was within the power of a limited company to enter into such a contract The indentity of its shareholders was not a matter of indifference to the company. Counsel pointed in the present case to statements contained in the press release and the letter from the first defenders' chairman which formed part of the offer document in which the commercial benefits of the take-over to the company were mentioned In the second place it was disputed that such a contract was contrary to the fiduciary duty owed by directors It was a basic and well established principle of company law that the legal personalities of the company and its shareholders were distinct. The fiduciary duty of directors was owed to the company, although its exercise involved balancing disparate interests including those of the company's employees and members. Reference was made to sec 309 of the 1985 Act which provided:

> "(1) The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members
>
> (2) Accordingly, the duty imposed by this section on the directors is owed by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors"

The directors owed no general fiduciary duty to shareholders (*Pennington's Company Law* (5th Ed) p. 682). *Clark v. Workman* showed that they owed a fiduciary duty to the company when considering the exercise of a power of transferring shares. By contrast, in *Percival v. Wright* [1902] 2 Ch. 421 it was held that directors were not trustees for individual shareholders and might purchase their shares without disclosing pending negotiations for the sale of the company's undertaking Directors might become subject to a duty to shareholders incidentally to the discharge of their duty to the company (*Pennington*, p. 683) While it was up to individual shareholders to decide whether or not to accept an offer, if directors took the decision to recommend the acceptance of that offer they had a duty — which might be called a secondary fiduciary duty — to the shareholders to act bona fide and not to mislead them, as was recognised in *Prudential Assurance v. Newman Industries Ltd.* and *Gething v. Kilner*. When an offer was made to shareholders it was the duty of the directors in implement of their duty to the company to consider whether it was in the best interests of the company that it should be accepted They were not under a duty to the shareholders to consider whether the offer was in their best interests and whether they should communicate with them and advise them about it. If, however, the directors considered that acceptance was in the best interests of the company they would be obliged to recommend its acceptance. It was then that they had a duty to see that any advice which they gave was honestly and carefully given The interests of the company and of the shareholders as prospective sellers might well diverge. Reference was made to *Northern Counties Securities Ltd. v. Jackson & Steeple Ltd* [1974] 1 W.L.R 1133, per *Walton* J at pp. 1143–1144 A contract to recommend an offer was relatively normal in the commercial world. There was no suggestion in *Gething v. Kilner, Rackham v. Vavasseur* or *John Crowther Group plc v. Carpets International plc* that it might be invalid. So long as the directors acted bona fide in the interests of a company their powers were untrammelled It was for them to take into account the possibility of a competing bid. Thus in the present case it had been for them to consider that possibility and, on the other hand, the risk that if the first defenders had not co-operated with a view to a "lock-out" bid the pursuers would have ceased to be interested. It was important to note that the pursuers did not aver that the first defenders had entered into a contract not to recommend an offer by another company.

As regards the effect of changing circumstances it was submitted that if after a recommendation had been made by the directors it became clear that the advice given to them was no longer good; the directors were under a duty to change the advice (see *Gething v. Kilner, Rackham v. Vavasseur* and *John Crowther Group plc v. Carpets International plc*) Thus if a third party made

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an unsolicited offer it would be for the directors to consider it in the exercise of their fiduciary duty to the company and their secondary fiduciary duty to the shareholders If it appeared to be clearly better they would require to make an appropriate recommendation So here it was accepted that the contract was subject to an implied condition that in the event of such a change of circumstances it would not be a breach of contract if the first defenders did not recommend acceptance of the original offer. This would be implied on the principle of what was required to give business efficacy. Reference was made to *Stirling v. Maitland & Anor.* (1864) 5 B. & S. 840; 122 E. R. 1043 per *Cockburn* C.J. at p. 852; 1047 in a passage adopted in *Shirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 K. B. 206 by Sir Wilfrid *Greene* M.R. at p. 224 However, this did not apply to a change of circumstances brought about by the actings of the agents of the target company. If it were otherwise it would mean that it was open to them to frustrate the contract.

If an unsolicited approach had been made to the target company which appeared to be likely to lead to a better bid it should have been treated in a neutral manner which was consistent with the agreement not to encourage or co-operate with another approach. Thus the directors should have said that they were committed to recommending the first bid; that it was up to the third party to approach the shareholders; and that if an offer was made to them the directors would consider it and make further recommendations accordingly. It should be borne in mind that it would have been of benefit to the shareholders to have had more than one offer to consider.

In reply to the first defenders' criticism of the factual averments it was submitted for the pursuers that they had averred enough, bearing in mind that the facts as to the alleged contract and its breach were within the knowledge of the first defenders The listing particulars and the press announcement did not purport to spell out all the arrangements that had been made Here Vantona Viyella plc had not been treated in a neutral manner and the first defenders' co-operation with them had resulted in Vantona Viyella plc making an agreed bid.

At the outset I do not accept as a general proposition that a company can have no interest in the change of identity of its shareholders upon a take-over. It appears to me that there will be cases in which its agents, the directors, will see the take-over of its shares by a particular bidder as beneficial to the company. For example, it may provide the opportunity for integrating operations or obtaining additional resources. In other cases the directors will see a particular bid as not in the best interests of the company. As regards the passage in *Morgan v. Tate & Lyle Ltd.* which was founded upon by the first defenders, it should I think be borne in mind that what Lord *Reid* had primarily in mind was the distinction between two forms which nationalisation may take: under one the assets of the company are expropriated, under the other the shares in it are expropriated but the company is left with its business As counsel for the pursuers put it, the company's trade as a trade is unaffected, the nationalisation could only affect the way in which it was conducted. Accordingly I do not accept that, by reason of lack of any interest in the matter, a company could not enter into a contract of the nature alleged by the pursuers.

I next consider the proposition that in regard to the disposal of their shares on a take-over the directors were under a fiduciary duty to the shareholders and accordingly obliged to act in such a way as to further their best interests. It is well recognised that directors owe fiduciary duties to the company. Thus the directors have the duty of fiduciaries with respect to the property and funds of the company. In terms of sec. 309 of the *Companies Act* 1985, when discharging their functions, the directors are under a fiduciary duty to the company to have regard to inter alia the interests of members and employees These fiduciary duties spring from the relationship of the directors to the company, of which they are its agents. I should observe that for the purposes of sec. 309 there appears to be no reason why "members" should not be capable of applying to future as well as to present members of the company.

In contrast I see no good reason why it should be supposed that directors are, in general, under a fiduciary duty to shareholders, and in particular current shareholders with respect to the disposal of their shares in the most advantageous way. The directors are not normally the agents of the current shareholders. They are not normally entrusted with the management of their shares. The cases and other authorities to which I was referred do not seem to me to establish any such fiduciary duty. It is contrary to statements in the standard textbooks such as *Palmer's Company Law* (23rd Ed.) para. 64-02. The absence of such a duty is demonstrated by the remarkable case of *Percival v. Wright*. I think it is important to emphasise that what I am being asked to consider is the alleged fiduciary duty of directors to current shareholders as sellers of their shares. This must not be confused with their duty to consider the interests of shareholders in the discharge of their duty to the company. What is in the interests of current shareholders as sellers of their shares may not necessarily coincide with what is in the interests of the company. The creation of parallel duties could lead to conflict. Directors have but one master, the company. Further it does not seem to me to be relevant to the present question to build an argument upon the rights, some of them very important rights, which shareholders have to take steps with a view to seeing that directors act in accordance with the constitution of the company and that their own interests are not unfairly prejudiced.

If on the other hand directors take it upon themselves to give advice to current shareholders, the cases cited to me show clearly that they have a duty to advise in good faith and not fraudulently, and not to mislead whether deliberately or carelessly. If they fail to do so the affected shareholders may have a remedy, including the recovery of what is truly the personal loss sustained by them as a result. However, these cases do not, in my view, demonstrate a pre-existing fiduciary duty to the shareholders but a potential liability arising out of their words or actions which can be based on ordinary principles of law. This, I may say, appears to be a more satisfactory way of expressing the position of directors in this context than by talking of a so-called secondary fiduciary duty to the shareholders.

This brings me to comment on the use made in argument of the decision of the Court of Appeal in *Heron International Ltd. v. Lord Grade*. It is important to note that this case was concerned with the power of directors under art. 29 of the articles of association, to decide who should be the purchaser and transferee when any shareholder desired to sell his shares. At pp. 264–265 *Lawton* L.J. said:

> "In the present case, for example, the directors as a whole were under a duty to decide whether to sanction a sale by any director of voting shares to Bell. This duty to determine which person shall acquire and be registered as the holder of voting shares in ACC is a fiduciary power which the directors must exercise in the interests of the company and in the interests of the shareholders of the company. The fact that the directors as individuals held between them a majority of the voting shares did not authorise them to reflect their individual inclinations. The directors as directors had a duty to consider whether, in exercise of the fiduciary power vested in them by art. 29, they should agree to voting shares being transferred to Bell."

The directors had accepted the Bell offer in respect of the 53 per cent of the voting shares held by them as individuals, as a result of which no other bid could be successful. It was held that in asserting that they would accept the Bell offer themselves irrespective of what advice should be given to other shareholders, they had ignored the fiduciary duties imposed by art. 29. Accordingly it was a case in which the directors had allowed their personal inclinations to conflict with their duties as directors, with the effect of preventing the other shareholders from having the opportunity to accept or reject a rival bid. I understand *Lawton* L.J. at p. 265 to mean that where it was decided by the directors that the company should be taken over, the duty to consider the interests of the company when exercising the power under art. 29 resolved itself into a duty to have regard to the current shareholders. I do not consider that the case is authority for the proposition that directors

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may not on behalf of the company agree to recommend a bid and not to encourage or co-operate with an approach from another would-be bidder without being in breach of a fiduciary duty to the current shareholders. In passing I would add that the case is also not authority for the proposition that directors are under a positive duty to recommend a bid on the basis that it is the higher bid: see *Re a Company No. 008699 of 1985* (1986) 2 BCC 99,024, per *Hoffmann* J. at p. 99,031, to which I referred counsel. A comparison may be made with the case of *Clark v. Workman*. In that case directors of a private company had power under art. 139 of the articles of association to approve the transfer of shares. The directors approved the transfer of a controlling interest which involved, according to *Ross* J. (at p. 117), "a complete transformation of the company". He held that the directors' action was wrongful and inconsistent with their fiduciary duty to the company in respect that the chairman had fettered himself by a promise to the transferee so that he was disqualified from acting bona fide in the interests of the company.

I do not consider that the first defenders' argument is assisted by the cases of *Greenhalgh v. Arderne Cinemas* and *Parke v Daily News*. The first of these cases was concerned with the question of whether a special resolution was a fraud on the minority in respect that it was not passed bona fide for the benefit of the company as a whole. It was accordingly concerned with the propriety of the actions of shareholders, who are not fiduciaries of the company. In that limited context the expression "the company as a whole" was treated as meaning the corporators as a general body, as opposed to a section of that body. In *Parke v. Daily News* (at p. 963) *Plowman* J. held that it was not lawful for directors to make an ex gratia payment of a large part of company funds to its employees. In that context, which he recognised was a very different context, he adopted the statement that the benefit of the company meant the benefit of the shareholders as a general body. I have some doubt as to whether that was an accurate way of putting the matter. However, that statement was not critical for the decision in the case, the effect of which was reversed in 1980 by an amendment to company law which resulted in sec. 309 of the *Companies Act* 1985 taking its present form.

I have considered the passages in the City Code to which my attention was drawn. Upon the assumption that it is proper for me to take the code into account in a debate on relevancy, its terms do not affect the conclusion to which I have come.

For these reasons I reject the view that directors are under a fiduciary duty to current shareholders in regard to the disposal of their shares in a take-over. Accordingly I reject the arguments presented in support of the contention that the first defenders could not have entered into a contract in the terms indicated by the pursuers' averments.

I consider next the submission that if there had been a contract between the pursuers and the first named defenders it would have been understood as conditional upon the pursuers' bid remaining the best bid from the point of view of shareholders. I understood that this was put forward primarily as a criticism of the unqualified nature of the contract which the pursuers' averments implied.

I am not persuaded that the pursuers' averments are irrelevant for this reason. The pursuers are offering to prove that the first defenders entered into a contract to recommend the pursuers' bid and not to encourage or co-operate with an approach from another would-be bidder. Whether it was implied in any such contract that the first defenders' obligations were qualified in a particular respect, and whether such a qualification was satisfied are matters for the defenders to aver and prove. I express no opinion on the adequacy of their present pleadings for the purpose.

Even if the pursuers' averments were to be read as subject to an implied condition which qualified the first defenders' obligations, I do not consider that that could lead to dismissal of the pursuers' claim as a matter of relevancy. Whether a particular condition was satisfied in this case and at what stage is a matter of fact which could only be determined after the hearing of evidence. Further at a hearing on relevancy I think that it would be unwise to

reach any concluded view as to what exactly were the implied conditions in any such alleged contract. It may well be that it would be implied, as the pursuers submitted, that the directors should be free, in the light of the making of a second bid, to discharge their duty to the company by informing shareholders what they considered to be in the best interests of the company, and to discharge their duty to the shareholders by ensuring that their advice was honest and not misleading. However, I am not to be taken as agreeing with the pursuers' submissions that the directors' freedom to advise shareholders depends upon whether they have not done anything to encourage or co-operate with the second bid. It may well be that it should be implied that they are free at all stages to take such actions as they considered to be in the best interests of the company. However, these are all matters that can only be appropriately resolved after the hearing of evidence

As regards the first defenders' criticism of the pursuers' factual averments as to the making of the alleged contract and its breach, while I consider that there was force in a number of the first defenders' criticisms it seems to me that they fell short of demonstrating that, in point of relevancy or specification, the pursuers had failed to aver sufficient to justify enquiry. The pursuers have given fair notice that they propose to establish that the first defenders' directors committed their company in a contractual sense to recommend the pursuers' offer and not to encourage or co-operate with an approach from another would-be bidder. As regards the allegation of breach of those contractual obligations and the effect of any such breach on the course of events which led to the pursuers' offer being withdrawn, these are matters that lie peculiarly within the knowledge of the first defenders. In my opinion the pursuers have given adequate notice of the conduct complained of and its effect.

In these circumstances I reject the first defenders' argument on relevancy and specification and will allow enquiry on the pursuers' case of breach of contract.

I turn now to the other case tabled by the pursuers, which is directed against all three defenders. It is averred in art 8 of the condescendence:

> "In the foregoing circumstances the pursuers have incurred expense as a result of the representations made to them by the defenders. By the statements made on their behalf at the previous meetings and in particular at meetings on 15 and 16 January and by their whole course of conduct, the first named defenders represented to the pursuers that they were committed to supporting the pursuers' offer, the terms of which had been adjusted with a view to discouraging an alternative offer on the understanding the proposed merger was in the interests of both companies and their shareholders. The first named defenders further represented to the pursuers that there had been no approach to them by another possible bidder, and were aware that the pursuers would not make an offer if the situation was one of a contested bid, and would not be likely to proceed if the bid became contested. By the said statements and course of conduct the first named defenders led the pursuers to believe that they would not encourage or co-operate with another offerer. The second and third defenders, as individuals, were personally involved in making the said statements and in the said course of conduct. In the event, the first defenders co-operated with the approach made by Vantona Viyella plc and did not inform the pursuers of their discussions with that company. The pursuers accordingly believe and aver that the said representations made by or on behalf of the defenders were made unwarrantably or recklessly. The defenders were aware that the pursuers were incurring substantial expense on the faith of their representations. By their said representations, the defenders caused substantial loss and expense to the pursuers for which the pursuers now seek reimbursement."

I understood from counsel for the pursuers that this case presupposes that no contract was made between the pursuers and the first defenders. Counsel for the defenders submitted that the pursuers were not entitled

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to advance both cases in the same action since one rested on a basis which was inconsistent with the other. This is a technical point of pleading. The defenders deny that the alleged contract was made between the pursuers and the first defenders. The pursuers could and should have set out their case on representations after the contract case and on an *esto* basis. On that view I do not consider that this point, which could readily be met by a minor rearrangement of the pursuers' pleadings, justifies the dismissal of the pursuers' claim.

I turn therefore to the defenders' attack on the legal basis of the pursuers' claim. The pursuers found upon the line of cases of which the well-known Melville Monument case, *Walker v. Milne* (1823) 2 S. 379 (2nd Ed. 338), is one of the earliest examples. The pursuers' use of the expression "unwarrantably or recklessly" was evidently inspired by a passage in the opinion of Lord *Deas* in *Allan & Anor. v. Gilchrist* (1875) 2 R. 587, at p. 590. In their third plea-in-law the pursuers refer to the defenders' representations as their "wrongful actings", following the use of expressions to a similar effect by Lord *Ardwall* in *Gilchrist & Anor. v. Whyte* 1907 S.C. 984, at pp. 992–994. I will have occasion later to refer to these opinions in discussing the line of cases.

In the course of their submissions counsel for the parties stated a number of propositions which were said to be supported by this line of cases. The defenders' proposition was that the remedy of reimbursement might be admitted where the party liable admits or has alleged against him a contract from which he has resiled where he was entitled to do so by reason of the absence of writing, having been given possession of heritage which can only be explained by reference to the alleged or admitted contract. The proposition advanced by junior counsel for the pursuers was that where one person has indicated to another an intention to enter into a contract but no such intention has been truly formed and leads the other to incur expense in reliance on the expressed intention, there has been an actionable wrong which entitles the person misled to recover to the extent of any expenditure made in reliance on the expression of intention. Senior counsel for the pursuers stated that there must have been representations or inducements held out by one party recklessly and unwarrantably as to a state of affairs which occasioned substantial loss to the other party. That state of affairs was not limited to the existence of a contract and could include a statement as to the party's future intentions.

Both parties founded for their own purposes on a number of cases. The first of these was *Walker v. Milne* itself. In that case the pursuer sued the subscribers for the Melville Monument alleging that they had entered into a contract with him to place it upon his property at Coates and that they had taken possession of the site and broken it up and performed various operations on it. He also claimed that he had been induced to make various alterations on his plans for feuing the ground and on the drains and levels. He sought implement of the agreement and, failing implement, that the defenders should free and relieve him in respect of his expenditure in consequence of their failure to implement the agreement. In the report it is stated that:

> "In defence, it was stated, that although there had been a communing, no contract had been completed; that even though there had been an agreement, yet, as it related to heritage, and was not constituted by writing, there was *locus poenitentiae*; and that as there was no binding contract, no damages could be due for resiling."

The report goes on to say (at p. 380) that,

> "... the Lord Ordinary, in respect that no binding contract had been completed, and that the facts alleged were not sufficient to bar *locus poenitentiae* assoilzied the defenders. But the Court, while they agreed with his Lordship, that no effectual contract had been concluded, altered the interlocutor so far as it assoilzied the defenders, and found 'that the pursuer is entitled to indemnification for any actual loss and damage he may have sustained, and for the expenses incurred in consequence of the alteration of the site of the monument'; and after ordering a condescendence, remitted to the Lord Ordinary to proceed accordingly."

As Lord *Deas* observed in *Allan v. Gilchrist* (at p. 590) it does not appear that the relevancy of the items of alleged loss was ever settled or the case brought to any judicial conclusion

Counsel for the defenders emphasised that the First Division had merely agreed with the Lord Ordinary that "no effectual contract" had been concluded. This did not suggest that they dealt with the case on the basis that the parties had failed to reach the bare parameters of a contract. It was also pointed out that in three cases relied on by the pursuer before the First Division, namely *Grahame & Anor. v. Burn* (1685) M. 8402, *Lawson v. Auchinleck* (1699) M. 8402 and *Buchanan v Baird & Ors.* (1773) M. 8478, an agreement had been reached from which one party had resiled without good excuse; and that the decision in *Walker v. Milne* had been subsequently interpreted in a way which favoured the defenders' contention that it related to an agreement not reduced to writing. Reference was made to *Bell v. Bell* (1841) 3 D. 1201 per Lord *Fullerton* at pp 1204–1205; *Gowans' Trustees v. Carstairs* (1862) 24 D. 1382 per Lord *Ardmillan* at p 1384; *Dobie v. Lauder's Trustees* (1873) 11 M. 749 per Lord *Shand* at p. 753; and *Allan v. Gilchrist* per Lord *Deas* at p. 590.

On the other hand counsel for the pursuers pointed out that in the Lord Ordinary's interlocutor which is set out in a footnote on p 338 (2nd Ed.) he found,

> " . . that the writings referred to are informal and improbative, and that, in connection with the facts condescended on, they are not only altogether insufficient to afford evidence of any contract binding on the parties having been agreed on, and by which the want of a more formal deed might be held to be implied, but even establish, that when the negotiation broke off, they were only *in nudis finibus contractus*, without having advanced so far as to have agreed upon the general terms of the conveyance, the extent of the property to be acquired, or the conditions under which it should be held, or even the person in whom the feudal title to the property should be vested . . that in these circumstances, the operations averred and admitted to have taken place, are insufficient to bar *locus poenitentiae* . . "

Thus it was submitted that this was a case in which the pursuer had been entitled to indemnification where the parties had not reached an agreement, let alone one which was reduced to writing. Counsel for the pursuers also founded upon *Fowlie v. McLean* (1868) 6 M. 255. In that case it was held that a verbal agreement to take furnished lodgings for 16 months at a certain rate per month which had been followed by possession but by no other *rei interventus*, could not be proved by parole evidence even to the extent of establishing a contract for a year. At p. 257 Lord Justice-Clerk *Patton* distinguished the case of *Walker v. Milne*, referring to it as a case in which an action was sustained "for indemnification of expense into which the party had been led in reliance on what may be considered the implied assurance of the other that there was a contract, when there was really none".

The next case founded on was *Allan v. Gilchrist*. In that case it was held to be incompetent to adduce parole evidence as to the making of a contract relating to heritable property even for the purpose of a claim of damages for non-implement. At p. 590 Lord *Deas* said:

> "But a claim of damages where it is not proved that there ever was a contract must rest upon some other ground than breach of contract.
>
> Accordingly it will be found that, in the only two cases which can be represented as countenancing such a claim, viz. *Walker v. Milne* (1823) 2 S. 379 and *Heddle v. Baikie* (1846) 8 D. 376, possession of the subjects had followed, and what was recognised was really not a claim of damages for breach of contract, but a claim for reimbursement of substantial loss occasioned to the one party by the representations and inducements recklessly and unwarrantably held out to him by the other party."

It was pointed out by the defenders that at p. 592 Lord *Deas* distinguished the case before him in respect that no possession was alleged and that no specific sums of expenditure or

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even of loss were condescended upon by the pursuer For their part the pursuers founded upon the description by Lord *Deas* of the general nature of a claim which was recognised by cases such as *Walker v. Milne*. They also drew my attention in the same context to the reference by Lord *Deas* at p 592 to an action being "based upon the subsequent conduct of the one party in misleading the other to expend his money on illusory grounds".

The third case which was founded upon was *Gray v. Johnston* 1928 S C 659 In that case the pursuer sued the executor of a farmer upon averments that the deceased had proposed to him that if he gave up a current situation and resided with him at the farm and looked after him and the farm, he would make him his heir The pursuer averred that after consideration and induced by these representations he accepted the proposal and lived with the deceased for 16 years as his companion and nurse without remuneration and successfully managed the farm. The deceased died without leaving a will. The pursuer sought payment for the loss which he had thereby sustained on two separate bases, one of which was the deceased's representations and the other was recompense. It was held that the pursuer's averments disclosed no more than a mere expression of intention and that any definite promise of heirship could not be proved as no writ of the deceased existed. As regards the claim based on representation, it was held that it failed in respect that the claim was not for reimbursement of expenditure but for hypothetical gain The defenders founded upon the opinion of Lord *Murray* (Ordinary) at p. 664 where he said that in previous cases in this line a contract was put in issue but failed,

> "either in respect that it was incapable of proof owing to our forms of law, or that there was *locus poenitentiae*, not excluded by actings"

—and that,

> "In general also there had been possession of the subjects by one or other party on the faith of the formal conclusion of the agreement, and actual outlay incurred."

The pursuers relied on what they said was the implication of the opinions of the Second Division. While the members of the court were divided as to whether the doctrine covered the particular type of claim advanced by the pursuer, it was not suggested that there was any other reason for holding that it would not have covered the case At p. 671 Lord *Ormidale* referred twice to the claim of reimbursement as being "apart from completed contract". It was also submitted that the general approach of Lord Justice-Clerk *Alness* favoured the pursuers' argument, although it was submitted that the passage from *Bell's Principles* (10th Ed), section 29 which he quoted at p. 676 was an inadequate expression of the scope of the remedy allowed under this doctrine The passage was as follows:

> "In certain cases, one who has induced another in bad faith or negligently to act upon an informal or legally incomplete agreement, which cannot be enforced by specific implement, has been held bound to recoup specific loss or expenditure so incurred"

Counsel for the pursuers also submitted that the defenders' submissions failed to take due account of the effect of *rei interventus*. If the doctrine were confined to cases in which possession had followed upon the making of an informal contract relating to heritage there would be little if any scope for the use of the remedy, standing the effect of *rei interventus*

Before coming to my own views on the submissions made to me there are two other cases to which reference was also made and which require to be examined In *Dobie v. Lauder's Trustees* the pursuer was held entitled to reimbursement of expenditure incurred by her in implementing an arrangement, proved by parole evidence, for the boarding of certain children for a term of years. Lord *Shand* (Ordinary) sustained the claim on the basis of the defenders' representations At p. 753 he expressed the view that the case fell within the rule to which effect was given in *Walker v. Milne* and *Bell v. Bell*,

> "that parole evidence of the arrangement and actions of parties is competent when

the claim made is for relief or indemnity from actual loss sustained by a party acting in reliance on the fulfilment by another who has refused to carry out his part of an arrangement which had been entered into but which could only be made legally binding so as to be capable of enforcement on being committed to writing. The indemnification from loss which in such a case is claimed has been directly caused by the representations and conduct of a party who refuses to fulfil his undertaking. The claim for relief is supported by obvious considerations of equity, and it is only reasonable that the representations and conduct of the parties which give rise to it should be capable of proof in the ordinary way in which representations, actings, and conduct are generally proved, viz. by parole evidence."

In the Second Division the claim was allowed on a different basis. Lord Justice-Clerk *Moncreiff*, with whom Lord *Cowan* and Lord *Benholme* concurred, stated at p. 754 that,

"The footing on which the parties acted was not and could not have been that of a binding contract. It was a family arrangement, the substance of which was that the children should live with the pursuer, and beyond doubt it was contemplated that this arrangement should be of some endurance."

At p. 755 he said:

"This being so, is there a claim for indemnity? I entertain no doubt, both on principle and on authority, that there is — that the arrangement necessarily included the condition that if the arrangement was terminated it should not be to the loss of one party"

This last passage appears to give the true ratio of the decision in the Inner House: see *Microwave Systems (Scotland) Ltd. v. Electro-Physiological Instruments Ltd* 1971 S.C. 140 per Lord *Thomson* at p. 144

In *Gilchrist v. Whyte* a claim for reimbursement of expenditure incurred in reliance on representations that a bond would be granted was rejected for the reason that the representations were merely an expression of opinion. At p. 992 Lord *Ardwall* said:

"I think that as such an action does not proceed on contract, it must proceed on one of two grounds, either on wrongdoing more or less flagrant, or on the ground which is expressed in the brocard *nemo debet ex alieno damno lucrari*."

At p. 993 he said with regard to *Dobie v. Lauder's Trustees*:

"But it may, I think, with equal truth be said that this was an action founded upon a wrong which consisted in the defenders leading the pursuer by certain representations to incur serious outlay and then disappointing her expectations without any reason."

On the same page, having reviewed the line of cases, he stated:

"From these authorities I think it may be inferred that an action of damages founded on the ground of recompense for loss caused through the failure to complete or carry out a contract, but where there has been no breach of contract, will only be entertained by the court in very special circumstances indeed, and for the most part only in cases where (1) loss has been wrongfully caused by one of the parties to the other, excluding, however, loss or expense incurred as part of the abortive negotiations between the parties; (2) where the wrong has been done without any excuse; and (3) where the losing party is in no way to blame for the loss."

In approaching the parties' submissions it is as well for me to bear in mind that this is an exceptional branch of the law in which it is recognised that the cases in which a remedy has been given for reimbursement of expenditure incurred in reliance on representations depended on their own specialities and that any tendency to extend the scope of the remedy is to be discouraged For that approach I was referred to *Allan v. Gilchrist* per Lord *Ardmillan* at p. 593; *Gilchrist v. Whyte* per Lord *Stormonth-Darling* at p. 989 and Lord *Ardwall* at p. 993; and *Gray v. Johnston* per Lord *Ormidale* at p. 671.

It is reasonably clear that the type of claim which is recognised in this line of cases is an equitable one. It is accordingly distinct from

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a remedy which is based on the implement or breach of a binding contract. It is also distinct from the equitable remedy of recompense, although a number of the decisions are capable of being explained either on the basis of recompense or upon the basis of representations. It is also in my view clear that the claim is distinct from a claim based on delict. So far as I have been able to discover from the cases which were cited to me, Lord *Ardwall* in *Gilchrist v. Whyte* appears to be the only judge who employed the word "wrongful" for the class of representations which could give rise to the remedy of reimbursement. An illustration of what he meant by the word "wrongful" can be seen from his remarks upon the case of *Dobie v. Lauder's Trustees*, which I have quoted above. That a claim in respect of representations is distinct from a claim based on delict is reinforced by two considerations. In the first place it is clear that the claim is not one of general damages but for reimbursement of specific expenditure. The best example of the operation of this distinction is provided by the decision in *Gray v. Johnston*. In the second place while cases of representations made mala fide or fraudulently may occur it is not of the essence that the representations be of that character. The case of *Bell v. Bell* appears to have been treated as one in which they were. In that case the pursuer alleged that he had expended money in erecting a house on ground with the knowledge of the proprietor and on the faith of his verbal promise to convey it to him. However, it had been subsequently made over by him to a third party. It was held that the pursuer had a relevant claim for reimbursement of that expenditure. Lord *Gillies* at p. 1204 said:

> "This promise was most fraudulent; it was given with a view to the most corrupt gain ..."

In later cases *Bell v. Bell* is sometimes referred to as a case in the line of *Walker v. Milne*. In others it is explained as resting on the principle that no man is entitled mala fide to enrich himself at the expense of another: see *Allan v. Gilchrist* per Lord *Deas* at p. 592. The case of *Heddle v. Baikie* (1846) 8 D. 376 which is analysed by him at pp. 590–592 appears to provide another example of a case in which the representations were in bad faith. In the present case the pursuers disclaimed an intention to establish fraud, but, as I have pointed out above, it was their submission that the line of cases afforded a remedy where one person indicated to another an intention which had not been truly formed. I am bound to say that I do not consider that in this area of the law, by which alone the pursuers' claim is said to be justified, it is of the essence that the pursuer establish that at the time of representations the defender did not truly intend what was represented. Further, to refer to the effect of these representations as an "actionable wrong" confuses the basis of a claim in this area of the law with that in the law of delict. I should also add that in the present state of the law I see no need for a court to resort to an equitable remedy to deal with a case in which one party has by means of a representation which is mala fide or fraudulent misled another into incurring expenditure or suffering other loss. The law of delict provides a remedy for fraudulent misrepresentation. It also covers negligent misrepresentation, including where the latter has given rise to the making of a contract: see sec. 10 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act* 1985. I should add that if I had taken the view that it was essential to the pursuers' case that the defenders lacked a true intention, or for that matter a true belief, as to what was represented, I would have favoured the defenders' submission that the pursuers' averments were not adequate for the purpose.

I come now to the main issue which divided the parties. Having reviewed the cases in this field to which I was referred I am not satisfied that they provide authority for reimbursement of expenditure by one party occasioned by the representations of another beyond the case where the former acted in reliance on the implied assurance by the latter that there was a binding contract between them when in fact there was no more than an agreement which fell short of being a binding contract, cf. Lord *Shand* in *Dobie v. Lauder's Trustees*. In such circumstances while the latter is within his rights in failing to implement his part without good reason, it is regarded as unconscionable that he should deny reimbursement of what

has been expended by the former in implement of his. It is significant that *Walker v. Milne* has never been explicitly recognised as an authority for reimbursement in a case in which parties had not reached an agreement. The judicial statements which were relied upon by the pursuers in support of a wider approach seemed to me to be capable of bearing the narrower interpretation. In an exceptional branch of the law it seems to me to be dangerous to attempt to derive an implication as to the scope of a remedy, as the pursuers suggested in regard to the case of *Gray v. Johnston*. Although the opinion of Lord Justice-Clerk *Alness* was relied upon by the pursuers I note that at p. 679 he stated:

> "There was, according to the pursuer, an agreement between the parties, upon which the pursuer acted. Although the promise of the deceased cannot be proved in order to support a claim for implement and damages, it can, in accordance with the authorities cited, be proved in order to support a claim for indemnification."

That approach to the case provides in my view support for the narrower interpretation which I favour. I should add that I consider that there are sound reasons for not extending the remedy to the case where the parties did not reach an agreement. It is clear that the law does not favour the recovery of expenditure made merely in the hope or expectation of agreement being entered into or of a stated intention being fulfilled: see *Gilchrist v. Whyte* per Lord *Ardwall* at p 994, and *Gray v. Johnston* per Lord *Ormidale* at p 671 and Lord Justice-Clerk *Alness* at pp 678–679

The alleged representations in the present case are two in number, first that the first defenders were committed to supporting the pursuers' offer and second that there had been no approach to them by another possible bidder. In the light of the interpretation of the law which I have adopted, neither of these fall within the scope of the remedy of reimbursement on the ground of reckless and unwarrantable representations. For these reasons I consider that the pursuers' case which is set out in art. 8 of the condescendence is irrelevant

In those circumstances I do not require to go on to consider certain further arguments which were presented by the defenders These were in brief that the nature of the expenditures or at least part of them was such that the exceptional remedy should not be granted in respect of them; that the first defenders' actions should not be regarded as inexcusable; and that the averments of the pursuers as to the involvement of the third defender in the alleged representations were inadequate.

In these circumstances I shall sustain the first plea-in-law for the defenders to the extent of dismissing the action so far as directed against the second and third defenders I shall also sustain the first and second plea-in-law for the defenders to the extent of withholding from probation the pursuers' averments in art 8, with the exception of their averments as to the quantification of their claim against the first defenders *Quoad ultra* I shall allow a proof before answer.

(Orders accordingly)

R. v. Georgiou.

Court of Appeal (Criminal Division). Judgment delivered 23 March 1988.

Directors — Disqualification from acting — Defendant convicted of carrying on insurance business without authorisation, and disqualified — Whether court had jurisdiction to make disqualification order — Whether conviction was of an offence "in connection with the management of a company" — Company Directors Disqualification Act 1986, sec. 2(1).

This was an appeal against the making of a disqualification order in the Crown Court under sec. 2 of the Company Directors Disqualification Act 1986, on conviction of an indictable offence.