CA on appeal from QBD (Mr Justice Bristow) before Lord Denning MR; Bridge LJ; Shaw LJ. 13th December 1977.

THE MASTER OF THE ROLLS:

1. This case took three weeks before the judge and two weeks before this court. It is very complicated, but I will try to state the main facts as simply as I can, missing out many details.

2. In 1974 the Northumbrian Water Authority were about to construct a big sewage works for Tyneside. There was much excavation to be done. Contractors were required to dig out vast quantities of earth, take it by conveyors to the river-side, tip it into seagoing barges, carry it out to sea for a few miles and dump it there. Tenders were invited. One of those invited was Ogdens, a firm of contractors in the North Bast. They were experienced in disposing of earth by land. But they had no experience of dumping it at sea.

3. In order to make their tender, Ogdens had to calculate the cost of the excavating and conveying - which they knew all about -but also the cost of the dumping at sea - which they knew nothing about. They had to hire barges suitable for the work. Two seagoing barges were to be employed. The operation was to be continuous. It was to be synchronised with the excavation. As soon as one barge was full, it would leave the quay, carry the material to the dumping ground, dump it and return. Meanwhile the other barge would be loading.

4. In order to prepare their tender, Ogdens got into touch with five firms who had barges, and invited them to quote a price for the hire. One of these firms were Howards of London. They had two German-built barges which might be available. They were self-propelled twin-screw hopper barges, 207 feet long. They were at the time lying idle in the Medway. Howards had used them previously at work in the estuary at Felixstowe where silt was being dredged up from the bottom. These two barges had been used to carry it out to sea, and dump it. Howards had bought the barges from the German owners and had the file of German shipping documents in their London office.

THE LETTER OF THE 10TH APRIL 1974

5. Howards were keen to find work for these two barges. So when Ogdens invited quotations, Howards sent their marine manager, Mr. O'Loughlin, up to the site at Tyneside to see the nature of the material to be carried. He thought the two barges could do the work. He then quoted for hire of them. He did it in an important letter of 10th April, 1974. He offered to let the barges to Ogdens at ,£1,800 per week "*subject to availability and charterparty*". In the letter he specified the volume of material that each barge could carry. He put it in marine terms: "Capacity (struck 940m) usable c.s. 850m ^{3}"

6. That meant that its capacity filled level to the brim would be 940 cubic metres: but that, as the material would not be level but *"in heaps",* its usable capacity was about 850 cubic metres. Mr. O'Loughlin based that figure on their experience at Felixstowe. In that letter, Howards said nothing about the weight that each barge could carry. That is called in marine circles the"deadweight". There are certain deductions to be made for fuel, etc. to give the *"pay-load",* that is, the load for which payment is received.

THE TWO TELEPHONE CONVERSATIONS OF APRIL 1974

7. On receiving that letter Ogdens wanted to make sure that the barges could carry the material which was to be excavated on Tyneside. So their Mr Dent in the North-East telephoned to Mr. O'Loughlin in the South, on 11th April, 1974, and asked him to explain the letter. *"Does your letter mean that each of these vessels can carry 850 cubic metres of spoil".*

8. Mr. O'Loughlin said: *"Yes, of course, each can carry 850 cubic metres, but you must remember that it depends on the weight of the material, A ton of feathers occupies much more space than a ton of lead. If the material is heavy, you must be careful not to fill the barge above the load-line".*

9. Mr. Dent knew so little about barges that he missed the point about the load-line. As a result of the conversation he was under the firm impression that each barge could carry 850 cubic metres of the material they were going to excavate at Tyneside.

10. A day or two later Mr. Hall (the area manager for Ogdens in the North-Bast) wanted to be sure that each barge could carry 850 cubic metres of the material. So he himself telephoned to Mr. O'Loughlin and asked him: *"Does it mean that each barge can carry 850 cubic metres solid measure?".*

11. Mr. C'Loughlin said: *"Yes, 850 cubic metres are available to be used".*

12. The Judge found that those two telephone conversations were bedevilled by a classic misunderstanding. Both of Ogden's men, Mr. Dent and Mr. Hall, were thinking of the clay they had to excavate in Tyneside; whereas Mr. O'Loughlin was thinking of the silt they had carried at Felixstowe. In the estuary of Felixstowe, the silt (being a mixture of sand and water) only weighed 1.24 tons per cubic metre. So 850 cubic metres of it would weigh 1,054 tonnes. This was, near enough, equal to the pay-load of each barge. But at the sewage site in Tyneside, the earth was heavy clay. It weighed *"in the dig",* in the ground before being excavated, two tons per cubic metre. So 850 cubic metres of it would weigh 1,700 tonnes. That was far more than either barge could safely carry. 1,700 tonnes would send the vessel down deep in the water, well below the load-line, and sink her.

13. At any rate, at the end of those two telephone conversations, both of Ogden's men, Mr. Dent and Mr, Hall, firmly believed that each barge could carry 850 cubic metres of *"in-dig clay"* weighing 1,700 tonnes. The Judge found that this was because they failed to ask Mr. O'Loughlin the right question, and honestly misunderstood his simple

answer to it. So there was no mispresentation:and no liability can attach to Howards in respect of those two telephone conversations.

THE TENDER

14. Believing that each barge could carry 850 cubic metres of "in-dig clay", Ogdens made calculations as to the cost of hiring the barges from Howards. But, as a matter of prudence, they worked on a capacity of 600 cubic metres instead of 850 cubic metres. That was indeed prudent: because they had overlooked the *"bulking factor*". When "in-dig clay" was excavated, it occupied more space in a heap than in solid. The *"bulking factor"* was 1-25. So 600 cubic metres of *"in-dig clay"* would occupy- 750 cubic metres of clay in a heap. Even on that figure of 750, it would go far to fill the volume of usable space in the barge (850 cubic metres). But unbeknown to Ogdens, it would be far too heavy. It would weigh 1,200 tonnes, whereas the pay-load was 1,050 tonnes. If filled with 1,200 tonnes the deck would be awash and the barges in peril.

15. Ogdens also made calculations as to the cost of hiring barges from the other four firms who quoted. Howards were the lowest. So Ogdens used their quotation in making their tender for the whole excavation to the Northumbria Water Authority. It was one of the items in the over-all figure. Ogdens made their tender to the Authority on 29th April 1974. It was to do the work for £1,847,647.31. Seven other contractors made tenders for the whole excavation. On the 18th June, 1974, the Authority accepted Ogdens' tender.

THE NEGOTIATIONS

16. Having got their tender accepted, Ogdens took up negotiations with Howards so as to acquire the barges. (They also kept in touch with the other barge firms in case their negotiations with Howards broke down). On 12th June, 1974, Mr. O'Loughlin of Howards went up to the North and saw Ogden's men, Mr. Dent and Mr. Hall. They discussed the barges (then lying in the Medway), but nothing was said about capacity, at any rate nothing which either side took seriously. At this meeting Mr. O'Loughlin handed Ogdens a draft charterparty. It contained many standard-form clauses. He said that the barges were still available. He reduced the price of hire to £l,724 a week. On 24th June, 1972, when he got back, he wrote to Ogdens confirming the conversation, and saying:

17. "... We now look forward to receiving your formal Letter of Intent booking our vessels, at which time we shall finalise charterparties for each vessel and will forward them to you for signature".

THE INTERVIEW OF 11th JULY, 1974

18. Nothing was, however, finalised at that time. Ogdens were negotiating with another firm of barge-owners as well as Howards. They asked both firms to send up representatives to the Forth-East. They prepared a questionnaire of 31 questions on all sorts of matters. The meeting took place on 11th July, 1974, at Ogden's office at Otley in Yorkshire. One of the questions was: "No. 8 -Capacity of Barges". They asked this question of the other firm, and also of Mr. O'Loughlin of Howards. The judge found what was said was this:
    (Q) Ogdens: "What is the capacity of each barge?"
    (A) Mr. O'Loughlin "850 cubic metres"
    (Q) Ogdens: "What is that in tonnes about?"
    (A) Mr. O'Loughlin "About 1600 tonnes subject to weather, fuel-load and time of year".

19. Mr. O'Loughlin's answer was noted down by Ogdens in writing, as follows: *"1600 + 850 m^3 usable".*

20. The judge found that Mr. O'Loughlin was perfectly honest in saying 1600 tonnes. Early on when Howards acquired the barges, he had looked up Lloyd's Register for these two barges. That Register gave the deadweight as 1800 tonnes. It was a figure which stuck in Mr. O'Loughlin's mind. Making generous deductions for the weight of crew, fuel, etc., the pay-load could be put at 1600 tonnes. But Lloyd's register had made a mistake - a very rare thing for them to do. The real deadweight was not 1800 tonnes but 1,194.94 tonnes. Making the appropriate allowances, the pay-load was 1,052.67 tonnes. But Mr. O'Loughlin did not know this. He was up in the North-East and had not the files with him. They were in the London Office. They might have shown him the correct figures. But he was not aware of this. So Mr. O'Loughlin was honest and, I think, had resonable grounds for saying 1600 tonnes: but it was wrong. No doubt Ogdens were satisfied with his answer. It meant that the barges could carry the weight which they had calculated (600 cubic metres at 2 tonnes each, making 1200 tonnes). So Ogdens continued with their negotiations.

FURTHER NEGOTIATIONS

21. After that meeting there were various exchanges by letter and telex. Howards reduced the proposed figure of hire to £l,644 a week, then to £1,578. On 9th August, 1974, Ogdens gave a firm order to Howards for the two barges at £1,500 each per week on their (Ogdens) own terms and conditions. This was rejected by Howards on 16th August, 1974, in a letter, saying: *"... We oust point out that our contract with you is subject to Charterparty terms and not to the terms of your order".*

22. On 18th September, 1974 there was an "*on-hire condition*" survey at Greenhithe, attended by surveyors on both sides. The principal purpose was to note down any structural damage to the barges or the machinery or equipment: but the surveyors if asked were well able to form a good opinion of the capacity of the barges.

THE CHARTERPARTIES

23. In October the draft charterparties were the subject of telexes between the parties. They were bare-boat charterparties in common form. Various amendments were suggested and accepted: but there was one clause which was contained in all the drafts which were submitted and exchanged: and no objection was ever taken to it. It was in these words: "*On handing over by the owners, the vessel shall be tight, staunch and strong, but charterers'*

acceptance of handing over the vessel shall be conclusive evidence that they have examined the vessel and found her to be in all respects seaworthy, in good order and condition and in all respects fit for the intended and contemplated use by the charterers and in every other way satisfactory to them".

DELIVERY OF THE BARGES

24. The charterparties were never actually signed; but, nevertheless, the barges were delivered by Howards. They sailed up from the Medway to the Tyne and were accepted by Ogdens. One on 20th October, 1974. The other on 27th October, 1974. They were put straight to work. Thereafter Ogdens used the barges for six months, from October 1974 to April 1975. Ogdens complained about defects in the machinery of the barges. Ogdens were also concerned because they suspected very early on that the barges could not carry the 1200 tonnes per trip without submerging their load lines. Then in March 1975 they discovered that the pay-load was only 1055 tonnes. In the circumstances Ogdens only paid £2,000 on account of hire: but they refused to pay any more. When hire was not paid, Howards withdrew the barges and they returned to the Medway. Ogdens employed other barges to complete the work.

LEGAL PROCEEDINGS

25. On 7th July, 1975 Howards issued a writ claiming £93,183.14 for the outstanding hire on the two barges. Ogdens counterclaimed on the ground that the barges had defective machinery, and also on the ground that Howards had misrepresented the cargo-carrying capacity. Such misrepresentations were, they said, made in the two telephone conversations in April 1974, and the interview oh 11th July, 1974. They said that, on account of the low carrying capacity, the whole operation of the contract was delayed. The excavation work was held up because the barges could not carry the required quantities. They counterclaimed for £600,000.

26. The issue of liability was ordered to be tried as a preliminary issue. The Judge dismissed the counterclaim and gave judgment for Ogdens for the hire of £93,183.14. Howards appeal to this court.

THE WRITTEN CONTRACT

27. At the trial it was submitted on behalf of Ogdens that there was no express contract because Ogdens had never signed that charterparty. The letter of 10th April,1974 said "subject to contract", that is a signed contract, and here no contract was ever signed. The judge rejected that contention and it was not renewed before us. It is plain that, when the barges were delivered and accepted, there was a concluded contract on the terms of the charterparty, see ***Brogden v. Metropolitan Railway Co,*** (1877) 2 Appeal Cases 666,672,680.

THE COLLATERAL ORAL WARRANTIES

28. Ogdens submitted that, in the two telephone conversations in April 1974, Howards gave oral warranties as to the carrying capacity of the barges; and that, on the faith of these warranties, they tendered for the main excavation contract and entered into it: that the warranties are therefore binding on Howards on the authority of such cases as the ***Shanklin Pier*** case (1951) 2 King's Bench 854: and ***Wells v. Buckland*** (1965) 2 Queen's Bench 170. Further, that at the interview of 11th July, 1974, Howards gave a further oral warranty as to the carrying capacity of the barges: and that, on the faith of it, they did order the barges and took them on hire under the Charterparties.

29. On this point we were, as usual, referred to ***Heilbut v. Buckleton*** [1913] AC 30. That case has come under considerable criticism lately, particularly in view of the contemporaneous decision of the House of Lords in ***Schavel v. Read*** (1913) 2 Times Reports 64, see Professor Grieg's Article in (1971) 87 Law Quarterly Review at pages 185/190. Much of what was said in ***Heilbut v. Buckleton*** is now out of date, as I mentioned in ***Evans v. Merzario*** (1976) 1 Weekly Law Reports at page 1081; and ***Esso v. Harden*** (1976) 1 Queen's Bench at page 817. Ho doubt it is still true to say, as Holt C.J. said: "an affirmative at the time of the sale is a warranty, provided it appears as evidence to be so intended" - which I take to mean intended to be binding.

30. Applying this test, I cannot regard any of the oral representations made in April 1974 as contractual warranties. Ogdens invited offers from five different owners of barges. These five made separate offers. Howards made their written offer "*subject to availability and contract*": which shows that they were not binding themselves to anything at that stage. It cannot be supposed that, in the telephone conversations, they were binding themselves contractually to anything. Nor would I regard the statement at the interview of 11th July, 1974 as a contractual warranty. It was made three months before the barges were delivered. And meanwhile there was the *"on hire condition survey"*: and the exchange of the draft charterparties in which you would expect any contractual terms to be included.

31. I agree with the judge that there were no collateral warranties here.

NEGLIGENT MISREPRESENTATIONS

32. Ogdens contended next that the representations by Howards, as to the carrying capacity of the barges, were made negligently: and that Howards are liable in damages for negligent misrepresentation on the principles laid down in ***Hedley Byrne v. Heller*** [1964] AC 465.

33. This raises the vexed question of the scope of the doctrine of ***Hedley Byrne***. It was much discussed in the Privy Council in ***Mutual life Ltd, v. Evatt*** *[*1971] AC 794; and in this Court in ***Esso Petroleum Co. v. Harden*** *(*1976) 1 Queen's Bench 801. To my mind one of the most helpful passages is to be found in the speech of Lord Pearce in ***Hedley Byrne v. Heller*** [1964] AC at page 539: *"... To import such a duty of care, 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 ... A most important circumstance is the form of the inquiry and of the answer".

34. To this I would add the principle stated by Lord Reid and Lord Morris of Borth-y-Gest in the Privy Council case [1971] AC at page 812, which I would adopt in preference to that stated by the majority: *"... 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 ... his action in giving advice ... (gives rise to) ... a legal obligation to take such care as is reasonable in the whole circumstances".*

35. Those principles speak of the "*gravity of the inquiry*" and the seeking of "*considered advice*". Those words are used so as to exclude representations made during a casual conversation in the street; or in a railway carriage; or an impromptu opinion given offhand; or "off the cuff" on the telephone. To put it more generally, the duty is one of honesty and no more whenever the opinion, information or advice is given in circumstances in which it appears that it is unconsidered and it would not be reasonable for the recipient to act on it without taking further steps to - check it. Some instances are to be found in the books. One is ***Fish v. Kelly*** (1864) 17 C.B.N.S. 294. The other is ***Low v. Bouverie***_(1891) 3 Chancery 82, as explained by Lord Reid and Lord Morris of Borch-y-Gest in ***Mutual Life v. Evatt*** [1971] AC at page 813. And the actual decision in ***Heilbut, Symons & Co. v. Buckleton*** [1913] AC 30 was that an honest answer on the telephone did not give rise to a cause of action.

36. Applying this test, it seems to me that at these various conversations Mr. O'Loughlin was under a duty to be honest, but no more. Take the first two conversations. They were on the telephone. The callers from the North wanted to know what was the capacity of the barges. Mr. O'Loughlin answered it offhand as best he could, without looking up the file. If they had wanted considered advice, they should have written a letter and got it in writing. Take the last conversation. It was on an occasion when Mr. O'Loughlin went up to the North to discuss all sorts of things. In the course of it, he was asked again the capacity of the barges, he had not got the file with him, so he answered as best he could from memory. To my mind in those circumstances it was not reasonable for Ogdens to act on his answers without checking them. They ought either to have got him to put it in writing - that would have stressed the gravity and importance of it - or they ought to have got expert advice on their own behalf - especially in a matter of such importance to them. So I agree with the judge that there was not such a situation here as to give rise to a duty of care: or to make Howards liable for negligent misrepresentation at common law.

THE MISREPRESENTATION ACT,_1967.

37. Alternatively Ogdens claim damages for innocent misrepresentation under the Misrepresentation Act, 1967. It says: *"... When a person a has entered into a contract after/representation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the representation would be liable in damages in respect thereof had the representation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe, and did believe up to the time the contract was made that the facts represented were true".*

38. This enactment imposes a new and serious liability OR anyone who makes a representation of fact in the course of negotiations for a contract. If that representation turns out to be mistaken -then however innocent he may be - he is just as liable as if he made it fraudulently. But how different from times past! For years he was not liable in damages at all for innocent -misrepresentation - see ***Heilbut v. Buckleton*** [1913] AC 13. Quite recently he was made liable if he was proved to have made it negligently, see ***Esso v. Mardon*** (1976) Queen's Bench 801. But now with this Act he is made liable - unless he proves - and the burden is on him to prove - that he had reasonable ground to believe and did in fact believe that it was true.

39. Section 2(1) certainly applies to the representation made by Mr. O'Loughlin on 11th July, 1974, when he told Ogdens that each barge could carry 1600 tonnes. The judge found that it was a representation: that he said it with the object of getting the hire contract for Howards. They got it: and, as a result, Ogdens suffered loss. But the judge found that Mr. O'Loughlin was not negligent: and so Howards were not liable for it.

40. The judge's finding was criticised before us: because he asked himself the question: Was Mr. O'Lcughlin negligent? Whereas he should have asked himself: Did Mr. O'Loughlin have reasonable ground to believe that the representation was true? I think that criticism is not fair to the judge. By the word *"negligent"* he was only using shorthand for the longer phrase contained in section 2(1) which he had before him. And the judge, I am sure, had the burden of proof in mind: for he had come to the conclusion that Mr. O'Loughlin was not negligent. The judge said in effect: *"I am satisfied that Mr. O'Loughlin was not negligent"*: and being so satisfied, the burden need not be further considered, see ***Robins v. National Trust Co*** [1927] AC at page 520.

41. It seems to me that, when one examines the details, the judge's view was entirely justified. He found that Mr. O'Loughlin's state of mind was this: Mr. O'Loughlin had examined Lloyd's register and had seen there that the deadweight capacity of each barge was 1800 tonnes. That figure stuck in his mind. The Judge found that *"the 1600 tonnes was arrived at by knocking off what he considered a reasonable margin for fuel, and so on, from the 1800 tonnes summer deadweight figure in Lloyd's register, which was in the back of his mind*".

42. The judge said that Mr. O'Loughlin had seen at some time the German shipping documents and had seen the deadweight figure of 1055-135 tonnes: but it did not register. All that was in his mind was the 1800 tonnes in Lloyd's Register which was regarded in shipping circles as the Bible. That afforded reasonable ground for him to believe that the barges could each carry 1600 tonnes payload: and that is what Mr. O'Loughlin believed.

43. So on this point, too, I do not think we should fault the judge. It is not right to pick his judgment to pieces - by subjecting it - or the shorthand note - to literal analysis. Viewing it fairly, the judge (who had section 2(1) in front of him) must have been of opinion that the burden of proof was discharged.

THE EXCEPTION CLAUSE

44. If I be wrong so far, however, there remains the exception clause in the charterparty. It was, as I have said, included throughout all the negotiations: and no objection was ever taken to it. The important words are: *"Charterers acceptance of handing over the vessel shall be conclusive evidence that she is ... in all respects fit for the intended and contemplated use by the charterers and in every other way satisfactory to them* ".

45. In the old days we used to construe such an exception clause strictly against the party relying on it: but there is no need - and I suggest no warrant - any longer for construing it so strictly. The reason is that now by section 3 of the Misrepresentation Act 1967 the provision is of no effect except to the extent that the court may allow reliance on it as being fair and reasonable in the circumstances of the case. Under this section the question is not whether the provision itself is reasonable: but only whether *"reliance on it is fair and reasonable in the circumstances of the case"*.

46. If the clause itself is reasonable, that goes a long way towards showing that reliance on it is fair and reasonable. It seems to me that the clause was itself fair and reasonable. The parties here were commercial concerns and were of equal bargaining power. The clause was not foisted by one on the other in a standard printed form. It was contained in all the drafts which passed between them, and it was no doubt given close consideration by both sides, like all the other clauses, some of which were amended and others not. It was a clause common in charterparties of this kind: and is familiar in other commercial contracts, such as construction and engineering contracts, see for instance ***Pearson v. Dublin Corporation*** [1907] AC 356, and the useful observations in Hudson on Building Contracts, 10th Edition (1970) at pages 39,48. It is specially applicable in cases where the contractor has the opportunity of checking the position for himself. It tells him that he should do so: and that he should not rely on any information given beforehand, for it may be inaccurate. Thus it provides a valuable safeguard against the consequences of innocent misrepresentation.

47. Even if the clause were somewhat too wide (I do not think it is), nevertheless this is, I think, a case where it would be fair and reasonable to allow reliance on it. Here is a clause by which Ogdens accepted that the barges were "in all respects fit for the intended and contemplated use by the charterers". Ogdens had had full inspection and examination of the barges They had had an on-hire survey by their surveyors. Any expert could have given them a reliable estimate as to the deadweight capacity. Yet they seek to say that the barges were not fit for the use for which they ended them - in that they were of too low carrying capacity, in support of this case they have no written representation to go upon. They only have two telephone conversations and one interview - as to which there is an acute conflict of evidence. It is just such conflicts which commercial men seek to avoid by such a clause as this. I would do nothing to impair its efficacy. I would allow Howards to rely on it. .

CONCLUSION

48. It seems to me, as a matter of probability, that all three representations should stand on the same footing - all three to convey the same meaning - all three true or all three false. Yet the judge drew a distinction between them. The first two were true. The third was untrue. But the distinction did not matter in the end before him. He held that none of the three was actionable. If we now draw a distinction - and hold that the third alone is actionable - we shall be making a rod for the back of the Official Referee. Ogdens will not be able to get damages for entering into the main contract for the work - but only for hiring the barges from Howards. That will give rise to a lot of speculation, Rather than commit the parties to all this trouble and expense, I would hold that Howards can rely on the exception clause - which was inserted, I believe, so as to avoid all such troubles as this case has given rise to. In my opinion, seeing that Ogdens had six months' use of these barges, they ought to pay the hire for them, amounting to £93,183.14p. I would dismiss the appeal, accordingly.

JUSTICE BRIDGE:

49. The powerful arguments addressed to us on behalf of the appellants by Mr. Anthony Lloyd, Q.C. have failed to persuade me that we could properly depart from the learned judge's Primary findings of fact as to the substance of the all important conversations between the parties. Accepting those findings there is no material in any of the communications between the parties-prior to the 11th July, 1974 which amounted to a misrepresentation by Mr. O'Loughlin let alone to a warranty with respect to the deadweight capacity of Howard's barges. In the course of the interview at Otley on the 11th July, however, Mr. O'Loughlin told Mr. Redpath that the barges would each carry about 1,600 tonnes subject to weather, fuel load, and time of the year. As the judge said, even with the qualification, this information was hopelessly wrong. It overstated the payload capacity of the barges by about 50 per cent. To establish that this information was warranted as accurate by the respondents the appellants would have to satisfy the court that the respondents intended to enter such a contractual liability collateral to the main contract embodied in the charterparty. Considering the whole of the evidence of the negotiations between the parties from the initial exchange of letters through to the eventual conclusion of a contract on the terms of the charterparty and setting the Otley interview in that context it does not appear to me that the respondents ever intended to bind themselves by such a collateral warranty.

50. Accordingly, in my judgment, the appellants establish no claim against the respondents in contract. But the remaining, and to my mind the more difficult, question raised in this appeal is whether Mr. O'Loughlin's undoubted misrepresentation gives rise to any liability in tort either under the provisions of the misrepresentation Act, 1967

or at common law for breach of a duty of care owed to the appellants with respect to the accuracy of the information given. I will consider first the position under the statute.

51. The Misrepresentation Act, 1967, by section 2(1), provides follows: *"Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto, as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect made thereof had the misrepresentation been/fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true*".

52. The first question then is whether the respondents would be liable in damages in respect of Mr. O'Loughlin's misrepresentation if it had been made fraudulently, that it to say, if he had known that it was untrue. An affirmative answer to that question is inescapable. The judge found in terms that what Mr. O'Loughlin said about the capacity of the barges was said with the object of getting the hire contract for the respondents, in other words with the intention that it should be acted on (judgment 29 C and 3D G). This was clearly right. Equally clearly the misrepresentation was in fact acted on by the appellants. It follows, therefore, on the plain language of the statute that, although there was no allegation of fraud, the respondents must be liable unless they proved that Mr. O'Loughlin had reasonable ground to believe what he said about the barges' capacity.

53. It is unfortunate that the learned judge never directed his mind to the question whether Mr. O'Loughlin had any reasonable ground for his belief. The question he asked himself, in considering liability under the Misrepresentation Act, 1967, was whether the innocent misrepresentation was negligent. He concluded hat if Mr. O'Loughlin had given the inaccurate information in the course of the April telephone conversations he would have been negligent to do so but that in the circumstances obtaining at the Otley interview in July there was no negligence. I take it that he meant by this that on the earlier occasions the circumstances were such that he would have been under a duty to check the accuracy of his information, but on the later occasions he was exempt from any such duty. I appreciate the basis of this distinction, but it seems to me, with respect, quite irrelevant to any question of liability under the statute. If the representee proves a misrepresentation which, if fraudulent, would have sounded in damages, the onus passes immediately to the representor to prove that he had reasonable ground to believe the facts represented. In other words the liability of the representor does not depend upon his being under a duty of care the extent of which may vary according to the circumstances in which the representation is made. In the course of negotiations leading to a contract the statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe.

54. Although not specifically posing the question of whether he had reasonable ground for his belief, the judge made certain findings about Mr. O'Loughlin's state of mind. He said (judgment page 5 D-3): *"Mr. O'Loughlin looked at the documents on the ships he was in charge of including HB2 and HB3's German documents. He is not a master of maritime German. He saw, but did not register, the deadweight figure of 1055.135 tonnes. Being in the London Office he went to the City and looked up Lloyds Register. There he noted that the summer loading deadweight figure for B41 and B45, described as TM sand carriers, was 1800 tonnes. This figure stayed in his mind. But it was one of Lloyds Register's rare mistakes".* Later the judge said a propos of Mr. O'Loughlin's state of mind at the Otlay interview: *"He had in his mind the 1800 tonnes figure from the Bible",* - meaning Lloyds Register - *"obviously an approximation and certainly subject to the Bible's caveat".*

55. It is tempting to adopt these findings simpliciter and to conclude that the figure Mr. O'Loughlin had seen in Lloyds Register afforded reasonable ground for his belief. But the learned judge's summary in the passages I have cited from the -judgment not only over-simplifies the effect of Mr. O'Loughlin's evidence on this matter, it also embodies at one point a positive misapprehension of what Mr. O'Loughlin said. At Volume 1 page 8 D of the transcript the following evidence is given:

"(Q) (by Mr. Evans) Had you seen that document among the company's files prior to April 1974?

(A) I would have said that I would have sighted it.

(MR JUSTICE BRISTOW) If you did see it, did it register?

(B) Not really, my Lord."

56. The document, however, to which this evidence related was not the document containing the vital figure of the barges' deadweight capacity, but another German ship's document of earlier date. Mr. O'Loughlin never said that the deadweight figure "did not register" with him. He acknowledged that he had seen it and understood it. It is true he said that he had not noticed the discrepancy between the deadweight figure in the German ship's document and that in Lloyds Register, though he had noticed a discrepancy in the figures for the gross and registered tonnage and he had quite correctly taken these latter figures from the German ship's documents.

57. He was pressed to explain how it came about that, having seen both the inaccurate figure in Lloyds Register and the accurate figure in the German ship's documents for deadweight capacity he came to rely on the former and to disregard the latter. This certainly called for explanation since both according to the expert evidence and as a matter of common sense it would normally be expected that the original figures in the ship's documents were more reliable than the derivative figures in Lloyds Register. This part of Mr. O'Loughlin's evidence is of such importance that I will set out the crucial passages in full.

58. He is asked about the vital document in chief at Volume 1 page 9 C - D:

"(Q) Was this document in your possession?

(A) It was-, yes.

(Q) Had you looked at this document at all?

(B) I had, yes. Basically as soon as I started to go through it or look through it, I saw that all the measurements - all they were talking about was for work in freshwater or sweet water, they call it.

(Q) I think if you looked at page 50, you would find the entry is 'Ladefahigkeit in Susswasser' - a figure of 1000.135 with no further measurement. Then if you turn to page 44, there is a figure for 'Tragfahigkeit' of 1055.135 tonnes. Had you those entries in mind when you consulted Lloyds Register?

(A) Not really because, as I say, they are basically talking about deadweight in freshwater and the other thing is that all the time when we are talking about barges of this nature, one doesn't talk about deadweight, one talks about their cubic capacity".

59. Then, in cross examination at page 63 G - 64 A: "

(MR. LlOYD) When you were giving your evidence yesterday, you said that you did not pay much attention to the document at 1/32 and 1/42 because the deadweight relates to freshwater?

(A) That is correct.

(Q) But I think you also accepted this morning that that would only make a difference of about 25/30 tonnes at the most to the deadweight cargo carrying capacity?

(A) Something of that order.

(Q) So that would still give you a much more accurate view of the deadweight in saltwater than anything else that was available to you?

(MR. JUSTICE BRISTOW) Mr. Lloyd, the point is made. It is there or better or for worse. It is a beautiful one, but it is made!

(MR. LlOYD) Now, you based yourself you said instead- You rejected this figure because it was freshwater and you based yourself instead on the Lloyds Register figure of 1800 tonnes?

(B) Precisely".

60. Finally, in cross examination at page 67 F - G:

(Q) You knew that the figure in the German document, the deadweight was 1050 tonnes in freshwater.

(MR. JUSTICE BRISTOW) He says he has seen it, but it had not registered.

(MR. L10YD) You had seen that figure?

(A) I had looked at that

(Q) You had seen that figure, had you not?

(A) I had seen that figure among many others in German.

(Q) And you rejected it, as you told my Lord yesterday, for two reasons; because it was freshwater and because you were only concerned with cubic capacity, (A) That is precisely so."

61. It should be pointed out that the learned judge's- intervention in the last passage quoted reflects the same misapprehension as the passage cited from his judgment.

62. I am fully alive to the dangers of trial by transcript and it is to be assumed that Mr. O'Loughlin was perfectly honest throughout. But the question remains whether his evidence, however benevolently viewed, is sufficient to show that he had an objectively reasonable ground to disregard the figure in the ship's documents and to prefer the Lloyds Register figure. I think it is not. The fact that he was more interested in cubic capacity could not justify reliance on one figure of deadweight capacity in preference to another. The fact that the deadweight figure in the skip's documents was a freshwater figure was of no significance since, as he knew, the difference between freshwater and sea water deadweight capacity was minimal. Accordingly I conclude that the respondents failed to prove that Mr. O'Loughlin had reasonable ground to believe the truth of his misrepresentation to Mr. Redpath.

63. Having reached a conclusion favourable to the appellants on the issue of liability under the Misrepresentation Act, 1967, I do not find it necessary to express a concluded view on the issue of negligence at common law. As at present advised I doubt if the circumstances surrounding the misrepresentation at the Otley interview were such as to impose on the respondents a common law duty of care for the accuracy of the statement. If there was such a duty, I doubt if the evidence established a breach of it.

64. There remains the question whether the respondents can escape from their liability under the statute in reliance on Clause 1 of the charterparty which provides: *"On handing over by the owners, the vessel shall be tight, staunch and strong, but charterers' acceptance of handing over the vessel shall be conclusive evidence that they have examined the vessel and found her to be in all respects seaworthy, in good order and condition and in all respects fit for the intended and contemplated use by the charterers and in every other way satisfactory to them".*

65. A clause of this kind is to be narrowly construed. It can only be relied on as conclusive evidence of the charterers' satisfaction in relation to such attributes of the vessel as would be apparent on an ordinary examination of the vessel. I do not think deadweight capacity is such an attribute. It can only be ascertained by an elaborate calculation or by an inspection of the ship's documents. But even if, contrary to this view, the clauses can be read as apt to exclude liability for the earlier misrepresentation, The respondents still have to surmount the restrictions imposed by section 3 of the Misrepresentation Act, 1967, which provides:

"If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict -

(a) any liability to which a party to a contract may be subject by of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the tract by reason of such a misrepresentation; that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case".

66. What the learned judge said in this matter was (Transcript 26A): *"If the wording of the clause is apt to exempt from responsibility for negligent misrepresentation as to carrying capacity, I hold that such exemption is not fair and reasonable".*

67. The judge having asked himself the right question and answered it as he did in the exercise of the discretion vested in him by the Act, I can see no ground on which we could say that he was wrong.

68. I would accordingly allow the appeal to the extent of holding that the appellants establish liability against the respondents under Section 2(1) of the Misrepresentation Act, 1967 for any damages they suffered as a result of Mr. O'Loughlin's misrepresentation at the Otley interview in the terms as found by the learned judge.

LORD JUSTICE SHAW:

69. This is a difficult case on the facts but in the end I reach the conclusion of the other members of the court that there is no sufficient justification for departing from the primary findings of fact as determined by Mr. Justice Bristow at the trial of this action.

70. On this basis no difficulty arises as to the proper inferences to be drawn from those findings until the discussions to which Mr, O'Loughlin was a party at Otley in July 1974. It is not in dispute that he then told Mr. Redpath that the barges which were to be the subject matter of the contemplated chartering had a carrying capacity of 1600 tonnes. It is equally clear that this information was inaccurate in that it grossly exaggerated the actual capacity of the barges. The question as to the carrying capacity had been an insistent one; and when it was answered by the person who was in the best position to ascertain what was the correct answer it seems to me that Mr. Redpath who sought the information on behalf of Ogdens was entitled, as were his principals, to regard it as being accurate so that it could be acted upon without further inquiry. The judge was of the view that the representation was made "*with the object of getting the hire contract for Howards.*" This inference seems to me inescapable, albeit the statement as to carrying capacity was made as one of a number of answers to questions of a miscellaneous kind dealing with matters of widely varying degrees of importance. It must have been apparent to everyone concerned including Mr. O'Loughlin that the profitability of Ogdens' contract with the Northumbrian Water Authority depended on the pay load of the barges. So the question, though swamped by a number of others, must or should have stood out by its content as relating to a matter of substance and importance. It called for an answer neither casual nor unconsidered but one, as the judge found, which could be relied upon.

71. I must confess that I was at one time inclined to the view that as Mr. O'Loughlin's answer could be regarded as part of the description of the subject matter of the charter, there was a sufficient basis for regarding it also as giving rise to a warranty as to the carrying capacity of the barges. Having had the advantage of reading the respective judgments of Lord Denning M.R. and Bridge L.J., I have ultimately come to the conclusion that in the circumstances in which the answer was given the basis for a collateral warranty is perhaps too tenuous to support it. Upon this aspect of the appeal accordingly I am in agreement with both of the preceding judgments.

72. I turn next to the question of liability for negligence. I would respectfully adopt what the Master of the Rolls has already said in preferring the minority opinion in ***Mutual Life Ltd. v. Evatt (1971)*** Appeal Cases 794 and I would approach the problem as he has done from the standpoint of the passage he has cited from the speech of 465 Lord Pearce in ***Hedley Byrne v. Heller*** [1964] AC 465 at page 539.

73. Now it does seem to me that the chartering of barges for the purpose of carrying clay out to sea and there dumping it is a business transaction whose nature makes clear the importance and influence of an answer to the question "*What is its carrying capacity in the context of the purpose of the prospective charterparties?*" That the question was only asked over the telephone in April and later repeated at an interview in July does not of itself, as I see it, render the subject-matter of the question less material or the impact of the answer less important. The information sought would govern the performance by Ogdens of their contract with the Tyneside Authority and this must have been apparent to any man of business let alone Mr. O'Loughlin. The learned judge so held (see his judgment at 10A). The information which had been asked for more than once cannot be regarded as other than important whatever the circumstances in which it was sought and given. Moreover it was not expert advice that was sought which might honestly and reasonably have assumed different forms according to the source of it. What was asked for was a specific fact. Ogdens had not., themselves any direct means of ascertaining what the fact was. Certainly they had no such ready and facile means as were available to Mr O'Loughlin. These factors in association with the relationship of the parties as owners and prospective charterers of barges to be employed for a specific purpose known to the owners did in my judgment give rise to a duty upon the owners to exercise reasonable care to be accurate in giving information of a material character which was peculiarly within their knowledge. All Mr. O'Loughlin had to do was to look at documents in Howard's possession and to read them accurately. Had he done so there would have been no room for error of fact or for misconceived opinion or wrong advice. That he chose to answer an important question from mere recollection *"off the cuff"* does not in my

view diminish, if I may adopt the language of Lord Pearce, the *"gravity of the inquiry or the importance and influence attached to the answer"*.

74. It is with considerable diffidence that I express this view since it is not shared by either of the other members of this Court and was not held by Mr. Justice Bristow. Nonetheless I would venture to hold that Ogdens have a cause of action in negligence at Common Law. This is not, in my judgment, affected, by the exception clause which does not purport to grant absolution from the consequences of negligence on the part of the owners.

75. There remains the issue raised by the claim under section 2(1) of the Misrepresentation Act 1967. I do not regard the telephone conversation of April and the interview of the 11th July,1974 as being so casual as to give rise to no legal consequences. Certainly I find myself unable to dismiss what was said at the interview in July as inconsequential. I share the opinion expressed in this regard in the judgment of Lord Justice Bridge which is based on the finding of the learned judge. I entirely agree, furthermore, with Lord Justice Bridge's analysis of the evidence, together with the learned judge's findings in this regard, and I agree also with the views expressed by Lord Justice Bridge as to the operation and effect of the relevant provisions of the Misrepresentation Act. I cannot do better than respectfully to adopt his reasoning without seeking to repeat it and I agree with his conclusions.

76. On this ground as well as in relation to the claim based on negligence at common law I would allow the appeal.

(**Order:** Appeal allowed with one-third costs to appellants. Judgment below varied. Costs below to be remitted to Mr. Justice Bristow. Leave to appeal to the House of Lords granted for both parties).

MR, N. THOMAS, Q.C. and MR. A,G.S. POLLOCK (instructed by R.A.Howard, Esq., Solicitor, Chatham) appeared on behalf of the Plaintiffs (Respondents).
MR. A. LLOYD, Q.C, and PHILLIPS (instructed by Messrs, Ingleden Mark Pybus, Solicitors, Newcastle-Upon-Tyne) appeared on behalf of the Defendants (Appellants).