

BETWEEN:

GILLIAN MAL'OUF

Claimant

and

MBNA EUROPE BANK LIMITED  
(trading as ABBEY CARDS)

Defendants

**JUDGMENT**

1. This deceptively simple case raises a significant question about the precise meaning and effect of Sections 56 and 75 of the Consumer Credit Act 1974 on which there is no guiding authority from the Supreme Court or the Court of Appeal.
2. The facts can be relatively simply stated and there is no significant dispute about any of them. In those circumstances, I shall not analyse the evidence, I shall merely recite the undisputed facts.
3. At the relevant time Mrs Mal'ouf had recently separated from her husband and had "downsized" her home thus coming into a fund of capital worth about £200,000. She began looking for viable investments for the money. In June 2004 she went to an exhibition at the Greater Manchester Central Exhibition Centre (popularly known as "G-Mex"). There, among other exhibitors, were two companies, one called Land International Ltd ("LIL") which was run by a Michael Morris, the other called Haydn James Land Aquisitions ("HJLA"), a Limited Liability Partnership run by Dominic Jones and Catherine Lewis.
4. Each business was involved in what is usually referred to as "Land Banking". They had bought areas of land which they claimed were very likely to be given planning permission for residential development, they had divided the areas into plots each suitable for a house and garden, and they were offering these individual plots for sale to investors on the basis that those running the scheme would subsequently apply for planning permission and when it was granted the investors could either sell the plots at a substantial profit or else build homes on them.
5. In each case, those representing the business concerned either said orally or gave Mrs Mal'ouf literature or both which stated clearly that the land concerned was very likely to gain planning permission within the near future. In each case the scheme was fraudulent because in each case those who were making the statements knew perfectly well that there was no realistic chance of the land gaining planning permission within the foreseeable future and very probably not ever.
6. While she was still at the G-Mex building, Mrs Mal'ouf decided to buy a plot from LIL and she paid a deposit of £500 using a credit card issued by the defendants. The "Plot Order Form" completed at the exhibition is at page 59 of the papers, the "Plot

Sold Document" is at page 60. The payment on the credit card was in fact taken by a company called Linographic Ltd. This was a separate company of which Mr Morris was also a director. This presumably was done because LIL did not and Linographic did have a merchant facility. The payment appears in Mrs Mal'ouf's credit card statement at page 62. Subsequently, she was contacted by solicitors on behalf of LIL (see letter at page 71). She later paid the balance of the purchase price £9495 by cheque on 25<sup>th</sup> June 2004 (page 77). The TP1 form in respect of the transaction is at pages 88 to 93.

7. After visiting LIL at the exhibition, she came to a stand occupied by HJLA. She spoke to Dominic Jones and Catherine Lewis but their plot prices seemed to be excessive so she did not buy anything at that time. About two weeks later she received a telephone call from Dominic Jones who told her that the site concerned had only four plots left and that he was offering the remaining four plots at a reduced price to enable the company to move onto the next site. He reduced the price from £19,995 to £11,995 and she agreed to buy a plot. She wanted it registered in the name of her daughter. Again she paid the deposit of £500 using a credit card issued by the Defendants. She gave the credit card details over the telephone. She then received a pack from the solicitors which included the TP1. The plot purchase agreement is at page 95, the "Terms and Conditions of Business" of HJLA are at page 95A. She paid the balance by cheque.
8. She subsequently also bought a second plot from LIL. She paid the deposit for this plot using a Marks & Spencer's credit card. M&S finance have subsequently repaid her the entire purchase price.
9. By 2007, when nothing had happened in relation to either plot she began writing to the companies concerned. She received no satisfactory response from either so she contacted the FSA and the insolvency agency. She was then contacted by Grant Thornton who had been appointed as liquidators of LIL. She was also in correspondence with Yorkshire Police about HJLA. She became aware of the fraud in 2008.
10. She began proceedings in June 2012. She sued only the present Defendants since the real culprits were not worth powder and shot. The principal cause of action against the suppliers would be misrepresentation in circumstances where the misrepresentation relied upon in each case was clearly fraudulent.
11. It is equally clear that MBNA were not actually involved in the fraud in either case and that MBNA and its officers and staff had no knowledge whatever that either scheme was afflicted by fraud. However, there are two relevant provisions of the Consumer Credit Act 1974, sections 56 and 75, which, it is argued on behalf of the claimant, make MBNA liable for the consequences of the fraud.
12. Section 56 reads (so far as relevant):

*"(1) In this Act "antecedent negotiations" means any negotiations with the debtor or hirer-...*

*(c) conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12 (b) or (c)...*

*and "negotiator" means the person by whom negotiations are so conducted with the debtor or hirer.*

*(2) Negotiations with the debtor in a case falling within subsection 1 (b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity"*

13. So far as relevant, section 75 reads:

*"If the debtor under a debtor-creditor-supplier agreement falling within section 12 (b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."*

14. "Debtor" is defined in Section 189 (1) as:

*"debtor" means the individual receiving credit under a consumer credit agreement".*

*"Finance" is defined in the same subsection as meaning "to finance wholly or partly".*

15. It follows that in circumstances such as those in the present case where the deposit or any other part of the purchase price is paid by the use of a credit card,

(a) any misrepresentation made by or on behalf of the supplier is deemed to have been made as agent of the credit card company; and

(b) if the customer has a claim against the supplier, she has "a like claim" against the credit card company.

16. The Defence relies on limitation. The relevant provisions of the Limitation Act 1980 are as follows:

Section 2 reads: *"An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

Section 5 reads: *"An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued"*

Section 9 (1) reads: *"An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued"*

Section 14A, subsections (3), (4) and (5) apply to an action in negligence which does not involve personal injury and they read:

*"(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below...*

(4) *That period is either:-*

*(a) six years from the date on which the cause of action accrued; or*

*(b) three years from the starting date is defined by subsection 5 below if that period expires later than the period mentioned in paragraph (a) above*

*(5).. the starting date...Is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action."*

Section 32 reads: "...where in the case of any action for which a period of limitation is prescribed by this Act...

*(a) the action is based upon the fraud of the defendant...*

*the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or would with reasonable diligence have discovered it."*

17. The significant cause of action against the suppliers in each case would be misrepresentation. Such a cause of action is partially based on the Common Law of contract and partly on the Misrepresentation Act 1967. The primary period of limitation in a claim in contract or a statutory claim is six years from the date of accrual of the cause of action. The action in this case was not commenced until eight years after the cause of action accrued.
18. There would also, as against each supplier be a claim in the tort of deceit. This would not be attributed to the present defendants under section 75 which refers only to claims in breach of contract or misrepresentation, not tort, but it could be attributed to them as a consequence of the statutory agency in section 56.
19. The primary limitation period in respect of a claim in tort is 6 years from the accrual of the cause of action. The accrual was in 2004. That was 8 years before the commencement of proceedings. Section 14 applies to negligence rather than fraud but in any event would be no help because where it extends the period it does so to 3 years following date of knowledge and proceedings were commenced four years from that date.
20. However, the claim against the supplier in each case would undoubtedly be saved by section 32 because both suppliers were clearly fraudulent, Mrs Mal'ouf did not discover the frauds until 2008 which was only 4 years before the commencement of proceedings and it has never been suggested that she should have discovered the existence of the fraud any earlier than she did.
21. If MBNA are afflicted with the consequences of the fraud they will be unable to rely on the limitation defence. The questions are therefore:

***A. Where the customer has a claim against the supplier in fraudulent misrepresentation, does the expression "a like claim" in section 75 of the CCA***

*include the element of fraud or does it apply only to the element of misrepresentation?*

*B. Where a false statement in the course of negotiations with the supplier is made fraudulently, does the statutory agency in section 56 of the CCA make the credit card company vicariously liable for the fraud or merely for the falsity of the statement?*

22. The point is one of some importance. I was told by counsel in the course of argument that there are a number of other potential claims in which the same point arises and that they are awaiting the outcome of this case. Moreover there appears to be no authority directly in point from the superior courts.
23. There are, at a fundamental level, two different approaches to statutory interpretation, literal and purposive. In my view a literal interpretation of section 75 would lead to the credit card company being afflicted with the fraud. The statute says "a like claim". The terms of the Misrepresentation Act 1967 and the common law define three types of misrepresentation claim:
- (a) Innocent Misrepresentation
  - (b) Negligent Misrepresentation
  - (c) Fraudulent Misrepresentation.

The three have different consequences. A claim in innocent or negligent misrepresentation is not "a like claim" to a claim in fraudulent misrepresentation. It follows that in order to be "a like claim" the claim against the credit card company would have also to be a claim in fraudulent misrepresentation.

24. Purposive interpretation seems to me to lead to exactly the same result. The whole philosophy of this Act is to permit finance companies to trade but to render them, if they do so, liable to the ultimate customer on the basis of joint and several liability with the supplier. Counsel for the claimant points out in an immaculately drafted skeleton argument that the report put before Parliament when the introduction of the consumer credit act was being discussed, stated that there were

*"Three different ways in which the borrower might be given relief against a connected lender. The first is to make the lender answerable in damages for misrepresentations made by the seller in antecedent negotiations and for breach of any term of the agreement relating to title, fitness or quality of the goods. An alternative and intermediate measure is to provide that, while the lender shall not incur a positive liability in damages, the borrower shall by way of defence to a claim for sums due under the loan agreement, be entitled to set off any claim that he has for such a misrepresentation or breach. The third approach is to require the borrower to pursue his remedies against the seller in the first incidence, the lender becoming liable to the consumer only if the latter is unable to obtain redress from the seller because of his insolvency...*

*...we have reached the conclusion that the first of these approaches is that which should be adopted...*

*...we therefore recommend that where the price payable under a consumer sale agreement is advanced wholly or in part by a connected lender that lenders should be liable for misrepresentations relating to the goods made by the seller in the course of antecedent negotiations and to defects in title, fitness and quality of the goods..."*

25. The drafting of the Act followed these recommendations. It is clear that Parliament recognised that access to a merchant facility with a credit card company or a trading relationship between the supplier and the credit card company might keep in business a supplier who was of dubious report and character, who might well break his contract or misrepresent the quality or nature of the goods and might then be very difficult to sue. The policy of the act was to protect the consumer from this risk by putting liability also on the credit card company and giving them the right of redress against the supplier, a right which they would be in a very much better position to enforce. This can only be achieved if the expression "a like claim" includes matters of fraud where these are present in the claim against the supplier.

26. Liability was intended to be joint and several, for that to be the case the causes of action would need to be identical. A claim in innocent or negligent misrepresentation is not identical to a claim in fraudulent misrepresentation.

27. **DURKIN v DSG RETAIL LTD [2010] SC 662, [2010] CSIH 49** supports this view. The decision is not directly in point but it is clear that the Court of Session was of the view that:

*"The words "a like claim" should be given their ordinary meaning in the context in which they are to be found. In our opinion that leads to the term being construed as entitling the debtor to pursue against his creditor claims he could have pursued against his supplier, in respect of the supplier's Misrepresentation or breach of contract."*

28. Numerous decided cases were in the bundles supplied to me for the purposes of legal argument none were of any real help:

**BARNSTAPLE BOAT CO LTD v JONES [2008] 1 AER 1142** is a case on Section 32 of the Limitation Act. It is concerned with the date when constructive knowledge was acquired for Section 32 of the Limitation Act 1980. It is of no help in relation to the present case there.

**CLARK V FOCUS ASSET MANAGEMENT 7 TAX SOLUTIONS LTD [2012] EWHC 3669** (Transcript supplied) is a case on whether, following a complaint to the Ombudsman which was not upheld, the claimant was nevertheless entitled to bring a civil action on the same facts. It was held that the doctrine of merger is not applicable to a decision of the ombudsman and hence that a civil action on the same facts could be maintained. Again the case is of no help in the present decision.

**MITCHELL V NEWS GROUP NEWSPAPERS LTD [2013] EWHC 2355** (Transcript supplied) is a case about relief from sanctions for failing to file a cost budget on time under the new regime introduced in April this year. Again it is no help in the present case.

**FRED PERRY (HOLDINGS) LTD v BRANDS PLAZA TRADING LTD [2012] EWCA Civ 224** (transcripts supplied) was a case involving trading in counterfeit sportswear. Again the case is concerned mainly with relief from sanctions under the new Civil procedure Rules. It is of absolutely no help in the present case.

**VENULUM PROPERTY INVESTMENTS LTD v SPACE ARCHITECTURE LTD [2013] EWHC 1242** (transcripts supplied) is a case involving discretion to extend time for service of a Particulars of Claim. It is of no help in the present case.

**DIMMOCK v HALLETT (1866-67) LR2 Ch. APP 21** is a case about a misrepresentation involving a farm. The question was whether the misrepresentation was substantial. It was held that it was and that the purchaser was entitled to rescind the contract. Again this is no help in the present case.

**MCCALLUM v MCCALLUM [1901] 1 Ch 143** is a case about the extension of limitations periods in a case of fraud but it is of no help in the present case.

**BEAMAN v A.R.T.S. LTD [1949] 1KB 550** is also about limitation and concealment of the cause of action by fraud but again it is of no help in the present case.

**PECO ARTS INC. v HAZLITT GALLERY LTD [1983] 1WLR 1315** is also a case about limitation and fraud and whether reasonable diligence was exercised by the purchaser but it is of no help in the present case.

**KETTEMAN v HANSEL PROPERTIES [1987] AC 189** was a case involving defective house foundations and limitation. Again the decision is of no help in the present case.

**CHARTER TRUST PLC v DAVIES (1998) 76 P&CR 396** is a landlord and tenant case on the question of whether a landlord has any duty to take steps to remedy a nuisance. I cannot understand why this was ever considered to be relevant.

**PEEKAY INTERMARK LTD v AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD [2006] EWCA Civ 386** (transcripts supplied) was a case on quite similar facts to the present. The Claimant had bought what he thought was an interest in Russian treasury bonds but the nature of the investment product had been fraudulently mis-described but the Claimant's signature on the relevant documents had not been induced by the misrepresentation. The case is of no assistance in the present decision.

29. In my view also the argument under section 56 reaches the same conclusion. There is no doubt whatever that in a common-law agency, if the agent is guilty of fraud to a third party, the principal is liable for the actions of the agent even though he was not party to the fraud and did not know at the time the statements were made that they were fraudulent. Counsel for the Claimant relies on **HEATONS TRANSPORT v TGWU [1973] AC 15**:

*"If A expressly or impliedly authorises the carrying out of a task on his behalf, he will be accountable for the way in which it is carried out, even if that way was not*

*intended or authorised by him. He will be liable even if it is carried out in a way which was expressly forbidden unless the prohibition was in such terms that what was done can be said to have been a different task from that authorised"*

30. The principle is very clearly stated at Halsbury's Laws of England (4<sup>th</sup> edition re-issue) Volume 2(1) paragraph 179. Numerous authorities are quoted at footnote 2.
31. I see no reason why the statutory agency produced by section 56 of the Consumer Credit Act should be in any way different from a common law agency in this respect. If so, the principal would be fully liable for all the consequences of his agents' fraudulent misrepresentation including the effect on limitation.
32. In those circumstances, I am of the view that both under section 56 and 75 the Defendants are afflicted by the consequences of the fraud for all purposes including the Limitation Act. The only authority to the contrary is a statement by Prof. Guest in his textbook in which he says that limitation would not be affected because the fraud is not that "of the Defendant" and thus the wording of section 32 of the Limitation Act has no application. With great respect to the Professor, this misses the point. Neither the fraud nor the misrepresentation have been made by MBNA which had no knowledge of either. MBNA is nevertheless afflicted with joint and several liability with the supplier and is therefore deemed to be responsible for the misrepresentation and, in my view, also the fraud.
33. A secondary point is taken in relation to the LIL transaction that, because LIL had no merchant facility and the merchant facility possessed by Linographic Ltd was used to take the payment, the "supplier" for the purposes of the Consumer Credit Act was Linographic Ltd not LIL and that hence the false representations were not made by the "supplier" and sections 56 and 75 do not apply.
34. In my view, this is a false point. Mr Morris was a director of both companies. As such his was the "controlling mind" for each company (see **TESCO v NATTRASS [1972] AC 153**). He was the author of the fraud. It follows that when he used Linographic Ltd to take the payment, Linographic Ltd became a party to the fraud so "the supplier" did make the representations relied on.
35. In my view therefore, the Defendants are not entitled to rely on the Limitation Act and the Claimant is entitled to succeed in both sums. Judgment accordingly.

Derek R Halbert  
Designated Civil Judge, Cheshire  
27<sup>th</sup> January 2014