

Aprilia's rocky way or

“Spice up your life”

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I. Introduction

With the come-back of the Spice Girls announced in June 2007 one is lavished with various stories about the separation of the girls almost ten years ago. However, barely one knows that in the course of the dissolution of the band the London Court of Appeal tried a spectacular case which throws some light on the English perception of good faith and fair dealing.

Since the ancient times, philosophers and jurists are concerned with the question whether or to which extent a party to a contract has an obligation to disclose material information to the other party.¹ In Continental Europe the answer to that question is given by the doctrine of good faith which requires both contractual parties to act honestly and to observe reasonable commercial standards of fair dealing.² In contrast, English law does neither recognise a general duty to disclosure³ nor the doctrine of good faith⁴. Instead, English courts have often “to resort to contortions or

¹ Cf. Cicero M.T., *De Officiis*, trans. by W. Miller, Loeb edn. (Cambridge, Harvard University Press, 1913) 51

² Steyn J., *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, 113 L.Q.R. 433, 438

³ *Keates v Cadogan* [1851] 10 C.B. 591

⁴ *Walford v Miles* [1992] 2 A.C. 128

subterfuges in order to give effect to their sense of the justice in the case”⁵. Thus, sometimes they are willing to imply terms into a contract⁶ or to construe an actionable misrepresentation. How difficult it can be for the wronged party to establish an actionable misrepresentation shows the decision of the Court of Appeal in *Spice Girls Ltd v Aprilia World Service BV*⁷.

II. The problem

Shortly before Ms Halliwell officially left the group on May 27, 1998 the Spice Girls Ltd (SGL), the service company for the pop group, entered into a contract with Aprilia World Service BV (Aprilia), a member of the Aprilia group of companies which manufactured motorbikes and scooters. In return for defendant’s sponsoring a world tour by the Spice Girls, the parties agreed for Aprilia to have the right to sell a limited edition Spice Sonic scooter, access to the Spice Girls to film a commercial and the right to promote the scooter. After SGL supplied Aprilia with some promotional materials the association was announced at a press conference on March 8, 1998 and the parties began to implement the agreement. To Aprilia’s disappointment a photocall with the group showed that the girls were not at all motivated. After an agent of the group sent Aprilia a fax dated March 30, 1998 assuring that the Spice Girls “were fully committed to ensuring that the promotional activities worked well for Aprilia”⁸ the commercial was finally shot on May 4, 1998. Two days later the parties executed the formal agreement which recited that SGL was entitled to the product endorsement rights of the group “currently comprising”⁹ the five girls and provided for Aprilia to have the right to produce the Spice Sonic scooter until at least March 31, 1999.

⁵ Powell R., *Good Faith in Contracts* [1956] 9 C.L.P. 16, 26

⁶ Cf. *Scally v Southern Health and Social Service Board* [1992] 1 A.C. 294

⁷ [2002] E.W.C.A. Civ 15

⁸ *Spice Girls v Aprilia World Service BV* [2000] E.M.L.R. 478, 479

⁹ *Ibid.*

What Aprilia did not know was that already before the press conference on March 8, 1998 Ms Halliwell told the other members that she was thinking of leaving the group, but they did not take her seriously. Although she confirmed her intention to leave the group at a meeting with their acting manager and their accountant on April 25, 1998 her intentions were kept strictly confidential. After Ms Halliwell left the group on May 27, 1998 Aprilia refused to pay the sponsorship fees, SGL brought proceedings for non-payment, Aprilia argued misrepresentation. While the High Court held that there was no misrepresentation the Court of Appeal ruled in favour of the defendant.

III. The doctrine of misrepresentation

Although the parties need not disclose important matters about the transaction to each other, nor make reasonable efforts to reach agreement contract law does impose a duty upon contract parties not to make false statements (misrepresentations) to induce the other party to enter the contract.¹⁰ Thus, a misrepresentation renders the contract voidable at the option of the representee. In order to establish an actionable misrepresentation under the common law as well as under s.2(1) of the Misrepresentation Act 1967 the wronged party must show that the representation was “an unambiguous, false statement of fact ... which is addressed to it, which is material and ... induces the contract”¹¹.

IV. Aprilia’s rocky way

„For the purposes of English law, the first requirement of a representation is that it be a statement of fact – usually, that is to say, a positive assertion ... capable of being proved right or wrong”.¹² This ‘positive assertion’ does not have to be explicit since it is recognised that also “a nod or a wink or a shake of the head, or a smile from the purchaser intended to induce the

¹⁰ Chen-Wishart M., *Contract Law* (Oxford, Oxford University Press, 2005) 195

¹¹ McKendrik E., *Contract Law*, 6th edn. (New York, Palgrave Macmillan, 2005) 273

¹² Whincup M.H., *Contract Law and Practice*, 4th edn. (The Hague, Kluwer Law International, 2001) 278

vendor to believe the existence of a non-existing fact¹³ suffice. Here, the difficulties for the representee arise in determining the meaning of the conduct and in identifying the circumstances under which the representor is under an obligation to correct it.¹⁴ In the case at hand, Aprilia had to show that the supply of promotional materials depicting the five girls by SGL in the beginning of March 1998 amounted to a statement made by conduct of the fact that none of them had a declared intention to leave before the end of the time period Aprilia was entitled to use the materials. Such an argument is complicated by the rule established in *Gordon v Selico*¹⁵ where it was found that “the law must be careful not to [stigmatise] every trivial act ... even if a highly scrupulous person might consider it dishonest”¹⁶. Indeed, although Arden J. of the High Court acknowledged that “Aprilia attached considerable importance to having the images of the five girls throughout the period to March 1999”¹⁷, she did not consider that the supply of promotional materials would amount to statement made by conduct that they would stay together. It was the Court of Appeal that finally held that the supply of the materials was not a ‘trivial act’ but was essential to “generate a connection in the public eye between the Spice Girls and the scooters”¹⁸. This demonstrates that although the figure of representation by conduct is universally acknowledged it still constitutes a difficult hurdle to overcome.

Secondly, the statement of fact has to be false. A representation is false if there is a discrepancy between the facts as represented and the actual facts which would be considered material by a reasonable representee.¹⁹ Thereby, it is for the wronged party to prove that the statement was

¹³ *Walters v Morgan* [1861] 3 De G.F. & J. 718, 723-724

¹⁴ fn 2, at 261

¹⁵ [1985] 275 E.G. 899

¹⁶ *Ibid.* at 903

¹⁷ *Spice Girls v Aprilia World Service BV* [2000] E.M.L.R. 478, 517.

¹⁸ fn 1, para 54

¹⁹ Lord Mackay of Clashfern, *Halsbury's Laws of England*, 4th edn., Vol. 31 (Bath, Bath Press, 2003) para 743

false.²⁰ In the current case the decisive question was as to when the knowledge that Ms Halliwell intended to leave the group could be attributed to SGL. Although Ms Halliwell told the girls about her plans on March 3 and 9, 1998, she did it under ‘adverse conditions’ due to which they did not take her seriously. For the High Court the fact that the statements were made on ‘informal occasions’ and that there was no ‘proper discussion’ was sufficient to dismiss Aprilia’s arguments.²¹ Only after the ‘formal’ meeting on April 25, SGL was to be taken to know about the intention of Ginger Spice. By taking this additional criteria into account the High Court raised the already high bar to establish misrepresentation although as early as 1876 the Court of Appeal held that the representor’s belief was immaterial.²² Even though this case was not mentioned, the judges of the Court of Appeal proceeded accordingly deeming the fact that the band did not take Ms Halliwell serious immaterial.²³ Hence, pretending that the group would stay together knowing that one member would depart was false from early March onwards.

Thirdly, the false statement of fact must have been addressed directly to the complainant or to a third party with the intention that it be passed to the complainant.²⁴ The individuals SGL was dealing with were employed by Aprilia.²⁵ Thus, the false statement of fact was directly addressed to Aprilia. Although this hurdle was not difficult to overcome, Aprilia had difficulties to establish that the fax received on March 30, was to be attributed to SGL. It had to show that the fax sent by the agent of the Spice Girl stating that the girls were “totally committed to their involvement with Aprilia”²⁶ was a false statement of fact made by SGL and not merely a statement of the agent’s opinion. A crucial distinction since statements of opinion or belief generally “have no legal effect because it is not a positive

²⁰ *Melbourne Banking Corp v Brougham* [1882] 7 App Cas 307, 314-315

²¹ *Spice Girls v Aprilia World Service BV* [2000] E.M.L.R. 478, 515

²² Cf. *R v Aspinall* [1876] 2 Q.B.D. 48, 57

²³ fn 1, para 55

²⁴ Chen-Wishart M., *Contract Law* (Oxford, Oxford University Press, 2005) 213

²⁵ fn 1, para 17

²⁶ fn 1, para 23

assertion that the fact stated is true"²⁷. How vulnerable the position of Aprilia was shows the conclusion of Arden J. of the High Court who held that the agent was "adding its own endorsement to the Spice Girls' commitment"²⁸. The Court of Appeal, on the contrary, was convinced that the fax constituted a positive assurance of each Spice girls' commitment and considered it containing an express representation of fact.²⁹ It made clear that it was immaterial that the agent was not aware of making such a representation and attributed knowledge of the fax to SGL.³⁰ Thus, the Court did not only give a clear distinction between statement of fact and mere opinion but also dealt with the question under which circumstances a statement made by a third party could be attributed to the representor.

Fourthly, the false statement of fact addressed to the complainant must have been unambiguous. However, it is imaginable that a representation genuinely and reasonably can have more than one meaning. In that case the representor is not liable if his interpretation is the correct one.³¹ In the case at hand, the question whether the words "currently comprising" used by SGL in the circulating draft and the actual agreement from May 6, 1998, were ambiguous, had an additional dimension. In *With v O'Flanagan*³² it was held that in case of a continuing representation the representor has a "duty to communicate the change of circumstances"³³. Given the fact that SGL made several statements concerning the cohesion of the group between March and May there was not one isolated representation but a series of continuing representations. Thus, if "currently comprising" was to be interpreted as to signal the possibility of future changes in the line-up of the group, SGL would have complied with its duty. Consequently, Aprilia had to show that the phrase could only be seen as an unambiguous affirmation of previous representations.

²⁷ Treitel G., *The Law of Contract*, 11th edn. (London, Sweet & Maxwell, 2003) 330

²⁸ fn 11, 514

²⁹ fn 1, para 29

³⁰ fn 1, para 57

³¹ *McInerny v Lloyds Bank Ltd* [1974] 1 Lloyd's Rep 246, 254

³² [1936] 1 Ch 575

³³ *ibid.* at 583

*Nottingham Patent Brick and Tile Co v Butler*³⁴, where a solicitor stated that he was unaware of any restrictive covenants affecting the land under negotiation without having checked it, provides a good example that although a party's statement is literally true it might constitute a misrepresentation if the representor omits important qualifications.

In the case at hand, the words "currently comprising" were referring to the present composition of the band and in that sense were true. However, since SGL knew that only the complete band would satisfy the commercial purpose of the agreement, omitting the fact that one of the Spice Girls was about to leave would render the whole statement false without room for any ambiguity. This line of argumentation was once again turned down by Arden J. who found that the "words 'currently comprising' clearly throw the risk of any change in the composition in the band ... on to Aprilia".³⁵ This reasoning was rejected by the Court of Appeal confirming that "what was omitted rendered which was actually said false or misleading in the context in which it was made"³⁶. The different approaches taken by the High Court and the Court of Appeal illustrate how difficult it is for a misled party to deal with problems that might arise out of a continuing representation and that the criterion of unambiguity which is mentioned only superficially in the most text books plays an important role in legal practice.

Finally, the representation must have been material and induced the contract. This both criteria are strongly interconnected. As Scott J. put it: "A representation is material ... if it is something that induces the person to whom it is made, whether solely or in conjunction with other inducements, to contract on the terms on which he does contract."³⁷ This has consequences for the burden of proof. If the misrepresentation would have induced a reasonable person to enter into the contract the onus will be on

³⁴ [1886] 16 Q.B.D. 778

³⁵ fn 11, 516-517

³⁶ fn 1, para 59

³⁷ *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 61 P. & C.R. 111, 124

the representor to show that the representee did not rely on the misrepresentation.³⁸ Otherwise, the misrepresentee would have to show that the misrepresentation induced him to act as he did. By examining whether Aprilia understood “the natural and ordinary meaning which would be conveyed to a normal person”³⁹ and concluding that “the various representations ... were as such as to induce a normal person to act”⁴⁰, the Court of Appeal followed this approach. It held that by reiterating the girls’ ‘commitment’ in the fax and letting them participate in the commercial shoot SGL created a material expectation on the side of Aprilia that the band would stay together and thus induced the company to enter into the contract.⁴¹ Something Aprilia would not have done if it would have known the truth.

V. Conclusion

All is well that ends well. Contrary to Shakespeare’s most unpopular ‘problem play’, the Court of Appeal succeeded to present an uninspiring and complex area of the law in a comprehensible and even amusing manner. By including numerous ‘ancient’ precedents it perpetuated legal continuity while providing a modern ‘text book’ example for the difficult hurdles on the way to an actionable misrepresentation. A rocky way that might become even steeper in view of the decision of the Court of Appeal in *Grimstead & Son Ltd v McGarrigan*⁴² where a clause excluding liability for pre-contractual misrepresentation was upheld. As pop groups have a tendency to fall apart, Aprilia could have missed out if SGL had incorporated a misrepresentation clause into the contract.

³⁸ Goff & Jones, *Law of Restitution*, 5th edn. (London, Sweet & Maxwell, 1998) 168

³⁹ fn 1, para 67

⁴⁰ Ibid, para 68

⁴¹ Ibid, para 72

⁴² Case No. QBENF 97/1641C, judgment October 27, 1999, unreported