Merger and acknowledgment clauses under the Contractual Remedies Act 1979

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In this article Professor McLauchlan analyses the recent case law concerning the effect of merger and acknowledgment clauses under section 4 of the Contractual Remedies Act 1979. He shows that the section has not been given its literal meaning; rather such clauses are regarded as prima facie not conclusive, opening up the issue of fairness and reasonableness in the circumstances. Further, there appear to be no cases in which deserving plaintiffs have been denied a remedy by the existence of such clauses. He concludes that the only kind of situation where an acknowledgment clause ought to be treated as conclusive is where the parties deliberately and conciously decided not just to sign a written contract but to limit their commitments to the terms recorded in that written contract.

I. INTRODUCTION [1]

It is commonplace for contractual documents to include clauses purporting to limit the parties' agreement to the terms set out therein and/or to negative the existence of actionable misrepresentation. These clauses are found in many standard form contracts, sometimes in addition to ordinary exemption clauses excluding or limiting liability for misrepresentation and breach, and they take a variety of forms. First, there is the "merger" clause which simply provides :

> This document contains the whole of the contract between the parties hereto.

Secondly, there is the clause whereby one party acknowledges that he has not relied upon statements made to him. For example :

> The purchaser admits that he has inspected the land and the improvements thereon and that he purchases them solely in reliance upon his own judgment and not upon any representation or warranty made by the vendor or any agent for the vendor.

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1 This article extends and updates chapter 3 of F. Dawson and D.W. McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell (N.Z.) Ltd., 1981)

Other clauses purport to negative not only reliance but also the very existence of any actionable statements other than those recorded in the writing. For example :

> I acknowledge that I have inspected the vehicle and have relied upon such inspection and my own judgment in contracting for the same and that no warranties representations or promises have been made by you or your servants except those given in writing and endorsed hereon.

Another approach, where the transaction is being conducted through a salesman or other intermediary, is to exclude either the existence of agency or authority to make representations. For example :

> The vendor does not make or give and neither the auctioneer nor any person in the employment of the auctioneer has any authority to make or give any representation or warranty in relation to this property.[2]

The effect of such clauses at common law was far from clear.[3] The main objection to them is that sometimes they may simply be *untrue*. Thus, in the case of a "merger" clause, the actual position may be that an oral undertaking was given which was intended to be legally binding, so that the writing was *not* in fact assented to as the complete record of the parties' contract. Even in a freely negotiated contract, it is possible that the parties may not have directed their minds to the accuracy or full implications of the clause. Similarly, in relation to the other types of clause mentioned above, there may be clear evidence that a representation *was* made and *was* relied upon, or that the agent *did* have ostensible authority to make the representation in question.

It was this realisation which prompted Parliament, when reforming and codifying the law relating to misrepresentation and breach of contract in the Contractual Remedies Act 1979, to enact section 4 of the Act. This provision, conceived on the basis of some extraordinarily muddled thinking on the part of the Contracts and Commercial Law Reform Committee,[4] was intended to ensure that "the Court will not be precluded from

2 It is not uncommon to find clauses stating that a salesman is deemed to be the agent of the purchaser and not the seller.

3 See, with regard to merger clauses, D.W. McLauchlan *The Parol Evidence Rule* (Professional Publications Ltd., Wellington, 1976) 73-79. As to the other clauses acknowledging the non-existence of actionable misrepresentation, see, e.g., *Rorison* v. *McKey* [1952] N.Z.L.R. 398, 402 and *Kemp* v. *Dalziel* [1956] N.Z.L.R. 1030, 1032, but contrast the approach of the English Court of Appeal in *Lowe* v. *Lombank Ltd.* [1960] 1 W.L.R. 196, 204 (acknowledgment clause can only operate as an estoppel), followed by Barker J. in *Westons Motors Ltd.* v. *Urlich*, Unreported, Whangarei Registry M.126/85, December 1986.

4 See Dawson and McLauchlan, supra n.1, 41-44.

ascertaining the position in fact"[5] and that the representor "will not be able to shelter behind a lie".[6] Section 4 provides:

(1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question
   (a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
   (b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or
   (c) Whether, if it was a representation, it was relied on
   the Court shall not, in any proceedings in relation to the contract, be precluded by the provision from inquiring into and determining any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

(2) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question whether, in respect of any statement, promise, or undertaking made or given by any person, that person had the actual or ostensible authority of a party to make or give it, the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining that question.

(3) Notwithstanding anything in section 56 or section 60(2) of the Sale of Goods Act 1908, this section shall apply to contracts for the sale of goods.

(4) In any proceedings properly before a Small Claims Tribunal, this section shall not limit the powers of the Tribunal under section 15(5) of the Small Claims Tribunal Act 1976.

To understand s.4, it must be read alongside s.6. The former essentially complements the latter, which is the key section of the Act. Section 6 allows damages to be awarded for misrepresentation "in the same manner and to the same extent as if the representation were a term of the contract that has been broken". Thus, for most practical puposes, it abolishes the representation/term distinction[7] and sweeps away the remaining vestiges of the parol evidence rule.[8] In this context, it is interesting to recall

5 Contracts and Commercial Law Reform Committee, *Report on Misrepresentation and Breach of Contract* (1978) p. 15.
6 *N.Z. Parliamentary Debates*, vol. 422, 76 (1979), Mr Brill M.P.
7 Dawson and McLauchlan, supra n.1, 34.
8 Ibid., 41-44.

the views which found favour with some members of the Contracts and Commercial Law Reform Committee when it first considered reform in 1967:[9]

> There are . . . strong arguments against any relaxation of the present rules governing the admissibility of oral statements where the terms of a written contract are in question. Contracts between businessmen in particular are frequently bulky documents, the end product of a long process of bargaining in which each party has received legal and technical advice. *To allow the whole course of negotiations to be traversed in order to ascertain the terms of such a contract seems both unreasonable and impracticable.* From the point of view of principle it seems to this group that where a party by executing a document or in some other manner acknowledges "this is our bargain" then it is to this expression of agreement alone that the Courts should be permitted to look. From the point of view of practice they consider there would be no certainty before any issue was litigated as to precisely what the terms of a contract were. Moreover if litigation did follow its length and expense could be much greater.

By contrast, the legislation finally enacted does allow "the whole course of negotiations to be traversed". Plaintiffs relying on s.6 must necessarily lead evidence of the pre-contract negotiations and, if they manage to convince the court that a misrepresentation by the defendant did induce the contract, they are entitled to damages as if the representation were a term. The policy behind s.6 (and, of course, s.4) plainly is that the courts should be permitted to look beyond the written expression of agreement and to inquire into the pre-contract exchanges.

II. THE SCOPE OF SECTION 4

On its face s.4 applies only to clauses of the type set out earlier which have the aim of negativing the existence of actionable representations or terms not contained in the writing. The section does not authorise the court to disregard true exemption clauses[10] - clauses which exclude or limit liability, or the availability of any remedy, for misrepresentation or breach of contract. For example :

> Any misrepresentation shall not annul the sale or be grounds upon which compensation may be claimed.

or

> It is a term of this contract that no action shall be brought to enforce any oral promises or representations made by the vendor, notwithstanding that they are terms of this contract, and the purchaser waives all rights which he might otherwise have in respect of any such oral promises or representations.

9 *Report on Misrepresentation and Breach of Contract* (1967) para. 12.42 Emphasis added.

10 Cf. the unsuccessful attempt to invoke s.4 in relation to a clause excluding liability for breach of contract in *Aggrecote Industries Ltd.* v. *A.C. Hatrick (N.Z.) Ltd.*, Unreported, Christchurch Registry A. 135/81, Cook J. 21 November 1986.

As discussed elsewhere,[11] it is a matter of some controversy whether, in light of s.5 of the Act, such clauses are effective to exclude liability for misrepresentation. Whatever the true position, it is plainly anomalous that s.4 enables a court to disregard (or give effect to) a clause saying "there are no representations" but not one saying "no liability for representations".

It should also be noted that a merger clause which states that the writing contains all the terms of the contract would not, even if treated as conclusive, bar a representee's right to damages under s. 6. That section allows damages for an innocent misrepresentation as if it were a broken term. The fact that the representation cannot *actually be* a term is of little significance.

III. THE COURT'S DISCRETION

In attempting to predict the likely approach of the courts to s.4, the following views were expressed by Francis Dawson and the writer in our book on the Contractual Remedies Act.[12]

> It will have been noted that the court's discretion under s. 4(1) is framed in quite different terms from that in s.4(2). The latter simply provides that a "no authority to make representations" clause shall not preclude a court from inquiring into the true position. The discretion is completely unfettered. However, in s. 4(1), the power of the court to inquire into the questions in paras (a), (b) and (c), despite the contractual clause, is subject to the qualification - "unless the court considers that it is fair and reasonable that the provision should be conclusive between the parties". It would appear, therefore, that s. 4(1) lays down a two-step review process. The court must first ask itself whether it is fair and reasonable to treat the clause as "conclusive", i.e. to prevent an inquiry into the plaintiff's allegation. Only if the decision is in the negative may the court proceed to inquire into and determine the question whether the representation or promise alleged by the plaintiff was made.
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> In deciding whether an inquiry ought to take place, the courts are directed to have regard to such specific matters as "the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor . . . ." Thus, it is intended, to take a clear case, that the court will ordinarily inquire into the plaintiff's allegation where the contract is in a standard form, the defendant was in a superior bargaining position and the plaintiff did not receive independent advice. Not only is it more likely in such a case that what is stated in the clause is untrue, but it is also, given the nature of the contract, fair and reasonable that an inquiry ought to be carried out. On the other hand, the courts are directed to take into account that the price of perfect justice in the individual case (expense, delay and uncertainty of litigation) may sometimes be too high. Thus, "it is not envisaged that the court will generally use its power when the question before it relates to long and protracted negotiations in respect of large commercial contracts between two parties of similar bargaining strength. In this type of contract it is often fair

11 Dawson and McLauchlan, supra n.1, ch. 11.
12 Ibid., 38-40.

and reasonable that the need for certainty should prevail over the desirability of a full investigation into the actual facts of the case".[13] Although such an inquiry might substantiate the plantiff's allegation, the demands of commercial convenience and certainty may sometimes properly take precedence.

However, it must be borne in mind that the court's powers are very flexible and that there is nothing in s. 4 which would prevent an inquiry into the plaintiff's claim in the latter type of case if the court considered that, in view of other circumstances, it would be unreasonable to treat the clause in question as conclusive. Indeed, the true position may be that the courts will never be able to avoid an investigation into the "actual facts of the case". Certainly they will experience problems in divorcing the two inquiries. Section 4(1) states that, in deciding whether it is fair and reasonable that the clause should be conclusive, the court is to have regard to *all the circumstances of the case*. It is difficult to see how the court can have regard to all the circumstances unless it first listens to the evidence relating to the negotiations between the parties, the other events surrounding the conclusion of the contract, the nature of the alleged representation or promise, and the plaintiff's explanation of why the clause which negatives his contention was not deleted from the written contract. Thus, in deciding the preliminary issue whether there ought to be an inquiry, the court necessarily becomes involved in listening to and evaluating evidence which will decide the result of an actual inquiry.

Further, when a dispute to which s. 4(1) is relevant comes on for trial, it is likely that the court will allow the plaintiff to adduce his evidence, reserving for later argument and decision the question whether it is reasonable that the clause should be conclusive. If the court happens to be convinced by that evidence and it is considered reasonable in all the circumstances that he should have his remedy, the chances of a later decision that the clause should be conclusive are obviously rather remote.

For these reasons, we believe that in practice s. 4(1) will be applied as if it enacted (a) that the clauses referred to are not conclusive and (b) that in determining the *weight* to be attached to such clauses the court should have regard to the specific matters mentioned in the subsection. In other words, the latter will be of significance in determining, not whether an inquiry ought reasonably to take place, but the outcome of what is in reality an actual inquiry. They will affect the plausibility of the plaintiff's assertion - the weight to be attached to the clause and consequently the quality of the evidence required to rebut it. Thus, in the case of a genuinely negotiated contract entered into between parties of equal bargaining strength it is less likely that the clause would have been left in the contract if the alleged oral representation or promise had been made. The chances will be correspondingly greater that the clause represents the position in fact if, for example, the parties were commerical men and/or were represented by solicitors. On the other hand, if the contract is in a standard form with the alleged representor being in a superior bargaining position, it is not so likely that the clause was brought to the representee's attention and its implications considered. He will not have read the clause, let alone understood its effect upon the representations and

13 N.Z. Parliamentary Debates, vol. 422, 76-77, Mr Brill M.P. See also ibid., 624.

promises made by the other party. The chances are greater that the clause does not represent the true position.

IV. JUDICIAL APPROACHES TO SECTION 4

Although it cannot be said that the courts have tended to treat the factors mentioned in s.4 as matters going to weight, the other observations in the concluding paragraphs of the previous section have been largely borne out by the cases in which s.4 has been invoked. First, s.4 has not been given its literal meaning. The courts have interpreted the section as if it simply provided that the clauses referred to are prima facie not conclusive. In other words, they do not provide a defence to an action for misrepresentation unless it is fair and reasonable that the representor should not be liable. Invariably, the courts have addressed acknowledgment clauses at the conclusion of their determination of the factual and legal issues relating to the representor's alleged liability for misrepresentation. In cases where the issue of liability has been resolved in favour of the representee, the practice has been simply to ask - is it fair and reasonable in the circumstances to allow the representor to rely on the acknowledgment clause in the contract? Thus, although the intention behind s. 4 is that the courts might sometimes decide that the need for certainty should prevail over the plaintiff's demand for a full investigation into the actual facts of the case, it has not worked out that way.

Secondly, there appear to be no cases in which a deserving plaintiff has been denied a remedy through the existence of an acknowledgment clause. The only instances in which it has been held, or suggested *obiter*, that such a clause was conclusive have been cases where either (i) the plaintiff had in any event failed to prove that actionable misrepresentation had occurred or (ii) the plaintiff substantially succeeded in its action on other grounds.

Section 4 was first considered by Casey J. in *M.E. Torbett Ltd.* v. *Keirlor Motels Ltd.*[14] The judge found that the plaintiff was induced to purchase a business by the defendant's fraudulent misrepresentation as to the amount of wages paid. The contract contained an acknowledgment clause which, by its terms, did not apply in cases of fraud. Casey J. held that, even if fraud were not established, the clause failed. Notwithstanding the importance of the transaction, the large amount of money involved,[15] the equal bargaining strengths of the parties and their representation by solicitors, the judge was satisfied that in all the circumstances it would be unjust to allow the defendant to rely on the "exclusion clause". This decision may be contrasted with *Falls Enterprises Ltd.* v. *M.D. & R.C. Butler Ltd.*[16] where Vautier J., having categorically rejected the

14 (1984) 1 N.Z.B.L.C. 102,079.

15 *Quaere* whether the judge actually regarded these factors as supporting his conclusion rather than negating it, as the legislature intended.

16 Unreported, Auckland Registry A. 293/85, 18 July 1985.

existence of actionable misrepresentations inducing the sale of a motel business, went on to suggest[17]

> that it would be exceedingly difficult to argue successfully that the Court should do other, on the facts of this case, than conclude that it would be fair and reasonable for the provision in the agreement to be conclusive between the parties. This was a case of parties who were very much in an equal bargaining position with the purchasers under no pressure of any kind and able to make all the inquiries and obtain all the information thought necessary to make a proper appraisement and with the advantage of advice from an experienced solicitor from the outset of the negotiations until the conclusion of the contract.

It is difficult to avoid the conclusion that in both cases the judges' views concerning the application of s.4 were very much influenced by the outcome of their inquiries into the merits of the plaintiffs' allegations of misrepresentation.

The same may perhaps be true of the next case of *Russell* v. *Wotherspoon*,[18] where Casey J., having found that the plaintiffs were induced to buy the defendants' coffee lounge by misrepresentations as to turnover and profitability, held that it was not fair and reasonable that the acknowledgment clause should be conclusive:

> The Russells had no previous experience and made this known to the vendors. The subject-matter was one in which the all-important questions of turnover and profitability were entirely within the vendors' knowledge and unless they chose to make full disclosure, the purchasers had no realistic means of discovering them. As it turned out, Mr Wotherspoon suppressed or destroyed the records of what he represented was the principal area of sales - the factory orders. The amount of money involved was substantial for both parties and the Russells relied on what they were told and did not consult a solicitor until their own experience suggested it was misleading.

The first detailed analysis of the factors to be weighed in adjudicating on the issue of conclusiveness under s.4 is to be found in the judgment of Henry J. in *Herbison and Goodare* v. *Papakura Video Ltd.*[19] This case concerned representations on the sale of a business as to turnover and trading accounts which were the subject of express warranties in the written contract. The representations were false and the plaintiffs were held entitled to damages for breach of contract. However, a further cause of action for misrepresentation relating to month by month turnover figures which were not incorporated in the written contract failed. That contract, after providing that the defendants warranted the accuracy of turnover figures and business records incorporated in the contract, stated: "Otherwise the Purchaser enters into this agreement relying upon his own judgment and not on any representation or warranty made by the Vendor except as expressed in this agreement." This provision was held to be conclusive despite the fact that the monthly figures bore a close relationship to the material included in the

17 See also the similar approach in *Patrick & Heyes (1985) Ltd.* v. *Lesters Pies Ltd.*, Unreported, Hamilton Registry A. 221/83, Doogue J. 21 November 1986.

18 Unreported, Auckland Registry A. 1163/83, 26 September 1985.

19 [1987] 2 N.Z.L.R. 527.

contract and were in fact an important inducement to the purchasers. These factors were strongly outweighed by the following factors in favour of conclusiveness: the transaction involved a sale at the substantial figure of $385,000; there was no disparity between the respective bargaining strengths of the parties; both parties received legal advice during the critical stages of negotiations; the precise wording of the special terms, including that containing the warranty and the acknowledgment clause, was the subject of detailed negotiation; the representation in question was originally incorporated in the contract but then was deliberately replaced; and the plaintiffs were experienced businessmen who had employed specialist accounting assistance before concluding the contract.

There have been two other important recent cases which call for more detailed analysis and comment - *Shotover Mining Ltd.* v. *Brownlie*[20] and *Collings and Brighouse* v. *McKenzie*.[21] It is convenient to deal with the latter first.

A. Collings and Brighouse v. McKenzie

In this case the plaintiffs purchased a launch from the defendant. The contract described the launch's engine as "Ford 180, hours 230, year 1983". The printed terms included the following clause:

> 8. The purchaser hereby confirms that he has entered into this agreement without relying on any representation or warranty given by the vendor or his agent and that he has relied upon his own inspection (or the inspection of his surveyor if appropriate). AND THE PURCHASER HEREBY UNDERTAKES AND ACKNOWLEDGES THAT HE SHALL MAKE NO CLAIM AGAINST THE VENDOR OR HIS AGENT IN RESPECT OF ANY REPRESENTATIONS OR WARRANTIES GIVEN BY THE VENDOR OR HIS AGENT.

When the engine broke down and was judged to be beyond repair the plaintiffs claimed damages for, inter alia, the cost of a new engine. They relied on two alternative causes of action: breach of condition and misrepresentation. They were successful in the former but failed in the latter.

On the first cause of action Eichelbaum J. found that the defendant had breached the term of the contract that the engine was manufactured by Ford in 1983. Not only had the engine not been manufactured by Ford but it had also served a long and hard life as a truck motor before being converted to marine use in 1983. Since the broken term constituted " a substantial ingredient in the identity of the thing sold"[22] it was properly classified as a condition of the contract and hence fell outside the exclusion clause relating to "representations and warranties" in the second sentence of clause 8.

However, the alternative cause of action for misrepresentation failed on the ground that, although the defendant had prima facie made an actionable misrepresentation, it was

20 Unreported, Invercargill Registry CP. 96/86, 30 September 1987 McGechan J.
21 (1988) 2 N.Z.B.L.C. 102, 997.
22 Ibid., 103,010.

fair and reasonable in the circumstances that clause 8 should be conclusive. The judge found "a considerable preponderance of elements in favour of such a decision".[23] First, although the subject matter of the contract was not intrinsically important, for private individuals the consideration involved was substantial. Secondly, the bargaining strengths of the parties were equal. Thirdly, one of the plaintiffs was an experienced solicitor and hence, for all practical purposes, the plaintiffs were "represented or advised by a solicitor" within the meaning of that expression in s.4. Fourthly, although the clause was contained in a standard form, the situation was far removed from the familiar "take it or leave it" choice facing the consumer buyer. The judge found that there was no pressure on the plaintiffs to accept the standard form and that if they had reservations about any of the printed conditions they would not have hesitated to raise them. Furthermore, the first plaintiff (the solicitor) had indicated his awareness of clause 8 by initialling it and he agreed in evidence that he was familiar with provisions of that kind. Fifthly, the judge took into account "the fact that the purchasers had a right of access by an expert before the contract became unconditional and that if they had exercised such right in relation to the engine and had asked the surveyor any questions about it they would assuredly have learned that its provenance was not what they had been led to believe".[24] All these factors heavily outweighed the one factor against conclusiveness - the significant amount of the loss suffered by the plaintiffs. His Honour then concluded by observing:[25]

> If in these circumstances I were to hold that the clause was not fair and reasonable I think I would be yielding to the traditional (and natural) distaste of Courts for exclusion and limitation provisions generally, rather than acting upon any reasoned application of the criteria set out in s.4.

The first point to note in relation to this decision that clause 8 was conclusive is that it had no practical effect, apart from reducing the award of costs, as the plaintiffs succeeded in recovering the damages claimed for breach of contract. Further, one wonders what the judge's attitude would have been if the description of the engine had not been incorporated as a term of the contract and hence if misrepresentation had been the plaintiffs' only cause of action. Let us suppose that prior to the contract the plaintiffs had made enquiries of the defendant concerning the engine and were given orally the false information which, on the actual facts, was a contractual term. Suppose further that the plaintiffs noted the provisions of clause 8 but, as so often happens, gave their significance no special thought. If they relied on the defendant's misrepresentation and that misrepresentation resulted in a substantial loss, it is difficult to believe that they would have been denied a remedy.

Two other issues are raised by Eichelbaum J.'s reasoning. First, despite the judge's firm belief that the defendant was prima facie liable for misrepresentation, it has to be questioned whether this was a case where, absent clause 8, it was appropriate to grant a remedy for misrepresentation. Given that the defendant's statement was a term of the contract, was there an actionable misrepresentation at all? Does every false statement of

23 Ibid., 103,012.
24 Idem.
25 Idem.

fact which is incorporated as a term of the concluded contract give rise to a remedy for misrepresentation? Section 6 of the Contractual Remedies Act would appear to be drafted on the assumption that the answer is no. That section gives a right to damages *as if the representation were a term* of the contract that has been broken. Further, as discussed by the writer elsewhere,[26] it is difficult to accept that a representation which becomes a term can still retain an independent existence outside of the contract. The representation should either be "in", so that the representee's action is for breach of contract, or it should be "out". Is not the case for this view even stronger now that the Contractual Remedies Act has assimilated the remedies for misrepresentation and breach of contract? The good pragmatic reasons for favouring the contrary view prior to statutory reform simply no longer exist.

The second difficulty raised by the judge's reasoning concerns his assumption that clause 8 was governed in its entirety by s.4. However, that clause actually went beyond the kind of merger and acknowledgment clauses that are addressed in s.4. It did not simply purport to negative the existence of representations or reliance. It went further and purported to *exclude liability*. As mentioned earlier,[27] s.4 does not, and was never intended to, deal with such a clause. The distinction is, to say the least, a fine one and judicial impatience with it would be both understandable and welcome. But in the present case the issue was not even spotted.

B. Shotover Mining Ltd. v. Brownlie

The facts of this mammoth case - the judgment of McGechan J. runs to 193 pages and a reading of it requires a considerable feat of concentration and endurance[28] - can thankfully be stated quite shortly for present purposes. The plaintiff purchased a mining licence from the defendant for $500,000. The contract was found to have been induced by fraudulent misrepresentation as to the depth and volume of gravel in the claim. Clause 8(e) of the contract contained a typical acknowledgment clause:

> The purchaser acknowledges that it has purchased the licence solely in reliance upon its own judgment and not upon any representation or warranty by the vendor or any agent of the vendor and the vendor does not warrant the accuracy of any matter of fact herein or any document or paper or any statement by the vendor or any other person.

For reasons to be canvassed shortly, McGechan J. held that it was not fair and reasonable to treat this clause as conclusive and accordingly the plaintiff succeeded in its principal cause of action for damages under s.6 of the Contractual Remedies Act.

The judgment of McGechan J. contains a lengthy account of the background to s.4, the general principles to be applied and some of the previous authorities[29] in which the

26 Dawson and McLauchlan, supra n.1, 46.
27 See text to n. 10.
28 For a useful summary see the note by Don McMorland in (1988) 4 B.C.B.233.
29 Those not referred to include *Falls Enterprises Ltd.* v. *M.D. & R.C. Butler Ltd.* supra n. 16 and *Russell* v. *Wotherspoon* supra n. 18.

section has been considered. The only aspect of this discussion which calls for particular note here concerns the effect of fraud on merger and acknowledgment clauses. His Honour cited the judgment of Casey J. in *M.E. Torbett Ltd.* v. *Keirlor Motels Ltd.*[30] as authority for the view that such clauses, as a matter of law, do not apply to fraud and said:[31]

> While not in any way dissenting from that approach, I prefer a slightly different route. It may be that s.4 is a codification. If that be so, it may be safer to commence from the exact words of the section. On that basis, the initial question always is whether it is "fair and reasonable" that such an exclusion clause be conclusive. It may well be that if fraud is proved it would be seldom indeed that it would be "fair and reasonable" to allow an exclusion clause to prevail. The end result on either approach is likely to be the same in most cases. However leaving some room for the exceptional case where there could perhaps be some counterbalancing fraud, disgraceful conduct, or other exceptional circumstances, I would prefer to avoid a remorseless rule under which s.4 must always give way to fraud. I prefer to approach the matter as a balancing exercise in which the existence of fraud is simply one factor in determining that which is "fair and reasonable", albeit a factor obviously of very considerable weight indeed.

Although unexceptionable in themselves,[32] the above remarks appear to the writer to be based on a misinterpretation of what Casey J. said in the *Torbett* case. Casey J. did not lay down a proposition of law that merger and acknowledgment clauses do not apply in cases of fraud. He said that the *particular clause* in question *expressly provided* that it did not apply to fraud. The misunderstanding stems partly from Casey J.'s failure to set out the precise terms of the acknowledgment clause in his judgment but it seems certain that, as in several other cases involving contracts for the sale of businesses in the Auckland region,[33] the clause expressly stated that "this provision shall not however operate to relieve the vendor or any agent of the vendor from liability for any fraudulent misrepresentation".[34]

However, of greater interest in the context of this article is McGechan J.'s reasoning in support of his conclusion on the facts that it was not fair and reasonable to treat the acknowledgment clause as conclusive. That reasoning was as follows:[35]

> Given the terms of s.4 and trends in judicial interpretation, if it were not for Mr Brownlie's fraud I would be inclined to uphold the conclusive nature of the provision. The circumstances of the case include subject matter in the form of estimating resources in relation to which representations are intrinsically

30 Supra n.14.
31 At p. 145.
32 See the similar approach of Hillyer J. in *Bird* v. *Bicknell* [1987] 2 N.Z.L.R. 542, 552.
33 *Falls Enterprises Ltd.* v. *M.D. & R.C. Butler Ltd.* supra n. 16, *Russell* v. *Wotherspoon* supra n. 18, and *Bird* v. *Bicknell* supra n. 32.
34 The New Zealand editors of Cheshire & Fifoot *Law of Contract* (7th ed., Butterworths, Wellington, 1988) p. 187 similarly misinterpret Casey J.'s judgment in *Torbett*.
35 At pp. 150-151.

> dangerous, and the matter was of considerable value. The parties had equal bargaining power. If anything, Mr Brownlie was under slightly greater pressure for financial reasons. Each party had apparently competent accounting and legal advice available. Each side had business experience. If anything, Mr Brownlie was the less experienced. The agreement concerned was negotiated out in detail with legal advice and assistance. The exclusion clause was not part of a standard form, but was inserted in the course of the negotiating process. It did not go unnoticed by the purchasers. I am not prepared to find on the facts that it was allowed to remain in as a quid pro quo; but certainly its existence was known. Apart from the question of fraud, the whole transaction has all the characteristics of one which would fit naturally within arms length transactions where the precluding effect of exemption clauses may be preserved despite s. 4. Aside from fraud there is but one possible matter which would render it not "fair and reasonable" to allow the clause to prevail. That one is a degree of concern I feel as to whether the [plaintiff's representatives] had legal guidance of an appropriate standard at the final negotiating session. Their solicitor, who was under considerable and unusual time pressures, may not have appreciated the intrinsic dangers of warranty clause 8(e), and may indeed have misunderstood its legal consequences. Whether that would be enough to outweigh factors on the other side I rather doubt, but it is not necessary for me to decide. In the end, I am at one with Casey J. in the approach he adopted in *Torbett* v. *Keirlor Motels Ltd.* (supra). Whatever the decision may have been in the absence of fraud, I am unable to say it is fair and reasonable that warranty clause 8(e) should stand so as to allow the working of a deliberate fraud. There may be exceptional cases where a contrary view could be reached, but the present is not one such. Clause 8(e) does not assist the defendant in relation to proceedings under the Contractual Remedies Act 1979.

Given the finding of fraud, this decision is obviously right and proper. But what of the position in the absence of fraud? The eventual tentativeness of the judge as to whether, absent fraud, the acknowledgment clause would have prevailed is interesting. He clearly favoured upholding the clause but indicated that the plaintiff at least had an argument. The present writer would go further and suggest that the *Shotover* case provides a neat example of a situation where, *despite all the specific statutory indicia being in favour of treating the acknowledgment clause as conclusive,* it would be quite unfair and unreasonable on close analysis of the circumstances to do so.

What are those circumstances? First, the representations as to depth and volume were firmly and positively made. Secondly, they related to a matter of "critical importance".[36] Thirdly, the plaintiff reasonably relied on the representations, particularly in light of the defendant's conduct. McGechan J. found that[37]

> The statements were made with intention they be believed and relied upon, *indeed to the unusual extent of accompanying protestations of honesty and absence of need for tests* .... The statements were made in a situation where the [plaintiff's representatives] not only were unable effectively to test their truth, but positively were dissuaded from doing so.

36 At p. 117.
37 At p. 113, emphasis added.

Thus, the situation was one where the defendant was saying in effect "I am to be trusted" and where the plaintiff realistically judged that attempts at independent verification or incorporation of the representations in the written contract could endanger the delicate negotiations as well as good relations. As the writer has argued elsewhere,[38] the realities of the contract making process are often such that what might appear to be the obvious precaution of altering the written contract to accommodate oral representations is not taken. This may be because of, for example, anxiety to complete the transaction without delay or fear of the testy reply "do you doubt my word?". Indeed, sometimes the more basic the representation the less likely it is to be incorporated in the contract. This leads on to the fourth factor in the circumstances of the *Shotover* case. Although the terms of the acknowledgment clause were adverted to by the plaintiff's representatives, one explanation given in evidence for their failure to object to it was that it was well known to the defendant that his representations were being relied on.[39] In other words, both sides knew that the clause did not represent the position in fact. Another quite plausible explanation given in evidence was that the clause was seen as relating to "ancillary matters" and did not affect information supplied by the defendant which went to "the very essence" of the contract[40] - information the accuracy of which formed the foundation for the negotiations and the eventual conclusion of a contract.

Two other points, albeit of lesser significance, which were brought out by McGechan J. in the course of his analysis of the evidence concerning fraud, should also be noted. First, there was evidence that acknowledgment clauses were "unusual in agreements relating to the working of mining licences".[41] Secondly, the clause "despite being a purchaser's warranty inconsistently [was] added in as a final paragraph following a number of vendor's warranties ... The effect [was] to reduce the prominence of the warranty concerned to the unwary reader".[42]

V. CONCLUSION

To refuse to uphold an acknowledgment clause in the circumstances of a case like *Shotover* (assuming the absence of fraud) where there is a freely negotiated commercial transaction means, of course, that such clauses will rarely be conclusive. The writer has no difficulty with such a result. Where a plaintiff suffers loss as a consequence of misrepresentation reasonably relied upon it will usually be fair that the normal remedies be available. Although the legislature did intend that the demands of commercial convenience and certainty might sometimes take precedence, such factors carry little weight when, as was bound to happen, the courts did not give s.4 its literal meaning and adopted the practice of inquiring into the plaintiff's allegation before deciding whether it was fair and reasonable that an inquiry should take place. Such an approach effectively dismisses or renders irrelevant considerations of convenience and certainty which

38 McLauchlan, supra n.3, 149-150.
39 See p. 73.
40 See p. 78.
41 At pp. 137-138.
42 At p. 138.

presuppose that the plaintiff will not get its day in court and that lengthy and expensive litigation will be avoided.

On this analysis, the only kind of situation where it will be fair and reasonable to treat an acknowledgment clause as conclusive will be that where the parties (usually with the assistance of their professional advisers) have, as in *Herbison and Goodare* v. *Papakura Video Ltd.*,[43] *deliberately and consciously* decided not just to sign a written contract but to limit their commitments to the terms recorded in that written contract. In such a situation it will usually be improper to grant any remedy for misrepresentation, even it it be plain that one did induce the contract, unless the requirements of the equitable remedy of rectification are satisfied; that is, the parties' common intention was that the representation should be a term of their contract but, by mistake, it was not recorded in the writing.[44]

43 Supra n.19.
44 Cf. Dawson and McLauchlan supra n.1, 34.