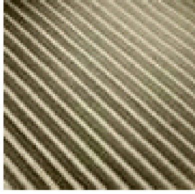

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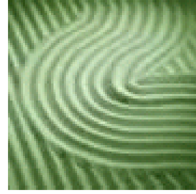
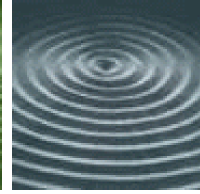
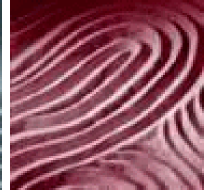

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Hedley Burns Brightly

by William M. Pigott
January 2002

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CONSTRUCTION LAW UPDATE ARTICLE

HEDLEY BURNS BRIGHTLY

JP Metal Masters Inc. v. David Mitchell Co. Ltd., Busby Bridger Holdings Ltd., Northwest Freeholds Limited and Bollum's Books Ltd., Third Party Claim by David Mitchell Co. Ltd. against Bollum's Books Ltd. and Busby Bridger Holdings Ltd., Court of Appeal for British Columbia, March 12th, (1998) 37 CLR (2d) 1.

Hedley Byrne: Hurdles And Trump

Lester Pearson was the Prime Minister of Canada when the House of Lords decided *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* in 1963. A lot of things have happened since then, including the adoption of *Hedley Bryrne* by the Supreme Court of Canada.

Hedley Byrne established that a party could recover "pure economic loss" following a negligent misstatement by another. But, there were conditions.

Most litigants sue for the money equivalent of the property damage or personal injury they have suffered. "Pure economic loss" is a different bird: no property damage or personal injury has been sustained. To Hedley Byrne, the "pure economic loss" was credit extended on the advice of a bank . The bank's advice was negligent and wrong. Result: Hedley Byrne gave credit to a customer which promptly went bankrupt.

Hedley Byrne established five hurdles for recovery of "pure economic loss" founded on a negligent misrepresentation. It also established that liability could be trumped. The *Hedley Byrne* hurdles are:

- a duty of care based on a special relationship of proximity between the maker and the receiver of a communication;
- a misrepresentation;
- the maker acted negligently;
- the receiver relied on the misrepresentation and was reasonable in doing so;
- the receiver suffered damages as a result of its reliance.

Clearing every hurdle results in "bingo" unless the maker trumped - by delivering a disclaimer. Heller avoided liability because it delivered a disclaimer to Hedley Byrne along with the negligent and incorrect information.

J P Metal Masters highlights a refinement to one of the five hurdles in *Hedley Byrne*.

J P Metal Masters/Facts

Busby Bridger Holdings Ltd. ("BB") - odd name for an architect - was hired by Bollum's Books Ltd. ("Bollum's) to covert an historic Vancouver building into a bookstore. David Mitchell Co. Ltd. ("Mitchell") was the general contractor. JP Metal Masters Inc. ("JP") was the structural steel subcontractor.

Bids were called based on drawings and specifications prepared by BB. BB's design included bracket devices hung from the ceiling to support bookshelves. In designing the bracket detail, BB did not consult a structural engineer to determine whether the existing structure, then covered, could support it.

Both Mitchell and JP telephoned BB for clarification of the bracket detail. BB told both that the bracket detail was prepared under the supervision of a structural engineer. Bids closed on that basis and JP was the successful bracket subcontractor.

The bracket detail was unbuildable. BB issued an addendum with a new detail which required JP to spend $75,000 more than it bid. BB would not approve an extra. Without BB's approval, payers were scarce.

What JP suffered was a "pure economic loss". But, could JP recover?

JP sued Mitchell, BB and Bollum's. Against BB, JP based its claim on negligence and negligent misrepresentation. Mitchell third partied BB and Bollum's and included a claim for negligence and negligent misrepresentation against each.

JP And Hedley Byrne

BB applied for the summary dismissal of the negligent misrepresentation claims of both JP and Mitchell. The application backfired because the summary procedure rule in BC allows the motion judge to award judgment ***against*** the party making the application - oops.

The motion judge found that BB was liable to JP for a negligent misrepresentation. She made the same finding in favour of Mitchell. When BB appealed to the Court of Appeal, the lower court decision was affirmed. BB could not demonstrate "..that the chambers judge reached a conclusion which cannot reasonably be supported."

In her motion decision, Madam Justice Smith had *Hedley Byrne* (and the Canadian cases which followed it) clearly in focus. She held that all of the hurdles of *Hedley Byrne* had been cleared. Here, there was no disclaimer.

In finding liability, Madam Justice Smith underscored a refinement in the *Hedley Byrne* concerning reliance. An important refinement, at that.

The fourth hurdle in *Hedley Byrne* is that the receiver has to demonstrate both reliance and the reasonability of reliance to succeed. The information can be as negligently wrong as the premature reports of Mark Twain's death - no consequences, without reliance.

BB maintained that Mitchell relied on JP and JP relied on its relationship with Mitchell. According to BB, neither had satisfied the onus of proving reliance on BB. Not so fast.

Not persuaded, Madam Justice Smith applied the reasoning of Mr. Justice Finch in *Kripps v. Touche Ross & Co.* to find for both JP and Mitchell:

> "It is sufficient, therefore, for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment. I am also of the view that where the misrepresentation in question is one...which would normally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred. The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor."

Madam Justice Smith found that the misrepresentation could be inferred; that BB had not rebutted it; and, that JP had suffered a loss. Success.

In the fluid world of construction bidding, it may be very difficult for any bidder to prove that it relied upon a specific consultant misrepresentation in making its bid. But, if proven, it will probably follow, that if the misrepresentation is material enough, the inference will be drawn. The ball will bounce back to the maker who will have a tough time rebutting. Four high hurdles and a low one, it seems.

Mitchell And Bollum's/Owners And Contractors

JP's recovery against BB renders Mitchell's action against Bollum's academic. Good thing, too.

In her decision, Madame Justice Smith made the following statement which received the approval of the Court of Appeal:

> *"Even in the absence of finding an express representation that a structural engineer reviewed the drawings before they were put out to bid, I accept the submission that Mitchell Co. and JP Metal did rely on the implied misrepresentation that the design drawings were buildable for the purpose*

for which they were tendered. It is improbable that any contractor or subcontractor would bid on a job if they thought the design could not be built as represented."

Had it been necessary for Mitchell to take up its cudgel against Bollum's, Mitchell's prospects were not good. The reason? The existence of a contract between Mitchell and Bollum's and several decades of case law.

Mitchell's main obstacle is best stated in the following quotation from Hundson's Building And Engineering Contracts, 11th edition (1994), p. 166:

> "Thus it is an absolute fundamental of a priced construction contract for a project designed on behalf of the owner that, in the absence of provision to the contrary, the owner does *not* warrant the practicability or "buildability" of his advisor's design, and on the contrary a contractor, by pricing for that design, *does* warrant his ability to carry out and complete it."

Mitchell's relationship with Bollum's usually prevents the application of the *Hedley Byrne* model. The reason - the existence of a contract. While Canadian courts permit a claimant to proceed concurrently in both contract and negligence, most construction contracts include trump to *Hedley Byrne* - disclaimers.

Construction contracts are no different than other contracts. They describe the parties' obligations to one another. And they allocate the underlying commercial risks. Mitchell's contract with Bollum's did not figure in the motion's court or Court of Appeal decisions. So, let us consider a typical construction contract and see where it takes us in the disclaimer department. Try CCDC2-1994.

In Article A-2 of CCDC2-1994, paragraph 2.1, the drafters seemed to have anticipated the situation in JP Metal Masters - and snuffed it out:

> "The Contract supercedes all prior negotiations, representations, or agreements, either written or oral, relating in any manner to the Work..."

Sure, there have been cases where the Courts set aside the disclaimer because it was the misrepresentation which induced the other party to sign the contract. A case in point is *Queen v. Cognos Inc,* cited by Madam Justice Smith in her reasons. So, if Mitchell signed CCDC2-1994 and attempted to circumnavigate paragraph 2.1 on the grounds of the negligent misrepresentation, it would have to fit within the rationale of *Queen v. Cognos Inc.* to avoid being cut off at the pass.

The chances are, Mitchell's contract with Bollum's included several trumps to a claim for negligent misrepresentation.

It is not clear that Mitchell's fate would be any different had it based a negligence action on an implied representation by the owner that its bid documents described a project that was *buildable*. Mitchell would face the collected case law reflected in Hudson's, quoted above. Or, Mitchell could find itself in the plight of the contractor described in the Supreme Court of Canada decision, *Steel Company of Canada Ltd. v. Willand Management Ltd.* . Willand constructed a roof precisely as specified in the contract documents. Within a year or two, the roof failed. It turned out that the consultant had specified a roofing system that simply would not last. Willand won the technical argument but lost the commercial one. The construction contract provided that Willand warranted the roof for five years after it was completed. That warranty shifted the risk of design suitability to the unfortunate Willand.

It may have been that the drafters of CCDC2-1994 had Willand and buildability in mind when they drafted paragraph 12.3.2 of the General Conditions:

> "The Contractor shall be responsible for the proper performance of the Work to the extent that the design and Contract Documents permit such performance."

So, while *Hedley* burns brightly in special relationships ***not*** established by a contract, its reasoning may illuminate the thinking of our Courts as they parse language like paragraph 12.3.2 in CCDC2. And, decide whether it allows a concurrent negligence action against the owner by the contractor for an unbuildable design.

In her reasons, Madam Justice Smith referred to the Supreme Court of Canada decision in *Edgeworth Construction Ltd. v. ND Lea And Associates* - an unfriendly decision if you are a consultant. The decision in *Edgeworth* significantly expanded the neighbourhood and the population of neighbours that a consultant is deemed to foresee. *JP* is not an extreme example of the *Edgeworth*. But, it does underscore the consultant's enigma. On the one hand, a consultant owes a duty of care to a generous population. On the other hand, it has limited means to disclaim its exposure to that population.

The consultant fraternity is not happy with this state of affairs. At the moment, they have little to look forward to from our courts except - possibly - sympathy.