V.K. Mason Construction Ltd. v. Bank of Nova Scotia, [1985] 1 S.C.R. 271

Supreme Court Reports

Supreme Court of Canada
Present: Dickson C.J. and Ritchie *, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.
1984: June 14 / 1985: April 4.
File Nos.: 17437 and 17435.

[1985] 1 S.C.R. 271 | [1985] 1 R.C.S. 271 | [1985] S.C.J. No. 12 | [1985] A.C.S. no 12

V.K. Mason Construction Ltd. (plaintiff), appellant; and The Bank of Nova Scotia (defendant), respondent; and Courtot Investments Limited (defendant); And between The Bank of Nova Scotia (defendant), appellant; and V.K. Mason Construction Ltd. (plaintiff), respondent; and Bregman and Hamann (defendants).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Ritchie J. took no part in the judgment.

Case Summary

Contracts — Unilateral contract — Bank advised contractor that developer adequately financed — Developer unable to meet payments — Whether or not Bank liable for breach of contract.

Torts — Negligent misrepresentation — Bank advised contractor that developer adequately financed — Financial agreement only to fixed amount — Cost overruns — Neither extended terms nor new credit advanced — Whether or not Bank liable to contractor for misrepresentation.

Interest — Mortgage contained in demand debenture — Interest rate calculated on 360-day year — Whether or not meaning of "mortgage on real estate" in s. 4 of Interest Act different from meaning in any other context — Whether or not s. 4 breached — Interest Act, R.S.C. 1970, c. I-18, s. 4.

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The two appeals in this consolidated action arose out of the financing and construction of an office and retail complex. Courtot was the owner and developer; Mason was the general contractor; and the Bank provided bridge financing for the construction, taking a mortgage in a demand debenture on the property as part of its security. The first action, brought by Mason against the Bank, was based on the alternative footing of contract and tort. The second action involved a claim by Mason under The Mechanics' Lien Act against Courtot and the Bank but, as Courtot and Mason settled, only the latter claim was before the Court.

Mason signed a fixed price construction contract with Courtot, but only when fully satisfied by a letter from the Bank, over and above its own knowledge of Courtot's financing, that Courtot was adequately financed to meet its payments. Construction went ahead and was substantially completed. Before completion, however, both Courtot and the Bank were aware that the Bank's loan to Courtot would not cover the cost of completion. The Bank refused to extend the due date or to extend more money. Mason was not informed of the situation and, faced with excuses to delay payment and vexatious litigation, lodged mechanics' liens against the property. The Bank later exercised its power of sale as mortgagee under the demand debenture and asserted its priority as mortgagee over the proceeds of sale. The remainder was not sufficient to satisfy fully the settlement reached in Mason's mechanics' lien action with Courtot.

The trial judge in the first action found the Bank liable to Mason in both contract and tort, and, in the second held that s. 4 of the Interest Act applied, with the result that the Bank's claim was reduced to the extent that Mason could be paid in full out of the proceeds of sale. The Court of Appeal dismissed the Bank's appeal with respect to the breach of contract claim and did not comment on the negligent misrepresentation issue. It allowed the Bank's appeal in the second action, however, holding s. 4 of the Interest Act to be inapplicable. The Court of Appeal also found the Bank was not estopped from asserting its priority as mortgagee.

The issues in the two actions involved (1) contract; (2) negligent misrepresentation; (3) s. 4 of the Interest Act; and (4) estoppel.

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Held: The appeal of the Bank of Nova Scotia should be dismissed and the cross-appeal of V.K. Mason Construction Ltd. should be allowed (in the contract/tort action). The appeal of V.K. Mason Construction Ltd. should be dismissed (in the mechanics' lien action).

No contractual relationship existed between the Bank and Mason. A unilateral contract -- the only one possible in the circumstances -- could not be implied as the certainty of intention necessary as a foundation for implying such a contract out of the documents and conduct did not exist. Much would have to be implied into the conduct of the parties and the exact nature of the Bank's obligation was left undefined. Reasonable business people would not have construed the Bank's letter as an absolute and unqualified guarantee.

All the requirements for negligent misrepresentation were met here: (1) an untrue statement (2) was negligently made and there was (3) a special relationship giving rise to a duty of care and (4) a reliance that was foreseeable. Mason sought an assurance from the Bank that Courtot would have adequate financing at a time when it knew the terms of the bank's loan to Courtot and found that loan to be an inadequate assurance. The Bank knew its letter would be construed as an assurance over and above the loan and yet persisted in giving the assurance based on the loan and the hope that certain costs would not be incurred. In doing so the Bank acted negligently. The Bank had a special relationship with Mason because it was inducing Mason to sign a contract with Courtot in reliance on the Bank's assurance of adequate financing. Mason relied on that assurance and that reliance was foreseeable by the Bank.

In calculating damages for misrepresentation, anticipated profit is not to be subtracted from contract damages. It could be assumed that Mason would have found a profitable means of employing itself had it not been induced to work on the Courtot project by the Bank's misrepresentation. The estimated profit on the Courtot project was a reasonable evaluation of what Mason likely would have made had it abandoned the project and found other work: lost profit on this contract represented lost opportunity for profit on any contract.

Mason was similarly entitled to prejudgment interest. It was reasonable to assume that Mason would have put the amount of outlay and the profits to profitable use. Interest is the Court's way of compensating Mason for the loss of the opportunity to invest the money.

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The transaction between the Bank and Courtot could not be characterized as something other than a mortgage on real estate simply because the Bank took other security in addition to the mortgage contained in the demand debenture. The meaning of a "mortgage on real estate" in s. 4 of the Interest Act is no different from its meaning in any other context. Section 4 is consumer protection law in the sense that, with respect to loans other than real estate mortgages, consumers are entitled to know the annual rate of interest they are paying. Courtot was a sophisticated commercial borrower in scant need of protection by being informed of the annual rate of interest rather than the 360 day rate. Since the section allows a borrower to escape from what would otherwise be a valid arm's length financial transaction, it would be unfair to adopt a construction that did not take into account the legitimate interests of the lender.

This was not a case for the application of promissory estoppel simply on the ground that the Bank never represented that it would not rely on its priority as mortgagee. Mason therefore could not make out a case of detrimental reliance with respect to its mechanics' lien.

Cases Cited

Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256; Hedley Byrne & Co. v. Heller & Partners Ltd., [1946] A.C. 465; Patrick L. Roberts Ltd. v. Sollinger Industries Ltd. (1978), 19 O.R. (2d) 44; Re Tudale Explorations Ltd. and Bruce (1978), 88 D.L.R. (3d) 584; Elmvale Lumber Co. v. Laurin (1977), 16 O.R. (2d) 241, referred to.

Statutes and Regulations Cited

Interest Act, R.S.C. 1970, c. I-18, s. 4.

Authors Cited

McGregor, Harvey. McGregor on Damages, 14th ed., London, Sweet & Maxwell Limited, 1980.

APPEAL AND CROSS-APPEAL from a judgment of the Ontario Court of Appeal (in the contract/tort action) (1982), 39 O.R. (2d) 630, dismissing the appeal of the Bank of Nova Scotia, allowing the cross-appeal of V.K. Mason Construction Ltd., and varying the judgment of O'Leary J. Appeal dismissed.

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APPEAL from a judgment of the Ontario Court of Appeal, (in the mechanics' lien action) (1982), 39 O.R. (2d) 630, allowing the appeal of the Bank of Nova Scotia and varying the judgment of O'Leary J., and dismissing the cross-appeal of V.K. Mason Construction Ltd. Appeal dismissed.

John D. Brownlie, Q.C., and James A. Hodgson, for the appellant V.K. Mason Construction Ltd. John J. Robinette, Q.C., John Sopinka, Q.C., D.B. Houston, and Barry W. Earle, for the respondent The Bank of Nova Scotia. John Sopinka, Q.C., and Barry W. Earle, Q.C., for the appellant the Bank of Nova Scotia. John D. Brownlie, Q.C., and James A. Hodgson, for the respondent V.K. Mason Construction Ltd.

Solicitors for V.K. Mason Construction Ltd.: Blake, Cassels & Graydon, Toronto. Solicitors for the Bank of Nova Scotia: Tilley, Carson & Findlay, Toronto.

The judgment of the Court was delivered by

WILSON J.

1 The Court is confronted in this case with appeals in two lawsuits which have been consolidated. The first lawsuit involved an action on the alternative footing of contract and tort brought by V.K. Mason Construction Ltd, ("Mason") against the Bank of Nova Scotia ("the Bank"). The second action involved a claim by Mason under The Mechanics' Lien Act, R.S.O. 1970, c. 267 as amended, against Courtot Investments Ltd. ("Courtot") and the Bank. The claim against Courtot was settled but the claim against the Bank is before us.

2 The principal source of dispute in the case is on the facts. There is relatively little disagreement over the applicable legal principles and presentations of counsel were substantially directed to the application of those principles to the facts as they saw them. Fortunately, the Court has the advantage of a very thorough and competent judgment by the trial judge, Mr. Justice O'Leary. Despite this the parties, and particularly the Bank in the contract/tort action, spent considerable time referring us to the record in an attempt to undermine his findings of fact. I am satisfied, as was the Ontario Court of Appeal, that these findings are amply supported by the evidence and I therefore [page276] approach the case on the basis of the facts as found by the learned trial judge.

1. The Facts

3 Both actions arose out of the financing and construction of an office and retail shopping complex in Toronto known as the "Courtot Centre". The owner and developer of the complex was Courtot, the general contractor in charge of construction was Mason and the Bank provided bridge financing for the construction, taking as part of its security a mortgage contained in a demand debenture on the property.

4 Courtot was a valued client of the Bank but was inexperienced in the field of property development. It was also shortsighted in its planning for financial contingencies and failed to obtain adequate funding to cope with rising interest rates and costly architectural changes implemented subsequent to the project's getting underway. As a consequence the litigation between Mason and the Bank took place in the aftermath of the commercial failure of the

Courtot Centre project and the inability of Courtot to raise sufficient financing to meet its indebtedness to its general contractor.

5 The story commences in March 1972 when Mason submitted a tender for construction of the project containing the following stipulation:

> Our tender and any contract entered into following acceptance of our tender are conditional upon production to us prior to execution of any construction contract, satisfactory evidence of the ability of the Owner to meet the payments as they become due under such contract.

6 By July 17, 1972 Mason was prepared to sign a fixed price construction contract with Courtot provided it was satisfied of Courtot's ability to meet the payments. Mason had begun construction before a contract was signed but Mr. Justice O'Leary expressly found at trial that it would not have signed the contract had it not been for assurances from the Bank. The reason for his conclusion on this point was that Mason's investment in the project up to the time of the signing of the contract was small enough that it would have been able, if [page277] it had abandoned the project, to recover its investment from Courtot on a quantum meruit basis under The Mechanics' Lien Act or otherwise.

7 Courtot meanwhile had been trying to arrange financing for the project from the Bank. In October 1971 the Bank rejected his application for bridge financing and in January 1972 it turned down a further application for a loan of $865,500 to cover pre-construction costs. In February 1972, however, the latter decision was reversed and by July 6, 1972 the Branch Manager, Mr. Hway, was prepared to recommend a loan of $9,000,000 to provide bridge financing. By August the Bank decided to loan Courtot $8,850,000 U.S., one of the bases for that decision being the fact that Courtot had been able to arrange a fixed price construction contract with Mason for $6,100,000. The Bank's commitment to Courtot, expressed in the form of a letter approving the loan in principle, was conveyed to Mason but this was not sufficient to convince Mason of Courtot's ability to meet the payments.

8 The events of August 30 through September 12 are crucial to the case and are covered in detail by Mr. Justice O'Leary. Mason through its solicitor sought assurances from the Bank that Courtot had sufficient financing. There was an exchange of telephone conversations and, although the oral evidence is unclear about the outcome of these conversations, the documentary evidence indicates that as of September 7, 1972 Mason was still not satisfied that Courtot was able to pay the contract price. Mr. Justice O'Leary found that, if Mason had continued to be unsatisfied about Courtot's ability to pay, it would not have continued with the project. He further found that the Bank knew or ought to have known this and that it was apparent that further assurances would be necessary.

9 Mr. Hway, the Branch Manager, on September 8, 1972 drafted a letter to Mason giving those assurances. He did not send it immediately but discussed the wording of the letter with the Bank's solicitor on September 11 or 12. The solicitor did not recommend any changes and on September 12, [page278] 1972 the letter was delivered to Mason. It read as follows:

> We wish to advise that we have accorded Courtot Investments Limited interim financing sufficient to cover the construction of the subject complex. We shall therefore provide funds for your progress billings as they occur against architects' certificates (Bregman & Hamann) of work completed subject to the usual search for liens by our solicitor.

10 Acting upon the strength of this assurance, Mason signed the construction contract with Courtot on September 14, 1972. Construction went ahead and Mason performed its part of the bargain, substantially completing construction in August 1974. The completion of construction had originally been scheduled for December 31, 1973 but changes in the specifications by Courtot had both added to the cost of construction (which resulted in an agreed increase in the contract price) and delayed the completion date. Mr. Justice O'Leary expressly exonerated Mason from any responsibility for the construction delays.

11 By April 19, 1974 it had become apparent both to Courtot and to the Bank that the amount of the Bank's loan to Courtot would not cover the cost of construction. The Bank did not, however, offer to extend Courtot more money or agree to Courtot's request for an extension of the due date of the loan. By July 31, 1974 Courtot had called down $8,413,000 U.S. of the $8,850,000 U.S. which the Bank had agreed to lend it. Rather than call for the rest of the money in order to provide at least part payment to Mason, Courtot tried to find excuses in order to delay paying Mason and then engaged in vexatious litigation against Mason for this purpose. The Bank at no point informed Mason that Courtot had insufficient funds to cover the cost of construction.

12 By August 30, 1974 Mason had substantially completed construction and had not been paid on architects' certificates dating back as far as July 10, 1974. Mason took out mechanics' liens on the property for $1,057,941.98 in work for which it had not been paid. In August 1975 the Bank [page279] demanded payment from Courtot on its loans and exercised its power of sale of the Courtot Centre as mortgagee under the demand debenture. On February 9, 1976 the complex was sold for $11,000,000.

13 In December 1977 Mason settled its mechanics' lien action against Courtot and Courtot acceded to the entry of judgment in favour of Mason in the amount of $1,427,487.17. The Bank asserted its priority as mortgagee over the proceeds of the sale and, after it had been paid, there were insufficient funds to pay Mason in full. In the mechanics' lien action, therefore, Mason asserted that by virtue of s. 4 of the Interest Act R.S.C. 1970, c. I-18 the Bank was limited to interest at the rate of 5 per cent. The learned trial judge agreed with this submission and the result was that, by reducing the amount of the Bank's claim, Mason would be enabled to have its claim satisfied out of the proceeds of the sale. Mason had also argued that the Bank was estopped from asserting its priority as mortgagee but, in light of his ruling on the Interest Act point, the learned trial judge did not find it necessary to make a ruling on this issue.

14 Returning to the contract and tort action, Mr. Justice O'Leary found on the facts as stated above that there was a contract between Mason and the Bank and that the Bank had breached that contract. He awarded damages in the amount of $1,057,941.98. The trial judge also found that the Bank was liable to Mason on the alternative basis of negligent misrepresentation. Specifically, he found that the representation in the Bank's letter of September 8, 1972 was false in that the Bank had not committed itself to provide sufficient funds to Courtot to complete the project but only a specified sum of money toward the financing of the project. Furthermore, Mr. Justice O'Leary found that, even at the date the statement was made, the amount of the Bank's loan to Courtot was significantly less than the projected cost of the project, a fact known to the Bank. The learned trial judge awarded damages of $897,941.98 for negligent misrepresentation, this sum being calculated [page280] by removing Mason's projected profit of $160,000 from the value of the contract damages.

15 The Bank's appeal in both actions was heard by Houlden, Goodman and Cory JJ.A. At the

conclusion of argument Houlden J.A. gave an oral judgment for the court. With respect to the contract/tort action, he dismissed the Bank's appeal with respect to the breach of contract claim and did not find it necessary to comment on the negligent misrepresentation issue. With respect to the mechanics' lien case, he allowed the Bank's appeal, holding that s. 4 of the Interest Act was inapplicable in this case because the Bank's loan was a mortgage on real estate and therefore expressly excluded from the operation of the section. He further held that the Bank was not estopped from asserting its priority as mortgagee over Mason under The Mechanics' Lien Act.

2. The Issues

16 The issues in the two actions may be conveniently dealt with under four main headings namely: (1) contract; (2) negligent misrepresentation; (3) s. 4 of the Interest Act; and (4) estoppel.

17 It might however be useful at the outset to put the case in perspective. This is not a simple situation in which a bank makes a representation about the creditworthiness of one of its clients to a third party. This is a case in which the Bank made a representation to a third party for the specific purpose of inducing the third party to enter into a contract with one of the Bank's own clients, thereby enabling that client to enter into a substantial loan transaction with the Bank. I do not think it is realistic to portray the Bank Manager, Mr. Hway, as an inexperienced person who had no motive or intention to mislead anyone. It is quite clear that Mr. Hway wished to check the letter with the Bank's solicitor precisely because he realized that [page281] the Bank was inducing Mason to enter into a contract and he wanted to avoid the prospect of the Bank's incurring a liability to Mason.

18 Mr. Hway, like Courtot, no doubt thought that the transaction would be a profitable one. Had Courtot been able to arrange permanent mortgage financing or find a buyer for the building there would have been no problem about the shortfall in the Bank's bridge financing. Unfortunately for all concerned, the market for commercial properties in that part of Toronto was soft at the time Courtot was looking for commercial tenants for the Centre. Also, Courtot was caught by having a floating interest loan at a time when interest rates were rising, thereby significantly increasing the amount of interest which it owed to the Bank. Furthermore, having taken out a loan in U.S. funds Courtot was hurt by currency fluctuations which resulted from the strength of the Canadian dollar as compared to the American dollar. Finally, Mr. Courtot was, as already mentioned, an inexperienced developer and he had not allowed himself sufficient flexibility by taking contingencies of this kind into account in arranging his financing. As a result the project, from Courtot's perspective at least, was a failure and the contest among the creditors was on.

(1) Contract

19 Mr. Sopinka, counsel for the Bank, put forward three main lines of argument against the existence of a contract in this case namely: (1) absence of an intention on the part of the Bank and Mason to create legal relations between themselves; (2) absence of offer and acceptance; and (3) absence of consideration. He submitted, moreover, that even if there was a contract between Mason and the Bank there was no breach of it by the Bank.

20 It seems to me that if there were a contract in existence between these two parties it must

be characterized, in terms of traditional contract analysis, as a unilateral contract. The Bank's letter to Mason would, on this analysis, be construed as [page282] an offer that, if Mason would sign a fixed price contract with Courtot, the Bank would supply Courtot with sufficient interim financing to complete the project. Mason was entitled to accept this offer either by communication or by performance, i.e., by signing the contract with Courtot; see Carlill v. Carbolic Smoke Ball Co. [1893] Q.B. 256 (C.A.). The consideration which passed to the Bank would be that Mason had obligated itself to Courtot to enter into a fixed price contract, thereby giving the Bank the assurance that the project was sufficiently sound that it could lend money to Courtot.

21 The problem with this analysis is that it requires a great deal to be implied into the course of conduct of the parties. By implying a contract into this course of conduct one is left unsure of the exact nature of the Bank's obligations. Was the Bank obliged to advance money to Courtot so that Mason would be paid even if Courtot did not demand the money? The trial judge held, in effect, that it was, but find it difficult to say that sophisticated business people, taking into account the course of conduct leading up to the Bank's statement, would construe the September 8, 1972 letter as imposing that kind of obligation. It is, of course, always a matter of judgment whether the requisite certainty of intention exists as a foundation for implying a contract out of a combination of documents and a course of conduct. I tend to view this as a case which falls on the far side of the line in the sense that I do not believe that reasonable business people would have construed the Bank's letter as an absolute and unqualified guarantee, which is what the courts below have effectively held.

22 Negligent misrepresentation is, in my view, the appropriate basis of liability in this case. The disadvantage in implying a contract in a commercial context like this is 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. I think this is one reason why the common law imposes an objective [page283] rather than a subjective test for the creation of an agreement. The objective test is important because it prevents parties from avoiding obligations which a reasonable person would assume they had undertaken, simply on the ground that there is no document embodying the precise nature of the obligation. On the other hand, if too broad a view is taken of what a reasonable person assumes will give rise to an agreement or obligation, the certainty which is one of the principal virtues of contract may be undermined. Obviously, there are circumstances in which a Bank's conduct could give rise to contractual liability as a guarantor, but I do not believe that this case falls into that category. I conclude therefore that there was no contractual relationship between the Bank and Mason.

(2) Negligent Misrepresentation

23 It seems to me that a negligent misrepresentation analysis properly focusses attention on the gravamen of the cause of action in this case, namely the fact that the Bank's representation to Mason was false. The parties are in agreement that the applicable law is to be found in the decision of the House of Lords in Hedley Byrne and Co. v. Heller and Partners Ltd., [1964] A.C. 465 (H.L.). Mr. Sopinka sums up the requirements for liability as follows: a) there must be an untrue statement; b) it must have been made negligently; c) there must be a special relationship giving rise to a duty of care; and d) there must be reliance which is foreseeable. His submission to the Court comprised a reconstruction of the facts to show that none of these prerequisites

was present. His problem is that Mr. Justice O'Leary made very clear findings of fact against the Bank on all four requirements.

24 The main difficulty I have with Mr. Sopinka's approach to the facts is that he attempts to isolate them from their context when it is the context that gives them meaning. For example, with respect to the falsity of the September 8, 1972 letter Mr. Sopinka attempts to show that, on the basis of Courtot's estimates of total project costs minus soft costs, the Bank was justified in representing [page284] that it was loaning Courtot sufficient money to complete the project. This seems to me to completely overlook the fact that what Mason was seeking was an assurance that Courtot would have sufficient funds at a time when Mason already knew the basic terms of the Bank's loan to Courtot. In other words, the September 8, 1972 letter would, as the Bank knew, be construed as an assurance of something over and above the terms of the loan, yet the Bank went ahead and gave that assurance relying solely on the terms of the loan and Courtot's cost estimates. Mr. Hway may have felt at the time that he was justified in his hope that the soft costs would not materialize before permanent financing had been secured, but he was not justified in assuring Mason that there would be sufficient funds without informing them that his assurance was based on the assumption that soft costs would not be incurred.

25 The same general comment can be made with respect to Mr. Sopinka's submissions on negligence, particularly in relation to special relationship and reliance. The Bank had a special relationship with Mason because it was inducing Mason to sign a contract with Courtot in reliance on the Bank's assurance of adequate financing. The statement was negligent because it was made without revealing that the Bank was giving an assurance based solely on a loan arrangement which Mason had already said was insufficient assurance to it of the existence of adequate financing.

26 Not only was the Bank's misrepresentation made negligently but it is clear from the finding of fact of Mr. Justice O'Leary that Mason relied on it and that such reliance was foreseeable by the Bank. I believe therefore that all the requirements for negligent misrepresentation are met in this case.

27 One of the interesting legal issues with respect to negligent misrepresentation is the issue of damages. Mason cross-appealed on this issue. The Bank concedes that in principle the proper aim of a damage award is to restore the plaintiff to the [page285] position in which he would have been if the negligent misrepresentation had never been made: see McGregor on Damages (14th ed. 1980), at p. 996. The Bank argues that Mason would have lost money in any event even if the misrepresentation had not been made because it would have lost money in severing its relationship with Courtot. The problem with this submission is that the trial judge made an express finding to the contrary. What we have to assume, I believe, is that but for the misrepresentation Mason would have ceased work for Courtot, recovered its expenses for work already done and found another construction project to work on.

28 The learned trial judge awarded damages for misrepresentation on the basis that they were equal to contract damages minus Mason's anticipated profit. Counsel for Mason submits that the trial judge was wrong in subtracting the anticipated profit because damages in contract and tort are the same. He also submitted that interest should have been awarded on the damages at 12 per cent from the completion of the project on October 7, 1974. While I tend to the view that there is a conceptual difference between damages in contract and in tort, I believe that in many instances the same quantum will be arrived at, albeit by somewhat different routes.

29 I agree with the submission of counsel for Mason that the trial judge was wrong in subtracting profit. I believe that in principle one is entitled to assume that Mason would have found a profitable means of employing itself had it not been induced to work on the Courtot project by the Bank's misrepresentation. This in my view is a reasonably foreseeable head of damage: see Patrick L. Roberts Ltd. v. Sollinger Industries Ltd. (1978), 19 O.R. (2d) 44 (Ont. C.A.). In equating Mason's lost profit with the profit estimated on the Courtot project we are simply saying that this is a reasonable estimate of what [page286] Mason would have been likely to have made if it had decided to abandon the Courtot project and find other work. That is to say, the lost profit on this contract represents the lost opportunity for profit on any contract. If Mason had made an exceptional profit on the Courtot project it might be disentitled to an award of the entire amount of that profit in tort damages, but this would be so only because it was not reasonably foreseeable that it would have made a similarly exceptional profit on some other contract.

30 On the basis of the same reasoning it seems to me that Mason ought to be entitled to prejudgment interest as of the date of completion of the project. In other words, to put Mason in the position it would have been in absent the misrepresentation we must assume that it would have in hand at the time it completed the project that amount of outlay and anticipated profit which it lost in completing the project. It seems to me to be only reasonable to assume that it would have been able to put that money to profitable use. Interest is the court's way of compensating Mason for the loss of the opportunity to invest that money.

31 I note that in connection with the issue of negligent misrepresentation the learned trial judge found that the Bank had a duty to warn Mason in April 1974 that Courtot did not have enough money to complete the project. This, in my view, is a separate (although related) head of liability. However, because the original negligent misrepresentation encompasses a greater liability than the duty to warn I do not consider it necessary to deal with this aspect of the case.

(3) Section 4 of the Interest Act

32 I do not believe there is any merit in Mason's appeal on this issue. As Mr. Robinette points out, it would be elevating form over substance to characterize the transaction between the Bank and Courtot as something other than a mortgage on real estate simply because the Bank took other security in addition to the mortgage contained in the demand debenture. Throughout its pleadings [page287] and argument Mason concedes that the Bank is a mortgagee but it is attempting to suggest that the meaning of a "mortgage on real estate" in s. 4 of the Interest Act is somehow different from its meaning in any other context. I cannot accept this.

33 Furthermore, I believe that the Bank's interpretation of s. 4 is much more in accord with the legislative purpose of the Interest Act. Section 4 is consumer protection law in the sense that, with respect to loans other than real estate mortgages, consumers are entitled to know the annual rate of interest they are paying. A sophisticated commercial borrower like Courtot, who in this case was borrowing at a floating rate of interest, is in scant need of protection by being informed of his rate of interest at the annual, rather than the 360 day, rate. More to the point, as Mr. Robinette points out, since the section allows a borrower to escape from what would otherwise be a valid arm's length financial transaction, it is unfair to adopt a construction which does not take account of the legitimate interests of the lender. I do not think that either the letter or the policy of the law supports the interpretation urged on the court by Mason and I would

affirm the Court of Appeal's decision on this issue.

(4) Estoppel

34 This issue was not pursued in great depth by the parties. I believe, however, that this is not a case for the application of promissory estoppel simply on the ground that the Bank never represented that it would not rely on its priority as mortgagee: see Re Tudale Explorations Ltd. and Bruce (1978), 88 D.L.R. (3d) 584 (Ont. H.C.). Accordingly I do not see how Mason could make out a case of detrimental reliance with respect to its mechanics' lien.

35 While the case of Elmvale Lumber Co. v. Laurin (1977), 16 O.R. (2d) 241 (Ont. S.C.), seems to support Mason, the weight of appellate authority appears to be in the other direction. This [page288] may represent less of an anomaly than one might think since I suspect that someone in Mason's position will often be able to recoup its losses in damages for negligent misrepresentation from the mortgagee and that this protection will be more comprehensive than an estoppel with respect to a mechanics' lien. The reason for this is that in a mechanics' lien action the mechanic can only call on his share of the proceeds of the sale of the property and then only on a pro rata basis with other lien claimants. Postponement of the mortgagee's priority on the lien gives him a better chance of being paid in full but it is no assurance. In a negligent misrepresentation action, however, the mechanic can call on the full assets of the mortgagee (including the proceeds of the exercise of the mortgagee's priority on the sale of the property) and he does not have to compete with other lien claimants unless, of course, they also have a cause of action for negligent misrepresentation. Accordingly I think the Court of Appeal was correct on this issue.

3. Conclusions

(1) The Bank is not liable to Mason in contract but is liable in negligent misrepresentation.

(2) Although damages for negligent misrepresentation would normally be assessed in terms of actual loss, including lost opportunity, rather than loss of anticipated profit, in this case the commercial context in which the parties operated dictates that Mason's loss should be calculated in the same way in tort as it would be in contract. Mason is accordingly entitled to damages in the sum of $1,138,151.63, being the entire balance outstanding under its contract with Courtot, plus interest on this amount at the rate of 9 per cent per annum from October 7, 1974 to March 21, 1980.

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(3) The Bank's claim to interest is not limited by s. 4 of the Interest Act since the Bank's loan constitutes a mortgage on real estate.

(4) The Bank is not estopped from asserting its priority over Mason's lien since it made no representation that it would not assert such priority.

4. Disposition

36 In accordance with the foregoing reasons I would dismiss the appeal of the Bank in the

contract/tort action. I would allow the cross-appeal of Mason and vary the judgment of the Court of Appeal to award Mason pre-judgment interest at the rate of 9 per cent per annum from October 7, 1974 to March 21, 1980. I would award no costs of the appeal or cross-appeal.

37 I would dismiss the appeal in the mechanics lien action with costs.

Appeal dismissed and cross-appeal allowed (in the contract/tort action); appeal dismissed with costs (in the mechanics' lien action).

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