

BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12

Supreme Court Reports

Supreme Court of Canada

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson* and Iacobucci JJ.

1992: January 28 / 1993: January 21.

File Nos.: 21939, 21955.

[1993] 1 S.C.R. 12 | [1993] 1 R.C.S. 12 | [1993] S.C.J. No. 1 | [1993] A.C.S. no 1

British Columbia Hydro and Power Authority, appellant; v. BG Checo International Limited, respondent. And between BG Checo International Limited, appellant; v. British Columbia Hydro and Power Authority, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (147 paras.)

* Stevenson J. took no part in the judgment.

Case Summary

Torts — Negligence — Negligent misrepresentation — Concurrent liability in tort and contract — Hydro calling for tenders to erect transmission towers and string transmission lines — Tender documents stating that right-of-way would be cleared by others — Parties incorporating tender documents into contract — Right-of-way not properly cleared — Whether plaintiff can sue in tort if duty relied on is also made a contractual duty by an express term of the contract — If so, whether terms of contract excluded Hydro's potential liability for misrepresentation.

Contracts — Breach of contract — Hydro awarding contract to erect transmission towers and string transmission lines — Contract stating that right-of-way would be cleared by others — Right-of-way not properly cleared — Hydro liable for damages for breach of contract.

[page13]

Hydro called for tenders to erect transmission towers and string transmission lines. Checo had a representative inspect the area by helicopter before its tender was submitted. The representative noted that the right-of-way had been partially cleared, and also noted evidence of ongoing clearing activity. He assumed that there would be further clearing prior to the commencement of Checo's work. Hydro accepted Checo's tender and the parties entered into a written contract. The tender documents, which were subsequently incorporated in the contract, stated that clearing of the right-of-way would be done by others and formed no part of the work to be performed by Checo. They also stated that it was Checo's responsibility to inform itself

of all aspects of the work and that should any errors appear in the tender documents, or should Checo note any conditions conflicting with the letter or spirit of the tender documents, it was Checo's responsibility to obtain clarification before submitting its tender. The tender documents also provided that Checo would satisfy itself of all site conditions and the correctness and sufficiency of the tender for the work and the stipulated prices. In fact, no further clearing of the right-of-way ever took place, and the improper clearing caused Checo a number of difficulties in completing its work.

Checo sued Hydro seeking damages for negligent misrepresentation, or, in the alternative, for breach of contract. The evidence at trial indicated that Hydro had contracted the clearing out to another company, and that, to Hydro's knowledge, the work was not done adequately. There was no direct discussion between the representatives of Checo and Hydro concerning this issue. During the trial Checo amended its statement of claim to include a claim in fraud. The trial judge found that Hydro had acted fraudulently in its dealings with Checo and awarded damages to Checo. Hydro appealed to the Court of Appeal, which rejected the finding of fraud, but found that there had been a negligent misrepresentation which induced Checo to enter into the contract. The Court of Appeal awarded damages for the misrepresentation, but reduced the trial judge's damage award, and referred the question of breach of contract and damages flowing therefrom back to the trial court.

The issues raised by Hydro's appeal are (1) whether a pre-contractual representation which becomes a contractual term can found liability in negligent misrepresentation; (2) if so, whether the terms of the contract operate to exclude Hydro's potential liability for any misrepresentations; [page14] (3) if not, whether Hydro is liable for negligent misrepresentation; and (4) whether there was a breach of contract. Checo's cross-appeal is to determine (1) whether Hydro should be liable for fraudulent misrepresentation and (2) whether the Court of Appeal correctly assessed Checo's damages for negligent misrepresentation.

Held (Sopinka and Iacobucci JJ. dissenting in part): The appeal should be dismissed and the cross-appeal allowed in part.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Hydro is liable to Checo for breach of contract. The contract required Hydro to clear the right-of-way as specified and that duty was not negated by the more general clauses relating to errors and misunderstandings in tendering, site conditions and contingencies. Since Hydro did not remove the logs and debris from the right-of-way, it is liable for breach of contract.

The contract does not preclude Checo from suing in tort. The general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse* is that where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, subject to any limit the parties themselves have placed on that right by their contract. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

This principle is illustrated by consideration of the three situations that may arise when contract and tort are applied to the same wrong. The first class of case arises where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they [page15] could not recover in tort for the higher contractual duty. The vast majority of commercial transactions fall into this class. The right to sue in tort is not extinguished, however, and may remain important, as where suit in contract is barred by expiry of a limitation period. The second class of case arises where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances. This occurs when the parties by their contract indicate their intention that the usual liability imposed by the law of tort is not to bind them. The most common means by which such an intention is indicated is the inclusion of a clause of exemption or exclusion of liability in the contract. Generally, the duty imposed by the law of tort can be nullified only by clear terms. The third class of case arises where the duty in contract and the common law duty in tort are co-extensive. In this class of case, like the others, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period. The case at bar falls into this third category. Hydro's common law duty

not to negligently misrepresent that it would have the right-of-way cleared by others is not excluded by the contract, which confirmed Hydro's obligation to clear the right-of-way.

The availability of concurrent liability in contract and tort should not be predicated on whether the contractual term is express or implied. Using the express-implied distinction as a basis for determining whether there is a right to sue in tort poses a number of problems. The law has always treated express and implied terms as being equivalent in effect, and it is difficult to distinguish between them in some cases. It is not evident that if parties to a contract choose to include an express term in the contract dealing with a particular duty relevant to the contract, they intended to oust the availability of tort remedies in respect of that duty. Finally, the test will be difficult to apply in situations where the express contractual term does not exactly overlap the tort duty. Neither principle, the authorities nor the needs of contracting parties support the conclusion that dealing with [page16] a matter by an express contract term will, in itself, categorically exclude the right to sue in tort.

The contract did not limit the duty of care owed by Hydro to Checo, nor did Checo waive its common law right to bring such tort actions as might be open to it. Checo is thus entitled to claim against Hydro in tort.

In situations of concurrent liability in tort and contract it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though particular circumstances or policy may dictate such a course.

Checo is entitled to be compensated for all reasonably foreseeable loss caused by the tort. The Court of Appeal was justified in finding that had the misrepresentation not been made, Checo would have entered into the contract, but with a higher bid. It was of the view that Checo would have increased its bid by an amount equal to the cost of the extra work made necessary by the improperly cleared work site plus profit and overhead. To compensate only for the direct costs of clearing, however, is to suggest that the only tort was the failure to clear. The real fault is that Hydro misrepresented the situation and Checo may have relied on that representation in performing its other obligations under the contract. Having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting in Checo incurring acceleration costs in order to meet the contract completion date. Such costs would also arguably be reasonably foreseeable. The matter should be referred back to the trial court for determination of whether any such indirect losses were the foreseeable result of the misrepresentation.

The breach of contract claims should be referred to the trial court for determination. Checo is to be put in the position it would be in had the work site been cleared properly, and is therefore to be reimbursed for all expenses incurred as a result of the breach of contract, [page17] whether expected or not, except to the extent that those expenses may have been so unexpected that they are too remote to be compensable for breach of contract. The damages in contract would thus include not only the costs flowing directly from the improperly cleared work site, but also consequent indirect costs such as acceleration costs due to delays in construction.

There was no evidence of an intention on the part of Hydro to deceive, and the Court of Appeal therefore correctly concluded that Hydro should not be liable for fraudulent misrepresentation.

Per Sopinka and Iacobucci JJ. (dissenting in part): In the circumstances of the case, Hydro may be liable in contract for the representations which Checo complains of, but it cannot be liable in tort. While as a general rule, the existence of a contract between two parties does not preclude the existence of a common law duty of care, contractual exclusion or limitation clauses can operate either to exclude or limit liability, or to limit the duty owed by one party to the other, whether in contract or in tort. In neither case will the plaintiff be permitted to use an action in tort to circumvent the limitation of liability or of duty in the contract. The contractual relationship can bring the parties into sufficient proximity to give rise to a duty of care, but no duty of care in tort can be concurrent with a duty of care created by an express term of the contract. If the duty is defined by an express term of the contract, the plaintiff will be confined to whatever remedies are available in the law of contract. A claim in tort is not foreclosed in all circumstances, however. A contextual approach should be adopted which takes into account the context in which the contract is made, and the position of the parties with respect to one another. The policy reasons in favour of the rule are strongest where the contractual context is commercial and the parties are of equal bargaining power. Here there is no question of

unconscionability or inequality of bargaining power. If such issues, or others analogous to them, were to arise, however, a court should be wary not to exclude too rapidly a duty of care in tort on the basis of an express term of the contract, especially if the end result for the plaintiff would be a wrong without a remedy.

[page18]

An action for negligent misrepresentation will survive the making of a contract between the parties. As in other areas of negligence, the plaintiff may have the option of concurrent actions in tort and contract. Here, however, the duty imposed in tort on Hydro by the clause in the tender documents is co-extensive with the duty imposed in contract by the express clause in the contract. Consequently, subject to any overriding considerations arising from the context in which the transaction occurred, Checo is limited to whatever remedies may be available to it in contract for Hydro's breach of the contract. An assessment of the context strengthens the conclusion that Checo should be limited to any remedies that might be available to it under the contract. This transaction occurred in a commercial context. The parties are both large corporations, and there is no allegation or indication of any inequality of bargaining power or unconscionability. As well, the contract which was concluded by the parties was included as part of the tender documents. Checo knew when it was preparing its bid that if its bid were accepted, the representation as to the condition of the right-of-way would be a term of the contract. Checo knew, or ought to have known, that disputes as to the condition of the right-of-way would potentially be governed by the contract.

There is no clause in the contract or in the tender documents which serves either to limit or exclude Hydro's liability for the representation the contract contained. Hydro breached the express term of the contract that the right-of-way would be cleared and is accordingly liable for damages, which should be assessed at the new trial.

There was insufficient evidence to support a finding of deceit. The Court of Appeal properly concluded that Hydro should not be liable for fraudulent misrepresentation.

Cases Cited

By La Forest and McLachlin JJ.

Considered: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; referred to: *Forbes v. Git*, [1922] 1 A.C. 256 (P.C.), rev'g (1921), 62 S.C.R. 1; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50; *Cotter v. General Petroleum Ltd.*, [1951] S.C.R. 154; *Dyck v. Manitoba Snowmobile Association Inc.*, [1985] 1 S.C.R. 589; *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; *Lister v. Romford Ice and Cold Storage Co.*, [1957] A.C. 555; *Canadian Indemnity Co. v. Andrews & George Co.*, [1953] 1 S.C.R. 19; [page19] *Dominion Chain Co. v. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385 (Ont. C.A.), aff'd sub nom. *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346; *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554; *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228.

By Iacobucci J. (dissenting in part)

Considered: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; referred to: *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1981), 18 C.L.R. 159 (B.C.S.C.), *aff'd in part* (1982), 18 C.L.R. 159 (B.C.C.A.); *Donoghue v. Stevenson*, [1932] A.C. 562; *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 30 B.C.L.R. (2d) 273; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1990), 43 B.C.L.R. (2d) 1, *aff'd* [1991] 3 S.C.R. 3; *Catre Industries Ltd. v. Alberta* (1989), 99 A.R. 321 (C.A.), *leave to appeal refused*, [1990] 1 S.C.R. vi; *University of Regina v. Pettick* (1991), 90 Sask. R. 241; *Fletcher v. Manitoba Public Insurance Co.* (1989), 68 O.R. (2d) 193; *Pittman v. Manufacturers Life Insurance Co.* (1990), 76 D.L.R. (4th) 320; *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271; *Esso Petroleum Co. v. Mardon*, [1976] 2 All E.R. 5; *Leame v. Bray* (1803), 3 East 593, 102 E.R. 724; *Bretherton v. Wood* (1821), 3 Brod. & B. 54, 129 E.R. 1203; *Boorman v. Brown* (1842), 3 Q.B. 511 (Ex. Ch.), 114 E.R. 603, *aff'd sub nom. Brown v. Boorman* (1844), 11 Cl. & Fin. 1 (H.L.), 8 E.R. 1003; *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399; *Groom v. Crocker*, [1939] 1 K.B. 194; *Bagot v. Stevens Scanlan & Co.*, [1966] 1 Q.B. 197; *Williamson v. Allison* (1802), 2 East. 446, 102 E.R. 432; *Legge v. Tucker* (1856), H. & N. 500, 156 E.R. 1298; *Turner v. Stallibrass*, [1898] 1 Q.B. 56; *Edwards v. Mallan*, [1908] 1 K.B. 1002; *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769; *Dominion Chain Co. v. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385; *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554; *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492; *New Brunswick Telephone Co. v. John Maryon International Ltd.* (1982), 43 N.B.R. (2d) 469; *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271; *ITO--International Terminal [page20] Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205; *Peters v. Parkway Mercury Sales Ltd.* (1975), 10 N.B.R. (2d) 703; *Carman Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *Derry v. Peek* (1889), 14 App. Cas. 337; *Nocton v. Lord Ashburton*, [1914] A.C. 932; *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; *De Vall v. Gorman, Clancey & Grindley Ltd.* (1919), 58 S.C.R. 259; *Kinsman v. Kinsman* (1912), 3 O.W.N. 966; *Howse v. Quinnell Motors Ltd.*, [1952] 2 D.L.R. 425; *Chapman v. Warren*, [1936] O.R. 145; *Gardner v. Merker* (1918), 43 O.L.R. 411; *Kennedy v. Anderson* (1919), 50 D.L.R. 105; *Gilmour v. Trustee Co. of Winnipeg*, [1923] 3 W.W.R. 177; *Thurston v. Streilen* (1950), 59 Man. R. 55; *Scholte v. Richardson*, [1951] O.R. 58; *Candler v. Crane Christmas & Co.*, [1951] 1 All E.R. 426; *Cann v. Willson* (1888), 39 Ch. D. 39; *Heaven v. Pender* (1883), 11 Q.B.D. 503; *George v. Skivington* (1869), L.R. 5 Ex. 1; *Clark v. Kirby-Smith*, [1964] 2 All E.R. 835; *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51.

Authors Cited

Baker, J.H. *An Introduction to English Legal History*. London: Butterworths, 1979.

Blom, Joost. "Remedies in Tort and Contract: Where is the Difference?". In Jeffrey Berryman, ed., *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 395.

Chitty on Contracts, vol. 1, 26th ed. By A.G. Guest. London: Sweet & Maxwell, 1989.

Fifoot, C.H.S. *History and Sources of the Common Law: Tort and Contract*. London: Stevens & Sons, 1949.

French, Christine. "The Contract/Tort Dilemma" (1983), 5 *Otago L. Rev.* 236.

Fuller, L.L., and W.R. Purdue, "The Reliance Interest in Contract Damages" (1936-37), 46 Yale L. J. 52 and 373.

Johnson, Howard. "Contract and Tort: Orthodoxy Reasserted!" (1990), 9 Int'l Banking L. 306.

Lewison, Kim. The Interpretation of Contracts. London: Sweet & Maxwell, 1989.

McLachlin, Beverley M., and Wilfred J. Wallace. The Canadian Law of Architecture and Engineering. Toronto: Butterworths, 1987.

[page21]

McLauchlan, D.W. "Assessment of Damages for Misrepresentations Inducing Contracts" (1987), 6 Otago L. Rev. 370.

McLauchlan, D.W. "Pre-Contract Negligent Misrepresentation" (1977), 4 Otago L. Rev. 23.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1990), 44 B.C.L.R. (2d) 145, 4 C.C.L.T. (2d) 161, 41 C.L.R. 1, [1990] 3 W.W.R. 690, reversing in part a judgment of Cohen J. (1988), 10 A.C.W.S. (3d) 312, [1988] B.C.D. Civ. 971-01, [1988] B.C.W.L.D. 2324, awarding damages for fraudulent misrepresentation. Appeal dismissed and cross-appeal allowed in part, Sopinka and Iacobucci JJ. dissenting in part.

Glenn A. Urquhart, Arthur M. Grant and Gordon D. Phillips, for the British Columbia Hydro and Power Authority. Donald J. Sorochan, Q.C., Meredith A. Quartermain and Mari A. Worfolk, for BG Checo International Ltd.

Solicitors for the British Columbia Hydro and Power Authority: Singleton, Urquhart, MacDonald, Vancouver. Solicitors for BG Checo International Ltd.: Swinton & Company, Vancouver.

The judgment of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

LA FOREST and McLACHLIN JJ.

1 We have had the advantage of reading the reasons of our colleague Justice Iacobucci. We agree with his conclusion that Hydro is liable to Checo for breach of contract. We disagree, however, with his conclusion that the contract precludes Checo from suing in tort. In our view, our colleague's approach would have the effect of eliminating much of the rationalizing thrust behind the movement towards concurrency in tort and contract. Rather than attempting to establish new barriers to tort liability in contractual contexts, the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions, thereby reducing the significance of the existence of the two different forms of action and [page22] allowing a person who has suffered a wrong full access to all relevant legal remedies.

2 The facts have been fully set out by our colleague and need not be repeated. The tender documents (subsequently incorporated in the contract) stated that clearing of the right-of-way would be done by others and formed no part of the work to be performed by Checo. The tender documents and contract documents also stated that it was Checo's responsibility to inform itself of all aspects of the work and that should any errors appear in the tender documents, or should Checo note any conditions conflicting with the letter or spirit of the tender documents, it was the responsibility of Checo to obtain clarification before submitting its tender. The tender documents also provided that Checo would satisfy itself of all site conditions and the correctness and sufficiency of the tender for the work and the stipulated prices.

3 Checo argues that the right-of-way was not properly cleared and that the statement in the tender documents and the contract that it had been cleared constituted a breach of contract and negligent misrepresentation.

4 Hydro argues first that it carried out the clearing required by clause 6.01.03 of the contract, and second, that in any event it was up to Checo to satisfy itself that the site was adequately cleared before tendering. In other words, if there was ambiguity as to what was meant by "cleared" Checo had assumed the risk of clearing which might not meet its expectations.

5 The trial judge found Hydro liable for the tort of deceit. The Court of Appeal found that the evidence fell short of supporting that finding, there being no evidence of intention to deceive. That conclusion cannot seriously be contested and Checo's cross-appeal on the issue of fraudulent misrepresentation must accordingly be dismissed. The only issues therefore are whether claims lie in [page23] contract and tort and if so, what is the measure of damages.

The Claim in Contract

6 The parties chose to set out their respective rights and obligations in the contract they signed. They chose to incorporate the tender documents into the contract. Thus all rights and obligations flowing from the tender documents onward are set by the parties' own agreement.

7 It follows that a court, in assessing the rights and obligations of the parties, must commence with the contract. It must look to what the parties themselves had to say about those rights and obligations.

8 This brings us to construction of the contract. The problem is that of reconciling provisions in the contract which are said to be inconsistent. One, the provision that placed on Hydro the obligation of clearing the right-of-way, was specific. Clause 6.01.03 stated that "[c]learing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract." It went on to state a limited exception for two areas, again drafted in specific terms: "Standing trees and brush have not been removed from the right-of-way in certain valley and gully crossings." The other relevant provisions are the general provisions placing on Checo the responsibility for any misunderstandings as to the conditions of the work or errors in the tender documents (clause 2.03), and for satisfying itself before bidding as to site conditions, quantities of work, etc., and requiring it to "obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect [its] Tender" (clause 4.04).

9 It is a cardinal rule of the construction of contracts that the various parts of the contract are to

be interpreted in the context of the intentions of the [page24] parties as evident from the contract as a whole: K. Lewison, *The Interpretation of Contracts* (1989), at p. 124; Chitty on Contracts (26th ed. 1989), vol. 1, at p. 520. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: Chitty on Contracts, *supra*, at p. 526; Lewison, *supra*, at p. 206; *Git v. Forbes* (1921), 62 S.C.R. 1, per Duff J. (as he then was), dissenting, at p. 10, *rev'd* [1922] 1 A.C. 256; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50 (S.C.C.), at p. 54. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleum Ltd.*, [1951] S.C.R. 154. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms -- or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

10 Approaching the matter in this way, the provisions referred to above are capable of reconciliation. The parties agreed that Hydro should bear the responsibility of clearing the right-of-way. The only exception was as to the removal of trees and debris in certain valley and gully crossings. The general obligation of Checo for misunderstandings and errors in the tender documents and for satisfying itself as to the site, the work and all contingencies must not have been intended to negate the specific obligation for clearing which the contract placed squarely on the shoulders of Hydro. The failure to discharge that responsibility was not a "misunderstanding" or "error" in the tender documents within clause 2.03. Nor was it relevant to the tenderer's inspection of the site or responsibility [page25] for risks and contingencies that might affect the bid within clause 4.04. Given the specific nature of Hydro's obligation to clear the right-of-way, the site inspection and contingencies referred to can reasonably be read as relating to matters other than clearing, which was a clearly assigned obligation and thus not a contingency. The same applies to the provision for preparation of the site (clause 7.01.02). In this way, the clause placing on Hydro the obligation to clear the right-of-way can be reconciled with the clauses placing on Checo the consequences of errors and misunderstandings in the tender documents and the obligation to satisfy itself as to the site, the work and contingencies.

11 We thus conclude that the contract required Hydro to clear the right-of-way as specified in clause 6.01.03 of the contract and that duty was not negated by the more general clauses relating to errors and misunderstandings in tendering, site conditions and contingencies. This was the view of the trial judge and the majority in the Court of Appeal. The trial judge, based on the evidence he heard, went on to define what "clearing" meant in the contract; it meant that "the right-of-way would be free of logs and debris." The majority of the Court of Appeal accepted this conclusion. So must we. Since it is not seriously contended that Hydro cleared the right-of-way to this standard, Hydro's breach of contract is established.

12 The plaintiff suing for breach of contract is to be put in the position it would have been in had the contract been performed as agreed. The measure of damages is what is required to put Checo in the position it would have been in had the contract been performed as agreed. If the contract had been performed as agreed, Hydro would have removed the logs and debris from the right-of-way. Checo would not have been required to do the additional work that was necessitated by reason of the work site being improperly cleared. It might also have [page26] avoided certain overhead. The contract stipulated 15 percent for overhead and profit on extra

work. Checo may be entitled to a portion of this sum for overhead. It would not be entitled to profit on the cost of clearing the right-of-way, since that would put Checo in a better position than it would have been had Hydro performed its contract; Checo never bargained for profit on this work, which was totally outside the parties' expectations. As will be explained in greater detail later in these reasons, we share Iacobucci J.'s view that if damages are to be assessed for breach of contract regarding the improper clearing of the work site, the case should be returned to trial for that to be done.

The Claim in Tort

The Theory of Concurrency

13 The first question is whether the contract precludes Checo from suing in tort.

14 Iacobucci J. concludes that a contract between the parties may preclude the possibility of suing in tort for a given wrong where there is an express term in the contract dealing with the matter. We would phrase the applicable principle somewhat more narrowly. As we see it, the right to sue in tort is not taken away by the contract in such a case, although the contract, by limiting the scope of the tort duty or waiving the right to sue in tort, may limit or negate tort liability.

15 In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, is that where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negate the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit [page27] or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. Thus if a person wishes to engage in a dangerous sport, the person may stipulate in advance that he or she waives any right of action against the person who operates the sport facility: *Dyck v. Manitoba Snowmobile Association Inc.*, [1985] 1 S.C.R. 589. Similarly, if two business firms agree that a particular risk should lie on a party who would not ordinarily bear that risk at common law, they may do so. So a plaintiff may sue either in contract or in tort, subject to any limit the parties themselves have placed on that right by their contract. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it.

16 Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering -- the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. For example, where the contractual limitation on the tort duty is partial, a tort action founded on the modified duty might lie. The tort duty as modified by the contractual agreement between the parties might be raised in a case where the limitation period for an action for breach of contract has expired but the limitation period for a tort action [page28] has not. If one says categorically,

as we understand Iacobucci J. to say, that where the contract deals with a matter expressly, the right to sue in tort vanishes altogether, then the latter two possibilities vanish.

17 This is illustrated by consideration of the three situations that may arise when contract and tort are applied to the same wrong. The first class of case arises where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they could not recover in tort for the higher contractual duty. The vast majority of commercial transactions fall into this class. The right to sue in tort is not extinguished, however, and may remain important, as where suit in contract is barred by expiry of a limitation period.

18 The second class of case arises where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances. This occurs when the parties by their contract indicate their intention that the usual liability imposed by the law of tort is not to bind them. The most common means by which such an intention is indicated is the inclusion of a clause of exemption or exclusion of liability in the contract. Generally, the duty imposed by the law of tort can be nullified only by clear terms. We do not rule out, however, the possibility that cases may arise in which merely inconsistent contract terms could negative or limit a duty in tort, an issue that may be left to a [page29] case in which it arises. The issue raises difficult policy considerations, viz. an assessment of the circumstances in which contracting parties should be permitted to agree to contractual duties that would subtract from their general obligations under the law of tort. These important questions are best left to a case in which the proper factual foundation is available, so as to provide an appropriate context for the decision. In the second class of case, as in the first, there is usually little point in suing in tort since the duty in tort and consequently any tort liability is limited by the specific limitation to which the parties have agreed. An exception might arise where the contract does not entirely negate tort liability (e.g., the exemption clause applies only above a certain amount) and the plaintiff wishes to sue in tort to avail itself of a more generous limitation period or some other procedural advantage offered by tort.

19 The third class of case arises where the duty in contract and the common law duty in tort are co-extensive. In this class of case, like the others, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period. The contract may expressly provide for a duty that is the same as that imposed by the common law. Or the contractual duty may be implied. The common calling cases, which have long permitted concurrent actions in contract and tort, generally fall into this class. There is a contract. But the obligation under that contract is typically defined by implied terms, i.e., by the courts. Thus there is no issue of private ordering as opposed to publicly imposed liability. Whether the action is styled in contract or tort, its source is an objective [page30] expectation, defined by the courts, of the appropriate obligation and the correlative right.

20 The case at bar, as we see it, falls into this third category of case. The contract, read as we have proposed, did not negate Hydro's common law duty not to negligently misrepresent that it would have the right-of-way cleared by others. Had Checo known the truth, it would have bid for a higher amount. That duty is not excluded by the contract, which confirmed Hydro's obligation to clear the right-of-way. Accordingly, Checo may sue in tort.

21 We conclude that actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise. This excludes, of

course, cases where the contractual limitation is invalid, as by fraud, mistake or unconscionability. Similarly, a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract, as the example given in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), of the captain of a vessel falling asleep and starting a fire in relation to a claim for cargo damage.

The Express-Implied Distinction

22 Our colleague asserts that where the parties deal with a matter expressly in their contract, all right to sue in tort is lost. We have suggested, with great respect, that this proposition is unnecessarily draconian. The converse of this proposition is that implied terms of contracts do not oust tort liability.

[page31]

23 Although Iacobucci J. states at p. 68 of his reasons that he is leaving open the question of "[w]hether or not an implied term of a contract can define a duty of care in such a way that a plaintiff is confined to a remedy in contract", the distinction between implied and express terms figures in his discussion of the effect of contract terms on tort liability. For example, at p. 67 of his reasons, our colleague states:

The compromise position adopted by Le Dain J. was that any duty arising in tort will be concurrent with duties arising under the contract, unless the duty which the plaintiff seeks to rely on in tort is also a duty defined by an express term of the contract. [The emphasis is Iacobucci J.'s.]

It would seem to follow from this statement that concurrent duties in contract and tort would lie where the contract duty is defined by an implied term of the contract, but not where the term is express. In these circumstances, it is not amiss to consider the utility of the distinction between express and implied terms of the contract as a basis for determining when a contract term may affect tort liability.

24 In our view, using the express-implied distinction as a basis for determining whether there is a right to sue in tort poses a number of problems. The law has always treated express and implied contract terms as being equivalent in effect. Breach of an implied term is just as serious as breach of an express term. Moreover, it is difficult to distinguish between them in some cases. Implied terms may arise from custom, for example, or from the conduct of the parties. In some cases words and conduct intermingle. Why should parties who were so certain in their obligations that they did not take the trouble to spell them out find themselves able to sue in tort, while parties who put the same matters in writing cannot?

[page32]

25 Nor is it evident to us that if parties to a contract choose to include an express term in the contract dealing with a particular duty relevant to the contract, they intended to oust the availability of tort remedies in respect of that duty. In such cases, the intention may more likely

be:

- (a) To make it clear that the parties understand particular contractual duties to exist as between them, rather than having the more uncertain situation of not knowing whether a court will imply a particular duty under the contract; and/or
- (b) To prevent litigation (for breach of contract) in the event of disputes arising -- the more certain the parties' respective rights and obligations (as is usually the case when those rights and obligations are set out in express contractual terms), the more likely it will be that disputes between the parties can be settled.

26 While the tort duty may be limited by the contractual terms so as to be no broader than the contract duty, there is no reason to suppose that merely by stipulating a duty in the contract, the parties intended to negate all possibility of suing in tort.

27 Indeed, a little further on in his reasons, our colleague appears to concede that the ouster of recourse to tort law must depend on more than the fact the contract has expressly dealt with the matter. He indicates at p. 69 of his reasons that whether the parties will be held to have intended to oust tort remedies in favour of contract remedies will depend on the context, including:

- (a) whether the contract is commercial or non-commercial;
- (b) whether the parties were of equal bargaining power;

[page33]

- (c) whether the court is of the view that to find such an intention will lead to an unjust result in the court action.

28 Thus the question of whether a concurrent action in tort lies would depend not only on whether the contract expressly deals with the matter, but also on the elastic distinctions between commercial and non-commercial contracts, the court's perception of relative bargaining power, and finally, whether the court sees the result as just or unjust. We do not agree that parties contracting in a commercial context should be presumed to be more desirous of ousting the availability of tort remedies than parties contracting in a non-commercial context. If there are particular commercial relationships in which the parties wish remedies for disputes between them to be in contract only, then they may be expected to indicate this intention by including an express clause in the contract waiving the right to sue in tort. As for equality of bargaining power and the court's view of whether the result would be just or unjust, we fear they would introduce too great a measure of uncertainty. Parties should be able to predict in advance whether their remedies are confined to contract or whether they can sue concurrently in tort and contract. Finally, it seems to us that Iacobucci J.'s test for determining when concurrent liability is precluded will be difficult to apply in situations where the express contractual term does not exactly overlap a tort duty. In the present case, the contractual term was identical to the negligent misrepresentation, but that is not often to be expected.

The Authorities

29 The authorities, as we read them, do not support the conclusion that the express mention of a matter in the contract, and only its express mention in the contract, ousts any possibility of suing in tort. The opposing schools of thought on the concurrent liability [page34] issue have not been divided along such lines. Instead, the issue has been whether there should be concurrent liability where any term of a contract, either express or implied, deals with the same duty imposed by tort law. For example, in *Lister v. Romford Ice and Cold Storage Co.*, [1957] A.C. 555 (H.L.), Viscount Simonds noted (at p. 573):

It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. [Emphasis added.]

30 Similarly, in *Canadian Indemnity Co. v. Andrews & George Co.*, [1953] 1 S.C.R. 19, Rand J. stated (at p. 26):

Where a contract expressly or by implication of fact provides for a performance with care, as in the case of carriers, the general duty is clearly not displaced and the person injured or damaged in property may sue either in contract or tort. [Emphasis added.]

31 On the other side of the concurrent liability debate, Wilson J.A. (as she then was), arguing in favour of liability lying in contract only, stated at p. 408 in her dissenting opinion in the Ontario Court of Appeal decision of *Dominion Chain Co. v. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385, *aff'd sub nom. Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346:

The borderline of contract and tort in my opinion exists where a contract either expressly or impliedly imposes on A a duty of care vis-à-vis B, the other party to the contract, to do the things undertaken by the contract without negligence and there is also coincidental with, but independent of, the contract a duty of care upon A in tort [W]here the person to whom the duty is owed, the scope of the duty and the standard of care have all been expressly or impliedly agreed upon by the parties, it appears to me somewhat artificial to rely upon Lord Atkin's "neighbour" test to determine whether or not the duty is owed to the particular plaintiff and as to [page35] the requisite standard of care the defendant must attain. [Emphasis added.]

32 It is perhaps a source of some confusion that in the course of his judgment in *Central Trust Co. v. Rafuse*, *supra*, Le Dain J. stated (at p. 205):

Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort.

33 In our view, this passage should not be read as predicating the availability of concurrent liability in contract and tort on whether the contractual term is express or implied. Le Dain J. is simply stating that tort liability lies where the contractual term is implied. He does not go on to state that tort liability is always excluded by an express contractual term. This happens only when the express contractual term negates the tort duty. Thus in his summary of the applicable rules, Le Dain J. refers to exclusion clauses -- express contract terms that negate general liability -- as the kind of contract clause that may oust tort liability.

34 Our colleague relies on a second passage from *Central Trust Co. v. Rafuse*, supra, at p. 205, for the proposition that an express contractual term always ousts tort liability:

What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. ... A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation [page36] or duty has been expressly and specifically defined by a contract.

Again, with respect, our understanding of the passage is different. In our view, Le Dain J.'s use of the words "created" and "depends" indicates the meaning of this passage is simply that for concurrent tort liability to be available there must be a duty of care in tort that would exist even in the absence of the specific contractual term which created the corresponding contractual obligation.

35 This interpretation of *Rafuse* accords with the view taken in other cases that concurrent liability in tort and contract is available where the contractual obligation in question arises from an express term of the contract. For example, in *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554, the English Court of Appeal ruled that the plaintiffs were entitled to judgment against the defendant developers in either contract or tort where a house leased to the plaintiffs on a 999-year lease was gradually becoming uninhabitable due to instability of the land on which the house was built. The contractual obligation owed to the plaintiffs by the developers arose from an express warranty in the contract between the plaintiffs and the developers that the house had been built "in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation ..." (p. 563). This contractual obligation in effect corresponded with a tort duty "to examine with reasonable care the land, which in this case would include adjoining land, in order to see whether the site was one on which a house fit for habitation could safely be built" (p. 567).

36 Nor do we see the reference by Le Dain J. in *Rafuse* to *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), and other related English case law differentiating tort and contract, as supportive of a distinction between express and implied contractual terms. The issue in those cases was one of classifying the causes of action as [page37] either tort or contract for procedural purposes under the successive County Courts Acts. Indeed, they may be seen as resting on the assumption that, apart from statutory prescription, concurrent actions may lie.

Summary

37 We conclude that neither principle, the authorities nor the needs of contracting parties support the conclusion that dealing with a matter by an express contract term will, in itself, categorically exclude the right to sue in tort. The parties may by their contract limit the duty one owes to the other or waive the right to sue in tort. But subject to this, the right to sue concurrently in tort and contract remains.

38 In the case at bar, the contract did not limit the duty of care owed by Hydro to Checo. Nor

did Checo waive its common law right to bring such tort actions as might be open to it. It follows that Checo was entitled to claim against Hydro in tort.

Damages in Tort and Contract in this Case

39 The measure of damages in contract and for the tort of negligent misrepresentation are:

Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

[page38]

40 At trial the plaintiff relied primarily on fraudulent misrepresentation, with its claim in contract being in the alternative to the claim in tort. The apparent reason for this approach was that the plaintiff had calculated its damages in tort as exceeding the damages in contract. In situations of concurrent liability in tort and contract, however, it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course.

41 The trial judge found for the plaintiff in fraudulent misrepresentation, and seems at some points in his judgment to have accepted the argument of the plaintiff that but for the misrepresentation the plaintiff would not have entered into the contract with Hydro. Accordingly, Checo's damages were calculated on the basis of what Checo lost overall on the contract. The trial judge also awarded the plaintiff a 15 percent markup for overhead and profit. With respect, while including an amount for overhead is appropriate where the damages are assessed as equalling the costs to the plaintiff of entering a contract it would not otherwise have entered, including as well something for profit is not appropriate. The trial judge's purported justification for this part of the damage award is not convincing. To fit this part of the award within a tort analysis, one would have to assume that but for the misrepresentation the plaintiff would have increased its bid by exactly the amount of the loss, plus overhead and profit (and would have been awarded the contract). This assumption contradicts the apparent assumption by the trial judge at other points of his judgment that Checo would not have [page39] entered the contract had it known the true state of affairs.

42 The trial judge did not assess damages for breach of contract, whether for failure to clear the right-of-way or other contractual breaches (i.e., claims related to the costs of returned conductor material and fire-fighting costs that Hydro failed to pay). Although the trial judge did not clearly state why he was not awarding damages for breach of contract regarding the conductor material and fire-fighting costs, this result seems to be consistent with an assumption that but for the misrepresentation the plaintiff would not have entered into the contract with Hydro. Once damages in tort are awarded on that basis (taking into account the plaintiff's overall loss on the project), to also award the plaintiff damages for breach of contract regarding part of the plaintiff's losses on the contract would be to allow the plaintiff double recovery.

43 The majority in the Court of Appeal not only substituted a finding of negligent misrepresentation for a finding of fraudulent misrepresentation, but also made an express

finding regarding what the plaintiff would have done had the misrepresentation not been made; contrary to the trial judge's apparent assumption, the plaintiff would have entered the contract but at a higher price. As Hinkson J.A., put it, writing for the majority:

The effect of [the] negligent misrepresentation was to induce the plaintiff to enter into a contract at a price less than it would have had it known the true facts.

((1990), 44 B.C.L.R. (2d) 145, at p. 158.)

Hinkson J.A. went on to find that the increase in Checo's bid had it known the true facts would [page40] have equalled the cost of the extra work made necessary by the improperly cleared work site, plus a 15 percent margin for overhead and profit.

44 As for breach of contract, the majority of the Court of Appeal referred the case back to trial for assessment of whether there was a breach of contract, and if so what is the proper assessment of damages. This referral back to trial was not stated to be limited to consideration of breaches of contract other than the failure to clear the right-of-way.

45 In the situation of concurrency, the main reason to expect a difference between tort and contract damages is the exclusion of the bargain elements in standard tort compensation. In the terminology of L. L. Fuller and W. R. Purdue, as set out in their article, "The Reliance Interest in Contract Damages" (1936-37), 46 Yale L.J. 52 and 373, contract is normally concerned with "expectation" damages while tort is concerned with "reliance" damages. The denial of "expectation" or "loss of bargain" damages in a misrepresentation case like the present will occur when it is concluded, for example, that but for the misrepresentation, no contract would have been entered at all; this was the situation that the Court found in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3. The Rainbow assessment of damages can obviously lead to a different quantum of damages because this method frees the parties from the burden or benefit of the rest of their bargain. The assessment of damages in a Rainbow situation could be lower or higher than the contract damages depending on whether the contract was a good or bad bargain; see D. W. McLauchlan, "Assessment of Damages for Misrepresentations Inducing Contracts" (1987), 6 Otago L. Rev. 370, at pp. 375-78. We note that a tendency towards similar damages in tort and contract can be identified even in Rainbow situations; see J. Blom, "Remedies in Tort and Contract: Where is the Difference?" [page41] in J. Berryman, ed., *Remedies: Issues and Perspectives* (1991), 395, at pp. 401-2.

46 This is not a case like Rainbow. Here the evidence at trial concerning Checo's desire to break into the B.C. market already provides solid support for the conclusion reached by the Court of Appeal. On the basis of that evidence, and in light of the absence in the trial judge's reasons of a clear conclusion as to what Checo would have done had the misrepresentation not been made, the Court of Appeal was in our view justified in making its own finding that Checo would have entered the contract in any event, albeit at a higher bid. This conclusion having been reached, one would expect that the quantum of damages in tort and contract would be similar because the elements of the bargain unrelated to the misrepresentation are reintroduced. This means not giving the plaintiff compensation for any losses not related to the misrepresentation, but resulting from such factors as the plaintiff's own poor performance, or market or other forces that are a normal part of business transactions.

47 In tort, Checo is entitled to be compensated for all reasonably foreseeable loss caused by the tort. The Court of Appeal was of the view that Checo, had it known the true facts (i.e., had

the tort not been committed) would have increased its bid by an amount equal to the cost of the extra work made necessary by the improperly cleared work site plus profit and overhead. Such loss was not too remote, being reasonably foreseeable. But to compensate only for the direct costs of clearing is to suggest that the only tort was the failure to clear. The real fault is that Hydro misrepresented the situation and Checo may have relied on that representation in [page42] performing its other obligations under the contract. For example, having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting in Checo incurring acceleration costs in order to meet the contract completion date. Such costs would also arguably be reasonably foreseeable. In our view, the matter should be referred back to the trial division for determination of whether any such indirect losses were the foreseeable results of the misrepresentation.

48 There remains the issue of assessment of damages for breach of contract. As implied above, it appears that the majority of the Court of Appeal intended to remit all breach of contract claims to trial, including the breach of contract claim related to the obligation of Hydro to have the work site cleared by others. We agree that this is the most appropriate disposition with respect to the breach of contract claims. On the claim for breach of contract Checo is to be put in the position it would be in had the work site been cleared properly, and is therefore to be reimbursed for all expenses incurred as a result of the breach of contract, whether expected or not, except, of course, to the extent that those expenses may have been so unexpected that they are too remote to be compensable for breach of contract. We note that in this respect the test for remoteness in contract may be of no practical difference from the test of reasonable foreseeability applicable in tort: see *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 673, and *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, at pp. 243-44. Viewed thus, the damages in contract would include not only the costs flowing directly from the improperly cleared work site, but also consequent indirect [page43] costs such as acceleration costs due to delays in construction.

Conclusion

49 We would dismiss the appeal, allow the cross-appeal in part and refer the question of damages in tort and contract to the trial division to be reassessed in accordance with the principles set forth in these reasons.

The reasons of Sopinka and Iacobucci JJ. were delivered

by

IACOBUCCI J. (dissenting in part)

50 The narrow question raised by this appeal is what remedy should be available for pre-contractual representations made during the tendering process. This question also raises a more general and more important issue. In light of the decision of this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, can a plaintiff who is in a contractual relationship with the defendant sue the defendant in tort if the duty relied upon by the plaintiff in tort is also made a contractual duty by an express term of the contract?

I. Facts

51 The appellant and respondent on the cross-appeal, B.C. Hydro and Power Authority, is a British Columbia Crown corporation. The respondent and appellant on the cross-appeal, BG Checo International Ltd., is a large corporation in the business of constructing electrical transmission lines and distribution systems. I will refer to the parties as "Hydro" and "Checo", respectively.

52 In November of 1982, Hydro called for tenders to erect transmission towers and to string transmission lines. In December 1982, prior to submitting its tender for the contract, Checo's representative inspected the area by helicopter. He noted that the right-of-way had been partially cleared, and also noted evidence of ongoing clearing activity. The [page44] representative assumed that the right-of-way would be further cleared prior to the commencement of Checo's work. On January 2, 1983, Checo submitted its tender, and on February 15, 1983, Hydro accepted Checo's tender and the parties entered into a written contract. Checo contracted to construct 130 towers and install insulators, hardware and conductors over 42 kilometres of right-of-way near Sechelt, British Columbia.

53 In fact, no further clearing of the right-of-way ever took place. The "dirty" condition of the right-of-way caused Checo a number of difficulties in completing its work. Checo sued Hydro seeking damages for negligent misrepresentation, or, in the alternative, for breach of contract.

54 The evidence at trial indicated that Hydro had contracted the clearing out to another company, and that, to Hydro's knowledge, the work was not done adequately. There was no direct discussion between the representatives of Checo and Hydro concerning this issue. There was evidence led at trial that the contract between the parties did not specify clearing standards with the same degree of detail as was present in similar contracts entered into by Hydro.

55 During the trial, Hydro tendered documents in evidence which Checo had unsuccessfully attempted to discover. These documents indicated that Hydro was aware of the problem with the clearing and of the impact that these problems would have on the successful tenderer. As a result, Checo amended its statement of claim to include a claim in fraud.

56 The trial judge found that Hydro had acted fraudulently in its dealings with Checo and awarded Checo \$2,591,580.56, being "the total loss suffered by [Checo] as a result of being fraudulently induced to enter into this contract". Hydro appealed to the Court of Appeal for British Columbia, which rejected the finding of fraud, but found that there had been a negligent misrepresentation which induced Checo to enter into the contract. [page45] The Court of Appeal awarded the sum of \$1,087,729.81, for the misrepresentation, and referred the question of breach of contract and damages flowing therefrom to the British Columbia Supreme Court. Checo's cross-appeal for punitive damages and for a higher scale of costs was dismissed: (1990), 44 B.C.L.R. (2d) 145, 4 C.C.L.T. (2d) 161, 41 C.L.R. 1, [1990] 3 W.W.R. 690.

57 It will be helpful to set out the relevant provisions of the contract. The terms of the contract, No. HA-8071, are identical to the tender documents. The critical clauses are 2.03, 4.04 and 6.01.03. I have highlighted that portion of clause 6.01.03 which Checo alleges founds the misrepresentation by Hydro.

It shall be the Tenderer's responsibility to inform himself of all aspects of the Work and no claim will be considered at any time for reimbursement for any expenses incurred as a result of any misunderstanding in regard to the conditions of the Work. Should any details necessary for a clear and comprehensive understanding be omitted or any error appear in the Tender Documents or should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender. [There follows some technical details.]

Neither B.C. Hydro nor the Engineer shall be responsible for any instructions or information given to any Tenderer other than by the Purchasing Agent, in accordance with this Clause.

4.04 INSPECTION OF SITE AND SUFFICIENCY OF TENDER

The Contractor shall inspect and examine the Site and its surroundings and shall satisfy himself before submitting his Tender as to the nature of the ground and sub-soil, the form and nature of the Site, the quantities and nature of work and materials necessary for completion of the Work, the means of access to the Site, the accommodation and facilities he may require, and in general [page46] shall himself obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect his Tender. Without limiting the generality of the foregoing, the Contractor shall satisfy himself of any special risks, contingencies, regulations, safety requirements, and other circumstances which may be encountered.

The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his Tender for the Work and of the prices stated in the Schedule of Prices which prices shall (except insofar as it is otherwise provided in the Contract) cover all his obligations under the Contract and all matters and things necessary for the proper execution of the Work.

6.01.03 WORK DONE BY OTHERS

Clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract.

Standing trees and brush have not been removed from the right-of-way in certain valley and gully crossings. The Contractor shall be responsible for such further site preparation as required by Section 7.01. [Emphasis added.]

7.01.02 PREPARATION OF THE SITE

The Contractor shall carry out any preparation of the Site, including removal of logs, stumps and boulders, as is necessary to perform his operations.

The Contractor shall ensure that the transmission line is protected from possible slides, washouts or other hazards resulting from his road construction, grading, benching, and other site preparation work and operations. Surface drainage shall be directed away from any structure foundations and guy anchors.

Any condition resulting from the Contractor's work and which, in the opinion of the Engineer constitutes a hazard to the transmission line shall be corrected to the satisfaction of the Engineer.

II. Judgments in the Courts Below

A. Supreme Court of British Columbia (Vancouver Reg. No. C864116, June 10, 1988)

[page47]

58 The trial began in November of 1987 and ended in April of 1988, taking 28 days in total. Cohen J. delivered his reasons on June 10, 1988. Checo's original claim was for breach of contract or, in the alternative, negligent misrepresentation. In the middle of the trial, Checo amended its statement of claim to advance a claim of fraudulent misrepresentation.

59 The trial judge found that Hydro knew and failed to disclose to Checo the problems with the clearing contractors, that the right-of-way was improperly cleared, and that merchantable logs, which Hydro intended to salvage, remained on the right-of-way. The trial judge also found that Hydro knew that the effect of the inadequate clearing would be to increase the costs of construction. He then turned to a consideration of the issue of fraud. Citing the principles set out in *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1981), 18 C.L.R. 159 (B.C.S.C.), at p. 169; (1982), 18 C.L.R. 159 (B.C.C.A.), at p. 277, Cohen J. was satisfied that Hydro was guilty of fraudulent misrepresentation.

60 It was significant to him that, in another contract for similar installations, Hydro included, in a paragraph "virtually identical" to s. 6.01.03, the words "logs and old logging slash will be on the right-of-way in some areas". Cohen J. concluded (at pp. 61-62):

... the decision to remove any reference in clause 6.01.03 of [Checo's] contract to logs remaining on the right-of-way was deliberate. Foxall [an employee of Hydro] insisted that it was not necessary to include any words of warning in [Checo's] contract because the existence of logs on the right-of-way would be obvious to a tenderer viewing the right-of-way. However, when I consider that words warning of logs remaining on the right-of-way were excluded when [Hydro's] clearing standards allowed for logs to be left on the right-of-way, a fact not disclosed in the tender documents, [Hydro] knew merchantable logs were left on the right-of-way, knew of problems with clearing contractors not clearing to specifications, and knew of the delays and extra costs [page48] experienced by [another contractor] due to logs on the right-of-way obstructing construction activities, the deliberate omission of these words in the tender documents amounted, in my opinion, to a form of tender by ambush.

61 The trial judge held that Hydro had a duty to be accurate in the information that it gave in its tender, and it was not open to it to say that Checo should not have assumed that the right-of-way would be cleared further, or that Checo should have made inquiries. Here, the "ordinary meaning" of the words used in clause 6.01.03 supported Checo's conclusion that the clearing

was not yet complete. This representation in clause 6.01.03 was a false one, and was a representation that Checo relied upon. Cohen J. found that Checo would not have contracted on the basis that it did in the absence of the representation, and held Hydro liable for the "actual damages directly flowing from [its] fraud" (p. 72).

62 Cohen J. did not consider Checo's claim in breach of contract. He declined to make an award of punitive damages.

B. Court of Appeal of British Columbia (1990), 44 B.C.L.R. (2d) 145

63 Hydro appealed from the judgment of Cohen J. Checo cross-appealed seeking punitive damages and costs to be taxed on a higher scale.

64 The Court of Appeal considered the issues of fraudulent misrepresentation, negligent misrepresentation and breach of contract. Writing for the majority, Hinkson J.A. (Lambert, Toy and Cumming JJ.A. concurring) allowed Hydro's appeal on the issue of fraudulent misrepresentation. However, Hinkson J.A. found Hydro liable for negligent misrepresentation (which had not been considered in the judgment at trial). Hinkson J.A. remitted Checo's action for breach of contract back to the British Columbia Supreme Court. Hinkson J.A. dismissed Checo's cross-appeal. [page49] Southin J.A., writing for herself, dissented in the result. While she agreed with Hinkson J.A. on the questions of fraudulent misrepresentation and breach of contract, she would have held that Hydro was not liable for negligent misrepresentation.

65 In the result, Hydro's appeal was allowed in part, in that the Court of Appeal held unanimously that Hydro was not liable for fraudulent misrepresentation. However, the Court of Appeal awarded damages against Hydro for negligent misrepresentation, but reduced the trial judge's damage award to \$1,087,729.81. Checo's cross-appeal was dismissed.

(1) Reasons of Hinkson J.A.

66 Hinkson J.A. considered that the omission of the reference to logs and logging slash in clause 6.01.03 left "the meaning of 'clearing' unqualified" (p. 153). The majority of the Court held that the representation in clause 6.01.03 as to clearing "meant that logs and slash would be cleared from the right-of-way" (p. 155), and that the state of the right-of-way in November 1982 was not the state that the right-of-way would be in at the commencement of the contract. The majority concluded that "on the date of the contract [Hydro], while having represented that the right-of-way would have been cleared, knew that it had not been done" (p. 156), and held that this was, therefore, a misrepresentation.

67 Hinkson J.A. then turned to a consideration of the issue of negligent misrepresentation, which had not been considered by the trial judge. Hydro had a duty to advise Checo about the amount of clearing which would in fact be carried out. Hydro having failed to discharge this duty, it made a negligent misrepresentation, the effect of which "was to induce [Checo] to enter into a contract at a price less than it would have had it known the true facts" (p. 158). Hinkson J.A. held that Checo had established a claim for negligent misrepresentation [page50] based on *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), and *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

68 In considering whether there was also liability for fraudulent misrepresentation, as the trial

judge had found, Hinkson J.A. traced the development of the law of the tort of deceit. He noted that although deceit, as it applies to corporations, is an evolving tort, fundamentally, "the plaintiff must establish an intention to deceive on the part of the defendant" (p. 161) and referred to the principles enunciated in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 30 B.C.L.R. (2d) 273 (C.A.). On the facts of this case, the majority concluded that the "evidence fell short of establishing the necessary basis for a finding of fraud" because there was no evidence of a dishonest intention (at pp. 161-62):

In the present case, a committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications for this contract. Rather, it is possible to conclude that they mistakenly and negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.

Hydro's appeal was accordingly allowed on the issue of fraudulent misrepresentation.

69 On the question of damages, the majority held that Checo was not entitled to recover the entire loss it suffered as a result of performing the contract. The majority held that the decision of the Court of Appeal, affirming the trial judgment in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1990), 43 B.C.L.R. (2d) 1, affirmed on appeal to the Supreme Court of Canada, [1991] 3 S.C.R. 3, could be distinguished [page51] from the case at bar, on the grounds that in the present case it was clear that Checo "would have entered into a contract if it had known the true state of affairs but would have adjusted the price of doing the work to reflect that state of affairs" (pp. 163-64). The majority held that on the basis of the statement of claim and the evidence, the extra work attributable to an improperly cleared work-site cost Checo \$945,852,01. The majority allowed an additional 15 percent for overhead and profit, making a total damage award of \$1,087,729.81.

70 Hinkson J.A. ordered a new trial on the breach of contract issue (at p. 164):

... I would remit the action to the Supreme Court for determination as to whether or not a breach of contract occurred and, in the event that the defendant is found to have been in breach of contract, what damages flowed from such breach. As the parties led evidence at trial in respect of this issue and with respect to the claim of the plaintiff for damages asserted to flow from breach of contract, the trial judge will be in a position on the basis of the record at trial to determine the issue of breach of contract and to assess damages if he finds a breach of contract occurred. The question of whether further evidence should be permitted on this issue should be determined by the trial judge.

71 Checo's cross-appeal was dismissed, punitive damages being inappropriate in view of the conclusion of the majority that the trial judge's finding of fraud was in error.

(2) Dissenting Reasons of Southin J.A.

72 Southin J.A. was in agreement with the majority on the issue of fraud, and the disposition of the cross-appeal, but would not have awarded damages for negligent misrepresentation.

73 With respect to the issue of fraudulent misstatement, Southin J.A. noted that, in her view,

"[b]ecause a conscious intention to deceive, i.e., mens rea, is a necessary ingredient of the tort of deceit, it follows that a corporation cannot be liable for this tort except upon the principle respondeat [page52] superior" (p. 183). In this context, Southin J.A. looked to evidence of the intent of Mr. Foxall, who was the Hydro employee in charge of the project. For there to have been a fraudulent misrepresentation, Foxall would have to be shown to have consciously intended to deceive Checo. Southin J.A. held that the trial judge had not asked himself the right questions and that there was no finding of the required fraudulent intent, and that therefore the claim in fraud could not stand.

74 Southin J.A. then considered the issue of negligent misstatement. After reviewing the case law, she concluded on the facts of this case that clause 6.01.03 did "not impart the information that between the date of the tender call and the date of commencement of work [Hydro would] clear the right of way to a standard thought suitable either by [Checo] or by a reasonable man" (pp. 200-1). Further, clauses 2.03 and 4.04 were evidence of Hydro's intention not to assume any duty to Checo (at p. 201): "In my opinion, by cls. 2.03 and 4.04, [Hydro] was declaring that it was not assuming any duty of care to [Checo]." Southin J.A. stated she was reinforced in her conclusion by the decision of the Alberta Court of Appeal in *Catre Industries Ltd. v. Alberta* (1989), 99 A.R. 321 (C.A.), leave to appeal to the Supreme Court of Canada refused on March 8, 1990, [1990] 1 S.C.R. vi.

75 She did not agree with the majority that the measure of damages in this type of case is different depending on whether liability is founded in contract or in tort.

76 As the trial judge had made no findings as to breach of contract, Southin J.A. agreed with Hinkson J.A. that there should be a new trial on the claim for breach of contract.

[page53]

III. Issues

77 I would characterize the issues raised by Hydro's appeal as follows:

- (1) Can a pre-contractual representation which becomes a contractual term found liability in negligent misrepresentation?
- (2) If the answer to the first question is in the affirmative, did the terms of the contract nonetheless operate to exclude Hydro's potential liability for any misrepresentations?
- (3) If the terms of the contract did not exclude Hydro's potential liability for any misrepresentations, is Hydro liable for negligent misrepresentation?
- (4) Was there a breach of contract?

78 I would characterize the issues raised by Checo's cross-appeal as follows:

- (1) Should Hydro be liable for fraudulent misrepresentation?
- (2) Did the Court of Appeal correctly assess Checo's damages for negligent misrepresentation?

IV. Analysis

79 In the interests of simplicity and brevity, I will deal with the issues raised by the appeal and cross-appeal somewhat out of order. Because the issue of fraudulent misrepresentation can and should be resolved quickly, I will deal with it first. Then I will examine, following *Central Trust v. Rafuse*, supra, the scope of the right of a party to a contract to sue the other party in tort (the tort-contract concurrency problem). It will also be necessary for me to review the law of negligent misrepresentation (which was not at issue in *Central Trust v. Rafuse*), in order to determine the applicability of the principles [page54] in *Central Trust v. Rafuse* to pre-contractual representations.

80 Because of my conclusions on these issues, it will not be necessary for me to decide whether there was a negligent misrepresentation, or whether the Court of Appeal's assessment of Checo's damages for negligent misrepresentation was correct. It will, however, be necessary for me to consider the issue of breach of contract.

A. Fraudulent Misrepresentation

81 The trial judge found Hydro liable in deceit. The Court of Appeal allowed Hydro's appeal on this issue. In argument before us, Checo submitted that the trial judge's ruling on the question of deceit should be upheld. At the hearing of the appeal, we indicated that we did not find it necessary to hear Hydro's response on the issue of deceit.

82 In my view, there was insufficient evidence to support a finding of deceit (i.e. of fraudulent intention, as discussed further in these reasons) against Hydro, and the Court of Appeal correctly intervened to reverse the trial judge on this point. As Hinkson J.A. noted (at pp. 161-62):

[A] committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications for this contract. Rather, it is possible to conclude that they mistakenly and negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.

Consequently, Checo's cross-appeal on this point should be dismissed.

B. Concurrent Liability in Tort and Contract

(1) Introduction

83 It was Hydro's submission on this appeal that it ought to be liable, if at all, in contract and not in [page55] tort. For the reasons which I will set out, I agree that in the circumstances of the case, while Hydro may be liable in contract for the representations which Checo complains of, Hydro cannot be liable in tort. Given the importance of the general issue of tort-contract concurrency, I propose to explore it in some detail.

84 As a general rule, the existence of a contract between two parties does not preclude the existence of a common law duty of care. Subject to the substantive and procedural differences that exist between an action in contract and an action in tort, both the duty of care and the

liability may be concurrent in contract and tort. In such circumstances, it is for the plaintiff to select the cause of action most advantageous to him or her. That was the position adopted by Le Dain J. in *Central Trust v. Rafuse*, supra. At pages 204-5, Le Dain J. said the following:

The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson*, *Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. ... [T]he question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one.

85 Le Dain J.'s conclusion that a plaintiff is generally entitled to choose, as between contract and tort, the cause of action most favourable to him or her was supported by a long line of Canadian and English authority, some of which I will consider below. *Central Trust v. Rafuse*, supra, has since met with wide acceptance, and has been applied by [page56] a number of provincial Courts of Appeal. See *University of Regina v. Pettick* (1991), 90 Sask. R. 241 (C.A.); *Fletcher v. Manitoba Public Insurance Co.* (1989), 68 O.R. (2d) 193 (C.A.); *Pittman v. Manufacturers Life Insurance Co.* (1990), 76 D.L.R. (4th) 320 (Nfld. C.A.); *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271 (C.A.), and *Catre Industries Ltd. v. Alberta*, supra.

86 In *Central Trust v. Rafuse*, supra, Le Dain J. recognized two situations in which, notwithstanding what would otherwise be a breach of the duty of care in tort, a plaintiff's ability to sue in tort will be limited by the terms of the contract. In one situation it is the liability in tort which is avoided or modified; in the other it is the duty in tort which is affected.

87 Le Dain J. recognized that liability in tort can be limited or excluded by the terms of a contract. A plaintiff will not be permitted to plead in tort in order to circumvent a contractual clause which excludes or limits the defendant's liability (at p. 206):

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

In this case, Hydro argues that the terms of the contract operated to exclude its liability for the conduct of which Checo complains. If Hydro were correct, then Checo would no more be able to recover in tort than in contract. As I will discuss below, I am of the opinion that the contract does not exclude Hydro's liability.

88 As mentioned, Le Dain J. also recognized that the defendant's duty in tort could be affected by the terms of the contract. If the duty of care alleged in tort is also defined by a specific term of the contract, then the plaintiff will be entitled only to [page57] those remedies which may be available pursuant to the contract. The contractual relationship can bring the parties into sufficient proximity to give rise to a duty of care. However, no duty of care in tort can be concurrent with a duty of care created by an express term of the contract. In the words of Le Dain J. (at p. 205):

What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. ... A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract.

89 On the facts of *Central Trust v. Rafuse*, supra, Le Dain J. concluded that the defendant solicitors had concurrent duties of care in contract and in tort. The contract between the parties was a general retainer. Le Dain J. held that it was an implied term of the contract between solicitor and client that the solicitor perform his or her professional duties with "reasonable care, skill and knowledge" (p. 208). The duty of care imposed on a solicitor at common law was the same as, and concurrent with, that imposed as an implied term of the contract (at p. 210):

While the solicitor's duty of care has generally been stated ... as arising as an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and tort are the same.

[page58]

90 Given the nature of a solicitor's duties in contract and in tort, and given the particular contractual relationship between the parties, Le Dain J. concluded that the duty of care of the solicitors ran concurrently in tort and contract. Moreover, there was no clause in the contract excluding or limiting the solicitors' liability which could affect the solicitors' liability in tort.

91 In *Central Trust v. Rafuse*, supra, it was not necessary for Le Dain J. to test the boundaries of the situations he described in which a plaintiff's right to recover in tort would be limited. As I mentioned, the contract before him had no clauses excluding or limiting the liability of the solicitors. Moreover, the contract contained no express terms creating specific obligations or duties which might have excluded the solicitors' duty of care in tort.

92 The facts of this case require me to do what it was not necessary for Le Dain J. to do in *Central Trust v. Rafuse*, supra: I must interpret and apply the principles to a contractual relationship in which there are exclusion or limitation of liability clauses which may exclude or limit liability in tort, as well as in contract, and in which there are clauses which may operate to exclude some parts of the duty of care in tort entirely. To interpret and apply the principles in *Central Trust v. Rafuse* in the circumstances of this case, it will be necessary for me to review the authorities governing concurrency of obligations in tort and contract. It will also be necessary for me to review the law governing clauses which exclude or limit liability.

(2) Concurrency of Tort and Contract

93 The recent history of concurrency in tort and contract can be characterized as the development of a single regime of concurrency from two sets of [page59] rules governing concurrency in distinct circumstances. Until *Esso Petroleum Co. v. Mardon*, [1976] 2 All E.R. 5

(C.A.), there was one set of rules governing obligations in tort and contract for the so-called "status relationships" and another set of rules governing obligations in tort and contract for all other relationships. Since *Esso Petroleum*, supra, these two sets of rules have been assimilated into a single regime governing obligations in tort and contract for all relationships. The principles set out by Le Dain J. in *Central Trust v. Rafuse*, supra, are representative of that single regime. To understand better the principles articulated by Le Dain J. in *Central Trust v. Rafuse*, it will be helpful to review the process of development which preceded and informed the judgment of Le Dain J.

(a) The Two Strands of Concurrent Liability in Tort and Contract

94 The modern conception of a distinct tort of negligence is relatively recent. It has been argued that the genesis of negligence is to be found in the long series of "running down" cases in the eighteenth and nineteenth centuries, as ever increasing numbers of horses, carts and ships meant increasing numbers of accidents. See J. H. Baker, *An Introduction to English Legal History* (1979), at pp. 342-45. But it was not until the famous case of *Donoghue v. Stevenson*, supra, that a general tort of negligence was finally recognized.

95 Negligence was not, however, unknown to the law before *Donoghue v. Stevenson*, or even before such running down cases as *Leame v. Bray* (1803), 3 East 593 (K.B.), 102 E.R. 724. Beginning in a much earlier time, negligence was actionable if the defendant's status imposed upon him or her a duty to take care in the exercise of his or her profession. Persons with such status included bailees and those who practised a "common calling", including those of innkeeper and common carrier. The liability [page60] of such persons arose independently of contract. To quote Baker, supra, at pp. 277-78:

Many callings were, in any case, controlled by the common law or custom independently of contract; an innkeeper, for instance, was liable under the 'custom of the realm' for his failure to look after a guest's goods or for refusing to accommodate a traveller. ... [S]imilar duties could be imposed on professional men. ... Another kind of status was that of bailee or custodian of property; it was held in 1487 that a shepherd having the custody of sheep was liable in *assumpsit* for failing to look after them, so that they were killed.

96 That a defendant who owed a duty to take care because of his or her status was liable in negligence even if there also existed a contract between the parties is confirmed by the judgment of Dallas C.J. in *Bretherton v. Wood* (1821), 3 Brod. & B. 54 (Ex. Ch.), 129 E.R. 1203, at p. 1206 E.R.:

This action is on the case [i.e. in negligence] against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.

...

Nor is it material, whether redress might or might not have been had in an action of *assumpsit* [i.e. in contract]; that must depend on circumstances of which this Court has

no knowledge; but, whether an action of assumpsit might or might not have been maintained, still this action on the case may be maintained. The action of assumpsit, as applied to cases of this kind, is of modern use. The action on the case is as early as the existence of the custom or common law as to common carriers. [Emphasis added.]

97 There has been some debate as to the extent of these status relationships. See *Central Trust v. Rafuse*, supra, at pp. 176-78; C. French, "The Contract/Tort [page61] Dilemma" (1983), 5 *Otago L. Rev.* 236, at pp. 273-78; and C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949), at pp. 157-59. On what French calls the "traditional view", status relationships included carriers, innkeepers, surgeons, apothecaries, attorneys, veterinary surgeons, smiths, and barbers, together with the relationships of bailor/bailee and master/servant (at pp. 274-78). Whatever the proper scope of the status relationships might have been, it is clear that they attracted concurrent liability in contract and in tort. As Tindal C.J. expressed it in *Boorman v. Brown* (1842), 3 Q.B. 511 (Ex. Ch.), 114 E.R. 603, at pp. 608-9 E.R., aff'd sub nom. *Brown v. Boorman* (1844), 11 Cl. & Fin. 1 (H.L.), 8 E.R. 1003:

That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions: and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff.

...

The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.

98 As the judgment of Tindal C.J. in *Boorman*, supra, indicates, the range of status relationships was seen in the nineteenth century as extensive (the profession at issue in *Boorman* was that of commodities broker). In fact, in the judgment of the House of Lords upholding the judgment of Tindal C.J., concurrency of tort and contract is stated as a general principle, without reference to [page62] status relationships at all (at pp. 1018-19 E.R., per Lord Campbell):

... wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract.

99 However, in the twentieth century, there was a noticeable trend towards limiting the range of the status relationships. In *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), Slesser L.J. found that a broker did not exercise a "common calling" (at pp. 406-7):

In reference to the suggestion that a broker might be regarded as exercising a common calling in the same way as, for example, a carrier, in respect of whom it has been held that his duties to the public are imported so that a breach of these is necessarily a tort, I desire to add that no authority was cited to establish that a stockbroker is in such a position. ... In my opinion a stockbroker does not exercise a "public calling" in the sense

BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12

in which that term is used as applied to carriers and certain other occupations. In this case a personal relationship existed between the parties, and in my view the breach complained of was a breach of contract.

In *Groom v. Crocker*, [1939] 1 K.B. 194, the Court of Appeal held that the profession of solicitor was not among the status relationships, as those of doctor, architect and stockbroker also were not (at p. 222 per Scott L.J.):

A solicitor, as a professional man, is employed by a client just as much as a doctor, an architect, or a stockbroker, and the mutual rights and duties of the two are regulated entirely by the contract of employment. ... The retainer when given puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest and carry out his instructions in the matters in which the retainer relates, by all proper means. ... But in all these aspects the tie between the two is contractual. [page63] There is to-day no common-law duty similar to that which survives in the case of a bailee or carrier, and no action lies in tort for the breach of the above duties. ...

The judgment of Diplock L.J. in *Bagot v. Stevens Scanlan & Co.*, [1966] 1 Q.B. 197, was to a similar effect. Diplock L.J. held that the relationship of architect and client was not a "status relationship" (at p. 206):

... I can see nothing in the relationship of architect and client which can be said to give rise to the kind of status obligation which arises from the origins of the common law in the case of master and servant, common carrier, innkeeper, bailor and bailee.

100 For those who were not in one of the status relationships, on the other hand, a different regime governed the tort liabilities of parties to a contract. For all those who were not in status relationships, an action in negligence lay only if the duty relied upon in negligence was "independent" of the duty imposed by contract. Before the causes of action were abolished by the Judicature Act, the principle was stated to be that if no cause of action remained if the allegation of a contract were struck out, then the action was founded on contract alone: *Williamson v. Allison* (1802), 2 East. 446 (K.B.), 102 E.R. 439. In *Legge v. Tucker* (1856), H. & N. 500 (Ex.), 156 E.R. 1298, all the judges were unanimously of the opinion that an action in tort would lie only if there was a duty existing apart from the contract. In the words of Pollock C.B. (at p. 1299 E.R.): "Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of *assumpsit*; but where there is a duty *ultra* the contract, the plaintiff may declare in case." In the words of Watson B. (at p. 1299 E.R.): "[T]he true question is, whether, if [the allegation of a contract] were struck out, any ground of action would remain. ... There is no duty independently of the contract, and therefore it is an action of *assumpsit*." The judgment of Smith L.J. in *Turner* [page64] *v. Stallibrass*, [1898] 1 Q.B. 56 (C.A.), is to the same effect (at p. 58):

The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract.

See also *Edwards v. Mallan*, [1908] 1 K.B. 1002 (C.A.), per Vaughan Williams L.J.

101 The "independent tort" requirement was applied and refined in more modern cases. In *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), Viscount Finlay stated, at p. 548, that for an action in tort to lie in a contractual setting, there must be "an independent tort unconnected with the performance of the contract". In this Court, Pigeon J. said in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, at pp. 777-78, relying on *Elder, Dempster & Co.*, supra, that no action for negligent misrepresentation would lie in "any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract ...". In *Dominion Chain Co. v. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385 (Ont. C.A.), Wilson J.A. (as she then was), dissenting in part, held that no action in tort would lie where the acts complained [page65] of by the plaintiff were in relation to the "very matters covered by the contract" (at p. 408):

... where the person to whom the duty is owed, the scope of the duty and the standard of care have all been expressly or impliedly agreed upon by the parties, it appears to me somewhat artificial to rely upon Lord Atkin's "neighbour" test [as set out in *Donoghue v. Stevenson*, supra] to determine whether or not the duty is owed to the particular plaintiff and as to the requisite standard of care the defendant must attain. In other words, it would appear that if the acts or omissions complained of by the plaintiff are in relation to the very matters covered by the contract, the essence of the plaintiff's action is breach of the contractual duty of care rather than breach of the general duty of care owed to one's "neighbour" in tort.

(b) The Emergence of a Single Theory of Concurrent Liability

102 Since *Esso Petroleum*, supra, the law in England and in Canada has ceased to apply a rule of concurrency for status relationships different from that in other relationships, although in *Esso Petroleum* it was not clear that this was the case. In finding that an architect was concurrently liable in contract and in tort, Lord Denning M.R. relied on the decision of Tindal C.J. in *Boorman v. Brown*, supra, a case based on status. However, any ambiguity was resolved by the judgment of Megaw L.J. in *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554 (C.A.). Megaw L.J. held that the rule in *Esso Petroleum* was not limited to "common callings", but was a rule of general application (at p. 566):

The distinction to which I have referred which Mr. Brown seeks to make is this: that the right of a plaintiff who sues in contract, where the facts giving rise to the breach of contract would also constitute a breach of common law duty apart from contract, to have the judgment entered on both heads is limited to cases where the common law duty is owed by one who conducts a common calling and thus is under a special type of legal liability, and to cases where the duty is owed by a professional man in respect of his professional skill. Mr. Brown contends that, though there is no affirmative authority for limiting the right in that way, it ought to be treated as being so limited because there is no case in the English books, going back over many years, which shows that the right has been allowed, or possibly even claimed, in cases other than the special types of case to which he referred, and in particular the professional skill types of case. In *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801 the right was held to arise in a case where the breach of duty was a breach of an expert in siting filling stations involving his professional skill. I see no reason, in logic or on practical grounds, for putting any such limitation on the scope of the right. It [page66] would, I think, be an undesirable development in the law if

such an artificial distinction, for which no sound reason can be put forward, were to be held to exist.

103 More generally, in *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.), Lord Wilberforce acknowledged that the duty of care in tort is now a general one, arising as a result of proximity, and not of the particular class of relationship between the parties (at p. 498):

Through the trilogy of cases in this House, *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and *Home Office v Dorset Yacht Co Ltd*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise

104 This trend towards a single theory of concurrent liability in tort and contract was recognized in Canada by La Forest J.A. (as he then was) in *New Brunswick Telephone Co. v. John Maryon International Ltd.* (1982), 43 N.B.R. (2d) 469 (C.A.). After an extensive review of the case law, La Forest J.A. concluded that an architect was concurrently liable in contract and in tort. La Forest J.A. based his conclusion on the concept of a general tort of negligence (at p. 520): "[W]hile I could dispose of this case by simply adding the profession of structural engineer to the list of common [page67] callings and skilled professions, I prefer to base my judgment on the generalized tort of negligence".

105 In *Central Trust v. Rafuse*, supra, Le Dain J. also rejected any distinction between status relationships and other relationships in determining whether parties to a contract can also recover in tort. Instead, Le Dain J. found that a single rule applied to all relationships (at p. 205): "[T]he question is whether there is a relationship of sufficient proximity, not how it arose." The rule of concurrency which Le Dain J. adopted was a compromise between two strands of authority.

106 In one strand of authority, that governing the status relationships, any duty arising in tort had always been concurrent with duties arising under the contract: *Brown v. Boorman*, supra. In the other strand of authority, the duty in tort was only concurrent with the duty in contract if the negligence complained of was unconnected with the performance of the contract: *J. Nunes Diamonds*, supra. The compromise position adopted by Le Dain J. was that any duty arising in tort will be concurrent with duties arising under the contract, unless the duty which the plaintiff seeks to rely on in tort is also a duty defined by an express term of the contract. If the duty is defined by an express term of the contract, the plaintiff will be confined to whatever remedies are available in the law of contract (at p. 205):

... the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by express terms of the contract. ... Where the common law duty of care is co-extensive with that

which arises as an implied term of the contract it obviously does not depend on the terms of the contract. ... The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

107 In my opinion, the compromise struck by Le Dain J. is an appropriate one. If the parties to a [page68] contract choose to define a specific duty as an express term of the contract, then the consequences of a breach of that duty ought to be determined by the law of contract, not by tort law. Whether or not an implied term of a contract can define a duty of care in such a way that a plaintiff is confined to a remedy in contract is not at issue in this case. I leave that determination to another day. While the rule articulated by Le Dain J. is a rule of law which does not depend on the presumed or actual intention of the parties, the intention which can be inferred from the fact that the parties have made the duty an express term of the contract provides policy support for the rule. If a duty is an express term of the contract, it can be inferred that the parties wish the law of the contract to govern with respect to that duty. This is of particular significance given that the result of a breach of a contractual duty may be different from that of a breach of a duty in tort. As Wilson J.A. noted in *Dominion Chain Co.*, supra, a plaintiff's substantive rights may be different in contract and in tort (at p. 409):

His cause of action may arise later in tort resulting in a later expiry of the limitation period. His damage may be greater in quantum and different in kind if he sues in tort. On the other hand his action in contract may survive him or be the subject of a set-off or counterclaim, neither of which would be so if his action were framed in tort.

The fact that damages may be assessed differently in contract from in tort was recently affirmed by this Court in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3.

108 A further policy rationale for the rule advanced by Le Dain J. is that contracts have become, particularly in commercial contexts, increasingly complex. Commercial contracts allocate risks and fix the mutual duties and obligations of the parties. Where there is an express term creating a contractual [page69] duty, it is appropriate that the parties be held to the bargain which they have made. Tort duties are of "uncertain definition and scope": H. Johnson, "Contract and Tort: Orthodoxy Reasserted!" (1990), 9 *Int'l Banking L.* 306. Commercial parties ought to be able to fix their respective rights and obligations in a particular transaction with certainty. Contractual certainty is a sine qua non without which reliance and the execution of obligations are seriously impaired. Moreover, without certainty, the transaction costs associated with a given commercial arrangement would most likely increase, perhaps drastically. In *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, Wilson J. alluded to these considerations stating, at p. 282, that "much of the value of commercial contracts lies in their ability to produce certainty. Parties are enabled to regulate their relationship by means of words rather than by means of their understanding of what each other's actions are intended to imply."

109 However, I do not believe that the rule advanced by Le Dain J. that forecloses a claim in tort is absolute in all circumstances. In this respect, I would favour a contextual approach which takes into account the context in which the contract is made, and the position of the parties with respect to one another, in assessing whether a claim in tort is foreclosed by the terms of a contract. The policy reasons in favour of the rule advanced by Le Dain J. are strongest where the contractual context is commercial and the parties are of equal bargaining power. There was no question of unconscionability or inequality of bargaining power in *Central Trust v. Rafuse*, supra, as there is no such question in this case. If such issues, or others analogous to them,

were to arise, however, a court should be wary not to exclude too rapidly a duty of care in tort on the basis of an express term of the contract, especially if the end result for the plaintiff would be a wrong without a remedy.

[page70]

(3) Contractual Terms Excluding or Limiting Liability or Duty

110 As noted above, contractual exclusion or limitation clauses can operate either to exclude or limit liability, or to limit the duty owed by one party to the other. In neither case will the plaintiff be permitted to use an action in tort to circumvent the limitation of liability or of duty in the contract. Terms going to duty are of particular importance where one party is alleging negligent misrepresentation, as Checo is in this case.

111 It is well-settled that a clause limiting liability in contract can, in appropriate circumstances, also have the effect of limiting liability in tort: see, for example, ITO--International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752, and London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299. In the words of Scrutton L.J. in Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205 (C.A.), at p. 213:

... where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort: Elder, Dempster & Co. v. Paterson, Zochonis & Co., per Lord Cave, Lord Finlay and Lord Sumner.

112 The rule that liability in tort cannot be used to circumvent a contractual limitation of liability is supported by recent Canadian authority, including Central Trust v. Rafuse, supra, itself. In New Brunswick Telephone Co. v. John Maryon International Ltd., supra, La Forest J.A. stated that (at p. 506):

... the law of negligence will not be used to give a remedy to a person for a breach of contract for which he is absolved under the contract. ... Parties are free to contract [page71] out of liabilities, tortious or otherwise, and the courts should not interfere with their agreements.

The point was reiterated by Le Dain J. in Central Trust v. Rafuse (at p. 206):

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

See, on this question, London Drugs Ltd., supra, where I deduce from this principle one of many reasons for permitting employees, in certain circumstances, to obtain directly the benefit of their employer's contractual limitation of liability clause so as to limit their liability for the breach of a common law duty of care. See also Peters v. Parkway Mercury Sales Ltd. (1975), 10 N.B.R. (2d) 703 (C.A.).

113 Contractual terms may also operate to limit the duty (as distinct from the liability ensuing from a breach of duty), tortious or otherwise, owed by one party to the other. To quote B. M.

McLachlin and W. J. Wallace, *The Canadian Law of Architecture and Engineering* (1987), at p. 134:

... it may now be said that courts have come to accept the concurrency of obligations imposed by tort law and obligations imposed by contract. However, this is subject to an important limitation. Where the parties have defined their duties by contract, the court will not impose contrary obligations on them. A contract defining the parties' rights and responsibilities will be a factor limiting the scope of the duty in tort.

114 Clauses limiting the duty owed by one party to the other are often important in cases where negligent misrepresentation is alleged. Such disclaimers or "non-reliance clauses", as they are sometimes described, may be contractual or extra-contractual. It should not be forgotten that in the leading case, *Hedley Byrne*, supra, the defendant bank was found not liable because the representation had been accompanied by the following disclaimer: [page72] "Confidential. For your private use and without responsibility on the part of this bank or its officials." There was no contract between the parties. Lord Morris found that the effect of the disclaimer was to negate any duty of care which would otherwise have been owed by the defendant (at p. 504):

... in my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given.

115 Disclaimers or "non-reliance clauses" may also be contractual. In *Carman Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958, the defendant successfully raised a contractual disclaimer clause as a defence to an action for negligent misrepresentation. The relevant clause of the contract was in the following terms (at p. 961):

3.1. It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the work under this Agreement, and the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company. [Emphasis added.]

Martland J. was careful to characterize the clause as a "non-reliance provision" negating the existence of a duty of care, as distinct from a clause limiting liability for the breach of a duty (at p. 973):

[page73]

... I do not regard s. 3.1 as being a clause exempting from liability. It is what the Court of Appeal described as a non-reliance provision, the effect of which was to prevent liability arising on the part of C.P.R. in respect of statements made or information given by its employees.

116 To summarize, if the liability of a party to a contract is limited or excluded by a term of the contract, or if a contractual term limits or negates the duty owed by one party to the other (whether in contract or in tort), the other party to the contract may not use an action in tort to impose a wider liability on the first party than would be available under the contract.

C. Negligent Misrepresentation

117 Checo alleges that Hydro negligently misrepresented the state of the right-of-way. The majority of the British Columbia Court of Appeal agreed. In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, a case involving issues somewhat similar to those in the present appeal, I reviewed many aspects of the tort of negligent misrepresentation including the required elements for such an action. The specific question I should like to address in this case is: if the parties are in a contractual relationship, under what circumstances will it be open to one of the parties to allege that the other was guilty of negligent misrepresentation? In other words, when will the existence of a contract preclude a tort action for negligent misrepresentation?

118 The action for negligent misrepresentation was first recognized by the decision of the House of Lords in *Hedley Byrne*, *supra*. The ingredients of a negligent misrepresentation set out in that case remain good law today. To quote from the speech of Lord Morris (at pp. 502-3):

My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, [page74] to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

119 The rule in *Hedley Byrne*, *supra*, has been adopted in numerous Canadian cases, some of which will be discussed below. Although *Hedley Byrne* was considered revolutionary when it was decided, the case was in fact the culmination of a series of majority and dissenting judgments extending back into the last century. Like *Donoghue v. Stevenson*, *supra*, *Hedley Byrne* needs to be understood in its context. An understanding of this context is particularly important to assessing the role of negligent misrepresentation where the parties are in a contractual relationship.

120 Before *Hedley Byrne*, *supra*, it was settled law that a misrepresentation could give rise to damages only if it was fraudulent, or if the representation was a collateral warranty to a contract. An "innocent" misrepresentation (which included what would now, since *Hedley Byrne*, be characterized as a negligent misrepresentation) was not actionable in itself, but only if it formed part of a valid contract.

121 The leading case in fraudulent misrepresentation was *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.). In *Derry v. Peek*, the Court of Appeal held that a negligent misrepresentation -- one made without due care as to its truth or falsehood -- gave rise to an action in damages for deceit for anyone to whom the statement was directed and who relied on the statement to his or her

detriment. The House of Lords rejected the suggestion that a false statement [page75] made negligently was actionable. In the words of Lord Herschell, "making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds" (p. 375). The House held that for an action in deceit or fraud to lie, the person making the statement must either know the statement to be false, or be reckless as to its truth or falsehood. This principle was reaffirmed by the House in *Nocton v. Lord Ashburton*, [1914] A.C. 932, where Viscount Haldane L.C. said this (at pp. 953-54): "It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit."

122 Although actions on warranties were originally actions in tort, actions for breach of warranty had become, by the nineteenth century, actions in contract. See Baker, *supra*, at pp. 293-95. The leading case of *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 (H.L.), settled the rule that for a representation to be actionable as a warranty, it must have been made with promissory intent.

123 The appellants in *Heilbut, Symons* were rubber merchants, who were promoting shares in what they represented was a rubber company. The respondent bought a large number of shares. The company turned out to be other than as it had been described, and the respondent brought an action in fraud and for breach of warranty. At trial, the jury found that the company had not been correctly represented by the appellants, but that the misrepresentation was not fraudulent. The jury did, however, find that the appellants had warranted that the company was a rubber company. The House of Lords allowed the appeal. In his speech, Lord Moulton held that no liability can flow from a representation [page76] which is not fraudulent, unless it is made with promissory intent (at p. 51):

It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more.

124 Between *Derry v. Peek* and *Heilbut, Symons*, *supra*, it was settled that a negligent misrepresentation which was not made with promissory intent was not actionable, as it fell between deceit and warranty. To succeed, a plaintiff was required to prove fraud or a collateral warranty. As Lord Denning M.R. observed in *Esso Petroleum*, *supra*, at p. 13:

Ever since *Heilbut Symons & Co v Buckleton* we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege -- I often did it myself -- that the misrepresentation was fraudulent, or alternatively a collateral warranty.

125 *Heilbut, Symons* and *Derry v. Peek*, *supra*, were equally the law in Canada. The rule in *Derry v. Peek* that misrepresentations must be made with intent to deceive in order to be actionable in deceit was applied by this Court in *De Vall v. Gorman, Clancey & Grindley Ltd.* (1919), 58 S.C.R. 259. Similarly, in *Kinsman v. Kinsman* (1912), 3 O.W.N. 966 (H.C.), Riddell J. noted at p. 968 that, "[o]f course, fraud -- fraudulent intent -- must be proved in an action for deceit: *Derry v. Peek*" See also *Howse v. Quinnell Motors Ltd.*, [1952] 2 D.L.R. 425

(B.C.C.A.), and *Chapman v. Warren*, [1936] O.R. 145 (H.C.). The rule in *Heilbut, Symons* that a misrepresentation which falls short of being fraudulent is not actionable [page77] unless it is incorporated into a contract as a warranty was applied *inter alia* in *Gardner v. Merker* (1918), 43 O.L.R. 411 (C.A.); *Kennedy v. Anderson* (1919), 50 D.L.R. 105 (Sask. C.A.); *Gilmour v. Trustee Co. of Winnipeg*, [1923] 3 W.W.R. 177 (Man. C.A.); *Thurston v. Streilen* (1950), 59 Man. R. 55 (K.B.); and in *Scholte v. Richardson*, [1951] O.R. 58 (H.C.).

126 It was against this backdrop that the House of Lords decided *Hedley Byrne*, *supra*. Through their bank, the appellants had obtained the opinion of the respondent merchant bankers as to the creditworthiness of E. Ltd. There was no contract between the appellants and the respondent. E. Ltd. subsequently went bankrupt, and it was found at trial that the respondent had been negligent in giving the opinion. Their Lordships, expressly distinguishing *Derry v. Peek*, *supra*, and implicitly distinguishing *Heilbut, Symons*, *supra*, held that a negligent misrepresentation may, even if not made with promissory intent, give rise to liability for damages. Lord Reid described those relationships in which a duty to take care in the making of representations will arise as follows (at p. 486):

... all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.

127 In reaching this result, their Lordships relied on an alternate line of authority reaching back through the dissenting judgment of Denning L.J. in *Candler v. Crane Christmas & Co.*, [1951] 1 All E.R. 426 (C.A.), and the decisions of the House of Lords in *Donoghue v. Stevenson*, *supra*, and *Nocton v. Lord Ashburton*, *supra*, to the nineteenth [page78] century decisions of *Cann v. Willson* (1888), 39 Ch. D. 39; *Heaven v. Pender* (1883), 11 Q.B.D. 503 (C.A.); and *George v. Skivington* (1869), L.R. 5 Ex. 1.

128 With the exception of *Nocton v. Lord Ashburton*, *supra*, the cases relied upon by their Lordships were all cases in which the relationship between the plaintiff and the defendant was not contractual, but the court (or the dissenting judge) nonetheless held that the defendant owed a duty of care to the plaintiff. That is, in each case, no contractual remedy was available to the plaintiff, but the action was allowed in tort. *Nocton v. Lord Ashburton* is the exception: in that case there was a contract between the plaintiff and the defendant (who was his solicitor). However, *Nocton v. Lord Ashburton* is readily distinguishable. In that case, an action for breach of contract was barred by the Statute of Limitation. Moreover, the plaintiff succeeded not in tort but for breach of fiduciary duty.

129 It was not clear from *Hedley Byrne*, *supra*, that an action for negligent misrepresentation would lie where the parties subsequently entered into a contract. In *Hedley Byrne* and in the cases upon which it relied (with the exception of *Nocton v. Lord Ashburton*, *supra*) there was no contract between the parties. A dictum of Lord Reid in *Hedley Byrne* hinted that if the parties were in a contractual relationship, the proper remedy was an action for breach of warranty (at p. 483): "Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty." The cases decided immediately after *Hedley Byrne* held that an action for negligent misrepresentation was barred if the parties were in a contractual relationship: *Bagot v. Stevens Scanlan & Co.*, *supra*, and *Clark v. Kirby-Smith*, [1964] 2 All E.R.

835 (Ch. D.). See also D. W. McLauchlan, "Pre-Contract Negligent Misrepresentation" (1977), 4 Otago L. Rev. 23.

[page79]

130 However, it was settled by *Esso Petroleum*, supra, that the existence of a contract is not a bar to a remedy for negligent misrepresentation. In the words of Shaw L.J. (at p. 26):

It is difficult to see why, in principle, a right to claim damages for negligent misrepresentation which has arisen in favour of a party to a negotiation should not survive the event of the making of a contract as the outcome of that negotiation. It may, of course, be that the contract ultimately made either expressly or by implication shows that, once it has been entered into, the rights and liabilities of the parties are to be those and only those which have their origin in the contract itself.

For a list of Canadian cases applying *Esso Petroleum*, see *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 (B.C.C.A.), at p. 59.

131 The principle that an action for negligent misrepresentation will survive the making of a contract between the parties was affirmed in this Court in *Carman Construction*, supra. Martland J., writing for the Court, held that the respondent was not liable on the basis of negligent misrepresentation because the contract that was made between the parties contained a "non-reliance provision" or disclaimer which had the effect that the respondent did not assume any duty of care. It is clear from Martland J.'s reasons that the fact that the alleged negligent misrepresentation had induced the contract would not have been a reason for disallowing the claim in negligence. The same proposition can be deduced from the recent decision of this Court in *Rainbow Industrial Caterers Ltd.*, supra. Although the narrow issue was the appropriate measure of damages where a plaintiff is induced to enter into a contract with the defendant by the defendant's negligent misrepresentation, both Sopinka J. (for the majority) and McLachlin J. (dissenting), agreed that damages for negligent misrepresentation could be awarded where the misrepresentation induces a contract.

[page80]

132 It is clear that the fact that the parties are in a contractual relationship is not in itself a bar to an action in tort for negligent misrepresentation. As in other areas of negligence, the plaintiff may have the option of concurrent actions in tort and contract. However, concurrency must be viewed in light of the principles articulated above. Where a duty arising in tort is co-extensive with a duty created by an express term of the contract, the plaintiff will be limited to whatever remedies are available under the contract. Moreover, if the liability or duty of the defendant is excluded or limited by the terms of the contract, the plaintiff may not allege a wider liability in tort in order to circumvent the terms of the contract.

D. Application of the Law to the Facts of this Case

133 Checo alleges that Hydro negligently misrepresented the state of the right-of-way, and that Checo suffered damages as a result of this misrepresentation. In the alternative, Checo has

alleged that Hydro was in breach of its contractual duties.

(1) The Claim for Negligent Misrepresentation

134 I will assess Checo's claim in tort for negligent misrepresentation first. Because Checo and Hydro are in a contractual relationship, Checo's claim in tort immediately raises two issues. First, is there a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which Checo alleges Hydro has breached? If there is such a contractual duty, then Checo is precluded from bringing an action in tort against Hydro for breach of the common law duty of care. In such a case, Checo would be confined to whatever remedies are available under the law of contract. Second, if the answer to the first question is negative, is Hydro's liability or duty in tort limited or excluded by the terms of the contract?

[page81]

(a) Is there a Contractual Duty Excluding a Common Law Duty of Care?

135 The question whether there is a contractual duty defined by an express term of the contract which would operate to exclude the common law duty of care upon which Checo relies in its action for negligent misrepresentation is shortly answered: there is such a duty. Checo bases its claim for negligent misrepresentation on the alleged representation made in clause 6.01.03 of the tender documents. Clause 6.01.03 of the tender documents was incorporated verbatim as an express term (also numbered 6.01.03) of the contract between Hydro and Checo after Hydro accepted Checo's tender. On Checo's interpretation of clause 6.01.03 of the tender documents, it is a representation as to the state of the right-of-way. If clause 6.01.03 of the tender documents is such a representation (and I am of the opinion that it is, as I will discuss below), then clause 6.01.03 of the contract is an express warranty as to the state of the right-of-way. Whatever duty is imposed in tort on Hydro by the clause in the tender documents is co-extensive with the duty imposed in contract by the express clause in the contract. In consequence, subject to any overriding considerations arising from the context in which the transaction occurred, Checo is limited to whatever remedies may be available to it in contract for Hydro's breach of clause 6.01.03 of the contract. Checo cannot rely on a breach by Hydro of any duty created by clause 6.01.03 of the tender documents to found an action in tort.

136 As I indicated, context is important in assessing whether a claim in tort is foreclosed by the terms of the contract. This transaction occurred in a commercial context. The parties are both large corporations, and there is no allegation or indication of any inequality of bargaining power or unconscionability. I would also note that the contract which was concluded by the parties was included as part of the tender documents. That is, Checo knew when it was preparing its bid that if its bid were accepted, the representation as to the condition of [page82] the right-of-way would be a term of the contract. Checo knew, or ought to have known, that disputes as to the condition of the right-of-way would potentially be governed by the contract. Knowing this, Checo decided to make a bid, hoping that its bid would be accepted. I would conclude that an assessment of the context strengthens my initial conclusion that Checo should be limited to any remedies which might be available to it under the contract.

(b) Is Hydro's Liability or Duty Limited or Excluded?

137 In light of my answer to the first question, it is unnecessary for the purposes of this appeal to consider whether Hydro's liability or duty in tort is limited or excluded by a term of the contract. Simply put, Checo's claim in tort is barred by the contract. However, I shall proceed at this stage to consider the effect of clauses 2.03 and 4.04 of the tender documents, which were incorporated into the contract, on Checo's rights under the contract.

138 In argument before this Court, Hydro submitted that clauses 2.03 and 4.04 operated to exempt Hydro from contractual liability for its representations. The representation relied upon by Checo is contained in clause 6.01.03, which is in the following language:

6.01.03 WORK DONE BY OTHERS

Clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract.

139 The two clauses which Hydro argues exclude its liability are as follows:

2.03 TENDERER'S RESPONSIBILITY

It shall be the Tenderer's responsibility to inform himself of all aspects of the Work and no claim will be considered at any time for reimbursement for any expenses incurred as a result of any misunderstanding in regard to the conditions of the Work. Should any details necessary for a clear [page83] and comprehensive understanding be omitted or any error appear in the Tender Documents or should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender. ...

Neither B.C. Hydro nor the Engineer shall be responsible for any instructions or information given to any Tenderer other than by the Purchasing Agent, in accordance with this Clause.

4.04 INSPECTION OF SITE AND SUFFICIENCY OF TENDER

The Contractor shall inspect and examine the Site and its surroundings and shall satisfy himself before submitting his Tender as to the nature of the ground and sub-soil, the form and nature of the Site, the quantities and nature of work and materials necessary for completion of the Work, the means of access to the Site, the accommodation and facilities he may require, and in general shall himself obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect his Tender. Without limiting the generality of the foregoing, the Contractor shall satisfy himself of any special risks, contingencies, regulations, safety requirements, and other circumstances which may be encountered.

The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his Tender for the Work and of the prices stated in the Schedule of Prices which prices shall (except insofar as it is otherwise provided in the Contract) cover all his obligations under the Contract and all matters and things necessary for the proper execution of the Work.

140 Clause 6.01.03 is a representation that the site would be cleared as of the date of the contract. It is an express contractual warranty as to the state of the right-of-way. The trial judge found that, in all the circumstances, "clearing" meant the right-of-way would be clear of logs and debris. Cohen J. stated (at p. 67):

[page84]

Kosty acknowledged that tenderers rely on information contained in the tender documents and the defendant intended that the plaintiff would prepare its bid based on the representations contained in the tender documents. Clause 6.01.03 does not define the word "clearing" and the tender documents do not contain the defendant's clearing standards or clearing contracts. In my opinion, based on what they observed and their past experience, the natural and ordinary meaning to be given to the word "clearing" in clause 6.01.03 was the one understood by Lemieux and Campeau, that the right-of-way would be free of logs and debris. I accept the evidence of Lemieux and Campeau, who I found to be honest and forthright, that they formed an honest belief in December 1982, after reading the tender documents and viewing the right-of-way, that clearing was not yet complete.

The trial judge also found as a fact that the right-of-way was incompletely and improperly cleared as of the date of the contract. In my opinion, clauses 4.04 and 2.03 do not limit or exclude Hydro's liability flowing from clause 6.01.03 of the contract and of the tender documents. Clause 6.01.03 is a specific provision which is not displaced by clauses 4.04 and 2.03.

141 Clauses 2.03 and 4.04 do not operate to limit Hydro's liability in contract for the representation relied on. Clause 4.04 required Checo to inspect the contract "Site", and specified that the contract price would cover all Checo's obligations under the contract. "Site" is defined by clause 4.01 of the contract as "the land upon which the Work is to be done [by the Contractor -- Checo] and any area or areas adjacent thereto used in connection with the Work and, unless the context otherwise requires, shall include all materials, supplies, tools, equipment and structures thereon" (emphasis added). The representation relied on by Checo, however, is that clearing of the right-of-way "has been carried out by others and will not form part of this Contract" (emphasis added). The ordinary meaning of the emphasized words suggests that the "Site" referred to in clause 4.04 of the contract does not encompass the right-of-way, which is the subject matter of the representation at issue. Thus, clause [page85] 4.04 is not relevant to Checo's action in tort or to its action for breach of contract.

142 The key phrase in clause 2.03 is, "should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender." The representation made in clause 6.01.03 was that the right-of-way would be cleared as of the date of the contract.

Accordingly, although Checo did note the "dirty" condition of the right-of-way at the time it was carrying out the inspection mandated by clause 2.03, the condition of the "Site" was not in conflict with the representation that the right-of-way would be cleared as of the date of the contract, and Checo's obligation under clause 2.03 to obtain clarification from Hydro on this point was not triggered. Moreover, the well-known principles governing the interpretation of contractual exclusion and limitation of liability clauses suggest that neither clause 2.03 nor clause 4.04 is sufficiently clear to limit or exclude Hydro's liability in contract for the representation relied on.

143 I would accordingly conclude that there is no clause in the contract or in the tender documents which serves either to limit or exclude Hydro's liability for the representation contained in clause 6.01.03.

(2) The Claim for Breach of Contract

144 I have found that it was an express term of the contract that the right-of-way would be cleared. As found by the trial judge, the right-of-way was not cleared. Therefore, Hydro breached the contract. I have also found that there is no exclusion or limitation clause that would affect Hydro's liability in contract. Given that he found Hydro liable for fraudulent misrepresentation, the trial judge did not consider the question of damages for breach of [page86] contract. I would return the matter to trial on the question of damages for the breach of contract.

145 At the original trial, Checo also claimed damages for breach of contract for items which would appear to be unconnected with the failure to clear the right-of-way. As the trial judge did not consider the issue of breach of contract, there are no findings of fact with respect to these items. Accordingly, if Checo establishes at the new trial that Hydro breached its contract in any other respect, unconnected with the failure to clear the right-of-way, and that Checo suffered damages therefrom, Checo is entitled to recover damages for these items in accordance with the applicable law of damages.

I. Disposition

146 I would accordingly allow Hydro's appeal in part and dismiss Checo's cross-appeal. I would order a new trial on the issue of breach of contract. I have found that Hydro breached the contract in that the right-of-way was not properly cleared. Damages for this breach should be assessed at the new trial. In addition, Checo is entitled to recover for any breaches of the contract unconnected with the condition of the right-of-way which it may establish at the new trial.

147 Under the circumstances, each party should bear its own costs, here and in the courts below.