast or any repetition of that earlier forecast prior to his entering into it. I further find that the 1963 forecast expressly or by implication contained a statement of fact, namely, as to the then potential of the site, and that that was not a mere expression of opinion as to what throughput the site might in fact achieve in the future. I further find that that statement of fact was incorrect. Put another way, in 1963 I find that the Eastbank Street site had not a potential throughput of 200,000 gallons in the third year or foreseeably in any year after the third year of tenancy. The incorrectness of that statement was attributable to the physical conditions of the site, its layout and siting, which were such as to fail in substance to attract the attention of passing as opposed to local traffic, and it was plain that, without a substantial contribution from passing traffic, the forecast throughput was unattainable.

For the reasons which I mentioned at the outset of my judgment, the counterclaim, so far as it is based on innocent misrepresentation, cannot be pursued. I come first, therefore, to the counterclaim based on breach of warranty. In my judgment, the statement as to potential cannot properly be treated as a warranty. I think that the authorities indicate conclusively that, to constitute a warranty, a statement must, first, be intended by the maker to constitute a promise which can be described

as a warranty, or, putting it into common language, it must be a statement by which the maker says: "I guarantee that this will happen." Secondly, to constitute a warranty a statement must be of such nature that it is susceptible in relation to its content of constituting a clear contractual obligation on the part of the maker of the statement.

I have been referred to the following principal authorities. The first group is constituted by three cases: *Morgan* v. *Griffith* (1871) L.R. 6 Exch. 70; *Erskine* v. *Adeane* (1873) L.R. 8 Ch.App. 756 and *De Lassalle* v. *Guildford* [1901] 2 K.B. 215. In *De Lassalle* v. *Guildford* there is a dictum as to what is said to be the decisive test as to whether a statement of the kind which we have under review in this case constitutes a warranty, a dictum which I find unanimously rejected by the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30, to which I will refer later. In each of these three cases the court held that a promise that the promisor would fulfil specific obligations in the future on the basis or faith of which the promisee entered into a lease was enforceable at the suit of the promisee who had entered into the lease in the event of the promisor failing to carry out his promise. *Hill* v. *Harris* [1965] 2 Q.B. 601 is another case which deals with the matter on the same basis, although in this case the existence of a promise was negatived.

The second set of cases is constituted by a group of which the following are representative and have been cited to me: *Brown* v. *Sheen & Richmond Car Sales Ltd.* [1950] 1 All E.R. 1102; *Shanklin Pier Ltd.* v. *Detel Products* [1951] 2 K.B. 854; *Oscar Chess Ltd.* v. *Williams* [1957] 1 W.L.R. 370; *Andrews* v. *Hopkinson* [1957] 1 Q.B. 229 and *Bentley (Dick) Productions Ltd.* v. *Harold Smith (Motors) Ltd.* [1965] 1 W.L.R. 623. In all these cases the statements which were held to be or alleged to constitute warranties were statements as to the existing qualities or attributes of the property which became the subject of the post-statement contract. The statement made in this case does not, in my judgment, fall into this category. It possesses none of the characteristics of those in the cases in the group to which I have referred. In my judgment it cannot be said that the statement was intended, and I find that it was not intended, to constitute a promise on the part of the plaintiffs, nor do I find that it was of such a nature that it was susceptible of constituting a clear contractual obligation. In other words, I am satisfied that there was no intention by the plaintiffs to promise that the forecast throughput should be achieved. I cannot see how the plaintiffs could possibly have implemented such a promise.

The vital point, I believe, is that whether or not the potential throughput of the site was achieved at the time indicated depended largely, if not exclusively, on factors entirely outside the control of the plaintiffs. I have been greatly helped in this part of the case by the references to and citations from *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30 which have been made, and particularly by passages from the speeches of Viscount Haldane L.C., at pp. 37 and 38, Lord Atkinson, at p. 43, and Lord Moulton, at pp. 49–51. I am therefore against the defendant on the issue of warranty.

On the other hand, the relevant statement was not a mere expression of opinion. In this respect it is to be distinguished from a statement which was the subject of Privy Council scrutiny in *Bisset* v. *Wilkinson* [1927] A.C. 177.

I finally come to what has been the most difficult part of the case,

that is, the counterclaim based on the allegations of negligence contained in the defence and counterclaim. This involves considering two questions. First, in the circumstances of this case did the plaintiffs owe a duty of care to the defendant in relation to the information contained in the statement which I have found was made to him in or about March 1963? Secondly, if such duty was owed, was it broken? I can deal at once with the second question. I am satisfied that the plaintiffs failed to take reasonable care in relation to the relevant statement. Their fatal error lay in the failure to reappraise the 1961 throughput forecast of 200,000 gallons in the light of the physical characteristics of the site as these became plain when its development was completed in 1963 and before the defendant began negotiations for the April 1963 tenancy. Mr. Leitch said, and I accept, that he was disappointed when he saw the results of the building of the showroom. He thought that it was, as was the fact, blocking the visibility from Eastbank Street of part of the forecourt. He agreed that the obstruction of the view of the pumps from that street would adversely affect throughput. He also conceded that the site layout was back-to-front and that that adversely affected the site's potential. The same view is, of course, expressed in the plaintiffs' internal memorandum of August 4, 1964.

The defence and counterclaim was amended by an addition made in the course of the trial, which refers to the alleged ignoring of the information contained in Mr. Leitch's sketch plan of May 1961 to which I have referred, and the further and better particulars of the plaintiffs' failure to exercise due care contain numerous and, I am sorry to say, repetitive allegations all of which, apart from the allegation relating to the design and siting of the station, I find to be wholly unfounded. It is not necessary for me to deal with them in detail.

My finding that the plaintiffs were in breach of duty, if one was owed to the defendant, rests and rests solely on a state of facts as to the site which were apparent to the defendant when he began his negotiations. The plaintiffs' difficulty in relying on this as an answer to the counterclaim based on negligence lies in the fact, which I have found, that the defendant's realistic assessment of throughput communicated to the plaintiffs' representatives was 100,000 to 150,000 gallons per annum, and that he resiled from his estimate in reliance on the plaintiffs' superior expertise, which, so to speak, "sugared" their statement so that he relied on what they told him and not on what he himself thought.

I come back to the vital question: did the plaintiffs, in all the circumstances, owe the defendant a duty in relation to the statement made? My answer is "yes." The reasons why I reach this conclusion can be summarised as follows. In *Nocton* v. *Lord Ashburton* [1914] A.C. 932 I understand their Lordships to be saying that a duty of care may arise in relation to a statement made when there are special circumstances which give rise to an implied contract in law or to a relationship which equity would regard as fiduciary. Lord Dunedin, at pp. 963–964, treats this liability as an aspect of the law of negligence. This I think is an important point because one finds very strong echoes of the same position being taken up in the speech of Lord Devlin in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, to which I will now come. Lord Reid, at pp. 485–6, is clearly of opinion that such a duty may arise from a special relationship, and the nature of this he indicates in passages in his speech, at pp. 486 and 492. Referring to Lord Haldane's speech

in *Robinson* v. *National Bank of Scotland*, 1916 S.C.(H.L.) 154, 157, a case in which Lord Haldane was virtually repeating points which he had made, if that is the right expression to use, in *Nocton* v. *Lord Ashburton* [1914] A.C. 932, Lord Reid says, at p. 486:

> "This passage makes it clear that Lord Haldane did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him . . ."

Then, again referring to Lord Haldane, who in *Robinson* v. *National Bank of Scotland*, 1916 S.C.(H.L.) 154, 157 had used the expression "a contract to be careful," Lord Reid says, at p. 492:

> "... Lord Haldane must have meant an agreement or undertaking to be careful. This was a Scots case and by Scots law there can be a contract without consideration: Lord Haldane cannot have meant that similar cases in Scotland and England would be decided differently on the matter of special relationship for that reason. I am, I think, entitled to note that this was an extempore judgment. So Lord Haldane was contrasting a 'mere inquiry' with a case where there are special circumstances from which an undertaking to be careful can be inferred . . ."

Lord Reid goes on to deal with the specific facts in that case. Lord Morris of Borth-y-Gest, at pp. 494 and 502, relates the duty to take care in relation to a statement to what he describes as an assumption of responsibility by the maker of the statement, to which he adds that the maker should be possessed of some special skill or expertise. Lord Hodson, at pp. 509–510, contemplates that the duty of care in the making of statements may arise where there is no fiduciary relationship, as where the maker of the statement holds out his skills to reinforce the acceptability of the statement, and, at p. 514, he agrees with the "assumption of responsibility" test with which Lord Morris in his judgment dealt; I think the most cogent passage is at pp. 502–503. Then Lord Devlin, at p. 528 and onwards, indicates that the duty of care is not limited by reference to certain types of person or sorts of situations but arises from the situations which he describes. He says, at p. 529:

> "It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction."

Finally, Lord Pearce, stressing the importance of the existence of a special relationship, says, at p. 539:

> "Was there such a special relationship in the present case as to impose on the defendants a duty of care to the plaintiffs as the undisclosed principals for whom the National Provincial Bank was making the inquiry? The answer to that question depends on the circum-

stances of the transaction. If, for instance, they disclosed a casual social approach to the inquiry, no such special relationship or duty of care would be assumed. To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer."

It seems to me that all their Lordships are really agreed that the special relationship from which the duty of care in the making of statements arises, apart from a general relationship involving fiduciary aspects such as solicitor and client and bank and customer, is not limited to particular categories of persons or types of situations. In *Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793, a Privy Council case, their Lordships were divided. The majority, Lord Hodson, Lord Guest and Lord Diplock, appeared to limit the duty of care in the making of statements by persons who carried on or held themselves out as carrying on the business of advice. Lord Diplock said, at p. 809:

"In their Lordships' view these additional allegations are insufficient to fill the fatal gap in the declaration that it contains no averment that the company to the knowledge of Mr. Evatt carried on the business of giving advice upon investments or in some other way had let it be known to him that they claimed to possess the necessary skill and competence to do so and were prepared to exercise the necessary diligence to give reliable advice to him on the subject-matter of his inquiry. In the absence of any allegation to this effect Mr. Evatt was not entitled to assume that the company had accepted any other duty towards him than to give an honest answer to his inquiry nor, in the opinion of their Lordships, did the law impose any higher duty on them. This is in agreement with the reasoning of Taylor J. in the High Court of Australia with which the judgment of Owen J. is also consistent."

I should have said that this was an appeal from the High Court of Australia, in which the High Court by a majority had decided that the claim of a person who had suffered damage as a result of relying on a misstatement as to the financial situation of a company disclosed a cause of action.

Lord Diplock went on with a substantial note of caution, at p. 809:

"As with any other important case in the development of the common law *Hedley Byrne* should not be regarded as intended to lay down the metes and bounds of the new field of negligence of which the gate is now opened. Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them. The instant appeal is an example; but their Lordships would emphasise that the missing characteristic of the relationship which they consider to be essential to give rise to a duty of care in a situation of the kind in which Mr. Evatt and the company found themselves when he sought their advice is not necessarily essential in other situations—such as, perhaps, where the adviser has a financial interest in the transaction on which he gives his advice . . ."

Then there is a reference made to the decision of Cairns J. in *W. B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.* [1967] 2 All E.R. 850

which has been cited to me. A reference is also made to the *American Restatement of the Law of Torts (3rd Tentative Redraft)*. Lord Diplock concludes with this passage, at p. 809:

> "On this, as on any other metes and bounds of the doctrine of *Hedley Byrne*, their Lordships are expressing no opinion. The categories of negligence are never closed and their Lordships' opinion in the instant appeal, like all judicial reasoning, must be understood secundum subjectam materiam."

It should be said, I think, that the majority in the Privy Council approached this matter as a decision to be made on a point of pleading, although the observations which the court made are clearly of general application.

The minority, Lord Reid and Lord Morris, differed from the majority view, the effect of which can fairly be said—this is implicit in the last passage which I have read, at p. 809—to be that the duty of care relating to statements is limited to people who are carrying on, or holding themselves out as carrying on, the business of giving advice in relation to the subject matters of the statements which they make. With respect, however, I think that this is unduly restrictive of the duty under consideration; I much prefer the minority reasoning of Lord Reid and Lord Morris, and I cite a passage from their judgment, at p. 812:

> "Then it was argued that an adviser ought not to be under any liability to exercise care unless he had, before the advice was sought, in some way held himself out as able and willing to give advice. We can see no virtue in a previous holding out. If the inquirer, knowing that the adviser is in a position to give informed advice, seeks that advice and the adviser agrees to give it, we are unable to see why his duty should be more onerous by reason of the fact that he had previously done the same for others. And again, if the previous conduct of the adviser is relevant, would it be sufficient that, in order to attract new customers or increase the goodwill of existing customers, he had indicated a general willingness to do what he could to help inquirers, or must he have indicated a willingness and ability to deal with the precise kind of matter on which the inquirer seeks his assistance?"

Then comes the vital test, in the minority's opinion:

> "In our judgment when an inquirer consults a business man in the course of his business and makes it plain to him that he is seeking considered advice and intends to act on it in a particular way, any reasonable business man would realise that, if he chooses to give advice without any warning or qualification, he is putting himself under a moral obligation to take some care. It appears to us to be well within the principles established by the *Hedley Byrne* case to regard his action in giving such advice as creating a special relationship between him and the inquirer and to translate his moral obligation into a legal obligation to take such care as is reasonable in the whole circumstances."

Subject to one last point which I have to consider, I am satisfied that there was, in the circumstances of the present case, a special relationship, and this special relationship I find to have existed even if one applies the tests indicated by the majority in *Mutual Life and Citizens Assurance*

Co. Ltd. v. *Evatt* [1971] A.C. 793. The present was a situation in which in fact the plaintiffs did have a financial interest in the advice which they gave. This was advice which was given to the defendant who, as they knew, was asking or seeking information and was in fact given information which would lead him into the decision to enter into the tenancy agreement, the benefit of which the plaintiffs as landlords would have. If one applies the test of the minority in *Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt* which is expressed in the passage which I have just read, it is clear, in my judgment, subject to the final point to which I am now coming, that this was a situation in which the plaintiffs owed the defendant a duty of care.

The last point on which the counterclaim could founder is whether the fact that the statement was made in the context of pre-contractual negotiations between the plaintiffs and the defendant, from which a contract resulted, excludes the duty of care. McNair J., obiter, in *Oleificio Zucchi S.p.A.* v. *Northern Sales Ltd.* [1965] 2 Lloyd's Rep. 496, did take this view, but it was quite unnecessary for him to do so because he was there dealing with a case stated on an arbitration award in which the arbitrator had found that there had been *no* failure to take care in the making of a statement in a pre-contractual relationship situation. It is also possible to contend that the observations of the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465 assumed that statements made in pre-contractual negotiations between parties who ultimately came to contract were excluded from the duty of care principle: see, for example, what Lord Reid said, at p. 483: "Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty." There are, however, other relevant passages in *Hedley Byrne*, and, taking the speeches as a whole, in my judgment it is not right to regard *Hedley Byrne* as containing anything which excludes the duty of care relationship in a pre-contractual negotiation situation. It seems to me that Lord Devlin's observations, at pp. 516–517 and 526–527, are a clear indication to the contrary, because he was dealing in those passages with the situation in which one has running alongside a contractual relationship a relationship which gives rise to a duty of care.

It is right to say that there is no direct authority on this point which is binding on me. There was, in fact, a decision of Bean J. in *Coats Patons (Retail)* v. *Birmingham Corporation* (1971) 69 L.G.R. 356. This is, however, a decision which I find not helpful, because in that case it was conceded that there was a duty of care situation in relation to the making of statements.

I have, however, been referred to *Dillingham Construction Pty. Ltd.* v. *Downs* [1972] 2 N.S.W.L.R. 49, a decision of Hardie J. sitting in the Supreme Court of New South Wales. This question is discussed by the judge at some length. I think that it will be sufficient if I read passages from the headnote, having first said that this is a decision which was handed down after the Privy Council had decided *Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793 in the way which I have indicated. The facts, putting them very briefly, were that the plaintiffs had entered into a contract to undertake certain works in a New South Wales harbour; those works became much more difficult to carry through at the contract price because all sorts of snags and difficulties emerged since there were disused coal workings under the harbour. The

A defendant had known of the existence of those workings but nothing had been said of them to the plaintiffs. So the plaintiffs alleged, amongst other things, that there had been a duty of care on the defendant to give them this information, in the course of making statements in the pre-contractual situation, and that that duty of care had been broken. The relevant passage in the headnote is as follows:

B "The policy of the common law is to uphold contracts freely made between parties who are at arm's length and on equal terms. The pre-contract relationship between such parties would not normally qualify as a special relationship of the type which, according to the doctrine of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, would subject one or other of the parties to a duty of care in the assembly or presentation of facts, figures or other information C as to the subject matter of the contract."

Then there is a reference to *Oleificio Zucchi S.p.A.* v. *Northern Sales Ltd.* [1965] 2 Lloyd's Rep. 496 and to two other Australian cases where the point had arisen but in which no determination had been reached about it. The headnote goes on:

D "In the present case, in view of the very special nature of the contract and the nature and extent of the specialised knowledge in the possession of the defendant which would have been of the utmost importance to the plaintiffs if it had been imparted to them, the mere fact that the parties were in a pre-contract relationship at the time when the duty was said to have been created and to have been breached, would not in itself necessarily preclude the application of E the principle under consideration. Upon a consideration of all relevant factors, including both spoken and written matter, there was no assumption or acceptance by the defendant, in fact or in law, of the task of providing the plaintiffs with accurate or full information . . ."

I am not going to read passages from the judgment of Hardie J.; they F are accurately, in my view, summarised in those passages in the headnote. I find the reasoning and the decision in his case to be very helpful, because they do indicate a view, which I personally hold, that the fact that statements are made in a pre-contractual relationship does not preclude the person to whom the statements are made from relying on the duty of care in the making of the statements by the person who is making them.

G The special features of the present case are, of course, that here was the defendant who had himself formed what he thought a realistic estimate of the throughput of this garage; he puts his realistic figure to the plaintiffs, who are the landlords seeking a tenant for their premises, and he is given by them a different estimate which I find to be affected by a failure to take care in relation to its being made. I have given the reasons why I hold that there was a failure to take care. Furthermore, the plaintiffs must H have appreciated, and I am sure they appreciated—and in fact they quite frankly said this—that had the statement not been made the defendant would certainly have not entered into the tenancy agreement of April 10, 1963, at the rental at which and on the terms on which he did enter into it.

As a matter of principle, I cannot think there is anything wrong in holding that the duty of care in relation to the making of statements may arise in a pre-contractual situation. For example, it is well established

that a seller of goods which are dangerous, and which are dangerous to the knowledge of the seller, can be liable to the buyer in damages for negligence as well as in damages for breach of the contractual term in relation to the merchantability or fitness of the goods, and the passages to which I referred in Lord Devlin's speech in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465 are really on the same lines. The theory that in some way or other the law is different in relation to negligent misstatements from the law concerning the circulation of dangerous things—the theory that there is a distinction between a negligent statement and some negligence or omission in relation to goods or chattels or land—seems to me to be harking back to the pre-*Hedley Byrne* days when the view was taken, on the basis of cases since overruled—*Le Lievre* v. *Gould* [1893] 1 Q.B. 491, and the majority decision in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164—that there was no duty of care in relation to the making of statements. What *Hedley Byrne* has done, I am quite satisfied, is to indicate that there is really no difference between the duty of care in relation to the making of a statement and the duty of care in relation to other situations which, if broken, might give rise to a cause of action for damages for negligence. Of course, it may well be said, if my view is right, that I am opening the door very wide indeed and eroding the principle of caveat emptor and the general principle that contracting parties are at arm's length. I fall back, however, on what Lord Reid said on this point in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, 486:

> "A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."

Therefore, for those reasons I find for the defendant on his counterclaim for damages for negligence. I am against him on the other basis of his counterclaim, but I have indicated sufficiently, I trust, the four walls within which this liability falls. It follows that the plaintiffs are entitled to £1,103·69, subject to setting off such damages as the defendant may be entitled to having regard to my findings as to the plaintiffs' liability on the counterclaim.

Order accordingly.

Solicitors: *Durrant Peisse; Batchelor, Fry, Coulson & Burder for Bellis, Son & Ashton, Southport.*