RESCISSION FOR MISREPRESENTATION

IN *Salt v Stratstone Specialist Ltd. (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745; [2015] C.T.L.C. 206, the Court of Appeal usefully emphasised that rescission is the primary remedy for misrepresentation (whether that misrepresentation be fraudulent, negligent, or innocent). The Court decided that the discretion to award damages in lieu of rescission under s. 2(2) of the Misrepresentation Act 1967 can only be exercised where the right to rescind still exists, which helpfully resolves an issue of some controversy. The Court of Appeal also held that rescission for misrepresentation is not barred just because the asset sold has dropped in value or been registered, and cast doubt on the notion that lapse of time can by itself bar rescission. The short but important decision in *Salt v Stratstone Specialist Ltd.* is welcome and full of interest.

Mr. Salt was a car enthusiast, with a particular interest in luxury and sports vehicles. In September 2007, he was approached by Stratstone Specialist Ltd. ("Stratstone") and offered a Cadillac CTS 3.6 litre Sport Luxury car. Stratstone told Salt that the car was "brand new", and Salt agreed to buy the car for £21,895. Unfortunately, there were problems with the ignition, battery, catalytic converter, oil warning light, windscreen wipers, satellite navigation system, and filter on the petrol intake. On one occasion, Salt was left stranded as a result. Stratstone repaired some of these defects, but not all of them. In September 2008, Salt decided that he had had enough, and tried to reject the vehicle. Stratstone refused to reimburse Salt, who initially sued for breach of contract. However, during the discovery process, Salt realised that the car was not brand new when it was sold to him: the car had been manufactured and delivered to Stratstone in 2005, and had undergone various repairs in 2005 and 2006. Salt therefore claimed misrepresentation.

At trial, the District Judge held that he could not order rescission because *restitutio in integrum* was impossible, but did award damages. He appeared to think that he had a discretion to award rescission or damages. The decision of the District Judge was overturned by H.H.J. Charles Harris Q.C., and the Court of Appeal also criticised this aspect of the District Judge's reasoning. Section 2(2) of the Misrepresentation Act 1967 provides that the court only has a discretion to award damages in lieu of rescission if the misrepresentation was not fraudulent and the mispresentee "would be entitled . . . to rescind the contract". The straightforward meaning of the statute is that, where the right to rescind has been lost, the court cannot award damages in lieu. The endorsement of this interpretation of the statute by the Court of Appeal is welcome in providing much-needed clarity, resolving the uncertainty generated by conflicting first instance decisions on this point (contrast e.g. *Witter (Thomas) Ltd. v TBP Industries Ltd.* [1996] 2 All E.R. 573 and *Government of Zanzibar v British Aerospace (Lancaster House) Ltd.* [2000] 1 W.L.R.

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2333). There is no ambiguity in the statute, the point of which is to provide the court with the discretion to award an *alternative* remedy to rescission, rather than a *new* remedy of damages where the right to rescind has been lost. This may seem harsh on the misrepresentee who has, through no fault of his own, lost the right to rescind, but the wording of the statute does not sensibly lead to any other interpretation.

The District Judge's decision that it was impossible to effect *restitutio in integrum* was overturned by H.H.J. Charles Harris Q.C., and again the Court of Appeal preferred the approach of the Circuit Judge. Longmore L.J. rightly said that "[t]he normal remedy for misrepresentation is rescission" and that "[t]his remedy should be awarded if possible". In *Erlanger v New Sombrero Phosphate Company* (1878) 3 App. Cas. 1218, Lord Blackburn emphasised that the court should "do what is practically just" in situations in which it cannot precisely restore the parties to the position they were in before the contract was made. This is important in order to avoid rescission becoming unduly restricted (see also *Halpern v Halpern* [2007] EWCA Civ 291; [2008] Q.B. 195). Adopting this approach, Longmore L.J. held that the fact that the car had been sold unregistered but had since been registered could not prevent rescission: "... registration is a legal concept which does not change the physical entity that a car is". Nor was the drop in value of the car a bar to rescission; in principle, it seems right that the fall in value should be borne by the misrepresentor rather than the misrepresentee (see also *Armstrong v Jackson* [1917] 2 K.B. 822), although Stratstone might perhaps have sought compensation. Similarly, the fact that Salt might have gained some benefit from using the car (which is not at all clear from the facts) would not prevent rescission, since Salt could be ordered to account for any benefits obtained.

The Court of Appeal also held that lapse of time did not bar rescission on the facts of the case. This is sensible. After all, Salt only found out about the misrepresentation during the discovery process, and then acted promptly in rescinding the contract. However, there is authority for the proposition that lapse of time can by itself bar rescission. In *Leaf v International Galleries* [1950] 2 K.B. 86, the claimant bought a picture from the defendants who represented that it was by Constable. Five years later, the claimant discovered that it was not by Constable and claimed rescission of the contract. The Court of Appeal held that it was too late to rescind the contract. Denning L.J. thought that the claimant had accepted the picture in performance of the contract, and that this precluded rejection of the picture for breach of condition under s. 11(1)(c) of the Sale of Goods Act 1893 (now the Sale of Goods Act 1979, s. 11(4)) and also rescission, since "a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred". This view was doubted by the Court of Appeal in *Salt v Stratstone Ltd.*

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Denning L.J.'s attempt to align the right to rescind with statutory schemes governing contractual rights was thought to be unconvincing (perhaps especially where ss. 20–24 of the Consumer Rights Act 2015 now apply). Longmore L.J. observed that *Leaf v International Galleries* was decided before the Misrepresentation Act 1967 came into force, and expressed the view that "[i]t must be doubtful whether since the enactment of s. 1 it is still good law that a representor should be in no worse position than if the representation had become a term of the contract". Similarly, Roth J. held that "it is something of a misnomer to say that rescission may be barred by lapse of time. It is only the lapse of a reasonable time such that it would be inequitable in all the circumstances to grant rescission which constitutes a bar to the remedy". This means that rescission should only be barred because of a lapse of time where laches can be established. Laches requires more than mere delay (see generally J. McGhee (ed.), *Snell's Equity*, 33rd ed. (London 2015), para. 5–011). The decision in *Salt v Stratstone Ltd.* therefore seems to sideline *Leaf v International Galleries* (perhaps to its particular facts concerning an innocent misrepresentation), or at the very least bring it within the conceptually more satisfactory doctrine of laches. It is preferable to consider that laches can prevent rescission, but not purely the lapse of time where laches cannot be established. If the facts of *Leaf v International Galleries* were to arise today, it is suggested that the right to rescind ought not to be barred, but that the court would now have discretion under s. 2(2) of the Misrepresentation Act 1967 to award damages in lieu of rescission.

It is somewhat unfortunate that such important points of principle needed to be decided in a case where relatively small sums were at issue. The case was originally allocated to the fast-track, but the costs of the litigation spiralled out of all proportion to the value of the case. The blame for this appears to lie with Stratstone, who refused sensible offers to settle. This is particularly surprising, since it appears that Salt could also have recovered damages under s. 2(1) of the Misrepresentation Act 1967 had he so wished: it is unlikely that Stratstone would have been able to prove that it "had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true". And, just as the burden is placed on the misrepresentor to escape the clutches of s. 2(1), so too is the onus placed on the misrepresentor to show that rescission should not be granted, or to show that the misrepresentee should have to pay compensation or to account for profits made. *Salt v Stratstone Ltd.* makes these points clear. It is a sensible decision from the Court of Appeal, and is likely to be another example of a very simple case becoming a leading case in English contract law.

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